EXPANDED UNFAIR CONTRACT TERMS REGIME HAS COMMENCED - ARE YOU COMPLIANT?

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Australia Antitrust, Competition, and Trade Regulation Alert

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IN BRIEF

Following a year's 'grace' to allow businesses to be prepared, changes to the Australian Consumer Law (ACL) and the *Australian Securities and Investments Commission Act 2001* (ASIC Act), which commenced on 9 November 2023 means that Unfair Contract Terms (UCTs) now contravene these legislations.

The changes, significantly expanding the scope of the UCT regimes and introduce the scope for very substantial penalties for contraventions of these provisions (in addition to other remedial orders) - meaning that it is very important for businesses to have their 'house in order' for their contracting environments if businesses use standard form contracts when engaging with third parties.

Below is a brief 'ready reckoner' of the changes and provisions, as well as the key steps to mitigate this risk - if you have not already taken steps to do so.

Please reach out if you have any queries or if you would like any further advice or assistance in reviewing your contracts - we would be happy to assist.

SIGNIFICANT PENALTIES FOR UCT CONTRAVENTIONS

The changes introduce very significant penalties for contraventions of the UCT regime under both the ACL and the ASIC Act:

	Under the ACL	**Under the ASIC Act**
For companies	The greater of: ▪ AU$50 million; ▪ Three times the benefit obtained from the conduct; or ▪ 30% of the company's adjusted turnover during the breach turnover period	The greater of: ▪ 50,000 penalty units (currently AU$13,750,000); ▪ Three times the benefit obtained from the conduct; or ▪ 10% of annual turnover, capped at 2.5 million

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	(minimum 12 months).	penalty units (currently AU$555 million).
For individuals	AU$2.5 million	The greater of: ▪ 5,000 penalty units (currently AU$1,375,000); or ▪ Three times the benefit obtained from the conduct.

IS YOUR CONTRACT A STANDARD FORM CONTRACT?

The UCT regimes apply to standard form contracts - contracts prepared by one party that contain a standard set of terms that the counterparty has little or no opportunity to negotiate. In assessing whether your contracts are standard form contracts, you should, and the Courts will, have regard to the following factors:

- Whether your business has a dominant bargaining position in your dealings;
- Whether the contract was prepared by your business prior to contractual discussions;
- Whether the counterparty has an effective opportunity to negotiate, or whether the contract was offered on a 'take it or leave it' basis;
- Whether the terms of the contract take into account the specific characteristics of the counterparty or the particular transaction; and
- The number of times your business has entered into the contract on the same or substantially similar terms.

Contracts may still be considered standard form even if the counterparty is given the opportunity to make insubstantial changes to the contract or to select from a range of term options, or if another counterparty to a different contract was able to negotiate and make substantial changes to that other contract.

IS YOUR CONTRACT A CONSUMER OR SMALL BUSINESS CONTRACT?

The UCT regime applies only to *consumer* and *small business* contracts.

Consumer contracts are defined as contracts for the supply of goods or services (or a sale or grant of an interest in land), to an individual whose acquisition of the goods, services or interest is wholly or predominantly for personal, domestic or household use or consumption.

The *small business* contract definition has been significantly expanded.

- *Under the ACL*, they are contracts for the supply of goods or services, where at the time of entering into the contract, at least one party:

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- Employs fewer than 100 full-time equivalent employees (up from 20); *or*
- Has an annual turnover of less than AU$10 million.

- *Under the ASIC Act,* they are contracts, where at the time of entering into the contract:
  - The upfront price payable under the contract is less than AU$5 million (up from AU$1 million for contracts longer than 12 months, and AU$300,000 for contracts less than 12 months); *and*
  - At least one party to the contract:
    - Employs fewer than 100 full-time equivalent employees (up from 20); *or*
    - Has an annual turnover of less than AU$10 million.

ARE YOUR CONTRACT TERMS 'UNFAIR'?

The substantive tests as to whether a term of a contract is an UCT have not changed - they are set out below.

However, the combination of the significant increases in penalty, the increased scope of this law on your businesses, as well as the more strident prosecutorial approach being taken by both of ASIC and the Australian Competition and Consumer Commission means it is more important than ever for your terms to be compliant.

A term in any of your contracts to which the UCT regime applies will be deemed 'unfair' if it:

- Causes a *significant imbalance* in the parties' rights and obligations;
- Is *not reasonably necessary to protect the legitimate interests* of the party advantaged by the term; and
- Would *cause detriment* (financial or otherwise) if relied upon.

In assessing whether any of your terms satisfy these elements, you should also have specific regard to:

- The *contract as a whole* (the combined effect of the term being considered together with other terms in the contract); and
- The *transparency* of the term,

as these are essential considerations for a court in the determination of whether a term is unfair.

With these factors in mind, regulators and the courts have identified some categories of 'high risk' terms. These include terms which:

- Limit or exclude the liability of one party;
- Provide for wide indemnities or automatic rollovers; or
- Give one party the right to unilaterally vary or terminate the contract without reasonable cause.

Whilst such terms will be considered on a case by case basis and may not be considered unfair in every circumstance, close reviews of 'high risk' terms are strongly recommended to ensure compliance with the UCT regime.

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WHAT CAN YOU DO TO MANAGE UCT RISK?

If you are still in the process of undertaking a UCT review, it is advisable to prioritise your business' core contracts, contracts that regularly lead to disputes or complaints, and contracts that contain any aforementioned 'high risk' terms.

More generally, it is also vital to ensure that all staff members involved in the drafting, management or negotiation of your contracts receive adequate UCT training and that you have appropriate processes in place through which potential UCT risks can be appropriately escalated.

In addition, when drafting or amending contract terms, there are a number of central considerations to which close regard must be had, including as referred to above, transparency, your business rationale, and considerations of reasonableness and mutuality.

Let us know if you would like any advice or assistance in reviewing your contracts.

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