

Article Information

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IT'S HERE: Unfair Contract Terms - New reforms in effect from 9 November 2023

Reforms regarding the use of 'unfair' contract terms will come into effect on 9 November 2023, implementing restrictions against a wider range of contracts and with more severe penalties.

Introduction

On 9 November 2023, reforms to the Unfair Contract Terms (UCT) regime will commence under the *Treasury Laws Amendment (More Competition, Better Prices) Act 2022* (Cth).

Crucially, this legislation broadens the application of the UCT regime so that if:

1. there is consumer or small business contract; and
2. the contract is a standard form; and
3. a term is unfair

the term will be void, and the business can face large penalties for the inclusion of each such term.

Three Key Reforms for Contractors and Principals

Firstly, the UCT reforms expand the definition a 'small business contract' to include any contract where at least one party has less than 100 employees, or less than \$10 million turnover in the last financial year.

Secondly, the UCT reforms expand the definition of a 'standard form contract' to include whether a party has made another contract that has the same or substantially similar terms. It is important to note that 'standard form contracts' are not limited to amended or unamended Australian Standards, but also include template contracts specific to the business. This is especially true if one party is unable to negotiate the contract terms.

Thirdly, the consequences and remedies associated with the UCT regime are broader. The courts have always had the power to void, amend, or refuse to enforce (in part or in whole) the contract to the extent required to address the loss, wrong, or damage that was suffered by the a wronged party to the contract. However, this provision now further extends to *likely* loss or damage. 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. If a term (or clause) is used across a business' standard form or small business contracts, the court has the power to affect all of the those contracts, and future contracts.

Furthermore, if a business uses or relies upon (or seeks to do either) an unfair contract term in a standard form contract, and the other party is a 'small business' as defined above, significant penalties may be applied, for both companies (the greater of \$50m, three times the value of the benefit or 30% of the body corporate's turnover) and individuals (increased to \$2.5m per individual).

These additional remedies pose a serious risk to the construction industry, especially on larger projects where standard form contracts may be used with dozens of separate subcontractors.

Unfair Contract Terms and the Construction Industry

The UCT reforms are expected to hit the construction industry hard as many terms commonly seen in construction contracts run the risk of being unfair. A term is unfair if:

1. it would cause a significant imbalance in the parties' rights and obligations arising under the contract;
2. it is not reasonably necessary to protect the legitimate business interests of the advantaged party; and
3. it would cause detriment if it were relied on.

Serious consideration must therefore be given to whether terms are reasonably necessary to protect a legitimate business interest and indeed, what those legitimate business interests are.

Amongst other UCT cases, *ACCC v JJ Richards & Sons Pty Ltd* [2017] FCA 1224, 45 and *Australian Competition and Consumer Commission v Fujifilm Business Innovation Australia Pty Ltd* [2022] FCA 928 identify a suite of unfair contract terms. Those relevant to the construction industry include:

- automatic renewals clauses;
- no reliance clauses;
- assignment without consent clauses;
- unequal limitation of liability;
- liquidated damages regimes;
- unreasonable time bars;
- unreasonable right of recourse to security;
- termination for convenience without appropriate compensation.

Conclusion

Contractors and principals alike should consider and seek legal advice regarding which of their contract arrangements (if any) may be caught by the expanded definitions of small business contracts and standard form contracts. There are ways to minimise the risk of contracts being found to be standard form, or terms being unfair, and the new UCT regime will apply to contracts made, renewed or varied after 9 November 2023.

Key Takeaways

- While the definition of an unfair contract term remains the same, its application to what are considered 'small business contracts' and 'standard form contracts' has expanded significantly.
- The consequences of having unfair contract terms are also much greater.
- Businesses that use standard form contracts should review their contracts to avoid exposure to penalties and liabilities.