ONE SIZE DOES NOT FIT ALL: COURT DECLARES 38 TERMS IN FUJIFILM SMALL BUSINESS CONTRACTS TO BE UNFAIR AND VOID

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IN BRIEF

The Federal Court has declared 38 terms across 11 of Fujifilm's (being Fujifilm Business Innovation Australia or Fujifilm Leasing Australia) small business contracts to be unfair contract terms (UCT) and void under the Australian Consumer Law (ACL) and the equivalent provisions in the *ASIC Act* (ASIC Act). It also ordered Fujifilm not to enforce the terms that were declared to be unfair and to contact all counterparties with ongoing contracts to inform them of the court orders.

The main types of contractual terms declared to be unfair included terms relating to the following:

- Unilateral rights to vary terms or prices;
- Automatic renewals;
- Incorporation of extraneous documents;
- Wide limitation of liability and indemnities;
- Non-reciprocal or one-sided termination rights and consequences (including the payment of exit fees); and
- Unfair payment terms.

This case demonstrates the ACCC's ongoing scrutiny of UCTs in small business and consumer contracts.

This scrutiny will ramp up further with the Government's proposed reforms to UCT laws (a bill will be introduced shortly), which will bring in significant penalties for non-compliance, as well as substantially broaden the coverage of the UCT regime.

The key takeaways for businesses are as follows:

- If you have not already done so, promptly review standard form contracts with small businesses and individual consumers to assess whether the terms could be unfair, including evaluating whether the drafting style and layout of the contract is contributing to a lack of transparency.

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- If there is a risk of allegations of unfairness about certain terms, closely consider amendments Io those terms or other terms in the contract (to 'balance' the overall fairness of the contract) to reduce risk under the UCT regime. Alternatively, with 'eyes wide open,' have clarity about the legitimate business interests the terms are seeking to protect (and maintain a record of evidence about this issue).
- Implement appropriate training and compliance processes to manage UCT risks.

REFRESHER ON THE CURRENT UCT REGIME AND PROPOSED UCT REFORMS (SIGNIFICANT BROADENING AND PENALTIES)

Current UCT Regime

The UCT regime under the ACL and the ASIC Act (for contracts relating to financial products or services) currently captures 'standard form contracts' (contracts with no meaningful opportunity for the counterparty to negotiate) that are either 'consumer contracts' or 'small business contracts.'

At present, a contract will be a 'small business contract' if:

- At the time the contract is entered into, at least one party to the contract is a business that has less than 20 employees; and
- The upfront price payable under the contract does not exceed AU$300,000, or AU$1 million if the contract has a term of more than 12 months.

A contract term is 'unfair' if it:

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

Currently, there are no penalties for businesses that are found to have a UCT in its contract. The primary remedy is a declaration by the Court that the terms are unfair and void (such findings could also potentially expose businesses to private actions from counter-parties).

Upcoming UCT Changes

In February 2022, the former Federal Government introduced a bill into Parliament, which proposed significant reforms to the UCT regime, including:

- Expanding the definition of a 'small business' to include businesses with less than 100 employees or an annual turnover of less than AU$10 million;
- Making the reliance on a UCT illegal (in addition to the inclusion of a UCT which is currently illegal); and
- The introduction of penalties - while at this stage the proposed applicable penalties are not clear, the new Government has recently released a separate proposal for a five-fold increase to the penalties for breaches of the ACL, which would see the maximum penalty per breach for corporations to be the greater

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of: AU$50 million or 30% of adjusted Australian turnover. (For further information, see our publication here.)

READING BETWEEN THE LINES: WHAT TERMS IN FUJIFILM'S CONTRACTS WERE DECLARED UNFAIR AND WHY WERE THEY UNFAIR?

Following complaints from small business customers, Fujifilm (an international company which supplies print hardware, software and related products and services, including equipment finance contracts) was taken to Court by the ACCC in October 2020 for breaches of the UCT provisions of both the ACL and the ASIC Act.

ASIC delegated its powers to bring proceedings to the ACCC, which allowed for one regulatory prosecution covering breaches of both the ACL and the ASIC Act.

Since November 2016 (when the UCT regime came into effect to cover small business contracts), Fujifilm entered into or renewed approximately 34,000 contracts with small businesses.

In order to resolve the lengthy and complex proceedings, Fujifilm and the ACCC agreed to the orders made by the Court (including the declarations that the terms are unfair). The reasoning for the 'unfairness' of the terms cited in the table below is therefore sourced from the ACCC's submissions (rather than the judgment of the Court).

The table below sets out the key types of terms that were declared unfair and our takeaway of the rationale for the terms' unfairness (a total of 38 contract terms across 11 contracts were declared unfair). Additionally, the ACCC made the following notable submissions that were relevant to its, and ultimately the Court's, assessment of unfairness:

Fujifilm's Terms Lacked Transparency in Its Presentation

The ACCC noted that the 'very small print,' 'dense text,' 'narrow spacing,' and 'formatting of the paragraphs' made the terms "hard to read and difficult to comprehend." The ACCC also noted that there were also some instances where references to the customer's counter-balancing right is 'buried elsewhere' in an unrelated section of the contract, which contributed to the opaqueness of such terms.

(Interestingly) Contractual Requirements for Fujifilm to Act 'Reasonably' Did Not Alleviate the Unfairness of the Terms

The ACCC noted that the requirement for Fujifilm to act 'reasonably' is ambiguous and still gives Fujifilm significant latitude to exercise the broad rights conferred by the unfair terms.

Type of Term Declared Unfair	Example of Unfair Term	The Significant Imbalance Created/ Why was the Term Unfair?
Unilateral Variation of Terms	The customer's use of the software is subject to the relevant end user licence agreement which can be amended without notice to	The customer has no corresponding or counterbalancing rights and the customer cannot terminate without

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	the customer and which Fujifilm is not required to provide to the customer.	penalty.
Unilateral Variation of Price	Fujifilm has the right to immediately vary all or some of the charges payable by the customer by notifying the customer.	
Automatic Renewal	This clause provides for automatic renewals for a further 12 months at Fujifilm's standard rates at that time unless the customer gave notice of cancellation no less than 30 days before the renewal date.	Fujifilm is in a better position than the customer to be aware of the expiry/renewal date of the contract. It also imposes significant detriment on the customer as they need to pay for another full term of the contract with no notice by Fujifilm of expiry or renewal date.
Incorporation of Extraneous Documents	The customer is bound by obligations in the "customer expectation document" which Fujifilm was not required to provide to the customer.	The customer was not in a position to understand the totality of its potential obligations/make an informed decision before entering into the contract, as Fujifilm was not required to provide the extraneous documents to the customer (and did not do so on a number of occasions). As a practical matter, Fujifilm managed the hyperlinks and could change the location of the documents/the hyperlinks. In fact, some of the extraneous documents were no longer located at the webpages referred to in the contracts.
Wide Limitation of Liability	Fujifilm is only obliged to use reasonable endeavours to deliver the software and is not liable to	There were no reciprocal rights for customers to limit their liability for any delay/non-performance of

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	the customer, to the extent permitted by law, for any delay, but the customer had no rights to be excused from the charges payable - across any agreement entered into with Fujifilm.	their obligations (for example, due to reasons outside of the customer's control, or in the event of a dispute regarding the goods or services that were delivered). This extent of the imbalance in the parties' contractual obligations was not reasonably necessary to protect Fujifilm's commercial interests.
Non-Reciprocal Indemnities	The customer must pay Fujifilm all costs and expenses incurred in exercising its contractual rights on a full indemnity basis, without any corresponding right for the customer.	
Disproportionate Termination Terms	If the customer is in breach of the contract, or another agreement with Fujifilm, then Fujifilm may suspend the provision of support services but the obligations of the customer to pay for the support services continues.	This term allowed Fujifilm to suspend its services regardless of the materiality of the contractual breach by the customer, while still requiring the customer to pay for services that are not provided. Further, the contract does not provide any mechanism for the customer to remedy any breaches or provide a process for the customer to dispute whether there is a breach. There is no corresponding right given to the customer (while we understand the ACCC's position, in our view this point is uncommercial and likely to be administratively very burdensome).
Termination Payment Terms	If Fujifilm exercises its rights to terminate the contract, then the customer must pay Fujifilm an amount that includes the unpaid balance of the licence fee for the remainder of the initial licence	Customers have an obligation to pay a significant amount in circumstances where Fujifilm terminated the contract regardless of the materiality of the breach. In addition, the amounts are not

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	term and any other resource costs, including break costs, that Fujifilm incurs.	referable to any losses that Fujifilm may suffer as a result of the termination. The customer is obliged to pay the remainder of the minimum term in circumstances where it is not receiving the benefit of the goods and/or services for the remainder of the term.
Unfair Payment Terms	Fujifilm will invoice the customer for licensed software irrespective of delivery by Fujifilm.	Similar to the above, this creates a significant imbalance between the parties as the customer is charged for software that they may not even get to use/have the benefit of.

OUR KEY TAKEAWAYS FOR BUSINESSES

Our key takeaways for businesses entering into *standard form contracts* with individuals or small businesses (recognising that each set of terms and conditions of a contract will differ in their effect depending on the other terms and rights of counterparties in the same contract) are:

Review contracts to check whether the types of terms identified above are included. Remember that a requirement on the business to act "reasonably" may not be effective in reducing UCT risks, depending on the nature of the terms.

- To the extent that reviews have not yet been undertaken, we recognise that your business cannot review the entire suite of its contracts simultaneously. Instead, the initial focus should be on the contracts that are key/core to your business and those contracts and/or terms which have been the subject of disputes to date, as these will be at the highest risk or are most important to your businesses. We note that the previous Government's February 2022 bill provided for a 12-month grace period prior to the enforcement of the amended UCT regime - it is as yet unclear whether the Labor Government's forthcoming bill will have a similar provision.
- As stated above, if there is a risk of allegations of unfairness, consider and implement amendments to the terms at risk of unfairness or other terms in the contract to reduce risk under the UCT regime. Alternatively, if you consider that the relevant terms are in fact necessary to protect your legitimate business interests, recognising the risks of regulatory oversight/investigation, have clarity about the legitimate business interests the terms are seeking to protect, including evidencing the nexus between the term and the business interest sought to be protected.

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When considering the fairness of a term, consider the overall transparency of the term and related terms to counterparties (including drafting style, page layout) and consider proactively incorporating user-focused design features (such as an up-front 'transparency schedule').

The ACCC's submissions about the factors contributing to a lack of transparency of the unfair terms in Fujifilm's contracts are instructive. These factors included:

- Small print, narrow spacing and two columns of text;
- Formatting that makes sub-clauses difficult to discern;
- Counter-balancing rights not being cross-referenced or included in seemingly unrelated sections;
- Unclear drafting requiring customers to track through a series of definitions; and
- Extraneous documents not being physically attached (and instead provided as hyperlinks).

Ensure staff responsible for managing standard form contracts or engaging with individual consumers or small business customers receive adequate training on UCTs and are empowered to escalate issues.

If you wish to have additional detail about any of the issues above or are seeking to undertake reviews of your suite of agreements please do not hesitate to contact us.

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