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Unfair Contract Terms and Independent Contractors - Are your templates at risk under new reforms?

The Unfair Contract Terms regime has been amended, coming into effect on 9 November 2023. While *employment* contracts are not impacted by the regime, contractor agreements in many cases will be. Additionally, proposed changes to the *Fair Work Act 2009*, if enacted, will provide contractors with more avenues to challenge their status.

Summary of Changes

On 9 November 2023, changes to the Unfair Contract Terms (UCT) regime will commence after the passing of the *Treasury Laws Amendment (More Competition, Better Prices) Act 2022* (Cth) (**TAA**) last year. See our article explaining the changes in detail [here](#).

The key changes the TAA brings are broadening the application of the UCT regime. A 'small business contract' will now be any contract where at least one party has less than 100 employees or less than \$10m turnover in the last financial year, and the agreement is subject to a standard form contract (which a contract will be presumed to be, unless shown otherwise).

Secondly, businesses found to have included UCTs in their standard form contracts will now face penalties simply for doing so, whereas previously the clause would merely be unenforceable. If a business uses or relies upon (or seeks to do either) a UCT 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).

Any business engaging with other businesses (including sole traders/contractors), where either party may be considered a 'small business', must now consider their standard form contracts to ensure no unfair terms exist, otherwise not only may components of the contract be unenforceable, but penalties may be applied as well.

Impacts on engaging Independent Contractors

The UCT regime has not, and will not under the new changes, apply to employment contracts. However, many businesses supplement their workforce with contractors, to whom (should they meet the requirements of a small business) the regime likely will apply. Accordingly, it is imperative that any business that engages with contractors be aware of the changes, and undertakes a review of their standard form contracts before the changes come into effect.

What is, or is not, an 'unfair' contract term will be determined on a case by case basis. However, examples of previous terms considered to have been unfair are terms that create an imbalance between the parties' rights and obligations (such as unequal rights of termination), any terms that are not reasonably necessary to protect a party's legitimate interests (such as onerous restraint clauses) or offering broad indemnities or exclusions of liability. Essentially, any clause that allows one party to do something, or receive a benefit, that the other party is prevented from doing/receiving, may constitute a UCT.

Such clauses can be common in standard independent contractor engagements. For example, a clause permitting the

principal business to terminate at any time but requiring the contractor to provide notice, may create an imbalance.

Any individual or small business engaged by a standard form contract may bring a civil action against companies or individuals for the use of UCTs. This means that any independent contractor engaged by a business may have such rights.

Interaction with *Closing Loopholes Amendments*

In September 2023, the Albanese Government introduced its third tranche of amendments to the *Fair Work Act 2009* (Cth) (**FW Act**) in the form of the *Closing Loopholes Bill*. While this Bill has not yet been passed, it is expected to do so, like the previous two tranches. See our summary of the Bill [here](#).

The Bill has a significant focus on regulating independent contracting; it proposes to introduce a new definition of employment that provides more flexibility to contractors, introduces new categories of work such as “employee-like” for digital platform contractors and provides new avenues for contractors to raise disputes against principals.

Currently, contractors can challenge their contractual terms under either Part 2-3 of the *Australian Consumer Law* (**ACL**), or Part 3 of the *Independent Contractors Act 2006* (**IC Act**), both of which are relatively underutilised. The new Bill proposes to create a third option, under the FW Act, allowing contractors (who have entered into contracts after the Bill becomes law) to apply to the Fair Work Commission for an order relating to UCTs.

The proposed provisions have crossover with the IC Act, and allow the FWC to find a contract to be a “services contract”. It can then make orders relating to any UCTs within that contract, by relating it to similar terms in an employment relationship. The types of considerations for unfairness are broadly similar to the UCTs under the ACL, such as imbalanced bargaining power, harsh or unreasonable terms, and significant imbalance in rights and obligations. Should the FWC find one or more UCTs, it would be empowered to order that part or all of the contract be set aside or varied.

We may well see independent contractors, particularly smaller businesses or sole traders, taking advantage of these provisions, instead of attempting to rely on the UCT regime, if the process is seen to be more efficient and less onerous.

Conclusion

Before 9 November 2023, it is important for all businesses engaging with contractors or individuals who may be considered a ‘small business’, to review their independent contractor agreements. After this time, any party found to have used, relied upon, or attempted to use or rely upon a UCT may be open to significant financial penalties and reputational damage. In considering whether to apply penalties, damages, or to declare a term (or contract) to be void, Courts are required to consider the *likely* loss or damage that *could* be caused, not just actual loss, wrongdoing or damage.

If you or your business use standard form contracts, or if you are unsure whether the new provisions will apply to you, please contact Piper Alderman.