

Unfair Contract Terms Regime

On 9 November 2023, changes to the existing unfair contract terms (UCT) regime under the Australian Consumer Law and the ASIC Act will take effect. Under the new UCT regime it will be unlawful to include or rely on an unfair term in a standard form contract that is a consumer contract or a small business contract, including leases.

Under the new UCT regime, the key questions are:

■ Is there a relevant contract?

The UCT regime only applies to **standard form contracts** that are either a **consumer contract** or a **small business contract**.

Standard form contracts may include contracts prepared by one party with most of the bargaining power, with little or no opportunity for the other party to negotiate the terms.

A contract is a **small business contract** if a contracting party is a business that employs fewer than 100 people or that had a turnover for the previous income year below \$10 million. If the ASIC Act applies, the contract must also have an upfront price no greater than \$5 million.

■ Which UCT regime applies?

When the contract was entered into, varied or renewed will determine which UCT regime applies.

■ Does the contract include unfair terms?

To be **unfair**, a term must:

- cause significant imbalance in the parties' rights and obligations;
- not be reasonably necessary to protect a party's legitimate interests; and
- cause financial or other detriment to the other party if relied on.

See guidance on the next page regarding typical terms that may be unfair.

■ What are the risks in using unfair terms?

- Unfair terms under the previous regime are **void**, while unfair terms under the new regime will be unlawful.
- Significant civil penalties (for companies, up to \$50 million or even more).
- Other enforcement action and court remedies.
- Reputational damage.

Our Top 10 Unfair Terms

These are examples of terms that **may** be considered unfair. These terms must be reviewed on a case-by-case basis taking into account the context.



01

A term that limits one party's liability but not the other party's liability.



02

Broad indemnities imposed on one party but not the other.



03

A term allowing one party to terminate the lease (but not the other party).



06

A term penalising one party for termination of the lease (such as unreasonable termination fees).



05

An unreasonable penalty in relation to failure to pay outstanding amounts.



04

A right for one party to determine and vary the fee for a service.



07

A term that allows one party (but not the other party) to vary the terms of the lease.



08

A term that seeks to avoid or limit consumer guarantees that cannot be excluded by law or that limits just one party's right to sue.



09

Automatic renewal clauses, particularly where no advance notice is provided before the renewal.



10

A term that permits one party to assign the lease to the detriment of the other party without their consent.