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Get to the points.

An update on unfair contract terms and Australian contract law

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Goals for today

We will:

1. Identify the types of contracts that are subject to "unfair contract terms" (**UCT**) protections.

2. Identify potential unfair contract terms.

3. Discuss recent case law.

4. Discuss how this can affect you and your business.

Background and timeline

Victoria provided statutory protections in 2003.

Since 2010, the Australian Consumer Law (**ACL**) has provided consumers with some protection against unfair contract terms imposed on them via standard form contracts.

In 2016 the UCT regime was applied to standard form contracts involving small businesses.

In November 2023 the UCT regime was updated again, to make UCTs illegal and subject to substantial penalties.

Source of the UCT regime

Source of the UCT regime - Australian Consumer Law (ACL)

The ACL is found in Schedule 2 of the *Competition and Consumer Act 2010* (Cth).

Under "Chapter 2 - General protections" of the ACL, you will see "Part 2-3—Unfair contract terms", with sections 23 to 28A providing the UCT regime.

UCTs are void, illegal and attract fines

Section 23 of the ACL "Unfair terms of consumer contracts and small business contracts"

Under section 23(1), a term of a consumer contract or small business contract is <u>void</u> if:

(a) the term is unfair; and

(b) the contract is a standard form contract.

A person contravenes section 23(1), if the term is in a "consumer contract" or "small business contract", that is also is a "standard form contract", the term "is unfair" and the term was proposed by that person (section 23(2A)).

Each UCT contained in a contract is a separate contravention.

Background - the justification for UCT rules

Small businesses and consumers often did not have any meaningful choice with standard form contracts, as small businesses and consumers:

- do not have sufficient bargaining power to advocate for better terms and conditions;
- too often face the scenario that, even for essential items, standard form contracts are usually presented on a ‘take it or leave it’ basis.

Reasons for the updated UCT regime included:

- consumers often do not have the time or expertise to closely read the terms of standard form contracts and assess the impact of the risks allocated to them;
- insights from studies into psychology and behavioural economics show that consumers operate with only "bounded rationality". Consumers ‘will often process imperfectly even the information they do acquire’ (also stated as rationality is limited when making decisions).

Background - old laws

Old laws (pre Nov 2023)

Under the "old laws", Courts could:

- declare specific terms of a contract unfair and therefore void (however, unfair contract terms were not prohibited);
- ***not*** impose penalties on businesses that included them in standard form contracts for consumers or small business; and
- had limited injunctive powers.

The change in UCT laws

The "new laws" made significant changes made to the UCT regime:

1. UCTs are illegal and attract monetary penalties.
2. Increased penalties for breaches.
3. Broader definition of "small business" (meaning that more contracts are subject to the UCT regime).
4. Changes to the assessment of "standard form contracts".
5. More powers given to the Court.

[Note that UCT doesn’t apply to certain maritime laws, company constitutions, prescribed laws and certain payment systems (see section 28)]

Increased penalties for ACL breaches

	Previous maximum civil penalty	New maximum civil penalty
Companies	The greater of: 1. $10 million; 2. 3x the value of the benefit obtained (if that can be determined); OR 3. if the value of the benefit cannot be determined, 110% of the annual turnover in the 12 months before the breach.	The greater of: 1. $50 million; 2. 3x the value of the benefit obtained (if that can be determined); OR 3. if the value of the benefit cannot be determined, 30°/o of the adjusted turnover during the breach turnover period (i. e. over the period the breach occurred, with a minimum of 112 months).
Individuals	$500,000	$2,500,000

More powers given to Courts

Courts have been empowered to make more flexible orders to prevent or reduce loss in relation to the use or reliance on an unfair contract term.

A Court can void, vary or refuse to enforce the contract.

On the application of the ACCC, a court can also make orders:

- preventing a UCT from being included in any existing or future standard form small business or consumer contracts (injunct); and
- it considers appropriate to redress loss or damage that has been caused or to prevent or reduce loss or damage that is likely to be caused by the UCT.

"Consumer contract" definition

Under section 23(3) of the ACL, a "consumer contract" is a contract for:

- a supply of goods or services; or
- a sale or grant of an interest in land;

to an individual whose acquisition of the goods, services or interest is wholly or predominantly for:

- personal,
- domestic, or
- Household,

use or consumption.

Broader definition of 'small business'

The contract is for a supply of goods or services, or a sale or grant of an interest in land; AND the following threshold applies

Previous 'small business' threshold	New 'small business' threshold

• businesses employing fewer than 20 persons; <u>and</u>
• either
  • upfront price payable under the contract is less than $300,000; or
  • $1 million if the contract is longer than 12 months.
	• who carry on a business and employ fewer than 100 persons; OR
	• the annual turnover of the business is less than $10 million.

Broader definition of 'small business' (cont)

- For the purposes of the employee threshold, all employees of the party to the contract must be counted.
- Employee numbers are calculated at the time a contract is entered into (later changes in employee numbers will not affect whether the threshold is met).
- Casual employees not employed on a regular and systematic basis are excluded.
- Staff employed on a part time basis are assessed on a pro rata basis.
- Whether you count the employees of a single entity or group is not explicitly clear.

Standard form contracts

- When considering unfair contract terms, the Courts must assess whether a contract is a standard form contract.
- A standard form contract is a contract prepared by one party, usually a business, where the terms are set in advance and offered on a "take it or leave it" basis, with little or no opportunity for the other party to negotiate (this is not the strict test, it is broader).
- If a party to a proceeding claims a contract is a standard form contract, it will be presumed to be so unless another party proves otherwise.
- Section 27(2) of the Australian Consumer Law sets out factors a court "*must take into account*" in determining whether a contract is a standard form contract.

Assessment of standard form contracts

When determining whether a contract is a standard form contract, under section 27(2) a Court may consider such matters as it thinks relevant, but <u>must</u> take into account certain considerations such as:

1. Whether a party has all or most of the bargaining power;
2. Whether the contract was prepared by one party before any discussion relating to the transaction occurred between the parties;
3. Whether a party was, in effect, required to either take it or leave it;
4. Whether a party was given an effective opportunity to negotiate the terms of the contract;
5. Whether the terms of the contract consider the specific characteristics of another party or the particular transaction;
6. Repeat usage of a contract must be taken into account by a Court when determining whether a contract is a standard form contract.

Assessment of standard form contracts (cont)

A court's assessment whether a contract is a 'standard form contract' can disregard:

1. whether a party had the opportunity to negotiate minor changes;
2. whether a party had the opportunity to select a term from a range of options determined by the other party; or
3. whether a party to another contract was given the opportunity to negotiate the terms.

Practical steps - what could be a 'standard form contract'

The following types of contracts/agreements are examples of potentially standard form contracts:

1. Standard terms and conditions (terms of sale, terms of supply, service contract, software licences)
2. Purchase orders;
3. Estimates and quotes with terms attached (and once accepted bind)
4. Requests for tenders;
5. Terms and conditions in quotations;
6. Supply and install contracts;
7. Australian Standard contracts;
8. Company-standard template agreements;
9. Framework agreements;
10. Consultancy agreements;
11. Subcontractor agreements; and
12. Deeds of assignment, deeds of novation.

What is an unfair contract term

Under section 24 of the ACL, a term in a standard form contract is an **unfair** if it:

1. *causes a significant imbalance in the parties' rights and obligations;*
2. *is not reasonably necessary to protect the legitimate interests of the party who would be advantaged by such a term; <u>and</u>*
3. *would cause detriment (financial or otherwise) to a party if the term were to be applied or relied on.*

In determining whether a contract term falls within this definition, a court can consider such matters as it thinks relevant but <u>must</u> take into account:

- the contract as a whole; <u>and</u>
- the extent to which a term is **transparent**.

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What is a "transparent" term

A term is ***transparent*** if the term is:

- expressed in reasonably plain language; and
- legible; and
- presented clearly; and
- readily available to any party affected by the term.

What is an unfair contract term (Grey List)

Section 25 of the ACL provides a list of 14 examples of the kinds of terms of a consumer contract or small business contract that "*may be unfair*". This is known as the "grey list" and include:

- One party may avoid or limit the performance of the contract, but not the other
- One party may terminate or penalise for termination, but not the other
- One party may vary the contract or vary what is to be supplied, but not the other
- One party may elect to renew or not renew, but not the other
- One party may vary the upfront price without the other party being able to terminate
- One party may determine when the contract has been breached, but not the other
- One party may assign the contract without consent, but not the other
- Limit's one party's right to sue or adduce evidence.

[the above is not the complete list]

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What is an unfair contract term (cont)

Looking at the ACCC's enforcement history can be helpful to get a sense of the kind of terms that have been challenged for 'unfairness' in the past:

- **Automatic renewal terms**, especially that roll over without notice or have trials that roll into paid subscriptions.
- **Imbalanced termination rights**, especially suspending without reason, unilateral rights to terminate for convenience or the small business is hit with excessive charges.
- **Asymmetric limitation of liability and indemnity provisions**, especially low liability caps, unreasonable list of categories of uncapped losses, one-sided indemnities (especially one party giving an indemnity for any breach of contract).
- **Unilateral variation**, including right to update website terms and policies without notice.
- **Unfair payment terms**, including charges payable without performance by the supplier or where there is no ability to get refund for unused services/products.

Case law

***Australian Competition and Consumer Commission v Mitolo Group Pty Ltd* [2019] FCA 1257; 138 ACSR 143**

(In this case the Respondents reached agreement with ACCC in relation to proposed declarations, injunctions, a pecuniary penalty and a compliance program)

- The contract terms which were declared to be unfair included terms that allowed Mitolo (the supplier) to:
  - unilaterally determine or vary the price Mitolo paid farmers for potatoes;
  - unilaterally vary other contractual terms;
  - declare potatoes as “wastage” without a mechanism for proper review;
  - prevent farmers from disparaging or making comments in respect of Mitolo; and
  - prevent farmers from selling potatoes to alternative purchasers.
- Terms preventing farmers from selling their own property unless the prospective purchaser entered into an exclusive potato farming agreement with Mitolo were unfair contract terms.

Case law

***Australian Competition and Consumer Commission v Fujifilm Business Innovation Australia Pty Ltd* [2022] FCA 928**

In this case, examples of **terms which were declared unfair and void** included the following:

1. **Automatic renewal terms:** Fujifilm could renew the contract for a further period unless customers cancelled the contract a certain number of days before the end of the contract term.
2. **Disproportionate termination terms:** Fujifilm could terminate the contract in a significantly wider range of circumstances than those which allow the customer to terminate the contract (if any).
3. **Limitation of liability terms:** Fujifilm's liability was limited and/or required the customer to indemnify Fujifilm without corresponding rights for the customer.
4. **Termination payment terms:** customers were required to pay extensive exit fees to Fujifilm in the event the contract was terminated, including certain charges which Fujifilm could set unilaterally.
5. **Unfair payment terms:** customers were required to pay Fujifilm for software licensed pursuant to the agreement irrespective of whether Fujifilm delivered the software and, when goods were purchased, to pay the purchase price prior to delivery.
6. **Unilateral variation terms:** Fujifilm could unilaterally vary some terms of the contract including the charges and terms contained in documents other than the signed contract.

Case law

ASIC v PayPal Australia Pty Ltd **[2024] FCA 762**

(by consent orders)

- The Court found that a “Fee Error Term” clause, which placed a time limit of 60 days for challenging fees that were incorrectly charged by a supplier, was unfair and void.
- The “Fee Error Term” operated so the customer had 60 days following receipt of the account to notify the supplier “*in writing of any errors or discrepancies with respect to the pricing or other fees applied by*” the supplier. If the customer did not do so, the Fee Error Term purported that the user had accepted “*such information as accurate*” and the supplier “*shall have no obligation to make any corrections, unless otherwise required by applicable law*”.
- The term imposed a de facto obligation on the small business to examine account information and statements in circumstances where the small businesses otherwise did not owe that obligation to PayPal.

Case law

ASIC v PayPal Australia Pty Ltd* [2024] FCA 762 *(continued)

- As the party advantaged by the term, PayPal was better placed than the small business to identify fees/charges and any errors. Even if requested, the account statements and information accessible by the small businesses did not describe the various types of fees or the manner in which they were calculated in a way that was readily reconcilable with how the fee was described.
- The term limited the rights of small businesses to claim a correction or compensation.
- There was no corresponding right for small businesses to retain the benefit of PayPal undercharging or failing to charge fees or charges if PayPal did not detect the error and notify the customer within 60 days.

(*As the case was not contested, PayPal did not seek to rebut the presumption that the term is not reasonably necessary to protect its legitimate interests*)

Case law - Cruise ships and US contracts

Karpik v Carnival [2023] HCA 39

Carnival Plc was sued in a class action in connection to an outbreak of COVID-19 on the Ruby Princess cruise ship in March 2020. Class members outside Australia sought compensation for their loss.

Carnival sought to rely on a clause in its contracts with consumers outside Australia which attempted to deny the rights of the consumer to participate in any class actions. Carnival also tried to rely on another clause which provided that any claims by the consumers had to be litigated exclusively in a US court.

The High Court found:

- that the class action waiver clause was unfair as well as not being transparent in the manner in which it was presented to the consumer agreeing to the contract.
- the UCT regime has extra territorial reach beyond Australian businesses as well as to others carrying on business in Australia

Case law - home and contents insurance

***Australian Securities and Investments Commission v Auto & General Insurance Company Limited* [2025] FCAFC 76**

- ASIC sought declarations that "notification clauses" in approximately 1.4 million home insurance contracts were unfair and void.
- The three notification clauses required the homeowner to advise the insurer if circumstances changed.
- The first clause contained a promise by the homeowner, during the term of the contract, to tell A&G “if anything changes” about the insured’s home or contents.
- The second clause specified the consequences of a breach of that promise, which were that A&G may refuse to pay a claim, reduce the amount it pays, cancel the contract or not renew the contract.
- The third clause gave examples of the changes that A&G wanted to be told about.

Auto & General Insurance (cont)

ASIC contended that the notification clauses were unfair because they were;

- not transparent
- would cause a significant imbalance in the rights and obligations of the parties

At the time of the initial trial, only 8 examples of the insurer attempting to cancel or not pay out on the policy for an 18 month period were identified.

The notification clause

Tell us if anything changes while you're insured with us

While you're insured with us, you need to tell us if anything changes about your home or contents.

If you don't tell us about changes, we may:

- refuse to pay a claim
- reduce the amount we pay
- cancel your contract
- not offer to renew your contract.

Examples of changes we want you to tell us about, are:

- Your insured property or address for contents changes
- Paying guests stay in your home, for example, Airbnb, Homestayz
- You are moving out and rent your home to tenants
- Any construction, alteration, or renovation work will start or finish
- Your home will be demolished, by you or a government authority
- Your property will be unoccupied for more than 60 days, or is occupied by trespassers
- You find out your home is heritage listed or has a heritage overlay
- Your home is no longer in good condition
- You will start earning an income at your insured address
- Security devices are removed, or broken
- You find out the building materials contain asbestos.

Auto & General Insurance case (cont)

The full Federal Court found for the insurer and held that:

- the drafting of the clause was not great;
- however, the clause was sufficiently transparent, especially given the insured's duties imposed by the *Insurance Contracts Act*;
- the transparency of the clause effectively defeated ASIC's claim that it was not reasonably necessary to protect A&G’s legitimate interests.

Case law - NDIS facilitator

ACCC v Mable Technologies Pty Ltd

Mable facilitated support services including social support, domestic support, nursing services and allied health services.

ACCC obtained from Mable a court enforceable undertaking in respect of UCT with its clients including:

- Mable's right to receive a minimum penalty fee of $5,000 from clients and support workers in particular circumstances;
- The deemed approval by the client of a service log and resulting charges if not disputed within 24 hours;
- Mable's right to change fees and terms without notice;
- Mable's rights to an indemnity for loss suffered by the clients and to limit its liability.

Case law - holiday accommodation

Commissioner for Consumer Protection v Starland Management Pty Ltd as director of Rolf Gerard Voulon [2022] WASC 96

Holiday accommodation provider was found to have 13 void terms in respect of use of credit card and charges to renters including:

Automatic extension: unfair because it denied the agreed departure date and gave occupants the unexpected burden of advance written notice for short-term holiday accommodation.

Credit card preauthorisation: unfair because there was no limit to the amount that could be charged and occupants could not verify or challenge the charges.

Commissioner for Consumer Protection v Starland Management Pty Ltd as director of Rolf Gerard Voulon (cont.)

Indeterminate liability to pay ongoing rent for lost keys: unfair as it created a potentially indeterminate liability to pay rent as a result of lost keys, and left the timing of any required cleaning or repairs in the hands of the property agent rather than the occupant.

Bond forfeiture for re-entry: The phrase “under any circumstances” in the bond forfeiture for re-entry term unfairly allowed the complete forfeiture of an occupant’s bond without reference to the reason for re-entry, and imposed a penalty that was disproportionate to the occupant’s conduct.

Bond and rent forfeiture for guests: unfair because the penalty imposed was disproportionate to any harm caused by the occupant’s conduct.

Case law - residential building contract

***Perera v Bold Properties (QLD) Pty Ltd* [2023] QDC 99**

- A home builder may increase the prices if construction does not commence on time.
- Term was unfair and void because:
  - It was not transparent.
  - It caused a significant imbalance because it allowed the builder to increase the price regardless of the cause of the delay and without permitting the buyer to terminate as an alternative.
  - The price increase was not set by any criteria.
- It was not reasonably necessary to protect a legitimate interest of the builder because it allowed an increase in price regardless of who caused the delay and was not limited to an increase in costs that occurred after the contract was entered into.

Sun v Lumi Skin Clinics Pty Ltd [2025] NSWCATCD 17

- The Applicant purchased 16 promotional beauty service packages from 'Lumi Skin' for $32,622. The Applicant alleged that following several procedures, she suffered injuries to her face.
- The Applicant alleged that the non-refundable term stating that *"all purchases are non-refundable as payments made will be used towards ordering materials and products required for the treatment"* was an unfair contract term.
- The contract term was declared <u>not</u> to be unfair.

Practical steps - run the analysis

1. Think whether your business supplies to consumers and/or small businesses (think about the increased statutory thresholds resulting in more small businesses getting the benefit of UCT protections).
2. Make a decision as to whether the contract is "standard form".
3. If yes, then clause by clause, analyse for whether the clause is transparent and if it is "unfair":
   - *causes a significant imbalance in the parties' rights and obligations;*
   - *is not reasonably necessary to protect the legitimate interests of the party who would be advantaged by such a term; and*
   - *would cause detriment (financial or otherwise) to a party if the term were to be applied or relied on.*

Practical steps - run the analysis

4. Keep your analysis and supporting evidence documented.
5. Consider what the new term could be in a clearer or fairer manner (think of causing less detriment)

A key consideration should be the substantive fairness of the term in the circumstances of the contract and supply, having regard to the contract as a whole (much of this is that "you will know it when you see it", eg: one side can vary, the other cannot; one side can terminate, the other cannot etc).

Keep an eye out for "boilerplates", "catch-all clauses" and "coverall terms" for being too broad and open ended to the detriment of a counterparty.

Trend - getting ChatGPT answers

Q1: "Draft an unfair contract term"

To the maximum extent permitted by law:

1. The Supplier may, at any time and without notice, modify, suspend, restrict, or discontinue the Software or Services (or any part of them) for any reason.
2. The Supplier is not liable for any Loss arising from the use of, or inability to use, the Software or Services, including where the Software or Services are unavailable, contain errors, or fail to perform as expected.
3. The Customer irrevocably releases the Supplier from all claims, demands, liabilities, and Loss arising in connection with this Agreement or the Software or Services.
4. The Supplier's total liability for any claim arising out of or in connection with this Agreement is zero.
5. The Customer must indemnify the Supplier for all Loss suffered or incurred by the Supplier arising directly or indirectly from:
    a) the Customer's use of the Software or Services;
    b) any act or omission of the Customer or its Users;
    c) any third-party claim relating to the Software or Services.

Trend - getting ChatGPT answers

Q2: "Draft an indemnity protecting a software supplier in Australia"

The Customer indemnifies, and must keep indemnified, the Supplier and its Related Bodies Corporate, and their respective officers, employees, contractors and agents (those indemnified, the Supplier Indemnified Parties) from and against all Loss suffered or incurred by any Supplier Indemnified Party arising out of or in connection with:

a) the Customer's breach of this Agreement;

b) any misuse of the Software or Services by the Customer or any User;

c) any infringement of third-party rights arising from:

   a) the Customer Data;

   b) any materials, information, or content supplied by or on behalf of the Customer;

   c) any modification, combination, or use of the Software or Services by or on behalf of the Customer other than in accordance with this Agreement;

d) any act or omission of the Customer, its Personnel, or Users;

e) any claim by a User or third party arising from the Customer's use of the Software or Services.

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Thank you.

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