

Article Information

Author: Tom Griffith, Joshua Annese, Maria Capati, Andrew Rankin, Ian Nathaniel, Megan Calder, Anne Freeman, Andrea Beatty

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Get ready for further enhancements to unfair contract term protections

It is now likely that a further extension to Australia's unfair contract term (UCT) laws will be in the 2021 pipeline after the Federal and State consumer affairs Ministers agreed to increase the scope of existing UCT laws on 6 November 2020.

In coming to the agreement, the Ministers considered a recently published Regulation Impact Statement (**RIS**) produced by Federal Treasury. In finalising the RIS, Treasury undertook a consultative process in early 2020 seeking submissions on a range of developed options to amend the existing UCT laws. The RIS considered around 85 submissions from a broad range of Australian entities ranging from banks, industry associations and impacted businesses in finalising the recommendations for the Federal and State Ministers.

The recent acceptance of the Treasury recommendations to further enhance the UCT laws comes after extensions to the applicability of the laws to small business 4 years ago, and further announcements earlier this year to the laws applying to the Insurance Contracts Act (1984) (Cth) (which will take effect from 5 April 2021).

The recommended amendments will materially expand the applicability of the UCT laws to a broader range of contracts and impose potentially large civil penalties for businesses that continue to use UCTs in their contracts. The key enhancements that have been accepted by the Ministers include:

	Existing UCT Laws	Recommended UCT Enhancements
Definition of "small business contract"	Where at the time of entering into the contract at least one party is a business that employs fewer than 20 people and the upfront price of the contract is below: <ul style="list-style-type: none">• \$300,000 for a contract with less than 1 years duration; or• \$1m for a contract longer than 1 year in duration.	The proposed definition will expand to: <ul style="list-style-type: none">• have no upfront price limit;• a business will be a "small business" if they have less than 100 employees OR less than \$10m annual turnover.
Available remedies	If the term is a UCT, the clause becomes automatically void and unenforceable.	A Court will have power to determine an appropriate alternative remedy if a UCT is used other than declaring it void and unenforceable.

Civil penalty provisions	<p>Courts may not impose a penalty for using a UCT, unless a person engages in unconscionable conduct or makes a false representation.</p> <p>If the term is a UCT, the clause becomes automatically void and unenforceable.</p>	<p>A Court will be given power to impose a civil penalty. The quantum of a civil penalty that would apply is yet to be determined.</p>
Clarity on what is a “standard form contract”	<p>There is no precise definition in the UCT laws. Currently a Court must consider whether a range of factors are at play, including:</p> <ul style="list-style-type: none"> • whether a party has been given an “effective opportunity to negotiate”; • whether the terms have been given on a “take it or leave it” basis; • if the contract was pre-prepared by a party prior to any discussions; and • whether one party has all or most of the bargaining power. 	<p>Courts will need to consider whether the contract has a pattern of “repeat usage”</p> <p>Legislation will clarify what actions do not constitute an “effective opportunity to negotiate”.</p>
Rebuttable presumption for same or similar UCT	<p>No current provision.</p>	<p>Introduction of a rebuttable presumption provision for UCTs used in the same or similar circumstances where that term was used in the same industry or entity and has previously been declared to be unfair.</p>

What does this mean for my business?

The planned expansion of the UCT regime will have an immediate impact to standard form contracts used by many Australian businesses.

Most Australian businesses that contract regularly with consumers may already have in place appropriate mechanisms to address the proposed changes given the UCT laws have now been in place for 10 years. However, certain sectors (such as those operating in the mining, construction, professional services and manufacturing sectors) or businesses that buy or sell goods or services on a regular basis may now need to turn their mind to how they will be impacted by the proposed laws.

The expansion of the applicability of the laws to a broader class of “small business”, and the likely imposition of new (and potentially substantive) civil penalties, means that:

- business should revisit their contracts used to purchase goods or services that may be considered “standard form” to ensure the terms comply with UCT laws; and
- procurement policies and practices in relation to the engagement of repeat contract suppliers, or the ongoing usage of standard form agreements, should be reviewed and appropriate procedures put in place to document compliance with the proposed requirements.

Treasury will now develop draft legislation, which will provide a further opportunity for stakeholders to comment on the detail of the reforms. There is no guidance on when this will occur, but we would expect that given recent comments by ACCC Commissioner Mr Rod Sims that *“making unfair contract terms illegal and subject to penalties would be an enormous boost to small business”* coupled with the need to stimulate the economy in the wake of the impact of COVID-19, the draft legislation will likely be released in the first half of 2021.

If you require assistance in assessing your existing contractual structures, procurement policies and practices or standard contract arrangements, please contact one of the Partners in the contact section.

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[Do you have standard contracts which may have unfair terms? The ACCC has you in their sights](#)