Unfair contract terms law guide

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Disclaimer

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Administration

Version 1.3 of this document replaces all previous versions of this document and takes effect immediately.

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Overview

Reforms came into effect on 9 November 2023 which include, amongst others:

- the introduction of substantial penalties for breaches of the unfair contract term provisions under the *Competition and Consumer Act 2010* and the *Australian Securities and Investments Commission Act 2001*
- expansion of the class of small business contracts that can rely on unfair contract term (UCT) protections
- provision of additional detail about what constitutes a standard form contract.

Importantly, the reforms do not change the test for whether a term is unfair.

Please note the following is a general guide and if you have specific queries it is strongly recommended that you seek legal advice.

When does the unfair contract terms law apply?

A) For contracts for the supply of goods or services (other than financial products and services), or the sale of an interest in land

The UCT protections in the *Competition and Consumer Act 2010* will apply to a government entity if:

1. the contract is for the supply of goods or services, or the sale of an interest in land;
2. the government entity is 'carrying on a business';
3. the contract is a 'standard form contract'; and
4. the contract is a 'small business contract'.

B) For contracts for the supply of financial products or services

The UCT protections in the *Australian Securities and Investments Commission Act 2001* will apply to a government entity if:

1. the contract is a contract for the supply of financial products or services;
2. the government entity is 'carrying on a business';
3. the contract is a 'standard form contract';
4. the upfront price payable under the contract does not exceed $5 million; and
5. at least one party to the contract:
    a. employs fewer than 100 persons and/or
    b. has a turnover for the last income year of less than $10 million.

What is a 'standard form contract'?

In determining whether a contract is a standard form contract, a court may take into account such matters as it thinks relevant, but must take into account the following:

(a) whether one of the parties has all or most of the bargaining power relating to the transaction;

(b) whether one of the parties has made another contract, in the same or substantially similar terms, prepared by that party, and, if so, how many such contracts that party has made;

(c) whether the contract was prepared by one party before any discussion relating to the transaction occurred between the parties;

(d) whether another party was, in effect, required either to accept or reject the terms of the contract the form in which they were presented;

(e) whether another party was given an effective opportunity to negotiate the terms of the contract;

(f) whether the terms of the contract take into account the specific characteristics of another party or the particular transaction;

(g) any other matter prescribed by the regulations.

A contract may be determined to be a standard form contract despite the existence of one or more of the following:

(a) an opportunity for a party to negotiate changes, to terms of the contract, that are minor or insubstantial in effect;

(b) an opportunity for a party to select a term from a range of options determined by another party;

(c) an opportunity for a party to another contract or proposed contract to negotiate terms of the other contract or proposed contract.

If a small business alleges that a contract is a 'standard form contract', the contract is presumed to be a 'standard form contract' unless a party to the proceeding proves otherwise.

What is a 'small business contract'?

From 9 November 2023, the class of 'small business contracts' covered under the UCT protections were expanded so that now a contract will be considered a 'small business contract' if *all* of the following apply:

- a party to the contract (for example, a supplier) **employs fewer than 100 people** at the time the contract is signed (including casual employees employed on a regular or systematic basis, and part-time employees as an appropriate fraction of a full-time equivalent employee); and/or has a turnover for the last income year of less than $10 million; and
- for **contracts for financial products or services**, the upfront price payable under the contract does not exceed $5 million (the 'cap') – for **other types of contracts**, there is no cap.

Application to the State

The proposed extension of the UCT regime to a broader range of small businesses will mean that more transactions involving 'standard form contracts' may fall within the scope of the regime but only to the extent that the State is 'carrying on a business'.

Generally, activities that form part of government function, or are traditional governmental purposes are unlikely to amount to carrying on a business. However, where some element of commerce or trade is involved, it is possible that the State may be 'carrying on a business' for the purpose of that activity.

Commercialised government entities, such as commercialised business units, are likely to be regarded as 'carrying on a business' in many circumstances. However, all government entities – even those without a commercial focus – need to carefully consider their own circumstances, and obtain professional advice if necessary, to identify if and when they are carrying on a business.

Providing detailed information on the circumstances in which a government entity may be 'carrying on a business' is outside the scope of this document.

Terms that may be unfair

A term will be unfair (and at risk of being declared void) if *all* three following conditions are met:

1. the term would cause a significant imbalance in the parties' rights and obligations under the contract; and
2. the term is not reasonably necessary in order to protect the legitimate interests of the government; and
3. the term would cause a detriment (whether financial or otherwise) to the small business if it were to be applied or relied on.

In determining whether a term is unfair, the following must be taken into account:

- the contract as a whole; and
- the extent to which the term is 'transparent'. A term is 'transparent' if it is expressed in reasonably plain language, legible, presented clearly and readily available to any party affected by the term.

Examples of terms which a court may decide are unfair include terms that:

- allow one party (but not the other) to avoid or limit their obligations under the contract;
- allow one party (but not the other) to vary, renew, assign or terminate the contract; or
- penalise one party (but not the other) for breaching or terminating the contract.

This does not mean that these terms will be unfair in all circumstances. There may be circumstances in which these types of terms may be reasonably necessary in order to protect the legitimate interests of the government entity.

Exclusions

There are certain terms and contracts to which the UCT law does not apply. You should seek legal advice as to whether any exclusions apply.

Penalties

Whilst the reforms provide courts with the power to impose a pecuniary penalty for a contravention of the unfair contract terms regime, that will not apply to the State. The only remedy against the State in relation to an unfair contract term is that the term may be held by a court to be void and unenforceable by the State.

An "authority" of a State or Territory which is defined to be:

- a body corporate established for a State purpose by or under a State law, or
- an incorporated company in which the State or the body corporate referred to above has a controlling interest,

will be caught by the penalty reforms.

How to minimise risk

Where a government agency wishes to minimise the risk of a contract term being found to be unfair, consideration may be given to the following:

Recommended Actions	Result
• Giving offerors an opportunity to request amendments to the contract terms. • Giving genuine consideration to requested amendments, having regard to the specific characteristics of the other party and the particular transaction. • Documenting any negotiations about the contract terms.	These actions may reduce the likelihood that a contract is regarded as a 'standard form contract'. However, if the opportunity to request amendments is limited to minor or inconsequential changes, a contract may still be regarded as a 'standard form contract'.
• Where an amendment requested by an offeror (in particular small businesses) is not accepted by the government agency, communicating and/or documenting the reason(s) and justification(s) for the rejection.	This may assist in establishing that a term was reasonably necessary to protect the legitimate interests of government and support a defence against a claim that a term was unfair.
• Ensuring the contract terms are clear.	This may assist in establishing that the term was transparent and support a defence against a claim that a term was unfair.

Further information

Australian Competition and Consumer Commission

- Contracts
- Unfair contract terms – A guide for businesses and legal practitioners (published March 2016)

Australian Securities and Investments Commission

- Unfair Contract Terms reforms commence – News article (published 9 November 2023)
- Unfair contract term protections for small businesses – Information sheet 211 (updated March 2025)