

Article Information

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Changes to unfair contract terms: considerations for head-contractors and developers

New penalties and enhanced remedies to address unfair contract terms. Parties have until 9 November to review and if necessary, amend their contracts and avoid exposure to costs, penalties and losing control of their contract terms.

Introduction

For some time, concerns have been expressed as to the insufficiency of deterrence to companies and individuals who are using prohibited unfair contract terms in contracts with potentially vulnerable people and small businesses. In response, the Commonwealth Government has passed the *Treasury Laws Amendment (More Competition, Better Prices) Act 2022* (Act).

The Act amends the Australian Consumer Law (ACL), which forms a part of the *Competition and Consumer Act 2010* (CCA). The ACL will enforce a penalty regime for imposing unfair contract terms in standard form and small business contracts. The Act has also increased the penalties applicable to the established breaches of the CCA and ACL such as false or misleading representations, coercion, unconscionable conduct, supplying products that do not comply with established standards, and harassment.

Standard form contracts are a set of repeatedly and commonly used terms and conditions, often used by companies including builders, developers and head contractors, amongst others, as a cost effective option when conducting business to avoid the cost of negotiating contracts. They are many and varied. These contracts are completed by one party and are often simply signed by the other, without any option to negotiate the terms of the contracts.

A small business contract is any contract where one party has less than 100 employees or less than \$10 million turnover in their last income year, thus including the vast majority of subcontractors and suppliers.

Consumers, vulnerable individuals and small businesses often lack the resources, bargaining power and perhaps the patience, to effectively review and negotiate terms of such contracts. The Act aims to narrow the negotiating power gap and exposes companies or individuals who have taken advantage of unfair contract terms and have been tardy in amending their standard form contracts to address the mischief.

The increased penalties for breaches of the CCA and ACL came into effect on **10 November 2022** and are applicable to breaches after that date. The key sections of the CCA, regarding penalties for unfair contract terms, will commence on **9 November 2023** and will apply to all standard form and small contracts regardless of when they were entered into.

This provides a 12 month respite for parties to review, obtain advice on and, if necessary, amend their standard form and small business contracts so as to avoid breaches of the revised legislation.

What is an Unfair Contract Term?

Unfair contract terms for the purposes of the ACL are typically those that cause an unreasonable or unnecessary imbalance between the parties' rights and obligations under the contract. This may include clauses which are not reasonably necessary to protect one party's legitimate interests and would otherwise cause financial, or other, detriment to the other party if it were relied upon.

In simplest form, an unfair contract term allows one party to do something whilst the other party is unreasonably or unnecessarily prevented from doing the same. For example, one party is permitted to terminate, amend, or renew the contract whilst the other is not.

It should be noted that unfair contract terms have always been prohibited and that the amendments do not change the definitions or considerations of defining unfair contractual terms, they go to their application and consequences. Accordingly the Court's interpretations of unfair contractual terms remain relevant.

Terms which the courts have previously considered to be unfair include those which:

- give rise to an imbalance between the parties' respective rights and obligations;
- are not necessary to protect any one party's legitimate interests in a contract or project;
- could cause significant financial or other detriment to a consumer or small business owner (or simply the other party);
- allow one party but not the other to limit the performance required under the contract;
- allow one party but not the other to terminate;
- penalise one party but not the other for breaches of the contract;
- allow one party but not the other to renew the contract;
- allow one party to vary the contract without prior notice to the other party without also allowing the other party a right to terminate for breach;
- allow one party to vary the price or goods or services without the other party's consent;
- allow the contract to be renewed automatically without notice to a customer/the other party;
- allow one party to terminate on a wide range of reasons and which may have significantly adverse consequences for the other party;
- include unreasonable restrictions on enforcement (i.e. only through arbitration in a foreign jurisdiction); and
- offer broad indemnities or exclusions of all liability.

Increased Maximum Penalties

Most companies, regardless of size, as well as business minded individuals will be aware that breaches of the CCA and ACL through anti-competitive behaviour already carry penalties. As stated above, penalties will also (from November 2023) be applicable to unfair contract terms where previously the applicable sanctions were limited to court orders that the particular unfair clause was void and unenforceable.

Accordingly, companies and individuals who once may have considered exposure to sanctions for unfair terms as simply a contractual risk will now be exposed to severe maximum penalties:

Party

New Maximum Penalties

The greater of:

- \$50 million;

- Three times the value of the benefit obtained from the unfair contract term; or

Where the value of the benefit cannot be determined,

30% of the adjusted turnover during the breach turnover period for the act or omission.

Corporations

Individuals

\$2.5 million

The maximum penalties apply to a number of offences and civil penalty provisions under the ACL as well as the CCA, such as cartel offences, prohibited conduct in energy market provisions and mandatory bargaining provisions. Importantly, the maximum penalties will also apply to unfair contract terms if those contract terms continue to be relied on after **9 November 2023**.

Other remedies

Whilst the courts have had the power to void, amend, or refuse to enforce part, or the entirety, of the contract to the extent required to address the loss, wrong, or damage that was suffered by the a wronged party to the contract, this provision now further extends to *likely* loss or damage that could be caused. This means the court will take into consideration not only whether the term *has* caused damage but also if it has the *potential* to cause damage, and deem the term unfair accordingly. The amendments make the prohibitions prospective.

Importantly, should it now be found that a particularly unfair clause/s is used across a business's standard form or small business contracts, then the court may order that all of the other contracts subject of the mischief also be void, amended, or that the particular clause may not be enforced across some or all such contracts.

Upon a particular clause being deemed to be unfair, the court may also injunct a party from including similar unfair terms in future standard or small business contracts. The court may also disqualify a person from managing a corporation based on their history of unfair contract terms.

These additional remedies pose a serious risk to head-contractors and developers alike, including on larger projects where standard form contracts may be used with dozens of separate subcontractors.

Who may bring an action?

Any individuals or small business may bring civil actions against companies or individuals for using unfair contract terms in their standard form or small business contracts. If successful in the action, being that a particular term is deemed unfair, then the court may not only award the wronged party with compensation but may also apply one of the remedies or penalties outlined above against the company or individual relying on the unfair contract term.

Additionally, such civil actions may prompt the Australian Competition & Consumer Commission (**ACCC**) to undertake further investigations into the breaching party's business activities, including for breaches of the ACL and CCA that were not related to the initial civil suit, leading to subsequent civil or criminal actions against the company or individual for the said breaches.

Who is at risk?

Industries of all nature of contracting are exposed. In the construction and infrastructure context, developers, head-contractors, service companies and other companies or individuals who work on large development projects, or projects that simply involve multiple parties, are particularly exposed to the new unfair contract term remedies. If one disgruntled subcontractor is successful in convincing a court that a term in their standard form contract is unfair, the Court may be minded to do the same across all the standard form contracts used and expose the entire project to ruin.

Call to action

Whilst standard form contracts are usually an effective way for reducing the costs of documenting transactions, companies and individuals can no longer be complacent in the context of outdated and unfair terms as the increases to penalties, and the additional remedies now available to courts, are too significant to ignore.

Given the potential consequences those using who use standard form or small business contracts are encouraged to review their contracts for unfair contract terms. To avoid exposure to the enhanced consequences, terms which could be considered unfair should be either removed or amended before 9 November 2023.

If you are unclear on whether your standard form or small business contracts include unfair contract terms, the team at Piper Alderman are ready to assist.