

MemberUpdate

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TOPIC: Changes to Unfair Contract Term (UCT) Legislation

DISTRIBUTION: GTA Members – primary contact list. Please circulate to all appropriate internal parties.

1. Purpose

To raise GTA member awareness of legislative changes to **Unfair Contract Terms (UCT)**.

2. Background

On **9 November 2023** reforms to Australia's UCTs under the Australian Consumer Law (ACL) regime took effect. These reforms make UCTs illegal and subject to substantial penalties.

Contracts under the scope of the new UCTs regime include:

- A standard form contract (SFC) for goods or services, or the sale or grant of an interest in land
- Where one of the contract parties is a small business or consumer.

3. Key changes to UCT Legislation, effective 9 November 2023:

Previous Law	New Law
No financial Penalty	Max penalty per contravention of: <ul style="list-style-type: none">- For Individuals: \$2.5m- For Companies: \$50m, 3x value of the benefit, 30% of turnover (whichever is highest)
Small business = less than 20 employees	Small business = less than 100 employee OR less than \$10m annual turnover
Contract Value \$300,000 (or under \$1m if longer than 12 months)	No value limit
N/A	Minor negotiations will not prevent a contract being a SFC
N/A	Court empowered to make orders preventing use of the same or similar terms in other SFCs.

Previously where a Court found a term in a standard form contract to be unfair, it was automatically void.

The new reforms allow Courts to:

- void, vary or refuse to enforce all (or part) of a contract
- prevent the same or a substantially similar term from inclusion in future contracts
- prevent a party from entering into a future contract or relying on an existing contract containing a similar term
- make adverse publicity orders or disqualify a person from managing a corporation, or both.

4. The unfair contract term test

A term may be considered unfair if all the following tests are satisfied:

1. Causes significant **imbalance** under the contract.

2. **Not** reasonably **necessary** to protect legitimate interests.
3. Will cause **detriment** (financial or otherwise) if the term was applied or relied on.

Other factors include the contract as a whole and transparency of the term/s.

Courts have discretion to consider other relevant matters, within the context of the contract as a whole.

5. Examples of Unfair Contract Terms

The key areas to be aware of include Terms which **grant** or **restrict** the **benefits, rights or protections** to/of only **one party**, where that term is **not** reasonably necessary to protect the benefitting party.

Examples of unfair contract terms may include:

- A term **allowing** only one party to:
 - Avoid or limit their performance
 - Terminate
 - Decide whether breach has occurred
 - Renew or not renew
 - Vary the terms
 - Vary the price (and the other part can't terminate)
- A term **limiting** only one party's:
 - Liability for its agents
 - Right to sue

6. Next Steps

GTA has reviewed its Standard Form Contracts (SFC) and are of the view they do not include UCTs.

GTA members with their own SFC or amended GTA SFCs should also consider a review to ensure they do not include any UCTs.

7. Further Information & Disclaimer

This information is provided for GTA Members use only.

This information is general in nature and NOT legal advice. Members should seek their own legal advice for their specific circumstances. The information is not guaranteed to be accurate, full and complete now or maintained in the future.

For further information please see the [ACCC website](http://www.accc.gov.au), or contact GTA at admin@graintrade.org.au