

What is an application for an unfair contract term remedy?

An application for an unfair contract term remedy offers independent contractors a dispute resolution mechanism in the Fair Work Commission (FWC), in relation to unfair terms within a services contract to which they are a party. The dispute must relate to a contract term that, if the relationship were an employment relationship, would be a workplace relations matter.

UC2025/1 – Application by Somphong (Em) Thongkhamchanh

Somphong (Em) Thongkhamchanh signed up as an Uber driver on 1 October 2024 and lodged his application in January, alleging the contract has several unfair terms that impact his ability to earn a living.

Thongkhamchanh, who is self-represented, claimed the Uber application (Uber app) on his phone faces “persistent malfunctions” stopping him from performing his job, and the contract “does not hold Uber accountable”. Thongkhamchanh alleges that the Uber app allows Uber to “penalise contractors through metrics”, including “cancellation rates, even when cancellations are due to app malfunctions beyond the contractor’s control”, and the Uber app places restrictions based on customer accusations, such as failing to report a lost item, even when “such accusations are unsubstantiated or incorrect”, which creates an “unfair power imbalance”. Thongkhamchanh wants contract amendments that exclude the penalising of contractors for cancellations resulting from platform-related issues or malfunctions, as well as the inclusion of a clause requiring “Uber to maintain a functional platform and address technical issues promptly”; he also wants contractors to be given clear, documented evidence for alleged breaches of conduct or alleged policy violations.

Thongkhamchanh seeks compensation of AU\$50,000 for his lost earnings, bonuses and surge price opportunities, as well as for financial strain and emotional distress incurred due to Uber’s alleged conduct. However, currently, the FWC does not have the power to award compensation or backpay in cases of unfair contract terms, as the FWC can only amend, vary or “set aside” (make ineffective) all or part of a services contract.

Uber’s representatives outline in their defence that the disputed terms would not, within an employment relationship, relate to a workplace relations matter.

Uber has asked the FWC to dismiss the application, for reasons including that the application fails to specify the terms that are “unfair” in the contract, and that the claim does not relate to a workplace matter faced in an employment relationship, so the application has therefore not been made correctly and should be dismissed. The legislation (s.536ND of the *Fair Work Act 2009* (Cth) (*FW Act*)) wording indicates that the FWC must determine which contract terms are unfair, rather than the unfairness of the contract as a whole.

Deputy President Tony Saunders (the member of the FWC assigned to resolve the matter), sought clarification as to which terms are “unfair” from the applicant. Thongkhamchanh was unable to specify exact clauses that address Uber’s responsibility for the Uber app failures; he provides that contract terms related to “Termination by Uber”, “Effect of Termination”, “How Ratings Work” and “Adjustments to Transportation Fee” relate to his claims that there are “arbitrary performance metrics and penalties” and “threats and platform restrictions”. The parties will submit their submissions over the next few weeks.

Who is eligible to make an unfair contract term application?

Part 3A-5 of the FW Act commenced on 26 August 2024, as a result of the Closing the Loopholes legislative amendments. These provisions allow for an independent contractor to make a claim in the FWC to challenge an “unfair” service contract “term”, if the service contract was entered into on or after 26 August 2024.

An independent contractor or an organisation (such as a union, or the person’s representative on the contractor’s behalf) may also make an application in relation to a services contract if the contractor’s annual rate of earnings is less than the contractor high income threshold (currently AU\$183,100 for FY25-26). Contractors earning above the threshold will instead rely on remedies under the *Independent Contractors Act 2006*.

Considerations by the FWC in relation to an unfair contract term application

The FWC will consider a range of matters (in accordance with s.536NB(1)-(2) of the *FW Act*), to decide whether a term of a services contract is an unfair contract term. This includes, for example, the relative bargaining power between the parties, and whether the services contract as a whole displays a significant imbalance between the rights and obligations of the parties.

The FWC may decide to make an order in relation to a services contract¹ if the FWC is satisfied that the services contract includes one or more unfair contract terms that, in an employment relationship², would relate to a workplace relations matter.

Examples of Workplace Relations Matters	Examples That Are Not Workplace Relations Matters
<ul style="list-style-type: none"> • Remuneration, allowances or other amounts payable (to employees) • Employees' leave entitlements • Employees' hours of work, • Enforcing/terminating contracts • Making, enforcing or terminating agreements determining terms and conditions of employment • Disputes or resolution of disputes between employees and employers • Industrial action by employees and employers (unless it impacts essential services) • Other substantially similar matters dealt by or under the <i>FW Act</i>, or state or territory laws 	<ul style="list-style-type: none"> • Superannuation • Workers' compensation • Occupational health and safety • Child labour • Public holidays (except public holiday rates) • Deductions from wages or salaries • Industrial action affecting essential services • Jury service • Professional or trade regulation • Consumer protection • Taxation • Preventing discrimination, or promotion of equal employment opportunity (unless in a state or territory industrial law)

The theme of workplace relations matters is that they are underpinned by an employee-employer relationship, which can have some similarities and some distinct differences to an independent contractor and employer relationship.

As a remedy to the applicant, the FWC can amend, vary or set aside all of part of a services contract that, in an employment relationship, would relate to a workplace relations matter.

Penalties for a contravention of the order is punishable by a maximum penalty of 60 penalty units (AU\$19,800) for a party to the services contract or organisation.

Unfair Contract Term Applications with the FWC

Aside from the *Application by Somphong (Em) Thongkhamchanh*, there has been one other unfair contract term application that progressed to a hearing and resulted in a published decision.

This was the case of *Application by Jacqueline Mary Margaret Bowden* [2025] FWC 485. The case was in relation to personal care services provided to a client, via written agreement, whereby service invoicing would be arranged through Trilogy Care Pty Ltd (Trilogy was not party to the contract).

Ultimately, the FWC's powers were not enlivened as the applicant insisted there was an alleged contractual breach regarding failure to adhere to the termination notice period, rather than a claim of an unfair contract term within the written agreement.

The case indicates that the term "services contract" has broader scope than solely applying to gig economy workers' services contracts, given that it applied to a personal services contract. As applications continue to be lodged with the FWC, case law will continue to evolve and be applied to other independent contractor's services contracts.

Next Steps

The application by Thongkhamchanh against Uber has been listed for a hearing on 1 September 2025 at 10 a.m. AEST (NSW).

Organisations utilising the services of independent contractors should be aware of the evolving case law and conduct a review of their current contractor agreements to identify whether any terms of the agreement are potentially unfair.

If you have any queries relating to how unfair contract term remedies may impact your organisation, or would like a review of the terms of your contractor's agreements, please contact our Labour & Employment team.

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1 "Services contract" has a broad definition ins.15H of the *FW Act*: "a contract for services (a) that relates to the performance of work under the contract by an individual; and (b) that has the requisite constitutional connection specified in subsection (2) or (3)".

2 Section 15AA indicates that whether two parties are in an employment relationship is to be determined by ascertaining the real substance, practical reality and true nature of the relationship between the parties.