



The New Rules of Fair Play.

Navigating the Reformed Unfair Contract Terms Regime

The changes

On 9 November 2023, a series of amendments to the Unfair Contract Terms regime (**UCT regime**) made by the Treasury Laws Amendment (More Competition, Better Prices) Act 2022 (Cth) came into effect.

In sharp contrast to the previous position under the Competition and Consumer Act 2010 (Cth) (**CCA**) and Australian Securities and Investments Commission Act 2001 (Cth) (**ASIC Act**) – which declared unfair contract terms void, but imposed no penalty for their inclusion in contracts – the amendments:

- expanded the scope of the UCT regime to apply to a broader range of contracts;
- directly prohibited persons from drafting contracts which contain UCTs;
- directly prohibited persons from applying or relying on UCTs; and
- established substantial fines for non-compliance.

For ease of discussion, we have used the terms ‘Principal’ and ‘Contractor’ throughout this article. However, please note that the tips and red flags in this article apply to all contracts that fall within the UCT regime.

Does the regime apply to your contracts?

The amended UCT regime applies to contracts captured by the UCT regime that are made, renewed or varied on or after 9 November 2023.

For actions taken under the Competition and Consumer Act 2010 (Cth), the UCT regime applies if the contract is a **standard form contract** and either:

- the contract is a **consumer contract**; or
- the contract is a **small business contract**.

Consumer contract	Small Business Contract
<p>A consumer contract is a contract for:</p> <ol style="list-style-type: none"> a supply of goods or services; or a sale or grant of an interest in land <p>to an individual whose acquisition of the goods, services or interest is wholly or predominantly for personal, domestic or household use or consumption.</p>	<p>A contract is a small business contract if:</p> <ol style="list-style-type: none"> the contract is for a supply of goods or services, or a sale or grant of an interest in land; and at least one party to the contract: <ol style="list-style-type: none"> carries on a business and employs less than 100 people; and/or the party’s turnover for the last income year (calculated pursuant to the Act) that ended at or before the time when the contract is made, is less than \$10,000,000.

However, the UCT regime does not apply to certain categories of terms, notably:

- terms that are specifically required or permitted by another law;
- terms that set the upfront price payable; and
- terms that define the main subject matter of the contract.

Actions may also be brought under the ASIC Act for UCTs in financial products or contracts for the supply of financial services. Separate criteria apply to these actions – refer to section 12BF of the ASIC Act.

Penalties

For companies, the pecuniary penalty for a contravention of the UCT regime under the CCA is the greater of:

- \$50 million;
- 3 times the value of the benefit that the body corporate received as a result of the UCT; or
- if that value is undeterminable, 30% of the body corporate’s adjusted turnover during the breach turnover period.

For individuals, the pecuniary penalty is \$2.5 million.

In addition to the substantial financial penalties, a company must also consider its corporate social responsibility obligations and the reputational risks associated with including and purporting to rely on unfair contract terms.

What is an unfair contract term?

A term is an unfair contract term if it:

- would cause a **significant imbalance** in the parties’ contractual 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) to a party.

No ‘one size fits all’ approach

There is no ‘one size fits all’ approach. The fairness of a particular term will be assessed in light of the contract as a whole, and hinges on whether an appropriate balance has been struck between the legitimate commercial interests of the business and the detriment the term would cause if enforced.

The following tips are therefore general in nature – a clause may be considered unfair in certain contexts, and fair in others.

Tips to mitigate unfairness:

Tip	Action Item
<p>Be transparent</p>	<ul style="list-style-type: none"> • Ensure terms are clear, legible and expressed in plain language. • Highlight key terms (such as the price and term of the contract, and any clauses that are likely to significantly impact the Contractor) at the outset and prior to renewal.
<p>Be specific</p>	<ul style="list-style-type: none"> • Clauses should only be as broad as is reasonably necessary to protect the Principal’s legitimate interests. <i>Example:</i> unfettered suspension rights and termination for convenience clauses are likely to be considered unfair. • Include reasonable timeframes in which obligations must be performed.
<p>Ensure reference documents are readily available</p>	<ul style="list-style-type: none"> • Ensure documents referenced in the contract (such as policies of the Principal) are readily available to the Contractor, and promptly notify the Contractor of any changes to such documents in writing.
<p>Be reciprocal, and include balancing terms</p>	<ul style="list-style-type: none"> • Where practicable, include reciprocal rights and obligations for each party. <i>Example:</i> equivalent set-off rights and confidentiality obligations can often be granted to, and imposed on, both parties. • If reciprocity is not feasible in the circumstances, include balancing terms. <i>Example:</i> if a unilateral variation clause is required by the Principal, that clause may be balanced with a clause that allows the Contractor to terminate the contract without penalty.
<p>Beware of terms of a limiting nature</p>	<ul style="list-style-type: none"> • Avoid terms that seek to limit a party’s rights and obligations at general law. • Pay particular attention to entire agreement clauses, clauses that purport to limit rights or obligations under Australian consumer law and any clauses that purport to exclude or limit a party’s right to sue. • Use opening phrases such as ‘to the extent permitted by law’ or ‘without limiting the party’s rights at law’.
<p>Facilitate negotiations</p>	<ul style="list-style-type: none"> • Include items such as extension periods, liquidated damages and delay cost rates in a schedule to the contract or separate document. • Doing so facilitates negotiations between the parties and can mitigate the unfairness often associated with these ‘red flag’ terms.
<p>Give adequate notice</p>	<ul style="list-style-type: none"> • Allow the Contractor time to rectify any breaches of the Contract prior to imposing penalties. <i>Example:</i> the Principal should notify the Contractor in writing of any alleged breach and grant the Contractor a reasonable time to rectify the breach prior to having recourse to the security or pursuing termination or suspension of the contract. • Give adequate notice of any changes under the contract.
<p>Act reasonably</p>	<ul style="list-style-type: none"> • Be reasonable. <i>Example:</i> penalties imposed should be proportionate to the seriousness of the breach and a genuine reflection of the loss or damage suffered or potentially suffered as a result. • Where possible, amend clauses to require parties to act reasonably, rather than in their sole discretion.
<p>Beware attempts to reserve rights of interpretation</p>	<ul style="list-style-type: none"> • Avoid clauses that grant one party the right to determine the meaning or interpretation of contract terms, or the order or priority of contract documents. • Clauses should be drafted in clear language and objective standards such as the order of precedence of the contract documents should be written into the contract.

Red flags

The following is a non-exhaustive list of common 'red flag' terms we have identified in our unfair contract term reviews. These clauses warrant further consideration, and often need to be removed or modified to mitigate unfairness.

- limitation of liability clauses;
- termination for convenience clauses;
- unilateral variations or extensions;
- automatic renewals;
- terms requiring contractors to provide evidence of insurance policy wording;
- terms that refer to a party acting in its 'sole discretion';
- non-disparagement clauses;
- exclusivity clauses; and
- non-reciprocal obligations.

How we can help

In March 2024, unfair contract terms in consumer and small business contracts were specifically identified as an enforcement priority by the ACCC. To avoid substantial penalties, and to mitigate the risk of becoming a 'test case' for what constitutes an unfair contract term, you must ensure that your contracts comply with the updated regime. There is no 'one size fits all' approach – please contact Muscat Tanzer for a bespoke review of your contract suite.

We also invite you to join us for our Muscat Tanzer Government Seminar Series on 28 August 2024 where we will delve deeper into the implications of the bolstered regime.

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Disclaimer: The information contained in this article is intended to be a guide only. Professional advice should be sought before applying any of the information to particular circumstances. While every reasonable care has been taken in preparing this article, Muscat Tanzer does not accept liability for any errors it may contain.



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