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# UNFAIR CONTRACT TERMS NOW ATTRACT PENALTIES

## BUSINESSES BEWARE

The Treasury Laws Amendment (More Competition, Better Prices) Act 2022 passed both houses of Parliament on 27 October 2022 and received Royal assent on 9 November 2022. The Act, which comes into effect on 10 November 2023<sup>1</sup>, changes the law on unfair contract terms (UCT). Companies need to be aware of the new provisions and comply.

This article will explain how the new laws affect your business, exemplified by reference to e-commerce merchants.

### What is a Standard form contract in general?

A standard form contract is also known as a pro forma, boilerplate, “take it or leave it” contract. It is typically a pre-prepared agreement to which a merchant requires its customers to agree before being given access to that merchant’s goods or services. Typically, the customers have little to no input into the terms or conditions of the contract – something to which most of us are well accustomed in the online environment.

### What is a Standard form contract in Australian law?

The Australian Consumer Law (ACL) as well as the Australian Securities and Investments Commission Act 2001 (ASIC Act) provide various indicia of standard form contracts that centre around whether a merchant has:<sup>2</sup>

- all or most of the bargaining power relating to the transactions;
- prepared the contract without any discussion relating to the transaction with the customer;
- given the customer no choice but to accept the terms and conditions if they want to buy an item or use a service;
- given the customer no choice to negotiate the terms and conditions;
- not taken into consideration the specific characteristics of either the customer or the particular transactions.

In the online environment, a customer must often agree to terms and conditions set by the merchant before they can purchase anything from the store or use any of its services. With few exceptions, the terms and conditions are not negotiable by the customer.

<sup>1</sup> Schedule 2 Treasury Laws Amendment (More Competition, Better Prices) Act 2022.

<sup>2</sup> Australian Consumer Law s 27(2) under Schedule 2 of the Competition and Consumer Act 2010; Australian Securities and Investments Commission Act 2001 s 12BK(2).

## Why use a standard form contract?

### *Consistency and efficiency*

An online merchant may want terms and conditions for its customers that are consistent, for example, around price, delivery of goods, and rules around refunds.

Many e-commerce transactions are focused on cookie-cutter services and Prêt-à-Porter (ready to use) products. They are about mass distribution of goods and services. They are not designed to provide individualised or bespoke services or products dependent on the customer's specific circumstances. Negotiation of terms is undesirable because having different terms and conditions with different customers would make transacting unwieldy, and the e-commerce business uncommercial.

What is an unfair contract term (or condition)?

In the context of standard form contracts by a merchant with its customers, be they individuals or small businesses, certain terms and conditions may be deemed 'unfair'.<sup>3</sup> The law defines these as unfair contract terms.<sup>4</sup>

An UCT is one that meets all three of the following UCT threshold criteria:

- (1) would cause a substantial<sup>5</sup> disadvantage to the customer (or advantage to the merchant) because it
  - a. is weighted significantly in favour of the merchant;<sup>6</sup>
  - b. grants to the merchant a beneficial option or discretion or power, or imposes on the customer a disadvantageous burden or risk or duty;<sup>7</sup>
- (2) is not reasonably necessary to protect the legitimate interests of the merchant, with which the onus of proof lies.<sup>8</sup>

What is reasonably necessary for a merchant will, amongst other potential factors, depend on

- i. its own facts and commercial circumstance;
  - ii. the nature of the particular business of the merchant and the context of the contract as a whole;<sup>9</sup>
  - iii. the proportionality of the term or condition against the potential loss sufferable;<sup>10</sup>
  - iv. whether other options that might be available to the merchant in relation to protecting its business interests are available;<sup>11</sup> and
- (3) would cause detriment (whether financial or otherwise) to the merchant's customer if it is allowed to remain in effect.

Some examples commonly used in commercial contracts that might meet all three UCT threshold criteria include:<sup>12</sup>

- terms permitting the contract to be varied by the merchant only;
- terms that are automatically renewed;
- unreasonable payment or termination terms;
- excessive exit fees; and
- terms permitting pricing increases without agreement from the customer.

Crucially, 'transparency' in terms by their being expressed in plain language, legible, presented clearly, and readily available to customers<sup>13</sup>, of itself, will not avoid a finding that they are unfair if they otherwise meet.<sup>14</sup>

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<sup>3</sup> ACL s 23(1); ASIC Act s 12BF(1).

<sup>4</sup> ACL s 24(1); (ASIC Act s 12BG(1)).

<sup>5</sup> Jetstar Airways Pty Ltd v Free [2008] VSC 539, [105] (Cavanough J).

<sup>6</sup> Australian Competition and Consumer Commission v CLA Trading Pty Ltd [2016] FCA 377, [54].

<sup>7</sup> ACCC v ACN 117 372 915 Pty Ltd (in liq) (formerly Advanced Medical Institute Pty Ltd) [2015] FCA 368, [950].

<sup>8</sup> ACL s 24(4); ASIC Act s 12BG(4).

<sup>9</sup> Poole v Australian Pacific Touring Pty Ltd [2017] FCA 424; Australian Competition and Consumer Commission v Ashley & Martin Pty Ltd [2019] FCA 1436, [48] - [49], [51], [53]

<sup>10</sup> Australian Competition and Consumer Commission v Ashley & Martin Pty Ltd [2019] FCA 1436, [55].

<sup>11</sup> Australian Securities and Investments Commission v Kobelt [2019] HCA 18, [98], [264], cited in Australian Competition and Consumer Commission v Ashley & Martin Pty Ltd [2019] FCA 1436, [54].

<sup>12</sup> Australian Securities and Investments Commission v Bank of Queensland Limited [2021] FCA 95, [16], [46], [61]-[64].

<sup>13</sup> ACL s 24(3); ASIC Act s 12BG(3).

<sup>14</sup> Jetstar Airways Pty Ltd v Free [2008] VSC 539, [115].

## What has Changed?

Under the current (outgoing) regime, the law deemed UCTs void or unenforceable, meaning that such terms will have no effect if the contract containing them was enforced. Having contracts in place with customers in which some of the terms (UCTs) might be void or unenforceable has been regarded as an acceptable risk of doing business by many merchants, especially because unless and until enforcement proceedings were commenced in respect of such contracts, the unenforceability of such terms would not become evident.

Accordingly, the current regime fails to incentivise the review and removal of UCTs from contracts that otherwise continue to operate, and fails to provide consequences for the merchants, or their directors or executive officers.

### *New Penalties*

The new law amends both the ACL and ASIC Act, more closely aligning the Australian position with that of other Organisation for Economic Co-operation and Development (OECD) countries. The ACL provisions address UCTs in contracts for goods, services and the sale or grant of an interest in land. The equivalent ASIC Act provisions address UCTs in contracts for financial products and services.

With effect from 10 November 2023, there will be a real cost to businesses that include UCTs in their standard form contracts, with such conduct attracting financial penalties.

Each UCT that a company proposes, applies, relies or purports to apply or rely on, exposes it to a maximum penalty of the greater of:

- \$50 million;
- The value of the benefit obtained which:
  - if the court is able to determine, will be three times the value of the benefit; or
  - if the court is unable to determine, will be 30% of the adjusted turnover for the company during the period of the breach, or during the 12 months preceding the breach, whichever is greater.

For individuals involved in the same conduct, the maximum penalty will be \$2.5 million.

Under the current regime, the court must be satisfied that loss or damage has occurred or is likely to occur due to an UCT. Under the new regime, a customer or regulator will only need to show that a court order will prevent loss and damage that may be caused. If loss and damage has already been caused, the court will need to be satisfied that the orders it makes can remedy that loss and damage.

The new regime further extends the court's power to make adverse publicity orders, on the application of a regulator,<sup>15</sup> requiring the company to publish information specified by the court. Plainly, negative publicity may also have adverse commercial consequences.

Furthermore, the regulator can seek disqualification orders from a court to prevent a person from managing a corporation, thereby exposing directors and executive officers to penalties for failing to ensure the company's contract complies with the new regime.

## Expanded Scope

Under the new regime, the UCT protections will apply to a consumer; as well as a customer who is a small business that employs fewer than 100 persons (up from the previous 20) or has a turnover for the last income year of less than \$10,000,000. Full-time equivalent employees are calculated on a pro rata assessment for all staff employed on a part-time basis.

Small businesses were included in the protection in recognition that, similar to individuals, small business consumers can also lack the resource and bargaining power to effectively review standard form contracts, let alone negotiate them.

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<sup>15</sup> Either the Australian Securities and Investments Commission (ASIC) or the Australian Competition and Consumer Commission (ACCC).

The new regime strengthens the UCT provisions by ensuring that repeat usage of a contract must be taken into account by a court when determining whether a contract is a standard form contract. It also clarifies that a contract may still be a standard form contract despite there being an opportunity for a party to:

- negotiate changes that are minor or insubstantial in effect;
- select a term from a range of options determined by another party;
- negotiate terms of another contract or proposed contract.

### **What do the changes mean?**

Maintaining UCTs in contracts risks liability for significant penalties.

The new regime is said to have been drafted in line with Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers. As the Explanatory Memorandum for the new regime notes, “larger penalties are more appropriate for bigger companies, as they provide an adequate deterrent to breaches of the unfair contract terms provisions”.

When determining an appropriate penalty, both the ACL and ASIC Act require a court to consider factors such as:

- the nature and extent of the contravention;
- any loss or damage suffered because of the contravention;
- the circumstances in which the contravention took place; and
- whether the person had previously been found to have engaged in similar conduct.

Despite the availability of a reduced penalty for a smaller entity, for a merchant (especially a start-up business with limited capital) even such a (reduced) financial penalty from a breach caused by an UCT could be fatal for the business.

### **What you need to do?**

The new regime now places greater burden on businesses using standard form contracts. This has particular significance for businesses that use various terms and conditions embedded in ‘small print’, for example, on online platforms. Companies only have until 10 November 2023 to comply with the new regime.

Companies should, therefore, review existing contracts, and remove any potential UCTs before the new regime comes into force. As champion of the new regime, the ACCC is likely to be running test cases to send a strong public message, stressing the seriousness of contravening conduct.

### **How S&A can help**

S&A can help companies understand the competition and consumer law and advise on necessary or prudent changes to existing contracts, the implementation of risk mitigation strategies and development of enhanced compliance processes.

**For more information please contact our team on (02) 9053 8000 or email [info@silberstein.law](mailto:info@silberstein.law).**

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<sup>16</sup> Attorney-General's Department (September 2011) <https://www.ag.gov.au/legal-system/publications/guide-framing-commonwealth-offences-infringement-notices-and-enforcement-powers>

<sup>17</sup> Explanatory Memorandum, Treasury Laws Amendment (More Competition, Better Prices) Bill 2022, 37 [2.52].

<sup>18</sup> ACL s 224(2); ASIC Act s 12GBB(5).



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