UNFAIR CONTRACT TERMS CONTINUE TO BE A MAJOR ENFORCEMENT PRIORITY FOR ASIC AND THE ACCC: PROSECUTIONS OF PAYPAL AND AUTO & GENERAL INSURANCE

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By: Ayman Guirguis, James Gray

IN BRIEF

Following reforms to the unfair contract terms (UCT) regime on 9 November 2023, the Australian Securities and Investments Commission (ASIC) and the Australian Competition and Consumer Commission (ACCC) are continuing to "test" what amounts to an unfair term, with various cases being brought before the Federal Court of Australia (Court).

The most recent developments are in ASIC's proceedings against:

- PayPal Australia Pty Limited (PayPal) – in July 2024, the Court found that PayPal's Fee Error Term was unfair in *Australian Securities and Investments Commission v PayPal Australia Pty Limited* [2024] FCA 762; and
- Auto & General Insurance Company Limited (Auto & General) – in March 2024, the Court found that Auto & General's Notification Term was not unfair in *Australian Securities and Investments Commission v Auto & General Insurance Company Limited*[2024] FCA 272, with ASIC appealing this decision.

PayPal's Fee Error Term placed a requirement on (small) business counterparties to notify PayPal of errors or discrepancies in fees within 60 days or otherwise accept the fees as accurate.

In light of the Court's ruling about this term being unfair, businesses that have a similar Fee Error Term in their standard form contracts should review these contracts for UCT compliance as a high priority.

UCT compliance continues to be a priority for ACCC and ASIC. Other notable updates in the UCT space include:

- ASIC's proceedings against HCF Life in relation to a pre-existing condition clause that purports to deny insurance coverage for pre-existing conditions that are undiagnosed (click here for details); and
- The ACCC issued a warning to franchisors to address UCT risks in franchise agreements (click here for details).

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RECAP ON UCT REGIME

Under the ASIC Act and the Australian Consumer Law (ACL), "standard form contracts" with "consumers" or "small businesses" must not contain terms that are "unfair".

Breaches of UCT laws can result in significant penalties, including:

- For corporations*:* up to AU$50 million or 30% of turnover (under the ACL) and AU$15.65 million or 10% of turnover (under the ASIC Act); and
- For individuals: AU$2.5 million (under the ACL) and AU$1.565 million (under the ASIC Act).

For more information about UCT laws, please refer to our Legal Insight titled "Expanded Unfair Contract Terms Regime Has Commenced – Are You Compliant?"

PAYPAL CASE (FES ERROR TERM FOUND TO BE UNFAIR)

PayPal's Fee Error Term that was the subject of the proceedings was as follows:

> "Your Responsibility to notify PayPal of pricing or fee errors Once you have access to any account statement(s) or other account activity information made available to you by PayPal with respect to your business account(s), you will have 60 days to notify PayPal in writing of any errors or discrepancies with respect to the pricing or other fees applied by PayPal. If you do not notify PayPal within such timeframe, you accept such information as accurate, and PayPal shall have no obligation to make any corrections, unless otherwise required by applicable law. For the purposes of this provision, such pricing or fee errors or discrepancies are different than unauthorised transactions and other electronic transfer errors which are each subject to different notification timeframes as set forth herein."

By consent, the Court found that the term was a UCT. The Court's reasoning in finding the term to be unfair is summarised in the table below.

Considerations Relevant to the Test of "Unfairness"	**Key Findings by the Court**
Did the term cause a significant imbalance in the parties' rights and obligations?	▪ The term imposed a *de facto obligation* on the small business to examine account information and statements in circumstances where the *small businesses otherwise did not owe that obligation to PayPal.* ▪ As the party advantaged by the term, *PayPal was better placed than the small business to identify fees/charges and any errors*. Relevant to this point: ▪ PayPal did not have to provide the relevant account information to small businesses *unless requested*.

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Is the term reasonably necessary to protect the legitimate interests of the party advantaged by the term?	▪ As the case was not contested, PayPal *did not seek to rebut the presumption* that the term is not reasonably necessary to protect its legitimate interests.
Would the term cause detriment if relied upon?	▪ If the small business failed to notify PayPal of an error, the small business would have *lost the benefit of the amount which had been wrongly charged* to its account (through no fault of its own). ▪ If the small business wished to ensure they had not been overcharged, they would have had to *examine account statements and other information in some circumstances where it was difficult to do so*. ▪ It was *irrelevant* that PayPal is not aware of a customer ever suffering loss due to the term being relied on.

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Other Considerations	▪ *Whether the term is listed as an example of a potentially unfair term in the ASIC Act:* The term fell within two examples of potentially unfair terms listed in s12BH(1) of the ASIC Act, being a *term that limits one party's right to sue and a term that permits one party to avoid or limit performance of the contract.* ▪ *Transparency:* The term was considered "to some extent, lack transparency" having regard to the nature of the term and the length and complexity of the documents and the fact that the term was not highlighted or otherwise drawn to the attention of the counterparty. ▪ *Contract as a whole:* There was nothing otherwise which mitigated the unfairness of the term (see also the "significant imbalance" section above).

KEY TAKEAWAYS FOR BUSINESSES FROM THE PAYPAL CASE

Despite the Court's judgment that PayPal's Fee Error Term was unfair, it is important to note that the case was not contested by PayPal, meaning that ASIC and PayPal made joint submissions and the Court did not have the opportunity to consider any defensive arguments that could have been raised by PayPal.

Nonetheless, the PayPal case should serve as a cautionary warning to businesses. Our key takeaways based on this case are as follows:

1. A Fee Error Term similar to that of PayPal's is at high risk of being unfair, unless there are key distinguishing features.
2. Any term that limits one party's right to sue is likely to be at high risk of being unfair.
3. In determining whether a term is unfair, the Court can focus on the factual circumstances that sit behind the term, such as business and operating procedures. In the case of PayPal, the level of detail provided to small businesses in account statements and other activity information was highly relevant to the Court's assessment of unfairness.
4. If imposing an obligation on a small business/consumer to notify any errors, businesses should consider whether they are better placed to identify errors based on the data held by the business as against what data is accessible by the small business/consumer.

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5. A term is likely to be considered as lacking in transparency if no efforts are made to draw attention to the term, particularly in long and complex contracts.

AUTO & GENERAL (NOTIFICATION TERM FOUND TO BE NOT UNFAIR)

The Court focused on the following wording in Auto & General's Product Disclosure Statement (PDS) as the Notification Term (although there were also a number of similar references elsewhere in the PDS and related documents):

> "Tell us if anything changes while you're insured with us"

ASIC's allegation focused on the term posing a broad and unclear obligation on the insured party in regard to what changes should be notified and the consequences that flow from the breach of the term.

The Court ruled that the Notification Term was not unfair, including for the following reasons:

Proper Construction

The Court took the view that, having regard to the contract as a whole, the proper interpretation is that the term "anything" encompasses changes to information about the insured's home or contents that had already been disclosed prior to entering into the contract. The Court also took account of the overall context, namely that the requirement was consistent with an insurer's obligations under the Insurance Contracts Act and, in particular, the obligations on an insurer to act with "utmost good faith" and to not refuse to pay a claim unless a failure to notify has prejudiced the insurer's interests.

No Significant Imbalance in Rights and Obligations

The Court rejected a number of ASIC's assertions; in particular, the Court noted that the unilateral obligation does not cause an imbalance because the one-way nature of information disclosure reflects the nature of the contract.

Reasonably Necessary to Protect Interests

Based on the Court's view about the proper construction of the term, it was satisfied that Auto & General has a legitimate interest in being made aware if the policy became outside of its willingness to accept risks.

Detriments

As the only limb of the "unfairness" test being satisfied, the Court took the view that the term would cause detriment if relied on, in the form of reducing the insurer's liability to indemnify the insured customer.

Transparency

The Court accepted that transparency includes clarity of meaning and that the proper construction of the term may not have necessarily been reached by customers with conviction. On this basis, the Court accepted that there was a lack of transparency. However, the Court stated that this was not determinative in this instance and that "transparency is not an independent element of unfairness", but rather, one of the factors relevant to unfairness.

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While there are a number of takeaways that could be taken from the Court's ruling, it would be premature to adopt these given that ASIC appealed the decision in April 2024 (click here for details), challenging every key ruling of the Court. In particular, ASIC asserts that:

- The proper construction of the clause is that it contains a broader obligation to disclose any changes to information than is required by the insurer to assess the insured's risk; and
- The primary judge erred by failing to have proper regard to transparency when assessing unfairness.

We will continue to follow the ASIC case and significant developments in the UCT space.

Please reach out to a member of our team should you require any further advice or assistance.

KEY CONTACTS



AYMAN GUIRGUIS
PARTNER

SYDNEY
+61.2.9513.2308
AYMAN.GUIRGUIS@KLGATES.COM



JAMES GRAY
SENIOR ASSOCIATE

SYDNEY
+61.2.9513.2428
JAMES.GRAY@KLGATES.COM

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