



## Your Need to Know Guide:

# UNFAIR CONTRACT TERMS

Significant new penalties will soon apply to any business using unfair contract terms (UCTs) in their standard form contracts.

In this handy Guide, our Commercial and Disputes + Litigation lawyers answer some frequently asked questions, help you identify if UCTs are lurking in your business and the risks of failing to comply.

Prompted by an increased focus on protecting consumers and small businesses, changes to the UCT regime aims to provide a stronger deterrent to businesses including UCTs in their commercial agreements – whether they are relied upon, or not.



**9 November 2023**

Changes to the UCT regime come into force.

## The FAQs

### What's changing?

The UCT regime will now include any small business (100 or less employees), or businesses with less than \$10 million annual turnover. This means that any suppliers engaged via a standard form contract, will now be protected under the regime.

### How is a 'standard form contract' classified?

The Court will now consider the degree to which the party was able to negotiate the terms of the agreement in order to determine if it is standard form.

### What makes a term unfair under the bolstered regime?

- a term that would cause a significant imbalance in the parties' rights and obligations
- a term that is not reasonably necessary to protect the legitimate interests of the party who would be disadvantaged by the term
- a term that would cause detriment (financial or otherwise) to a party if it were applied or relied on

Whether a term is deemed unfair will depend on how the term operates in the context of the whole agreement.

Disclaimer: This information is general in nature and does not take into consideration individual circumstances or objectives.

## RED FLAGS

If your standard form agreements contain any of the following, you might be at risk:

- automatic renewal clauses
- unbalanced termination rights
- unbalanced limitations of liability or indemnities
- termination provisions that require the terminating party to pay the other party as a condition of terminating
- any terms that allow one party to unilaterally vary terms, such as a price or the rights or obligations of the parties'
- terms that incorporate supplementary contractual terms by reference to external documents

## Are UNFAIR CONTRACT TERMS lurking in your business?

Is your contract with a consumer or a small business?

Yes

No

Regime does not apply

Is it a standard form contract?

Yes

No

Regime applies

Regime does not apply



## Protecting your legal rights and the

# RISK OF BEING CAUGHT OUT

When the new UCT regime comes into effect, the consequences for businesses found to be relying on UCTs will become significantly more broad and severe.

## INCREASED PENALTIES, regardless of actual reliance

Increased penalties will apply to businesses that include UCTs in their standard form contracts. As such, businesses will no longer need to have actually enforced or relied upon an unfair term to be captured under the regime.

If this occurs, the potential damages have been increased to:

**\$50 mil**

or

**3x**

or

**30%**

the value of the benefit to the business (if applicable)

of the company's turnover during the offence period

## EXPANDED POWERS OF THE COURT

The powers of the Court to make other orders in the case of UCTs will also expand. From November 9, it will be open to the Court to:

1

Void, vary or refuse to enforce a contract, if necessary, in order to prevent loss or damage that is likely to occur.

2

On application by the Australian Competition and Consumer Commission only:

- prevent a term that is the same or substantially similar to another term that has been deemed unfair from being included in any future standard form contract; and
- prevent or reduce loss or damage that is likely to occur from a term or a substantially similar term that has previously been declared as unfair.

3

Provide injunctive relief restraining a party from proposing, applying, relying upon a term of a contract which has been deemed unfair.



It is now the responsibility of businesses to not only ensure they are not relying upon terms which may be deemed as unfair, but to also have a working knowledge as to terms which the Courts have previously deemed as unfair, in order to ensure they do not rely on a term which is substantially similar.

## HERE TO HELP

Should you have any concerns about the new regime, your standard form agreements, or if you believe UCTs are being enforced against your business, please don't hesitate to reach out to our Commercial and/or Disputes + Litigation lawyers.



hello@lawsquared.com



+61 3 9008 5954



www.lawsquared.com