

TREASURY PROPOSES CIVIL PENALTIES AND OTHER CHANGES TO UNFAIR CONTRACT TERMS REGIME

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Legal Briefings - By **Patrick Gay, Stephanie Panayi, Philip Aitken, Gila Segall and Tomas Kemmery**

Among other proposals, a civil penalty regime is proposed for standard form contracts containing unfair contract terms which, if passed into law, would apply to an expanded class of contracts.

Treasury has released its long awaited exposure draft legislation set out in the Treasury Laws Amendment (Measures For A Later Sitting) Bill 2021: Unfair Contract Terms Reforms (**Draft Bill**) and commenced a public consultation seeking submissions **by 20 September 2021**.

These changes arise from the November 2020 meeting of the ministers for consumer affairs who identified concerns about the prevalence of unfair contract terms (**UCTs**) in standard form contracts and uncertainty about the scope of protections. They proposed changes to the UCT provisions in order to protect consumers and small businesses when agreeing standard form contracts.¹

IMPLICATIONS FOR BUSINESS

The Draft Bill represents a significant change in the way in which standard form contracts are defined and the remedial and enforcement outcomes available to courts and regulators if those contracts fail to meet the requisite consumer law standards.

The proposed changes would apply to new contracts made on or after the commencement date as well as existing contracts that are renewed or terms that are varied on or after the commencement date.

- **Are more of your contracts caught?:** The Draft Bill expands the class of contracts that are covered by the unfair contract term provisions. It is important consider whether this expanded definition will apply to a greater number of your standard form contracts and increases your potential risk exposure under the Draft Bill.
- **Introduction of pecuniary penalties:** The introduction of pecuniary penalties for UCTs and the availability of disqualification orders for individuals reinforces the need to ensure that your standard form contracts are compliant with the ACL and that customer facing staff are trained in and well aware of their consumer law obligations. The introduction of a pecuniary penalty regime is significant (under the current regime unfair terms are not enforceable). There is some inherent uncertainty as to when a provision will be found to be unfair. Businesses will need to grapple with this uncertainty and its consequences. The possibility of pecuniary penalties may require a reconsideration of relevant terms.
- **Implications of the rebuttable presumption:** If a term used in a standard form contract has been declared by a court to be unfair, in a subsequent proceeding, any same or similar term will have a rebuttable presumption that is unfair. This will mean not just that a similar term in a different standard form contract by that party is unfair, but will also apply to similar terms by other suppliers in the same industry. Everyone should, therefore, be alive to and vigilant about UCT findings within their industry and be quick to take appropriate steps to minimise risk exposure.

WHAT IS THE DETAIL OF THE CHANGES?

The Draft Bill would amend the *Australian Consumer Law* and the *Australian Securities and Investments Commission Act*. Summarised in the table below are the key changes to the UCT provisions:

Key change	Explanation
Rendering it illegal to propose, apply or rely on an UCT	<p>The Draft Bill proposes two separate prohibitions. A person will breach the UCT provisions if:</p> <ul style="list-style-type: none"> • they propose an unfair term in a standard form consumer or small business contract into which they have entered; • they apply or rely (or purport to do so) on an unfair term of a standard form consumer or small business contract. <p>For both prohibitions, a person can be in breach multiple times in relation to a single contract. These prohibitions and the pecuniary provisions apply in addition to the current regime under which a court can declare a contract term to be unfair.</p>
Expanding the class of contracts to which UCTs apply	<p>The Draft Bill expands the class of contracts to which UCTs apply by amending the definition of a small business contract to:</p> <ul style="list-style-type: none"> • remove the upfront contract value thresholds; and • require one party to a contract either to be a business that employs fewer than 100 persons or has an annual turnover of less than \$10,000,000 for the previous income year (casual employees are excluded and part-time employees are counted as a fraction of a full-time equivalent).
Pecuniary penalty regime for UCTs	<p>If a person is in breach of the law, a court has the power to impose a pecuniary penalty (in addition to the current power to declare it unfair). The pecuniary penalty matches the maximum pecuniary penalties available under the ACL which is \$500,000 for individuals and, for corporations, the greater of:</p> <ul style="list-style-type: none"> • \$10,000,000; • three times the value of the benefit received, or • 10% of annual turnover in preceding 12 months, if court cannot determine benefit obtained from the offence.
Expanding and streamlining the court's role	<p>In addition to awarding pecuniary penalties, a court can also make other orders, including to:</p> <ul style="list-style-type: none"> • void, vary or refuse to enforce part or all of a contract if the court thinks this is appropriate to prevent or reduce loss or damage that may be caused; • make orders injuncting persons from entering into any future contract that contains a term that is the same or similar in effect to a declared unfair contract term. The court can also injunct a person from applying or relying on a term in any existing contract that is similar in effect to the declared unfair contract term whether or not that contract is before the court; and • issue public warning notices and make orders disqualifying a person from managing a corporation.
Creating a rebuttable presumption	<p>If a term used in a standard form contract has been declared by a court to be unfair, in a subsequent proceeding, any same or similar term will have a rebuttable presumption that is unfair. The presumption is limited to a term proposed by the same person who proposed the original unfair term or where the term is part of a contract that is in the same industry as the contract that contained the original unfair term.</p>

DETERMINING WHETHER OR NOT THERE IS A STANDARD FORM CONTRACT

The Draft Bill provides further clarity around the definition of a standard form contract by setting out matters the court must take into account when considering if a contract is standard form, including:

- whether a party has entered into a contract that is the same or substantially similar to another contract entered into by that person and the number of times this has been done;
- when determining whether a party was able to genuinely negotiate a contract, a court is to disregard instances where a party:

- has negotiated minor or insubstantial changes to the terms of a contract;
- is given the ability to select from a pre-determined range of terms within a contract; and
- to another similar contract has been given an effective opportunity to negotiate the terms of that contract.

EXEMPTIONS

The Draft Bill makes clear if a law of the Commonwealth, a State or a Territory requires or reads in certain terms into a standard form consumer or small business contract then it cannot be an unfair contract term.

CONSULTATION PERIOD

Treasury is consulting on the Draft Bill and submissions are open until 20 September 2021. There is no clear timeframe for consideration of the Draft Bill, nor is it clear that all of the proposed amendments will be passed into law. However, it is timely for businesses now to review their standard form contracts and consider the implications of the proposed changes on their business.

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1. <https://consumer.gov.au/consumer-affairs-forum/communiques/meeting-12-0>

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



LINDA EVANS
REGIONAL HEAD OF
PRACTICE -
COMPETITION,
REGULATION AND
TRADE, AUSTRALIA,
SYDNEY
+61 2 9322 4719
linda.evans@hsf.com



LIZA CARVER
PARTNER, SYDNEY
+61 2 9225 5574
Liza.Carver@hsf.com



PATRICK GAY
PARTNER, SYDNEY
+61 2 9322 4378
Patrick.Gay@hsf.com



SARAH BENBOW
PARTNER,
MELBOURNE
+61 3 9288 1252
Sarah.Benbow@hsf.com



STEPHANIE PANAYI
SPECIAL COUNSEL,
SYDNEY
+61 2 9322 4875
stephanie.panayi@hsf.com



PHILIP AITKEN
SENIOR ASSOCIATE,
MELBOURNE
Philip.Aitken@hsf.com

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