

# Draft amendments to the UCT legislation

AUGUST 2021

## AT A GLANCE

The expected changes to the UCT legislation are nearly upon us and have now been released in draft form.<sup>1</sup> The purpose of the draft release is to provide a snapshot of the changes if the bill is passed and provide interested parties the opportunity to consult with the Treasury on the same. Given the bill is already based on consumer feedback the Treasury obtained last year, we expect the bill will be passed in substantially similar terms to what is currently proposed.

You will recall that the UCT regime applies to “standard form” contracts for the supply of goods and services, financial products or financial services and that most insurance contracts are no longer exempt from the UCT regime.

Broadly there are two key developments – the prohibition of unfair contract terms and the expansion of the “small business contract” definition. In effect the UCT regime net is to be widened and the potential consequences more severe with companies exposed to civil penalties and directors exposed to civil penalties and disqualification.

**We summarise the key changes in the table over the page.**

You can view the full announcement from Treasury here:  
<https://treasury.gov.au/consultation/c2021-201582>

## Get in touch with our national financial lines team

For more information on the Unfair Contract Terms regime and the impact of expected changes to legislation on insurers, contact one of our national financial lines contacts at the link below. We are available to arrange a webcall with your team to update you in person and discuss any other queries you may have.



> DOWNLOAD CONTACT CARD

> MORE W+K INSIGHTS

**The UCT regime net is to be widened and the potential consequences more severe with companies exposed to civil penalties and directors exposed to civil penalties and disqualification.**

<sup>1</sup> The working title being Treasury Laws Amendment (Measures for a later sitting) Bill 2021: Unfair contract terms reforms

| ISSUE   | CURRENT UCT REGIME  | PROPOSED CHANGES  |
|---|---|---|
| <p><b>Prohibition on unfair contract terms</b></p>                                    | <p>No express prohibition or contravention provision in the ACL or ASIC Act – rather, the current regime provides for the court to declare a term as unfair, which results in that term being automatically void.</p>   | <p>Creation of two new contraventions by a “person” (i.e. individual or body corporate) where:</p> <ul style="list-style-type: none"> <li>the person proposes the unfair term; <b>and/or</b></li> <li>the person applies or relies on the term.</li> </ul> <p>A person can breach each of these prohibitions on multiple occasions – i.e. for each unfair contract term in a contract, or on each occasion that the person applies or relies upon that term.</p> <p>The contravention will be liable to a pecuniary penalty under the ACL and will be deemed a civil penalty provision under the ASIC Act).</p>   |
| <p><b>Definition of “small business contract”</b></p>                                 | <p>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:</p> <ul style="list-style-type: none"> <li>the upfront price payable under the contract does not exceed \$300,000; <b>or</b></li> <li>if the contract has a duration of more than 12 months, the upfront price payable under the contract does not exceed \$1 million.</li> </ul>  | <p>At the time the contract is entered into, at least one party to the contract:</p> <ul style="list-style-type: none"> <li>enters into contract in the course of carrying on a business and at a time when the party employs fewer than 100 persons; <b>and/or</b></li> <li>has a turnover for the last income year of less than \$10,000,000</li> </ul> <p>There will be no upfront price threshold.</p>  |
| <p><b>Factors in determining whether a contract is a standard form contract</b></p>   | <p>The matters set out in the relevant sections of the ASIC Act (s12BK) and the ACL (s27), being:</p> <ul style="list-style-type: none"> <li>whether one of the parties has all or most of the bargaining power relating to the transaction;</li> <li>whether the contract was prepared by one party before any discussion relating to the transaction occurred between the parties;</li> <li>whether another party was required either to accept or reject the terms of the contract (other than the terms which define the subject matter of the contract) in the form in which they were presented;</li> <li>whether another party was given an effective opportunity to negotiate the terms of the contract (other than the terms which define the subject matter of the contract); and</li> <li>whether the terms of the contract (other than the terms which define the subject matter of the contract) take into account the specific characteristics of another party or the particular transaction.</li> </ul> | <p>The matters in 12BK/s27 (as applicable) plus whether one of the parties has entered into another contract, in the same or substantially similar terms, prepared by that party, and, if so, how many such contracts that party has entered into.</p> <p>Additionally, in determining whether a contract is standard form, a Court will not be permitted to take into account:</p> <ul style="list-style-type: none"> <li>an opportunity for a party to negotiate minor or insubstantial changes to terms of the contract;</li> <li>an opportunity for a party to select a term from a range of options determined by another party; and</li> <li>the extent to which a party to another contract or proposed contract was given an effective opportunity to negotiate terms of the other contract or proposed contract.</li> </ul>  |
| <p><b>Remedies</b></p>  | <p>If the court determines that the relevant term is unfair, the term is declared void and the contract will continue to bind the parties if it is capable of operating without the unfair term.</p> <p>The court may also make such order(s) as it sees fit against the person who relied upon or purported to rely upon a term which has been declared to be unfair. The court has to be satisfied that the order will compensate for, or prevent, loss or damage.</p> <p>Such orders include but are not limited to order declaring whole or part of a contract void/void ab initio, varying the contract or an order for the return or refund of money.</p> <p>The regulator (i.e. ACCC or ASIC, as applicable) may seek certain orders on behalf of a class of people or contracts.</p>  | <p>Where a term is declared unfair (and therefore void), the Court will be permitted to make orders as it sees fit to prevent loss or damage that “<b>may</b>” be caused, or to redress loss or damage that has been caused, by the declared term. This is a softening of the previous power insofar as the power to make orders to <u>prevent</u> loss but is largely the same where that loss or damage has in fact occurred.</p> <p>Injunction powers will also be tailored to the UCT provisions in both the ACL and ASIC Act.</p> <p>Directors will be liable for fines of between \$500,000 - \$1m and the disqualification provisions in the ASIC Act will extend to the UCT provisions.</p> <p>Finally, companies will be liable for fines of tens of millions of dollars (a product of the increases to civil penalties following the Banking Royal Commission).</p> |
| <p><b>Rebuttable presumption where a court has made a finding of unfair terms</b></p> | <p>Not applicable.</p>  | <p>A term that has previously been found to be unfair in a proceeding will be presumed to be unfair in another proceeding unless proved otherwise.</p> <p>The term in question in the “new” proceeding must have been proposed by the same person, or the contract concerned relates to the same industry, as the “original” proceeding.</p>  |