

Unfair Contract Terms Reforms

Background and overview of the reforms

In 2020, the Federal and State Governments have committed to reform and strengthen unfair contract term (UCT) protections for consumers and small businesses. This has led to:

1.

UCT protections being **extended** to also include consumer and small business insurance contracts terms entered into, renewed or varied from 5 April 2021.

2.

The release of the Federal Government's exposure draft of the UCT Reforms Bill in August 2021, which seeks to **strengthen protections** for consumers and small businesses against unfair contract terms in standard form contracts.

The proposed amendments to strengthen and expand the protection to more businesses and contract types in the UCT Reforms Bill include:

Increasing scope of "small business contracts": Contract where 1 party has either fewer than 100 employees **OR** an annual turnover below \$10 million (currently it's where one party has fewer than 20 employees)

Making UCTs illegal: Introducing prohibitions to
(1) enter into standard form contracts with UCT proposed by that party;
(2) apply or rely on UCTs.

Removing contract price threshold: Threshold of upfront price under \$300,000 **OR** \$1 million for contracts longer than 12 months to be removed as to include more contracts.

Introducing severe penalties for non-compliance: Potential financial penalties for each contravention of UCT prohibition.

- For body corporates - the greater of:
 - (a) \$10 million
 - (b) 3 x value of benefit from contravention
 - (c) 10% of annual turnover.
- For individuals:
 - \$500,000

REGULATOR'S POV

"We see significant value in addressing non-compliance with more severe consequences for breaches as an initial step... This is likely to have a substantial deterrent effect and to increase incentives for contract-issuing businesses to take proactive steps to review and amend their existing standard form contracts."

- ASIC, March 2020 submission in response to the Treasury's consultation on enhancing to unfair contract terms protections

*"An express prohibition backed up by effective remedies will not only provide a direct incentive for compliance, it is also fundamental to promoting an ongoing culture of compliance.. The ACCC strongly supports making the inclusion of UCTs in both business-to-consumer and business-to-business **standard form contracts an express contravention of the ACL and subject to civil pecuniary penalties.**"*

- ACCC, March 2020 submission in response to the Treasury's consultation on enhancing to unfair contract terms protections.

PRACTICAL IMPLICATIONS FOR CONTRACT-ISSUING BUSINESSES TO CONSIDER

Compliance obligations

Do we understand the proposed changes to legislation and its impact on our business?

Will we be able to meet any potential new obligations and avoid potential new prohibitions?

Uncertainties

How do we identify potential "unfair contract terms"?

How many contracts may be affected and where are those contracts located?

How many third parties may be affected?

Logistical challenges

How will we locate and review large volumes of contract in a cost-efficient and accurate manner?

Do we have the technology and resources to quickly and effectively collate and manage a high volume of contracts?

Future proof

How will we remediate or renegotiate terms in a contract with a large number of third parties?

How will we ensure that any update to existing or new standard form contracts will not include potential unfair contract terms?

Unfair Contract Terms Reforms Bill

How Deloitte Legal can support your business

1. Centralise and map in-scope contracts

Key activities:

- ✓ Collate and centralise your portfolio of contracts from across your business
- ✓ Digitise any paper form contracts
- ✓ Analyse and quantify contracts

2. Large scale contract review

Key activities:

- ✓ Design methodology to identify and avoid potential UCTs
- ✓ Tech-assisted review to identify potential UCTs
- ✓ Legal review of new or existing contracts pending renewal

3. Remediation and renegotiation

Key activities:

- ✓ Remediate third parties or customers impacted by potentially unfair contract terms
- ✓ Support with contract renegotiations with third parties or customers

4. Ongoing digital contract management

Key activities:

- ✓ Leverage solution used in large scale review to deploy into a forward looking smart technology solution to manage contracts on an ongoing basis
- ✓ Provide legal advice on an ongoing basis as required

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