

Unfair Contracts

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Overview

The unfair contracts regime under the ACL

- Who is caught?
- What is caught?
- What is an 'unfair term'?
- What are the consequences of an unfair term?
- What about other laws that deal with unfair contracts?

Australian Consumer Law

- The *Australian Consumer Law* (ACL) gives the courts the power to declare that a term is “unfair” (unfair terms are void). Although the contract itself will continue to bind the parties without the unfair term, the courts may make orders varying the contract, refusing to enforce the contract, or declaring that the whole contract is void.
- Part 2-3 provides unfair contract terms protection for:

Standard form consumer contracts



Standard form small business contracts



When is a small business protected by the ACL from unfair contract terms?



One party is a consumer or a small business



Parties enter into a standard form contract



The contract is not of an excluded type



A term that is 'unfair'



ACL - What is a 'small business'?



Major changes commenced on 9 November 2023.

A business need only meet one of two requirements:

1. Annual turnover for previous income year of less than \$10 million; or
2. One party has less than 100 employees determined at the time the contract is entered into (casuals only counted if regular and systematic).

What is a 'standard form contract'?

Indicators

- Contract prepared before discussions;
- One party required to accept or reject the contract;
- No 'effective opportunity to negotiate';
 - Actions which **do not constitute** an 'effective opportunity to negotiate' include negotiating minor amendments only, selecting from a range of options determined by another party, opportunity to negotiate terms of a different contract or proposed contract;
- Contract terms not specific to one party or the particular transaction;
- Repeat usage of the same or similar terms in other contracts.



To what sort of contract will the regime apply?



- Supply of goods or services
- Sale or grant of an interest in land
- Policy of insurance

- Marine salvage/towage
- Charterparty of a ship
- Contract for carriage of goods by a ship



What is unfair?

A term may be considered unfair if it:



Would cause a **significant imbalance** in the parties' rights and obligations under the contract; and



Is not reasonably necessary to protect the **legitimate interests** of the party who would be advantaged by the term; and



Would cause **detriment** (whether financial or otherwise) to a party to the contract if the term were applied or relied on.

The court may also take into account the extent to which the term is **transparent** and the contract as a whole.

Examples of unfair terms

The ACL list

- Terms that permit, or have the effect of permitting:
 - One party to avoid the contract;
 - One party to vary the terms of the contract;
 - One party to assign the contract to the detriment of another party without that party's consent;
 - Variation of the upfront price without a right to terminate; or
 - Limiting a party's right to sue.
- Terms that limit, or have the effect of limiting:
 - One party's vicarious liability for its agents; or
 - One party's right to sue another party.

Tips from the ACCC

- Consider both points of view;
- Include counter-balancing terms (eg if you vary, the customer can terminate the agreement);
- Don't have terms that try to avoid obligations under the Australian Consumer Law (eg compulsory consumer guarantees);
- Be clear – use simple language;
- Be transparent – ensure key terms are drawn to your customers' attention

Case study: *ASIC v PayPal Australia Pty Limited* [2024] FCA 762



- Term in dispute was a 'Fee Error Term' which required customers to notify PayPal of errors in fees in writing within 60 days, otherwise the fees were deemed to be accurate (and PayPal had no obligation to correct errors after this point).
- Approximately 600,000 contracts between PayPal and small businesses contained this term in the period from 21 Sep 2021 to 7 Nov 2023.
- The court found that this term was unfair.
- There were no findings that the term had actually been relied upon by PayPal (so no loss was suffered as a result of this term).



Case study: *ASIC v PayPal Australia Pty Limited* [2024] FCA 762 (cont'd)



- **Significant imbalance** in the parties' rights:
 - Placed an obligation on small businesses to examine account information (even though PayPal was better positioned to determine if fees had been overcharged).
 - Permitted PayPal to retain fees which it had overcharged due to its own error.
 - Limited the right of the business to claim compensation.
 - No corresponding right for the small business if PayPal accidentally undercharged.
- **Detriment:** the small business would have lost the benefit of the amount wrongly charged to its account.
- **Legitimate interests:** not reasonably necessary to protect PayPal's legitimate interests (duty is on PayPal to show this).
- **Transparency:** the term was not highlighted/otherwise drawn attention to, and the contract was long and complex.



Case Study: *ASIC v Auto General Insurance Company Limited* [2024] FCA 272



- The disputed term required customers to inform the insurer ‘if anything changes’.
- The court found that the term was **not** unfair.
- **Significant imbalance:** Even though there was no reciprocal obligation on the part of the insurer, the duty to disclose was simply a reflection of the nature of the contract as a whole (so there was no significant imbalance).
- **Legitimate interests:** the term was reasonably necessary to protect the insurer’s legitimate interests, as it allowed the insurer to collect information to manage risks which it was not prepared to insure against.
- **Detriment:** the term is designed in such a way as to prevent it being used unfairly against the customer.
- **Transparency:** although the term does lack transparency, this is not fatal, as the other three factors work in favour of the term (‘ambiguity in meaning will point towards a lack of transparency’).

What clauses cannot be unfair?

A term cannot be unfair to the extent that it:

Defines the main subject of the contract

Sets the upfront price payable under the contract

Is required or expressly permitted by a law of the Commonwealth or a State or Territory



What happens if a term is unfair?



- An unfair term is automatically void;
- The balance of the contract remains;
 - However, the court may make an order varying, refusing to enforce, or declaring void the remainder of the contract;
- Courts can apply a civil pecuniary penalty;
- Courts may make redress orders for 'non-parties' (parties who aren't part of the enforcement proceedings);
- Courts may also make compensation orders for injured persons.



What happens if a term is unfair?

- **Offences:** Proposing, using, applying or relying on unfair contract terms in a standard form consumer or small business contract;
 - Each unfair term is a separate contravention, and civil penalties can be imposed;
- **Remedies:** Court can issue injunctions and can make orders with respect to contracts that are the same or similar to a contract that has been declared unfair;
 - Can issue adverse publicity orders and disqualify directors.



Penalties under ACL for unfair terms



The amendments have also increased certain maximum penalties under the ACL:

Where the contravening party is	Civil penalties
A corporation	The greater of: <ul style="list-style-type: none">• \$50 million;• Three times the value of the benefit obtained; or Where the value of the benefit cannot be determined, 30% of the adjusted turnover during the 'breach turnover period' for the act or omission.
An individual	\$2.5 million

'Breach turnover period' covers the period from when a business is found to have begun committing a contravention to when it ceased doing so. The minimum period will be 12 months.

What about other laws? FWA



- Contractors will be specifically protected from UCTs under recent amendments to the *Fair Work Act* (FWA). This includes companies.
- Aims to make remedies accessible to contractors with limited bargaining power, for whom the costs of going to court would probably be unaffordable.
- These protections only apply where the income of the contractor is below the 'contractor high income threshold' (\$175,000).
- These changes started on 26 August 2024 but only apply to contracts entered into since that date.

What does the FWC do?



- The Fair Work Commission (FWC) can only make an order where it is satisfied that a 'services contract' includes one or more UCTs which relate to rates, hours, termination, disputes etc.
- When a term is found to be unfair, the FWC may make an order:
 - (a) setting aside the services contract; or
 - (b) amending or varying the services contract.

What is an 'unfair term' under the FWA?



- The FWC **may** take into account:
 - **Bargaining power** of the parties;
 - Whether there is a **significant imbalance** between the rights of parties;
 - Whether the **total payment for work** is less than what is prescribed under a Minimum Standards Order;
 - Whether the term is reasonably necessary to protect the **legitimate interests** of a party; or
 - Whether the term imposes a **harsh, unjust or unreasonable requirement** on a party.



Unfair Contracts

Under the Contractor High Income Threshold

- *Fair Work Act 2009* (Cth):
- FWC has power to amend, vary or set aside a contract which contains one or more unfair term/s;
- FWC may consider relative bargaining power, whether the term is reasonably necessary, and whether the total remuneration is less than what an employee would receive (among other matters).

Over the Contractor High Income Threshold

- *Independent Contractors Act 2006* (Cth):
- Court has power to vary or set aside the whole or part of a contract which is unfair and/or harsh;
- Court may consider relative bargaining power, any undue influence or pressure, and whether the total remuneration is less than that of an employee performing similar work.

Contractor High Income Threshold is currently \$175,000

Independent Contractors Act 2006



An independent contractor can have a 'services contract' reviewed on the grounds that it is unfair or harsh. This is considered having regard to:

- The relative bargaining strengths of the parties;
- Any undue influence or pressure; and
- Whether the contract provides for remuneration likely to be less than that of an employee performing similar work.

A court can set aside all or part of the contract or vary the contract.



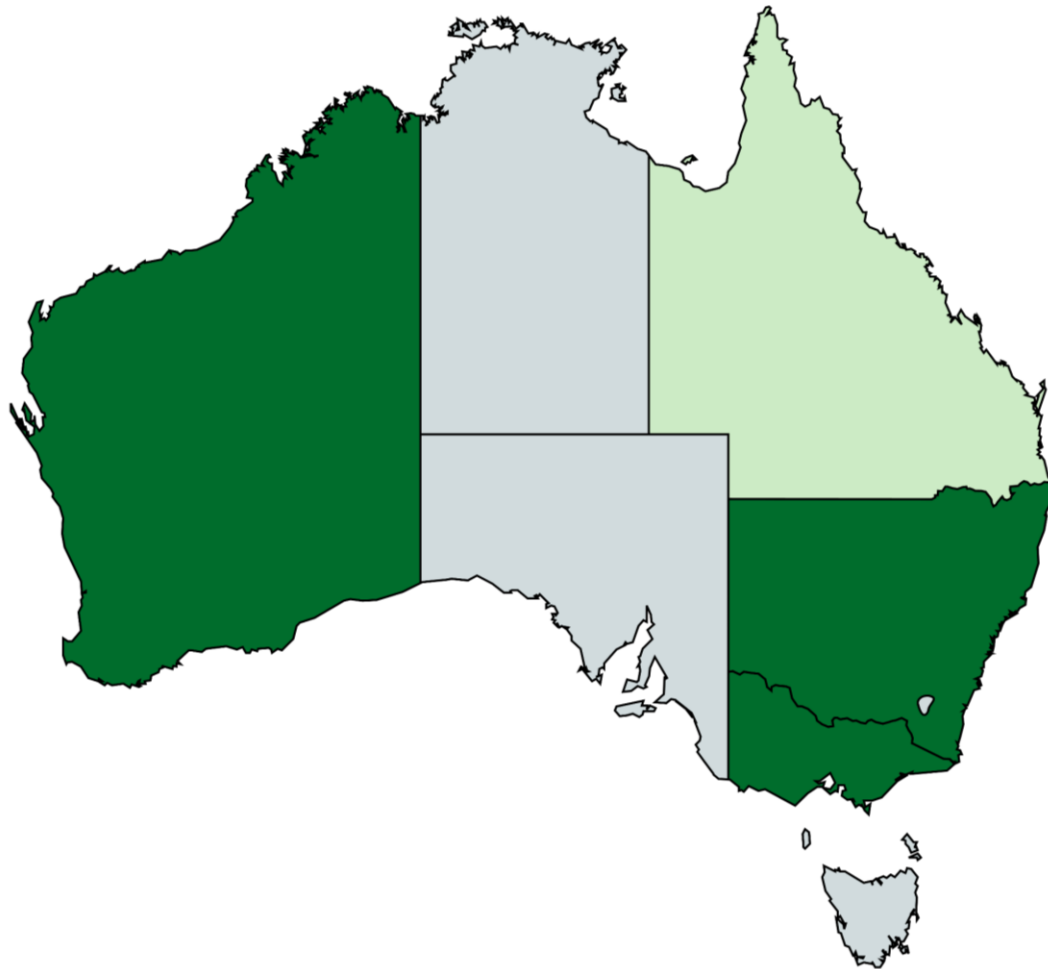
Keldote v Riteway Transport [2010]

- The contract allowed Riteway to make changes to the vehicles to be supplied without paying extra.
- Owner drivers told to replace their single trailers with B Doubles, or they would get no more work.
- Offered only \$200 extra per trip.
- After negotiations broke down, the contract was terminated by Riteway.



Court found the contract was unfair and ordered damages of \$20,000 (goodwill) plus three months of payments in lieu of notice

Other remedies under state owner driver laws



In Force

NSW
Victoria
Western Australia

But no double dipping – you can't bring an action in the FWC if you have already brought action under the ACL or state owner driver laws



Get in touch

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Thank you

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