

Australia's new Unfair Contract Terms laws

It's time to act!

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2023

Key Takeaways

- Penalties in Australia for including unfair contract terms in **standard form contracts** for each breach significantly increased when new laws were passed in late 2022.
- The Australian unfair contract terms (**UCT**) regime is broad and far reaching - capturing many standard form contracts with consumers or small businesses (small business being a party with <AU\$10m turnover or <100 employees).
- Standard form contracts made, renewed or varied on or after 9 November 2023 affected.
- Action is needed now to audit existing contracts and amend contract templates.

What are the new penalties and when are you at risk?

In addition to UCTs being unenforceable, new penalties apply to anyone proposing UCTs in their standard form contracts with consumers or small businesses.

Maximum penalties for UCTs

Corporation	The greater of: a) AU\$50 million; b) three times the value of the benefit obtained; or c) where benefit value cannot be determined, 30% of turnover during the breach period.
Individual	AU\$2.5 million

Types of contracts that might be impacted

Standard form contracts commonly used in businesses include:

- online browse wrap/click wrap terms and conditions (including website terms of use, terms and conditions of sale or end-user licensing agreements)
- template purchase order/supply terms and conditions
- template non-disclosure agreements, term sheets or heads of agreement
- template agreements for premises leases or the licences/leases
- template guarantees
- template licensing / distribution / reseller / agency or franchise agreements.

What is a standard form contract?

The term "standard form contract" is not defined in the new laws. Instead, courts must consider factors such as whether:

- a party had all or most of the bargaining power;
- a party prepared and made other contracts with the same or substantially similar terms (and how many);
- the contract was prepared before discussions (so not bespoke) and whether the other party's specific characteristics or the specific transaction was taken into account;

- a party was required to accept or reject the terms in the form presented or it was given a genuine opportunity to negotiate and, if so, which terms.

What is a small business contract?

Apart from contracts with consumers, from November 2023, the Australian UCT regime applies to standard form contracts with small businesses defined as a business that:

- employs fewer than 100 people; or
- has a turnover of less than AU\$10million.

What makes a term unfair?

A term will be unfair if it:

- causes a significant imbalance in the rights and obligations of the contracting parties; and
- is not reasonably necessary to protect the legitimate interests of the party wanting to rely on it; and
- causes detriment (financial or otherwise) to a party if applied or relied upon.

Courts will consider the contract as a whole and also if the term was transparent. Potential unfair terms include one-sided:

- limitations or exclusions of liability (including limiting vicarious liability for agents)
- limits on a party's right to sue the other party or on evidence a party can adduce in proceedings or other one-sided evidential burdens.
- penalties for breach or termination
- rights such as rights to:
 - determine if the contract has been breached
 - terminate
 - interpret the contract meaning
 - vary terms, or characteristics of goods or services to be supplied or prices (where there is no right of the other party to terminate)
 - renew or not renew
 - assign the contract without consent.

What should you be doing now?

- **Assess:** How the UCT regime changes impact or might impact your contracting approach.
- **Audit:** Your standard form contracts used for consumers or small businesses. Identify those at risk of having unfair terms including those being renewed or varied on or after 9 November 2023.
- **Amend:** To action the advice received from Dentons about the changes needed to your standard form templates and contracting processes (including processes to identify if the counterparty is a small business or consumer).
- **Apply:** The updated terms and changes to acceptance procedures and notices. Execute changes to contracting processes and checklists.

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