

If you use standard form contracts in your business, you should be proactive to ensure that your contracts do not contravene the “unfair contract terms” (UCT) regime set out in the Consumer and Competition Act 2010 (Cth) (CCA), in light of the amendments to be introduced in the CCA and the Australian Securities and Investments Commission Act 2001 (Cth) (ASIC Act) under the Treasury Laws Amendment (More Competition, Better Prices) Bill 2022 (Bill).

The Bill, which has now passed both houses of the Parliament, significantly amends the UCT provisions of the CCA and the ASIC Act by:

- Increasing the thresholds for standard form small business contracts
- Giving additional powers to the court and the Australian Securities and Investments Commission in relation to the UCT provisions
- Introducing penalties for contravention of UCT prohibition

What is the Current UCT Regime?

Under the Australian Consumer Law (ACL), an unfair term of a standard form contract is void. Often, the contract will continue to operate and bind the parties with the unfair term being severed from the contract.

Currently, the UCT provisions of the ACL apply to:

- A consumer contract, which is a contract for a supply of goods or services or a sale or grant of an interest in land to an individual, predominantly for personal, domestic or household use or consumption
- A small business contract, which is a contract for a supply of goods or services, or a sale or grant of an interest in land, where one of its parties is a business that employs fewer than 20 persons and the upfront price payable under the contract does not exceed either AU\$300,000 or, if the contract has a duration of more than 12 months, AU\$1 million

The ACL does not define “standard form contract”. The ACL presumes a contract to be a standard form contract if a party to a proceeding alleges so, while the other party to the proceeding must prove otherwise. The court will determine whether the particular contract is a standard form contract based on a range of matters, including imbalance in the parties’ bargaining power; preparation of the contract by one party without engaging the other party into negotiations in respect of its terms; absence of opportunity to negotiate the terms of the contract; and other matters. A standard form contract will normally be a contract that has been offered on a “take it or leave it” basis. Most often, clickwrap and browsewrap online contracts are considered to be standard form contracts.

Under the ACL, a term in a standard form contract is considered unfair if the term:

- Would cause a significant imbalance in the parties’ rights and obligations arising under the contract; and
- Is not reasonably necessary to protect the legitimate interests of the party who would be advantaged by the term; and
- Would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on

In determining whether a term of a contract is unfair, the court considers the contract as a whole and takes into account the extent to which the term is transparent (i.e. expressed in reasonably plain language, legible, clearly presented and readily available to any party affected by the term) and any other matters it considers relevant.

What Contracts Will the Amended UCT Prohibition Apply to?

The Bill expands the small business contracts which the UCT regime will apply to by increasing the small business definition thresholds and removing the contract value threshold for such contracts.

In particular, the UCT protections will apply to a small business contract where one party is a business that employs fewer than 100 persons or has a turnover for the last income year of less than AU\$10 million.

The Bill also gives wider power to the court to determine whether a contract is a standard form contract. For example, a court will have power to determine that a contract is a standard form contract despite the fact that a party had an opportunity to negotiate minor or insubstantial changes to the terms of a contract, or had an opportunity to select a term from a predetermined range of options. Also, a court may determine that a contract is a standard form contract even if a party to another contract has been given an opportunity to negotiate the terms of that contract.

As a result, many standard form contracts that are not currently subject to the UCT regime will now fall under the UCT prohibition under the Bill.

What Will the Consequences be for Contravening the UCT Prohibition?

The Bill amends both the ACL and the ASIC Act to prohibit the inclusion of, or reliance on, an unfair contract term in standard form contracts, and allows the court to order a civil pecuniary penalty for contravention of such prohibitions, which are not insignificant.

Therefore, those businesses that have been including unfair contract terms in their standard form small business contracts – absorbing the risk of such terms being void – will be most impacted by the amendments under the Bill.

The maximum penalty that can be ordered under the ACL for an individual will be AU\$2.5 million. For a body corporate, the maximum penalty will be the greater of:

- AU\$50 million
- If the court can determine the value of the benefit that the body corporate, and any body corporate related to the body corporate, have obtained directly or indirectly, and that is reasonably attributable to the act or omission – 3 times the value of that benefit. If the court cannot determine the value of the benefit obtained – 30% of the body corporate's adjusted turnover during the breach turnover period for the act or omission

The maximum penalties that can be ordered for contravention of the new UCT prohibitions in the ASIC Act will be:

- For an individual, the greater of:
 - 5,000 penalty units
 - If the court can determine the amount of the benefit derived and detriment avoided because of the contravention – that amount multiplied by 3

- For a body corporate, the greatest of:
 - 50,000 penalty units
 - The amount of the benefit derived and detriment avoided because of the contravention multiplied by 3
 - 10% of the annual turnover of the body corporate for the 12 month period ending at the end of the month in which the body corporate contravened, or began to contravene, the civil penalty provision, or, if that amount is greater than an amount equal to 2.5 million penalty units – 2.5 million penalty units

Importantly, since each individual unfair term contained in a contract proposed by the person is considered a separate contravention, a person can potentially be found to have multiple contraventions in relation to the same contract or unfair term of a contract if they apply or rely on (i.e. give effect to, or seek to enforce) multiple unfair terms, or an unfair term or terms on multiple occasions.

The Bill gives the court a wider power to make orders that apply to any existing standard form contract which contains an unfair contract term that is the same as – or substantially similar to – a term the court has declared to be an unfair contract term. Furthermore, the Bill clarifies the court's power to issue injunctions with respect to existing or future small business standard form contracts that contain a term which is the same – or is substantially the same – as a term the court has declared to be an unfair contract term. Those powers are additional to the court's power to declare the whole or any part of the contract, or of a collateral arrangement relating to the contract, void, or to make an order varying the contract or such a collateral arrangement.

What Should You do Next?

The amendments in respect of the UCT, which are set out in Schedule 2 of the Bill, commence 12 months after the Bill receives royal assent. Although such amendments generally do not apply to a contract made before the commencement of the schedule, if the existing contract is renewed at or after the commencement of Schedule 2, the schedule will still apply to the contract as renewed – and from the day – on which the renewal takes effect.

Since many standard form small business contracts include provisions that allow their automatic extension for a next term, such contracts may be subject to the amendments introduced by the Bill. Therefore, it is extremely important that you review the terms of your standard form contracts in due course, to avoid any penalties and negative consequences for your business.