

Unfair Contract Terms under the Australian Consumer Law

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Introduction

1. The focus of this paper is the legislative provisions regulating unfair contract terms in standard form contracts. These provisions apply to consumer contracts and small business contracts.
2. The unfair contract term provisions are found in Pt 2-3 of the *Australian Consumer Law (ACL)*¹ and Pt 2 Div 2 Subdiv BA of the *Australian Securities and Investment Commission Act 2001 (ASIC Act)*. The provisions in the ACL and the ASIC Act are for practical purposes the same, except that the ACL does not apply to financial services or financial products whereas the ASIC Act applies to such services and products. Together these provisions are referred to as the Unfair Contract Terms Law (**UCTL**).²
3. In 2016 the operation of the UCTL was expanded to apply to small business contracts. These provisions came into effect on 16 November 2016. Currently, further major changes are proposed. These changes are aimed at strengthening the UCTL protections through increased penalties and to expand the class of contract that will be covered by the UCTL.

Why Regulate Unfair Contract Terms?

4. In common law, a basic principle underlying the law of contract is freedom of contract. Pursuant to classic contract theory, one of the major functions of the law of contract is to preserve the integrity of the bargaining process but otherwise to allow contracting parties the freedom to negotiate the substantive terms of their agreements as they see fit.³ This objective is promoted by doctrines that allow a court to set aside an otherwise

¹ The ACL is contained in Schedule 2 of the *Competition and Consumer Act 2010 (Cth)*

² Paterson J, *Unfair Contract Terms in Australia*, (Lawbook Co. 2012), 1.

³ Subject to requirements such as legality and certainty.

validly formed contract on the grounds that the consent of one party was impaired or vitiated. These vitiating circumstances include such doctrines as fraud, misrepresentation, mistake, undue influence, and unconscionable conduct and its legislative equivalents, including the prohibition of misleading and deceptive conduct. If the conditions for voluntary decisions by contracting parties have been met, there is no jurisdiction under general contract law to intervene in a validly formed contract on the basis of substantive unfairness.⁴

5. In the report *Review of Australian Consumer Policy Framework*⁵, the Productivity Commission identified a number of arguments that provide a rationale for intervening in unfair contract terms contained within standard form consumer contracts. A key argument is that fairness is a highly valued ethical norm and that most people abhor unfairness to themselves and others. Other arguments are that consumers might underestimate the risk inherent in certain contract terms, resulting in an inefficient distribution of risk between firms and consumers. Unfair contract regulations might also help to drive out 'bad' firms that act in poor faith and impose unfair terms on their customers. Such 'bad' firms would otherwise survive in greater numbers because of the difficulty for consumers to distinguish them from 'good' firms that deal fairly with customers.⁶
6. Another justification for prohibiting the use of unfair contract terms in standard form contracts is the argument that such contracts do not fit well with the assumptions made by classic contract theory and its concern for freedom of contract. Standard form contracts benefit contracting parties by reducing the costs associated with negotiating and drafting contracts on a case-by-case basis.⁷ However, this efficiency means that standard form contracts do not tend to promote the principle of freedom of contract. By their nature, standard form contracts tend to limit opportunities to engage in genuine negotiations regarding contract terms.⁸
7. The concern that consumers might underestimate the inherent risk in certain standard form contracts and lack the ability to make rational economic decisions when assessing the price/risk trade-offs presented to them in the contracts of different traders arises from studies in the field of behavioural economics. These studies suggest that consumers are unlikely to read the terms of standard form contracts and even if they

⁴ *Biotechnology Australia Pty Ltd v Pace* (1988) 15 NSWLR 130 at 132-133.

⁵ Productivity Commission, *Review of Australia's Consumer Policy Framework, Volume 2*, Inquiry Report No 45 (2008) *Ibid*, 413 and 422.

⁶ Paterson J, *Unfair Contract Terms in Australia*, (Lawbook Co. 2012), 4.

⁸ *Ibid*, 5; *Australian Competition and Consumer Commission v CLA Trading Pty Ltd* [2016] FCA 337 at [48].

do, are poor at processing large amounts of information. Consumers tend to focus only on the key elements of a transaction.⁹ Additionally, suppliers' standard form contracts are often lengthy, consumers have limited opportunity to read and consider them and the terms might be expressed in technical legal language. As a result, consumers are ill equipped to avoid buying from suppliers that use unfair terms and instead support suppliers that use contract terms that are fairer and more balanced.

8. Many of these arguments also apply to small businesses. For example, small businesses often receive standard form contracts from other businesses on a take it or leave it basis and encounter similar disadvantages as individual consumers in negotiating contracts with suppliers. Small businesses often lack in-house legal expertise, and the cost of obtaining legal advice can be prohibitive, especially for low-value contracts. Accordingly, commercially powerful businesses dealing with small businesses, may use standard form contracts to shield against commercial risks in a way that is unfair.¹⁰

The UCTL

9. The UCTL provides that a term of a consumer contract or a small business contract is void if:

- a. the term is unfair; and
- b. the contract is a standard form contract.¹¹

10. The contract continues to bind the parties if it can operate without the unfair term.¹²

Consumer contract

11. A consumer contract is defined as a contract for the supply of goods or services, or for the 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.¹³

⁹ Paterson J, *Unfair Contract Terms in Australia*, (Lawbook Co. 2012), 7-9.

¹⁰ B Billson (Minister for Small Business), *Address to the Australian Food and Grocery Council Industry Leaders Forum*, speech, Canberra 30 October 2013, accessed 15 February 2016; *Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Bill*, Explanatory Memorandum, 7.

¹¹ ACL s 23(1); ASIC Act s 12BF(1).

¹² ACL s 23(2); ASIC Act s 12BF(2).

¹³ ACL s 23(3); ASIC Act s 12BF(3).

Small business contract

12. A contract is a small business contract if:

- a. the contract is for a supply of goods or services, or a sale or grant of an interest in land; and
- b. at the time the contract is entered into, at least one party to the contract is a business that employs fewer than 20 persons; and
- c. either of the following applies:
 - i. the upfront price payable under the contract does not exceed \$300,000;
 - ii. the contract has a duration of more than 12 months and the upfront price payable under the contract does not exceed \$1,000,000.¹⁴

Unfairness

13. A term of in a consumer or small business contract is unfair if it:

- a. would cause a significant imbalance in the parties' rights and obligations arising under the contract; and
- b. is not reasonably necessary to protect the legitimate interests of the party advantaged by the term; and
- c. would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.¹⁵

14. In determining whether a term in a contract is unfair, a court may take into account such matters as it thinks relevant but must take into account:

- a. the extent to which the term is transparent; and
- b. the contract as a whole.¹⁶

15. A term is transparent if it is:

- a. expressed in reasonably plain language;

¹⁴ ACL s 23(4); ASIC Act s 12BF(4). In counting the persons employed by a business for the purpose of the provisions, a casual employee is not to be counted unless he or she is employed by the business on a regular and systematic basis. ACL 23(5) and ASIC Act s 12BF(5).

¹⁵ ACL s 24(1); ASIC Act s 12BG(1).

¹⁶ ACL s 24(2); ASIC Act s 12BG(2).

- b. legible;
- c. presented clearly; and
- d. readily available to any party affected by the term.¹⁷

16. There is a rebuttable statutory presumption that a term in a consumer contract is not reasonably necessary to protect the legitimate interest of the party advantaged by the term.¹⁸

Exempt terms

17. The unfair term provisions do not apply to a term that:

- a. defines the main subject matter of the contract;
- b. sets the upfront price payable under the contract; or
- c. is required or expressly permitted by law.¹⁹

18. The upfront price is the consideration that is provided for the supply, sale or grant under the contract and is disclosed at or before the time the contract is entered into but does not include any other consideration that is contingent on the occurrence or non-occurrence of a particular event.²⁰

Standard form contract

19. If a party to a proceeding alleges that a contract is a standard form contract, it is presumed to be a standard form contract unless another party to the proceeding proves otherwise.²¹

20. In determining whether a contract is a standard form contract, a court may take into account such matters as it thinks relevant but must take into account:

- a. whether one of the parties has all or most of the bargaining power in the transaction;
- b. whether the contract was prepared by one party before any discussion of the transaction occurred among the parties;
- c. whether another party was, in effect, required either to accept or reject the terms of the contract (other than the exempt terms) in the form in which they were presented;

¹⁷ ACL s 24(3); ASIC Act s 12BG(3).

¹⁸ ACL s 24(4); ASIC Act s 12BG(4).

¹⁹ ACL s 26(1); ASIC Act s 12BI(1).

²⁰ ACL s 26(2); ASIC Act s 12BI(2).

²¹ ACL s 27(1); ASIC Act s 12BK(1).

- d. whether another party was given an effective opportunity to negotiate the terms of the contract, other than the exempt terms;
- e. whether the terms of the contract (other than the exempt terms) take into account the specific characteristics of another party or the particular transaction; and
- f. any other matter prescribed by regulations.²²

Grey list of terms

21. The UCTL provides a number of examples of the terms in a consumer contract that might be unfair:

- a. a term that permits or has the effect of permitting one party (but not another party) to avoid or limit performance of the contract;
- b. a term that permits or has the effect of permitting one party (but not another party) to terminate the contract;
- c. a term that penalises or has the effect of penalising one party (but not another party) for a breach or termination of the contract;
- d. a term that permits or has the effect of permitting one party (but not another party) to vary the terms of the contract;
- e. a term that permits or has the effect of permitting one party (but not another party) to renew or not renew the contract;
- f. a term that permits or has the effect of permitting one party to vary the upfront price payable under the contract without permitting the other party the right to terminate the contract;
- g. a term that permits or has the effect of permitting one party to unilaterally vary the characteristics of the goods or services to be supplied or the interest in land to be sold or granted under the contract;
- h. a term that permits or has the effect of permitting one party to unilaterally determine whether the contract has been breached or to interpret its meaning;
- i. a term that limits or has the effect of limiting one party's vicarious liability for its agents;
- j. a term that permits or has the effect of permitting one party to assign the contract to the detriment of another party without that party's consent;
- k. a term that limits or has the effect of limiting one party's right to sue another

²² ACL s 27(1); ASIC Act s 12BK(2).

party;

- l. a term that limits or has the effect of limiting the evidence one party can adduce in proceedings relating to the contract;
- m. a term that imposes or has the effect of imposing the evidential burden on one party in proceedings relating to the contract; and
- n. a term of a kind or a term that has an effect of a kind proscribed by regulations.²³

22. The ACL does not apply to financial services or financial products.²⁴ The UCTL provisions in the ASIC Act apply to a contract that is:

- a. a financial product; or
- b. a contract for the supply or possible supply of services that are financial services.²⁵

Contracts to which the UCTL Applies

23. The UCTL applies only to standard form contracts that are consumer contracts or small business contracts as defined at paragraphs 11 and 12 above.

24. A consumer contract or small business contract may relate to the supply of goods or services or the sale or grant of an interest in land. These concepts are broadly defined in s 2 of the ACL.

25. Goods include:

- a. ships, aircraft and other vehicles;
- b. animals, including fish;
- c. minerals, trees and crops, whether on, under or attached to land or not;
- d. gas and electricity;
- e. computer software;
- f. second hand goods; and

²³ ACL s 25(1); ASIC Act s 12BH(1). No further examples have been prescribed by regulation.

²⁴ ACL s 131A(2)(b).

²⁵ s 12BF(1)(c) of the ASIC Act. 'Financial product' is defined in s 12BAA and 'financial service' in 12BAB of the ASIC Act.

- g. any component part of or accessory to goods.

26. Services include:

- a. any rights (including rights in relation to and interests in real or personal property), benefits, privileges or facilities that are or are to be provided, granted or conferred in trade or commerce; and
- b. without limiting paragraph (a), the rights, benefits, privileges or facilities that are or are to be provided, granted or conferred under:
 - i. a contract for or in relation to the performance of work (including work of a professional nature), whether with or without the supply of goods;
 - ii. a contract for or in relation to the provision of or the use or enjoyment of facilities for amusement, entertainment, recreation or instruction;
 - iii. a contract for or in relation to the conferring of rights, benefits or privileges for which remuneration is payable in the form of a royalty, tribute, levy or similar exaction;
 - iv. a contract of insurance;
 - v. a contract between a banker and a customer of the banker entered into during the course of the banker carrying out the business of banking; or
 - vi. any contract for or in relation to the lending of money.

Services do not include rights or benefits that are the supply of goods or the performance of work under a contract of service.

27. An interest in land includes:

- a. a legal or equitable estate or interest in the land;
- b. a right of occupancy of the land, a building or part of a building erected on the land arising by virtue of the holding of shares or a contract to purchase shares in an incorporated company that owns the land or building; or
- c. a right, power or privilege over, or in connection with, the land.

28. It is important to note that, under the UCTL, a consumer contract is not limited to the supply of things of a personal, domestic or household nature. The UCTL applies to the supply of goods, services or an interest in land to an individual, provided that the acquisition thereof is wholly or predominantly for personal, domestic or household use or consumption. The definition of consumer contract under the UCTL therefore differs from the definition of a consumer under s 3 of the ACL.²⁶
29. This difference might result in a person being considered a consumer under s 3 of the ACL but not under the provisions of the UCTL. The following example is given by Jeannie Patterson:²⁷ an individual owning a small business who purchases a coffee machine (of a non-commercial standard) for use by staff members is a consumer under the ACL and, therefore, has the benefit of the consumer guarantee provisions under Pt 3-2 of the ACL but is not a consumer under the UCTL as the coffee machine was not bought for personal, domestic or household use or consumption. In contrast, a person buying a tractor for more than \$40,000 for personal use in a suburban garden is not a consumer under the general provisions of the ACL but is a consumer under the UCTL as the tractor was acquired for personal, domestic or household use or consumption.²⁸
30. Whether a contract is a consumer contract under the UCTL should be determined with reference to the time the contract was made. Therefore, it should be the purpose at the time of acquisition that determines the character of the contract.²⁹
31. As stated at paragraph 22 above, standard form contracts that deal with the supply of financial services and financial products are regulated by the UCTL in the ASIC Act. Financial products and services are broadly defined in s 12BAA and s 12BAB of the ASIC Act and may include financial investments, credit facilities and a guarantee related to a mortgage or a credit contract.³⁰

Standard form contract

32. The UCTL does not define what a standard form contract is. As mentioned above, the UCTL contains a rebuttable presumption that a contract is a standard form contract.

²⁶ Section 3 provides that a person is taken to have acquired particular goods as a **consumer** if the amount paid or payable for the goods did not exceed \$40,000 or the goods were of a kind ordinarily acquired for personal, domestic or household use or consumption; or the goods consisted of a vehicle or trailer acquired for use principally in the transport of goods on public roads. Note that from 1 July 2021 the threshold amount for determining who is a consumer has been increased to \$100,000 (see *Treasury Laws Amendment (Acquisition as Consumer – Financial Thresholds) Regulations 2020*).

²⁷ Associate Professor at the University of Melbourne Law School.

²⁸ Paterson J, *Unfair Contract Terms in Australia*, (Lawbook Co. 2012), 56.

²⁹ *Ibid*, 57; *Jetstar Airways Pty Ltd v Free* [2008] VSC 539 at [119]; *Director General of Fair Trading v First National Bank* [2002] 1 ALL ER 97 at [13].

³⁰ *Australian Securities and Investments Commission Regulations 2001*, reg 2B(g) and (h); Paterson J, *Unfair Contract Terms in Australia*, (Lawbook Co. 2012) p 52. See also *Australian Competition and Consumer Commission v CLA Trading Pty Ltd* [2016] FCA 337 at [12] - [35].

This presumption reflects the view that, ordinarily, the claimant will have evidence of only the existence of one contract and the respondent will be best placed to provide evidence regarding the nature of the contracts it uses.³¹ The matters that a court must take into account in deciding whether a contract is a standard form contract are set out in s 27(2) of the ACL.

33. Standard form contracts are typically contracts that are pre-prepared by a supplier. Such contracts usually are not subject to negotiation and do not take into account the specific characteristics of the other party. Standard form contracts were described by Lord Diplock in *A Schroeder Music Publishing Co Ltd v Macaulay*³² as follows:

The terms of this kind of standard form of contract have not been the subject of negotiation between the parties to it, or approved by any organisation representing the interests of the weaker party. They have been dictated by that party whose bargaining power, either exercised alone or in conjunction with others providing similar goods or services, enables him to say: 'If you want these goods or services at all, these are the only terms on which they are obtainable. Take it or leave it.'

34. From the factors that a court must take into account under s 27(2), it appears that a contract is considered a standard form contract unless it was subject to effective and meaningful negotiations. Courts are likely to require a high threshold for the level of effective negotiations that must take place before holding that a supplier's pre-prepared contract is not a standard form contract.³³

Contracts and Terms Exempted Under the UCTL

Exempted contracts

35. Certain contracts are excluded from the application of the UCTL. The UCTL does not apply to:
- a. certain shipping contracts, such as a contract of marine salvage or towage, a charter party of a ship or a contract for the carriage of goods by ship;
 - b. a contract that is the constitution of a company, managed investment scheme or other kind of body.³⁴

³¹ *Explanatory Memorandum, Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010 (Cth)* 5.73.

³² [1974] 3 All ER 616 at 624.

³³ See Paterson J, *Unfair Contract Terms in Australia*, (Lawbook Co. 2012), 54 and Booth P, *An introduction to the Australian Consumer Law Bill*, 20 August 2009, 3-4, available at: www.gordonandjackson.com.au/online-library.

³⁴ ACL s 28; ASIC Act s 12BL.

36. It used to be the case that section 15 of the *Insurance Contracts Act 1984* (Cth) had the effect that the UCTL did not apply to insurance contracts. Section 15 provides that a contract of insurance cannot be made the subject of relief under any other Commonwealth Act, State Act, Act or Ordinance of a Territory. Relief is defined as 'relief in the form of judicial review of a contract on the grounds that it is harsh, oppressive, unconscionable, unjust, unfair or inequitable'. In April 2021 -- following recommendations made by the Hayne Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry -- section 15 was amended to expressly bring standard insurance contracts within the ambit of section 12BF of the ASIC Act.

Exempted terms

37. The UCTL does not apply to terms in a standard form consumer contract that define the main subject matter of the contract or set the upfront price payable under the contract.

Main subject matter

38. The main subject matter of a contract refers to the goods, services or interests in land that the consumer acquires under the contract. The main subject matter may also include a term that is necessary to give effect to the supply or grant under the contract or without which the supply or grant could not occur. The reason for excluding such terms is that these matters invariably are subject to genuine negotiation between the consumer and the supplier, allowing the consumer to exercise a choice in these matters before entering into the contract.³⁵

39. By excluding terms that define the main subject matter of the contract, the legislation reflects a compromise between the opposing aims of consumer protection and freedom of contract.³⁶ Thus, the decision-making autonomy of consumers is respected and consumers are prevented from using the UCTL to renege on a bargain on the grounds of price or quality.³⁷ As stated by Harbison J in *Director of Consumer Affairs Victoria v Craig Langley Pty Ltd & Matrix Pilates & Yoga Pty Ltd*³⁸

S 32X requires me to consider whether or not the terms have been individually negotiated. Although no guidance on how this should be applied is found in the Act, it appears to me to reflect the common sense view that terms of a consumer contract which have been the subject of genuine negotiation should not be lightly declared unfair. This legislation is designed to protect consumers from unfair

³⁵ *Explanatory Memorandum, Trade Practices Amendment (Australian Consumer Law) Bill* (No 2) 2010 (Cth) 5.60-5.61.

³⁶ *Office of Fair Trading v Abby National plc* [2010] 1 AC 696 at [44].

³⁷ Paterson J, *Unfair Contract Terms in Australia*, (Lawbook Co. 2012), 37.

³⁸ [2008] VCAT 484 at [66].

contracts, not to allow a party to a contract who has genuinely reflected on its terms and negotiated them to be released from a contract term from which he or she later wishes to resile.

40. While the UCTL does not apply to terms that define the main subject matter of the contract insofar as they relate to the quality of the goods or services provided, such terms may be regulated by the consumer guarantee provisions in Pt 3-2 of the ACL.³⁹

41. It might not always be easy to determine what the main subject matter of a contract is. In a broad sense, all terms of a contract are in some way related to the price or remuneration, especially in the case when a bundle of services is provided. Jeannie Patterson⁴⁰ gives the following example:

Consider ... a contract for a package holiday. In such a case, is the main subject matter the holiday destination, or also the transport to that destination and the tours and activities offered on arrival?⁴¹

42. Courts in England, applying the UTCCR, have interpreted the core terms exemption restrictively. In *Director General of Fair Trading v First National Bank*,⁴² Lord Bingham stated that:

There is an important distinction between the term or terms which express the substance of the bargain and “incidental” (if important) terms which surround them (*Chitty on Contracts*, 28th ed, 1999, ‘Unfair Terms in Consumer Contracts’, p 747, para 15-025). The object of the regulations and the directive is to protect consumers against the inclusion of unfair and prejudicial terms in standard form contracts into which they enter, and that object would plainly be frustrated if regulation 3(2)(b) were so broadly interpreted as to cover any terms other than those falling squarely within it.

43. The English case of *Office of Fair Trading v Ashbourne Management Services Ltd*⁴³ concerned the fairness of a term in the defendant’s standard form contract that required members who signed up to a gym to remain members for a minimum period of 12, 24 or 36 months. Members were liable to pay the monthly membership fee for the whole of the minimum period even if they wanted to terminate their gym membership early. Kitchin J held that regulation 6(2)(b) under the UTCCR⁴⁴ precludes assessment of the fairness of a term related to the main subject matter of the contract. The main subject matter of the contract included such matters as the meaning or description of the length of the minimum period, the facilities to which the members gained access and the

³⁹ Paterson J, *Unfair Contract Terms in Australia*, (Lawbook Co. 2012) chapter 11.

⁴⁰ Associate Professor at the University of Melbourne Law School.

⁴¹ Paterson J, *Unfair Contract Terms in Australia*, (Lawbook Co. 2012), 40.

⁴² [2002] 1 AC 481 at [12].

⁴³ [2011] EWHC 1237 (Ch).

⁴⁴ The comparable provision in the ACL is s 26 and in the ASIC Act is s 12BI.

amount of the monthly subscription fee members had to pay. Regulation 6(2)(b) did not preclude assessment of the fairness of the impugned term so far as it related to the consequences of early termination.⁴⁵ On the facts, it was held that the term was an unfair term.

Upfront price

44. Upfront price is defined in s 26 of the ACL. The Explanatory Memorandum to the ACL states that:

The exclusion of upfront price means that a term concerning the upfront price cannot be challenged on the basis that it is unfair. Having agreed to provide a particular amount of consideration when the contract was made, which was disclosed at or before the time the contract was entered into, a person cannot then argue that that consideration is unfair at a later time. The upfront price is a matter about which the person has a choice and, in many cases, may negotiate.⁴⁶

45. The upfront price includes the cash price payable under the contract. It is likely the upfront price also includes future payments or a series of payments, provided that they are disclosed at or before the time the contract is entered into. In this regard, the Explanatory Memorandum states that:

A key consideration for a court in considering whether a future payment, or a series of future payments, forms the upfront price may be the transparency of the disclosure of such payment or the basis on which such payments may be determined, at or before the time the contract is made.⁴⁷

46. In the case of consumer credit contracts, s 12BI of the ASIC Act provides that the consideration excluded from review (the upfront price) includes the total amount of the principal that is owed under the contract.

Terms permitted by law

47. The UCTL excludes from review for unfairness terms required or expressly permitted by a law of the Commonwealth, a state or a territory.⁴⁸ An example would be s 139A of the *Competition and Consumer Act 2010* which provides that a term in a contract for the supply of recreational services to a consumer by a person is not void under s 64 of the ACL only because the term excludes, restricts or modifies the liability of the person providing such services for failure to comply with a guarantee that applies under consumer guarantee provisions in Pt 3-2 of the ACL.

⁴⁵ At [175].

⁴⁶ At [5.67].

⁴⁷ At [5.67].

⁴⁸ ACL s 26(1); ASIC Act s 12BI(1).

The Test for Unfairness

48. There are three elements of the threshold test for unfairness. A term is unfair if it would:
- a. cause a significant imbalance in the rights and obligations of the parties; and
 - b. not be reasonably necessary to protect the legitimate interests of the party advantaged by the term; and
 - c. cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.

Significant imbalance

49. The element of significant imbalance directs attention to the substantive unfairness of the term in question.⁴⁹ In *Director General of Fair Trading v First National Bank*,⁵⁰ Lord Bingham stated that:

The requirement of significant imbalance is met if a term is so weighted in favour of the supplier as to tilt the party's rights and obligations under the contract significantly in his favour. This may be by the granting to the supplier a beneficial option, discretion or power, or by the imposing on the consumer a disadvantageous burden, risk or duty.

50. This explanation of significant imbalance was followed in the Federal Court by Edelman J (as His Honour then was), in *Australian Competition and Consumer Commission v Chrisco Hampers Australia Ltd*.⁵¹

51. Terms similar in effect to those in the grey list of terms under the UCTL are examples of terms that, on the face of it, might cause a significant imbalance in the rights and obligations of the parties. In *Jetstar Airways Pty Ltd v Free*⁵² Cavanough J, referring to the grey list of terms in the former Pt 2B of the *Fair Trading Act 1999 (Vic)* (**Fair Trading Act**), described the nature of these terms:

Each paragraph supplies an example of a term which may not only be described as one-sided but which also tends to derogate from the enforceability or value of a promise made by the supplier (or of a right conferred on the consumer) by another express or implied term of the contract.

52. However, even a term that, on the face of it, appears neutral as it applies equally to both parties might cause a significant imbalance when one considers its practical effect in the context of the transaction as a whole. Thus, it was held in the Scottish case *Office*

⁴⁹ *Director General of Fair Trading v First National Bank* [2002] 1 ALL ER 97 at [37].

⁵⁰ *Ibid* at [17].

⁵¹ [2015] FCA 1204.

⁵² [2008] VSC 539 at [114].

of *Fair Trading v MB Designs*⁵³ that an entire agreement clause that applied equally to both parties was an unfair term. Lord Drummond Young stated that:

It seems to me obvious that the main practical effect of terms of this nature will be to prevent the customer from relying on representations made by the first respondent's salesman. Such cases are likely in my opinion to represent the vast majority of cases where the clauses in question are relevant. In those cases, it is clear that it is the customer who is likely to be prejudiced, not the first respondent. I accordingly reject the submission for the respondents that clause 7 and clause 6 should be regarded as essentially neutral terms. That is not how they operate in practice, and I am obliged by regulation 6(1) to take account of all the circumstances attending the conclusion of contracts between customers and the first respondent.⁵⁴

53. It is clear that, in considering whether a term causes a significant imbalance, one must consider the contract as a whole. In *Jetstar Airways Pty Ltd v Free*⁵⁵ the Victorian Supreme Court had to decide whether VCAT erred in law in holding unfair a term that required the purchaser of an airline ticket who wished to substitute the name of a new passenger to pay the difference between the fare originally purchased and the fare available on the date of the variation. Cavanough J held that VCAT failed to consider the contract as a whole. In particular, the Tribunal disregarded the fact that the ticket was bought at a special introductory price. Cavanough J held that the low price paid for the ticket counterbalanced what might otherwise appear to be a harsh or strict term.⁵⁶

54. In considering the contract as whole not each and every term would be equally relevant to the question of unfairness. The main requirement is to consider terms that might reasonably be regarded as counterbalancing the term in question.⁵⁷ For a price reduction to counterbalance the effect of an otherwise unfair term, it must be shown that the low price can be related to the term and not to another feature of the contract. The reduction in price must also be proportionate to a term that gives a significant advantage to the supplier or places an onerous burden on the consumer. In *Director of Consumer Affairs Victoria v Blackloads.com Pty Ltd (Civil Claims)*, Harbison J held that the 'argument that the respondent offers a cheaper service to consumers, even if accepted, cannot be used to justify this clause, or neutralize its obvious unfairness'.⁵⁸

Legitimate interest

⁵³ [2005] CSOH 85.

⁵⁴ At [43].

⁵⁵ [2008] VSC 539.

⁵⁶ At [129].

⁵⁷ *Australian Competition and Consumer Commission v CLA Trading Pty Ltd* [2016] FCA 337 at [54(g)].

⁵⁸ [2009] VCAT 754 at [211] and Paterson J, *Unfair Contract Terms in Australia*, (Lawbook Co. 2012), 74-75.

55. The second element of the test of unfairness directs attention to the position of the supplier. It qualifies the fact that a significant imbalance might cause a term to be unfair. The UCTL provides that a term in a standard form consumer contract is presumed not to be reasonably necessary to protect the legitimate interest of the party advantaged by the term unless that party proves otherwise.⁵⁹
56. There are two stages to the relevant inquiry. The first stage is to ask whether the term protects a legitimate interest of the supplier. This requires evidence from the supplier about such matters as its cost and revenue structures, industry practice and the need for mitigation of business risks. Such evidence is intended to show that there are legitimate business reasons for insisting on the term.⁶⁰
57. The second stage is to consider whether the term is reasonably necessary to protect the supplier's legitimate interest. A supplier must show that the term represents a proportionate response to the interest it wants to protect. If there is a less burdensome way to protect the legitimate interest of the supplier, a court may decide that the term is unfair. In *Director of Consumer Affairs Victoria v Trainstation Health Clubs Pty Ltd (Civil Claims)*,⁶¹ VCAT held that a term allowing the respondent to terminate a contract with a member for failure to comply with the club's rules and regulations was not unfair pursuant to the former Pt 2B of the Fair Trading Act. The term was necessary to protect consumers by providing a framework for the efficient and safe operation of the health clubs.⁶²

Detriment

58. The third element of the test of unfairness is that the term would cause detriment to a party if it were to be applied or relied on. The detriment may be financial or otherwise. The use of the words "*if it were to be applied or relied*" on suggests that it is not necessary to prove actual detriment. It would suffice to show that a term has the potential to cause detriment.
59. Fairness must be judged as at the time the contract is made, although account may properly be taken of the likely effect of a term that is said to be unfair.⁶³ Accordingly it is not necessary to show that detriment was suffered at the time the contract was made.

⁵⁹ s 24(4) of the ACL and s 12BG of the ASIC Act.

⁶⁰ See *Bransgrove v Sebring Pty Ltd & Anor* (Civil Claims) [2012] VCAT 1189 at [64]-[66].

⁶¹ [2008] VCAT 2092.

⁶² At [174]. See Paterson J, *Unfair Contract Terms in Australia*, (Lawbook Co. 2012), 80-81.

⁶³ *Director General of Fair Trading v First National Bank* [2002] 1 ALL ER 97 at [13].

It is enough to show that detriment would exist in the future as a result of the application or reliance on the unfair term.

The role of transparency

60. In considering whether a term in a standard form consumer contract is unfair, a court may take into account any matter it thinks relevant but must take into account the contract as a whole and the extent to which the term is transparent. Transparency is defined in s 24(3) of the ACL. In regards to the elements of unfairness under the UCTL, transparency appears to be most relevant to a significant imbalance in the rights and obligations of the parties.⁶⁴ This suggests that a trader may overcome an allegation that a term causes a significant imbalance by establishing that the term was transparent. In such a case, the conditions for informed consent have been met.

61. This approach has some support in decisions by Judge Harbison, sitting as vice president of VCAT. The passage from the decision by Her Honour in *Director of Consumer Affairs Victoria v Craig Langley Pty Ltd & Matrix Pilates & Yoga Pty Ltd*⁶⁵ quoted in paragraph 39 above, suggests that terms that have been subjected to genuine negotiation should not be lightly declared unfair.

62. In *Director of Consumer Affairs Victoria v Trainstation Health Clubs Pty Ltd (Civil Claims)* the question was whether a term in a gym membership contract that allowed the operator of the health club to change the location of the club within 12 kilometres without allowing the customer to terminate the agreement was an unfair term under the former Pt 2B of the Fair Trading Act. Harbison J held that:

It is a term which in my view would surprise consumers. It is one which they would not expect. However, I can envisage that such a term might be perfectly fair if it was brought to a consumer's attention prior to signing of a contract.⁶⁶

63. Other authorities, however, suggest that transparency on its own account cannot overcome underlying unfairness in a contract term.⁶⁷ In *Jetstar Airways Pty Ltd v Free*⁶⁸ Cavanough J expressed the view that, depending on all the circumstances, a term might be unfair notwithstanding full prior knowledge on the part of the consumer. Referring to the former Pt 2B of the Fair Trading Act, His Honour stated:

⁶⁴ Australian Competition and Consumer Commission, *A Guide to the Unfair Contract Terms Law* (Commonwealth of Australia, 2010), 12.

⁶⁵ [2008] VCAT 482 at [66].

⁶⁶ [2008] VCAT 2092 at [145].

⁶⁷ *Explanatory Memorandum, Trade Practices Amendment (Australian Consumer Law) Bill* (No 2) 2010 (Cth) at [5.39].

⁶⁸ [2008] VSC 539.

The legislation proceeds on the assumption that some terms in consumer contracts, especially in standard form consumer contracts, may be inherently unfair.⁶⁹

Some Case Law

Chrisco Hampers

64. In November 2015 Edelman J of the Federal Court handed down judgement in the matter of *Australian Competition and Consumer Commission v Chrisco Hampers Australia Ltd*.⁷⁰ The issue in this case, as far as the UCTL was concerned, was a term in the standard form contracts used by Chrisco (called the HeadStart term) that required customers to allow Chrisco to continue withdrawing funds from the customer's bank account even after the customer had made full payment for the goods ordered. The term would apply unless the customer opted out of it. The money withdrawn from the customer's bank account would be used for any future order made by the customer, but the customer would not obtain any discount on a future order and if the customer did not place an order, but requested a refund of the money paid, the money would be refunded without interest.

65. The judge accepted each of the following matters concerning the construction of s 24 put to him by senior counsel for the respondent:

- a. for a term to be unfair it must satisfy all three requirements in s 24(1)(a) to (c);
- b. the onus is upon the applicant to prove the matters in s 24(1)(a) and (c) but it is upon the respondent in relation to s 24(1)(b);
- c. s 24(2)(a) only requires the Court to consider transparency in relation to the particular term that is said to be unfair and only in relation to the matters concerning that term in s 24(1)(a) to (c);
- d. similarly, the assessment of the contract as a whole in s 24(1)(c) only requires the Court to consider the contract as a whole in relation to the particular term that is said to be unfair and only in relation to the matters concerning that term in s 24(1)(a) to (c);

⁶⁹ At [115].

⁷⁰ [2015] FCA 1204.

- e. as the Explanatory Memorandum to the Trade Practices Amendment (Australian Consumer Law) Bill (No 2) provided at [5.39], "if a term is not transparent it does not mean that it is unfair and if a term is transparent it does not mean that it is not unfair"; and
- f. guidance can be had to s 25 which provides examples of unfair terms.

66. Edelman J held that the term was an unfair contract term. His Honour placed significant weight on the fact that Chrisco was not required to pay interest on the sums of money it withdrew from customers' accounts and the fact that Chrisco did not provide any discount to a customer who subsequently chose to place an order. The detriment to the customer who paid money to Chrisco pursuant to the HeadStart term was not balanced by any substantial corresponding right or benefit that was received from Chrisco.⁷¹ Edelman J also placed reliance on the fact that the language of the HeadStart term was not plain and the term could have been presented in a manner that was far more legible, much clearer and more readily available to the consumer. These factors reduced the transparency of the HeadStart term.⁷² At [97] of the judgement His Honour concluded:

Overall, for the reasons I have expressed, and as an evaluative assessment of all the circumstances relevant to the HeadStart term including its transparency and the contract as a whole, the HeadStart term caused a significant imbalance in the parties' rights and obligations arising out of the contract.

67. Recently the reasoning in *Chrisco* was followed by Muir J in the first case to be decided in New Zealand under their unfair contract term provisions introduced in the *Fair Trading Act 1986*.⁷³

CLA Trading

68. In April 2016 Gilmore J, gave judgement in the matter of *ACCC v CLA Trading Pty Ltd*⁷⁴. The ACCC instituted proceedings in the Federal Court against CLA Trading Pty Ltd, trading as Europcar Australia, alleging that Europcar included unfair contract terms in its vehicle rental contracts and made false and misleading representations regarding the liability cover provided to car hire customers. The allegations regarding unfair contract terms relate to:

⁷¹ At [69].

⁷² At [71]-[94]

⁷³ *Commerce Commission v Home Direct Limited* [2019] NZHC 2943 (12 November 2019)

⁷⁴ [2016] FCA 377.

- a. terms requiring consumers to pay a damage liability fee (up to \$3,650) if the rental vehicle were damaged or stolen, irrespective of fault; and
- b. terms making the consumer fully liable to Europcar if the rental vehicle were damaged or stolen and the consumer breached the rental contract, irrespective of how trivial the breach was and whether it caused the damage or loss.

69. Europcar initially decided to defend the proceedings, however, subsequently it substantially admitted the allegations made against it and against that background the parties tendered a statement of Agreed Facts and Admissions.⁷⁵ It was submitted to the court by both parties that the relevant car rental agreements were "financial products" within the ASIC Act. In the circumstances the case was decided pursuant to the provisions in the ASIC Act.

70. Gilmore J, summarised the principles applicable to unfair contract terms as follows:

- a. The underlying policy of unfair contract terms legislation respects true freedom of contract and seeks to prevent the abuse of standard form consumer contracts which, by definition, will not have been individually negotiated: *Jetstar Airways Pty Ltd v Free* [2008] VSC 539 at [112];
- b. The requirement of a "significant imbalance" directs attention to the substantive unfairness of the contract: *Director General of Fair Trading v First National Bank plc* [2002] 1 AC 481; [2001] UKHL 52 at [37] ;
- c. It is useful to assess the impact of an impugned term on the parties' rights and obligations by comparing the effect of the contract with the term and the effect it would have without it: *Director General of Fair Trading v First National Bank plc* at [54];
- d. The "significant imbalance" requirement is met if a term is so weighted in favour of the supplier as to tilt the parties' rights and obligations under the contract significantly in its favour - this may be by the granting to the supplier of a beneficial option or discretion or power, or by the imposing on the consumer of a disadvantageous burden or risk or duty: *Director General of Fair Trading v First National Bank plc* at [17] per Lord Bingham, applied in *Australian Competition and Consumer Commission v ACN 117 372 915*

⁷⁵ *Australian Competition and Consumer Commission v CLA Trading Pty Ltd* [2016] FCA 337 at [8].

Pty Limited (in liq) (formerly Advanced Medical Institute Pty Limited) [2015] FCA 368 at [950] ;

- e. Significant in this context means "significant in magnitude", or "sufficiently large to be important", "being a meaning not too distant from 'substantial'": *Jetstar Airways Pty Ltd v Free* at [104]-[105] per Cavanough J; cf *Director of Consumer Affairs Victoria v AAPT Limited* [2006] VCAT 1493 at [32]-[33] ;
- f. The legislation proceeds on the assumption that some terms in consumer contracts, especially in standard form consumer contracts, may be inherently unfair, regardless of how comprehensively they might be drawn to the consumer's attention: *Jetstar Airways Pty Ltd v Free* at [115]; and
- g. In considering "the contract as a whole", not each and every term of the contract is equally relevant, or necessarily relevant at all. The main requirement is to consider terms that might reasonably be seen as tending to counterbalance the term in question: *Jetstar Airways Pty Ltd v Free* at [128].

71. The Court held that the terms as set out above were unfair contract terms and declared that they were void pursuant to the UCTL.⁷⁶ The Court also found that Europcar made representations on its website that were misleading or deceptive or likely to mislead or deceive and imposed a pecuniary penalty of the sum of \$100,000. Europcar was ordered to pay the ACCC's cost of the proceedings, which was \$65,000.

JJ Richards & Sons

72. On 13 October 2017 Moshinsky J, gave judgment in the matter of *ACCC v JJ Richards & Sons Pty Ltd*.⁷⁷ Of note is that this case concerned unfair contract terms in small business contracts. JJ Richards admitted that a large number of its small business standard form waste management contracts contained terms that were unfair. The unfair terms included:

- a. a 5 year contract term that was subject to automatic renewal for another 5 years unless either party gave written notice within 30 days prior to the end of the initial term or the renewal term;

⁷⁶ *Australian Competition and Consumer Commission v CLA Trading Pty Ltd* [2016] FCA 337 at [81].

⁷⁷ [2017] FCA 1224.

- b. a unilateral price variation term in favour of JJ Richards;
- c. a term granting JJ Richards exclusivity; and
- d. a term that provided a customer could not terminate the agreement unless they have made payment of all monies outstanding.

73. In the age of apps and other online subscriptions, automatic renewal terms are very common. With respect to the automatic renewal clause Moshinsky J stated, albeit in a case that was ultimately not contested, that:

The clause and, in particular, the limited period of time within which a JJR Customer can terminate the contract and the lack of any requirement in the contract for JJ Richards to provide notice to a customer that the contract is about to expire and that the automatic renewal will otherwise occur may result in JJR Customers inadvertently missing the opportunity to terminate the contract and therefore remaining contracted to JJ Richards for extensive periods with no opportunity to change to an alternative supplier during the term of the renewed contract. In the context of the whole contract, the automatic renewal clause creates a significant imbalance in the respective rights and obligations of the parties as JJ Richards is more likely to be aware of when the customers' contracts are coming up for renewal than small business customers, who as small businesses have limited resources and competing demands that mean they may not have effective systems in place to identify the termination period for their waste management contract.⁷⁸

TPG Internet

74. In *ACCC v TPG Internet Pty Ltd*⁷⁹, O'Callaghan J, held that a forfeiture term in a mobile phone contract was not an unfair contract term. TPG is a retailer of mobile, internet and home telephone services. It supplies consumers on a prepaid basis, meaning that customers are required to pay TPG in advance for the selected service.

75. Each TPG plan required a fixed monthly amount to be paid by the customer in advance for the particular service included in the plan. The prepayment is debited from the customer's nominated bank account or credit card. For each mobile plan, TPG's website included the following term under the heading "Mobile Prepayment Outside Included Value":

All TPG services are prepaid. You must pay the monthly recurring charges in advance. In addition, you must make a prepayment for usage that is not within the included value (if any) for the plan that you have acquired. Your initial prepayment will be \$20. After registration, you may nominate how much you wish to prepay but the minimum amount is \$20. The prepayment will be debited

⁷⁸ At [56(a)]. See also *ACCC v Servcorp Ltd* [2018] FCA 1044 at [38]-[40].

⁷⁹ [2019] FCA 1677.

from your nominated bank account or credit card. By acquiring and continuing to use the service, you agree to an automatic top up of your prepayment. The top up will occur when the amount of prepayment falls to below \$10. When that happens, TPG will debit a sufficient amount from your bank account/credit card to restore your nominated prepayment amount. If your usage is higher, this can occur more than once per month. You authorise TPG to make such debits to your account/credit card. If you do not exceed the Included Value and do not incur any charges that are excluded from your plan, there will be no automatic top-ups. We will send you messages about your usage and the debits during the month. Your service will become inactive if our attempts to debit credit card/bank account to top up your prepayment are unsuccessful. If you do not use the prepayment, it will be forfeited to us when you cancel the service. You agree that no bill will be provided for the service and that direct debiting of your account or charge to your credit card may occur notwithstanding that no bill is provided and that it may occur even though you may not have had the opportunity to check charges at least 10 working days before the debit.

76. The effect of the term was that a customer had to provide a prepayment on the account of at least \$20 (over and above the monthly recurring charge). If the client used more than its allocated monthly usage or data, and the prepayment gets to \$10, TPG was authorised to top up the prepayment to \$20 or such higher amount as nominated by the customer (this was called the Top-Up Term). When the customer cancelled the service the unused portion of the prepayment was forfeited to TPG (this was called the Forfeiture Term). The practical effect was that in most cases the customer would forfeit at least \$10 of the prepayment to TPG when they cancelled the service. There was evidence before the court that TPG held in excess of \$16 million in respect of forfeited amounts.

77. The ACCC submitted that the combined effect of the Top-UP and Forfeiture terms was unfair because its result was that at least \$10 of a customer's prepayment would be forfeited and therefore not used for services. Therefore, TPG's customers were required to make a payment for which they received no benefit. It was also argued that the effect of the two terms was not adequately disclosed to customers.

78. Justice O'Callaghan, held that the Forfeiture Term was not an unfair contract term for the following reasons:

- a. The judge did not accept that the term was not adequately disclosed. The forfeiture of the unused part of the prepayment was sufficiently apparent to the reasonable or ordinary consumer.
- b. The judge did not accept the ACCC's argument that the customer received nothing for the forfeiture of the prepayment. It was necessary to consider the forfeiture term within the contract as a whole. The customer got the

opportunity to select a very cheap prepayment plan as opposed to a much more expensive unlimited data plan. Therefore, the "fairness" of one plan versus another depended on matters of personal preference.

- c. The term did not create a significant imbalance between the parties and the detriment, if any, is not unfair because the forfeiture term was but one term within the contract which offered low prices and provided customers with certainty as to their payments.
- d. TPG had shown that the term was reasonably necessary to protect their legitimate interest. The term was necessary to minimise the serious effects that bad debts had on the industry and the costs of telecommunication services.⁸⁰

79. As a result, the ACCC's claim was dismissed with costs.

Lobux Pty Ltd v Willshaun Pty Ltd

80. *Lobux Pty Ltd v Willshaun Pty Ltd* [2022] FCA 204 provides an example of how the UCTL may apply in a commercial case between contracting businesses. The case concerned the manufacture of a custom made "Hooklift Backdoor Vacuum Tank" by the applicant (**Lobux**) for, and at the request of, the respondent (**Willshaun**).

81. Prior to the completion of the manufacture of the tank, Willshaun removed it from the possession of Lobux on the premise that it was going to have some work done on it by a third-party and that it would be returned. The tank was not returned, nor was the balance of the purchase price paid. Notwithstanding, Willshaun used the tank in his business and was still doing so at the time of trial. Lobux registered a security interest over the tank pursuant to the PPSA and issued proceedings, seeking orders for the return of the tank. Willshaun brought a cross-claim alleging that the tank was not fit for purpose and sought a declaration that it was not required to pay the balance of the purchase price. It also sought declarations under s 250 of the ACL that certain terms within Lobux's standard form contract were unfair terms.

82. Willshaun lost the case and was ordered to return the tank to Lobux. The court did, however, make a declaration that certain of the terms and conditions of the agreement between the parties were unfair contract terms and for that reason void. The judge expressed the view that, having regard to the evidence at trial, no additional order was

⁸⁰ At [101]-[114].

warranted in the relation to the unfair terms, but invited the parties to make further submissions in that regard.⁸¹

83. Of note for our purposes is one of the terms the judge found to be unfair. This term provided as follows:

12. Security and Charge

12.1 In consideration of [Lobux] agreeing to supply the Goods, the Customer charges all of its rights, title and interest (whether joint or several) in any land, realty or other assets capable of being charged, owned by the Customer either now or in the future, to secure the performance by the Customer of its obligations under these terms and conditions (including, but not limited to, the payment of any money).

12.2 The Customer indemnifies [Lobux] from and against all [Lobux's] costs and disbursements including legal costs on a solicitor and own client basis incurred in exercising [Lobux's] rights under this clause.

12.3 The Customer irrevocably appoints [Lobux] and each director of [Lobux] as the Customer's true and lawful attorney/s to perform all necessary acts to give effect to the provisions of this clause 12 including, but not limited to, signing any document on the Customer's behalf.

84. The judge held that the clause was not expressed in reasonably plain language which means it cannot be concluded that it is transparent within the meaning of s 24(3) of the ACL. The expression "*any land, realty or other assets capable of being charged*" would likely leave the customer in a position of uncertainty as to the meaning and effect of the clause.⁸²

85. More significantly, the judge held that when the term is considered in the context of the agreement as a whole – which included other terms which provided an appropriate level of security for Lobux's legitimate interest – clause 12 created a significant imbalance in the rights and obligations arising under the agreement. It charges all rights, title and interest in all of the customer's assets which are "*capable of being charged*" either "*now or in the future*". It was held that such a clause is excessive. Moreover, Lobux did not rebut the presumption that the clause is not reasonably necessary in order to protect its legitimate interest. As result the court held that clause 12 is an unfair term.

86. Clauses in supply agreements that purports to create a security interest in favour of the supplier by way of an equitable charge over land are not uncommon. Often such clauses also provide for the right to lodge a caveat against land owned by the

⁸¹ at [229].

⁸² at [119].

customer.⁸³ Suppliers that provide credit to their customers and use such a clause to obtain security for debts owed by the customer should take note of this decision.

Proposed Amendments

87. In November 2018 the *Review of Unfair Contract Term Protections for Small Business: Discussion Paper* which was released. This review found that while the unfair contract term regime had improved protections for small business in certain industry sectors, it did not provide strong deterrence against businesses using unfair contract terms in their standard form contracts. It also found that some aspect of the UCTL have created ambiguity, uncertainty and practical difficulties for business to comply with the law.

88. As a result of the review, in November 2020 the Commonwealth, state, territory and New Zealand ministers responsible for consumer affairs agreed that action was required to strengthen the protections of consumers and small business from unfair contract terms.⁸⁴ This resulted the preparation of an exposure draft setting out the reforms agreed to by the ministers. A public consultation process on the exposure draft has been concluded. On 9 February 2022, legislation amending the unfair contract terms was introduced into Parliament. The *Treasury Law Amendment (Enhancing Tax Integrity and Supporting Business Investment Bill 2022* ('the Bill') contain the proposed amendments to the UCTL.

89. The main amendments proposed in the Bill are set out below.

<i>New law</i>	<i>Current law</i>
Definition of 'small business'	
Under the ACL, the unfair contract terms protections will apply to a small business contract if one party to the contract is a business that employs fewer than 100 persons or has a turnover for the last income year of less than \$10,000,000. In the ACL the upfront price threshold has been removed.	The unfair contract terms protections apply to a small business contract if one party to the contract is a business that employs fewer than 20 persons and the upfront price payable under the contract does not exceed one of the two alternative monetary thresholds provided for in the law.
Under the ASIC Act, the protections will apply to a small business contract	

⁸³ See for example *Bunnings Group Ltd v Hanson Construction Materials Pty Ltd* [2017] WASC 132.

⁸⁴ Joint Communique-6 November 2020- Legislative and Convenience Forum on Consumer Affairs available at <https://consumer.gov.au/sites/consumer/files/inline-files/CAFCommunique-20201106.pdf>.

<i>New law</i>	<i>Current law</i>
<p>if the upfront price payable does not exceed \$5,000,000, and one party to the contract employs fewer than 100 persons or has a turnover for the last income year of less than \$10,000,000.</p> <p>Under both the ACL and ASIC Act part time employees are to be counted as an appropriate fraction of a full-time equivalent employee.</p>	
Consequences of using an unfair term	
<p>A person will be in breach of the ACL or the ASIC Act if they proposed the use of an unfair term in a standard form contract.</p> <p>Each unfair term in a standard form contract that will constitute a separate contravention.</p>	<p>Currently under s 237(1)(a)(ii) and s 250 the ACL is breached only if a term is used that has been declared by a court to be an unfair term. The same applies under the provisions of the ASIC Act.</p>
<p>A pecuniary penalty may be imposed if a person proposes, applies, relies or purports to apply or rely on, an unfair contract term.</p>	<p>No equivalent.</p>
<p>The court can make orders for a whole contract or collateral arrangement, including to void, vary or refuse to enforce the contract, if this is appropriate to prevent loss or damage that is likely to be caused. The new provisions do not require a court to consider that they will redress actual loss or damage.</p> <p>The court can also make orders, on the application of the regulator, preventing a term that is the same or substantially similar in effect to a term that has been declared as unfair, from being included in any future standard form small business or consumer contracts.</p> <p>Additionally, the court can make orders, on the application of the regulator, to prevent or reduce loss or damage which is likely to be caused to any person by a term that is the same or substantially the same in effect to a term that has been declared unfair.</p>	<p>Where a court determines a term in a standard form contract to be unfair, it is automatically void.</p> <p>The court can also make orders for the whole or any part of a contract or collateral arrangement between the respondent and another person, including that the contract is void. These orders can be made by an affected party or by application of the regulator on behalf of either a party or a non-party. Such orders can only be made when a person or class of persons has suffered, or is likely to suffer, loss or damage.</p>

<i>New law</i>	<i>Current law</i>
<p>In addition to the current injunction powers, the court can make an injunction restraining a person from:</p> <ul style="list-style-type: none"> • entering into any future contract that contains a term that is the same or similar in effect to a term that has been declared an unfair contract term; or • applying, or relying on, a term in any existing contract that is the same or similar in effect to a term that has been declared unfair, whether or not that contract is before the court. 	<p>Among other powers, the court can make an injunction in such terms as it considers appropriate restraining a party from applying, relying on, or purporting to apply or rely on, a term of a contract that has been declared an unfair term.</p>
Standard form contracts	
<p>In addition to the current matters set out in s 27 of the ACL, a court must also take into account whether one of the parties has used the same or a similar contract before.</p>	<p>The matters set out in s 27 of the ACL.</p>
<p>A contract may be determined to be a standard form contract despite there being an opportunity for:</p> <ul style="list-style-type: none"> • a party to negotiate changes to contract terms that are minor or insubstantial in effect; • a party to select a term from a range of options determined by another party; or • a party to another contract or proposed contract to negotiate terms of the other contract or proposed contract. 	<p>In determining whether a contract is a standard form contract, a court must take into account a number of matters, including whether one party was required to reject or accept the terms of a contract in the form in which they were presented and whether another party was given an effective opportunity to negotiate the terms of the contract.</p>
Exempt terms	
<p>In addition to the current exemptions to the unfair contract terms provisions, contractual provisions that are taken to be included in a contract by operation of a Commonwealth, state or territory law are also excluded to the extent that the relevant law mandates their inclusion. Additionally, a clause of a contract that results in other contract terms being included in a contract because of the operation of another law of the Commonwealth or a state or territory,</p>	<p>Contractual provisions that are required or expressly permitted by a law of the Commonwealth, or of a state or territory, are exempt from the unfair contract terms regime.</p>

<i>New law</i>	<i>Current law</i>
is exempt from the unfair contract terms provisions insofar as the provisions would prevent the other terms from being included or operating as required by the law.	
Exempt contracts	
<p>Certain categories of contracts are excluded from the operation of the unfair contract terms provisions. These include:</p> <ul style="list-style-type: none"> • the operating rules of licensed financial markets such as ASX Limited; • the operating rules of licensed clearing and settlement facilities; and • real time gross settlement systems approved as payment and settlement systems by the RBA. • Certain life policies within the <i>Life Insurance Act 1995</i> such as guaranteed renewal contracts are also excluded from the scope of the provisions. 	No equivalent.

90. Under the Bill the amendments to the UCTL will come into force 12 months after the date on which the Bill receives Royal Assent. This grace period will give businesses time review and adjust their contracts before the new provisions come into force.
