

# UNFAIR CONTRACT TERMS AND YOUR BUSINESS

As a business owner, you have a responsibility to ensure your standard form contracts do not contain Unfair Contract Terms (UCTs). It is crucial to familiarise yourself with the recent changes to UCT law and how they affect your rights and responsibilities.

## WHAT IS A STANDARD FORM CONTRACT?



Unfair contract terms ('UCT') law covers 'standard form' contracts for goods and services supplied to consumers and small businesses. An example is an online contract where you tick a box to accept terms and conditions.

A standard form contract usually requires one party to accept or reject terms on a 'take it or leave it basis' without a real opportunity to negotiate the terms.

## WHO DO THE NEW LAWS APPLY TO?



The new laws will apply to consumer contracts and small business contracts:

- entered into on or after 9 November 2023;
- renewed on or after 9 November 2023; and
- amended on or after 9 November 2023.

The table on following page outlines the upcoming changes.

## WHAT MAKES A CONTRACT TERM UNFAIR?



A contract term will be 'unfair' if:

- it gives one party an advantage over the other;
- the party gaining the advantage does not reasonably need that clause; and
- the disadvantaged party is likely to suffer harm or loss (such as financial loss).

## WHAT YOU NEED TO DO



1. Review your customer base to identify any businesses with < 100 employees or an annual turnover of less than \$10 million.
2. Consider whether your contracts are 'standard form'.
3. Check your consumer and standard form contracts for one-sided or unfair terms.

# WHAT ARE THE KEY CHANGES?

Currently, UCTs do not attract penalties. However, from 9 November 2023, courts may impose penalties on a party that makes a contract containing a UCT, or where a party applies or relies on (or attempts to apply or rely on) a UCT.

For corporations, the maximum penalty for breaching UCT law is the greater of:

- (a) \$50 million;
- (b) 3 times the value of the benefit obtained from the UCT; or
- (c) 30% of adjusted turnover during the breach turnover period (i.e. over the period the breach occurred, with a minimum of 12 months).

For an individual, the maximum penalty is \$2.5 million. Each UCT in a contract may be treated as a separate breach.

	CURRENT LAW	NEW LAW (EFFECTIVE 9 NOVEMBER 2023)
REMEDIES	Once a court determines a term is unfair, the whole or part of the contract is automatically void. Courts can prevent you from attempting or appearing to apply or rely on a contract term the court deemed unfair.	Courts have been granted additional remedies. For example, a court can make an order preventing a party from using UCTs in existing or future contracts.
DEFINITION OF SMALL BUSINESS CONTRACT	A contract where: <ul style="list-style-type: none"><li>• one party has fewer than 20 employees; <b>and</b></li><li>• the upfront price payable under the contract is less than \$300,000 (or \$1,000,000 if the contract is longer than 12 months).</li></ul>	A contract where one party has: <ul style="list-style-type: none"><li>• fewer than 100 employees; <b>or</b></li><li>• an annual turnover for the last income year of less than \$10,000,000.</li></ul>
STANDARD FORM CONTRACTS	In determining whether a contract is a standard form contract, the court must consider whether one party had to reject or accept the terms of a contract in the form they were presented, and whether the other party had an opportunity to negotiate the contract's terms.	In addition to the current law, a contract maybe standard form despite a party having the opportunity to: <ul style="list-style-type: none"><li>• negotiate changes to terms that are minor or of little significance;</li><li>• select a term from a range of options determined by another party; or</li><li>• negotiate terms of the other contract or proposed contract.</li></ul>