

Unfair Contract Terms part 3: What a small business can do if they think a contract term is unfair and potential penalties for using an unfair term.

The last bulletin of our 3 Part bulletin on UCT Law.

If a small business thinks that a term in their contract is **unfair**, they can challenge it.

Here is what a small business (or beneficiary) can do if they want to challenge a term of their contract:

Step 1: Complain to the financial services provider (for example, an insurer or a bank).

First, they can make a complaint to the financial services provider they have the contract with to try to get the result they want.

They can also seek assistance from the Australian Small Business and Family Enterprise Ombudsman (ASBFEO), which provides dispute resolution support.

Small business contracts that are covered by an industry code may have additional protections, including protections similar to those provided under the unfair contract terms law. Examples of industry codes are:

- the Code of Banking Practice administered by the Australian Banking Association
- the Customer Owned Banking Code of Practice administered by the Customer Owned Banking Association
- the General Insurance Code of Practice administered by the Insurance Council of Australia, and
- the Life Insurance Code of Practice administered by the Financial Services Council

Step 2: Complain to the Australian Financial Complaints Authority (AFCA)

If the financial services provider cannot resolve the complaint, then you may be able to complain to the Australian Financial Complaints Authority (AFCA). AFCA provides consumers and small businesses with a free and independent dispute resolution scheme to assist with resolving financial complaints. No guidance has been provided by AFCA on their process with "unfair contract terms" since the 5 April 2021. The VACC is monitoring any information AFCA provides on this and will advise its members as more information becomes available.

Step 3: Apply for a court to declare the term unfair

Depending on the result of the complaint to AFCA, you can apply to a court for a declaration that the term is unfair. If you are successful, the term will be void and ultimately made illegal.

For more information, see ASIC Moneysmart's guidance on How to complain and Information Sheet 174 Disputes with financial firms (INFO 174).

What ASIC can do about unfair contract terms

To make a complaint to ASIC about an unfair contract term, a small business can lodge a report of misconduct online: see Information Sheet 153 How ASIC deals with reports of misconduct (INFO 153).

ASIC do not generally take action for a small business unless it is in the wider public interest, and ASIC can only take action if the matter is within their area of responsibility.

ASIC cannot endorse contract terms or declare that they are unfair. Only a **court** can decide whether or not a term is unfair.

ASIC, as well as any party to the contract, or a beneficiary under an insurance contract, can apply to a court to have a term declared unfair.

Since the unfair contract terms regime for small businesses came into effect in 2016, ASIC has successfully negotiated to have unfair terms removed from some standard form small business contracts.

ASIC is responsible for enforcing the unfair contract terms law only for **financial products** and services. For other goods and services (e.g. franchising), responsibility is shared between the Australian Competition and Consumer Commission (ACCC) and the state and territory consumer protection agencies.

For more information about unfair terms in contracts for non-financial products and services, contact the ACCC.

What happens if a term is unfair?

If a court declares a term unfair, it is automatically void under section 23 of the ACL or section 12BF of the ASIC Act. The contract will continue to bind the parties if "it is capable of operating without the unfair term". This is likely since a term which "sets the upfront price payable under the contract" or which "defines the main subject matter of the contract" is beyond the reach of the UCT laws. If such significant terms could be avoided under the UCT laws, it is likely that a contract may become inoperative without them.

Various compensatory orders may be made once a term is declared unfair; for example, refunding money paid under the now-void term. No sanctions (such as penalties or disqualification orders) may be imposed; however, this is expected to change in late 2021.

A court can then:

- grant an injunction
- order the financial services provider to provide redress to the small business affected, or
- make any other orders the court considers appropriate

Civil penalties can be imposed

Potentially large civil penalties will be introduced for using UCTs. So far, there has been no announcement about the quantum of these penalties or how they will be calculated, but it is possible the existing penalties for contraventions of the Australian Consumer Law will apply, that is, a maximum penalty will be available of **the greater of A\$10m per contravention, three times the value of any benefit from the contravention and (if the value of the benefit cannot be determined) 10% of Australian turnover in the 12-month period prior to the contravention.**

Remedies will be expanded

A UCT will not automatically be void and instead a court will have the power to determine an appropriate remedy for the use of the UCT other than declaring it to be void.

When and how will these changes be implemented?

These changes will be implemented by legislative amendments to the Australian Consumer Law, Australian Securities and Investments Commission Act 2001 (Cth) and relevant State and Territory legislation. The final legislation will contain valuable details on the precise nature of the amendments.

Important Notice

Please note that the information is a summary giving you basic information about a particular topic. It does not cover the whole of the relevant law regarding that topic, and it is not a substitute for professional advice.

You should also note that because this information sheet avoids legal language wherever possible, it might include some generalisations about the application of the law. Some provisions of the law referred to have exceptions or important qualifications. In most cases, your particular circumstances must be considered when determining how the law applies to you.

If you need further information, please contact me on 03 9829 1142.

Kind regards

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