

Our Ref: 0001127

7 November 2023

Bulletin – Amendments to the Unfair Contract Terms Regime – Will Result in Massive Fines to a Broader Class of Contractors

Amendments to the unfair contract terms regime under the Australian Consumer Law (ACL) and the Australian Securities and Investments Commission Act 2001 (**Unfair Contract Terms Regime**) are set to commence on 9 November 2023 (Amendments).

The Amendments broaden the scope of contracts that fall within the Unfair Contract Terms Regime, namely 'standard form' contracts to which at least one party is a consumer as defined.

Standard Form Contracts

Are your contracts/Subcontract's standard form contracts as defined?

A court may ask the following questions, an affirmative answer to which may indicate a contract/subcontract is a *standard form* contract:

- Is there an inequality in bargaining power?
- Is the contract pre-prepared?
- Are the terms offered on a take it or leave it basis?
- Is there a limited effective opportunity to negotiate terms?
- Is it a commonly used contract?
- Are the terms overly generic and not specific to the parties' particular circumstances?

What is an Unfair Contract Term

An unfair contract term is a term in a standard form contract that:

- (a) causes a significant imbalance in the parties' rights and obligations under the contract;
- (b) is not reasonably necessary to protect the legitimate interests of the party who would be advantaged by the term; and
- (c) causes financial or other detriment to a party if applied or relied on.
(Unfair Contract Terms)

The Federal Court decision in *ACCC v Fujifilm Business Innovation Australia Pty Ltd & Anor* [2022] FCA 928 provides guidance on the types of provisions likely to be found 'unfair', include:

- Automatic renewal terms - provided for one party to automatic renewal of the contract (unless the customer gave prior notice to cancel);
- Disproportionate termination terms;
- One sided liability limitation terms;
- One sided indemnity terms;
- Unilateral variation terms; and
- Incorporation of terms by reference, where those documents are difficult to obtain by the other party

Such Unfair Contract Terms, for several years now, been void and unenforceable. However, the Amendments now impose massive fines on a party seeking to benefit from such Unfair Contract Terms.

Imminent Significant Financial Penalties

Significant financial penalties will very soon apply to any person or business that 'proposes, applies, relies or purports to apply or rely on' an unfair contract term. Importantly, this means exposure to enforcement action arises at the time an Unfair Contract Term is offered to a counterparty, not only after the contract is in force. The maximum penalties available under the Amendments are the greater of:

- \$50 million;
- If the court can determine the value of the benefit obtained – three times the value of that benefit;
- If the court cannot determine the value of the benefit obtained – 30% of the body corporate's adjusted turnover during the breach turnover period for the offence, act or omission.

The Amendments will also make it easier for both regulators and private parties to claim that contracts are standard form and protected by the enhanced Unfair Contract Terms Regime, by its expansion of the definition of a Small Business Contract.

Broadened Definition of Small Business Contract

The Unfair Contract Terms Regime applies to Small Business Contracts. For a contract or subcontract to be a Small Business Contract, one of the parties must:

- Have less than 100 employees; or
- Have an annual turnover of less than \$10M

Thus broadening the scope of Small Business Contract, to potentially covering many subcontracts you enter into to assist you in meeting your head-contractor or developer responsibilities.

Timing of Enforcement

Significantly, the potential for enforcement arises not only after a contract is in force but from the point an unfair term is offered. This is a key change, increasing the risk period for businesses.

In view of the above set out Amendments, it is recommended you take note of the above set-out *massive* maximum penalties, to the which you may potentially be exposed.

Recommendation

We recommend that you:

- Conduct a thorough review of all standard form contracts used in their business operations to identify any terms that may be at risk of being deemed 'unfair'.
- Reassess bargaining processes to ensure that there is a fair opportunity for negotiation, especially for contracts that may be classified as standard form contracts.

- Consult with legal professionals specialized in Australian Consumer Law to evaluate and, if necessary, redraft contract terms to comply with the new legislation.
- Implement internal compliance checks to regularly review contracts in light of the evolving legal landscape.
- Educate employees involved in contract negotiation and management about the reforms and their implications to ensure frontline compliance.

Do not hesitate to contact RGCL if you have any questions in relation to the above, or if you wish us to review any of your contractual terms you use.

This bulletin is not intended as legal advice. We must review the particular facts of any matter you may have and then provide you with specific advice.