

BILL PROPOSING CIVIL PENALTIES AND OTHER CHANGES TO UNFAIR CONTRACT TERMS REGIME INTRODUCED TO PARLIAMENT

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

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On 9 February 2022, legislation amending the unfair contract terms (**UCT**) regime was introduced into Parliament.

The amendments are included in the Treasury Laws Amendment (Enhancing Tax Integrity and Supporting Business Investment) Bill 2022 (the **Bill**) which, among other proposals, introduces a civil penalty regime for standard form contracts containing UCTs that would apply to an expanded class of contracts.

With one material exception, the Bill is substantially similar to the exposure draft legislation, which was consulted on during 2021. The draft exposure legislation proposed an amendment which would create a new rebuttable presumption. Under this proposal, if a term used in a standard form contract had been declared by a court to be unfair, any same or similar term would also be presumed to be unfair in any subsequent proceeding. Significantly, this amendment has not been included in the version of the Bill before Parliament.

IMPLICATIONS FOR BUSINESS

The 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. Businesses will have time to prepare, with the law not scheduled to commence until 12 months after it is passed.

- **Are more of your contracts caught?** The Bill expands the class of contracts that are covered by the UCT provisions. It is important to consider whether this expanded definition will apply to a greater number of your standard form contracts and increases your potential risk of exposure under the 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.

WHAT IS THE DETAIL OF THE CHANGES?

The 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 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 made; • 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 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 for small business contracts under the ACL, although an increased financial threshold (of \$5,000,000) is retained under the ASIC Act; 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 applicable pecuniary penalties match the maximum penalties available under the ACL and ASIC Act respectively.</p> <p>Under the ACL, a penalty of \$500,000 may be ordered 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 the 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.

DETERMINING WHETHER OR NOT THERE IS A STANDARD FORM CONTRACT

The 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.

KEY CONTACTS

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



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