

## Unfair Contract Terms

From November 2016, both the ASIC Act and the Competition and Consumer Act (CCA) will apply the same unfair contract term ('UCT') requirements to standard form contracts between businesses. UCT requirements have applied to standard form contracts with consumers since 2010.

The UCT requirements will apply to all standard form commercial contracts (sales, services, finance, commercial relationships etc), where at least one of the contracting parties is a small business.

From an operational perspective, businesses are advised to identify all the standard form contracts they have in place, not only their finance contracts. Businesses should then:

- identify all contract terms that may be challenged as unfair – the concept of unfair is not explicitly defined by UCT law
- assess whether the member has a legitimately valid justification for that contract term
  - document the justification where a potentially UCT term is to be retained
- amend, or remove, those where there is an unnecessary imbalance in rights and obligations
- give careful consideration in their approach to, and expression used in, drafting contracts, specifically the requirement for courts to consider 'transparency'
  - 'Transparency' is discussed in the joint 2010 ASIC/ACCC 'guide to unfair contract terms law'. At page 13, it refers for guidance to a UK judicial decision on comparable law in which it was said that country's equivalent 'requires not only the actual wording of individual clauses or conditions be comprehensible to consumers, but that the typical consumer can understand how the term affects the rights and obligations that he and the seller or supplier have under the contract'. This is pertinent guidance for UCT laws now being applied to business contracts
  - UCT transparency requirements influence the format, drafting style and comprehensibility of the whole contract, not only individual terms
- identify whether any contracts in place that may include any unfair contract terms may be automatically renewed or extended post October 2016
  - If this is the case, the contract will need to be varied to amend or remove the unfair contract term by November 2016. For example, master finance contracts which give rise to individual contracts as goods are financed under its terms over time

In assessing whether contract terms are unfair, businesses need to assess whether they include clauses that:

- require one party to bear the risk of a high cost, low probability event;
- create an automatic rollover extension of the contract (e.g. inertia rentals);

- affect or remove the ability of the other party to vary the contract terms, limit their obligations, terminate or renew the contract;
- levy excessive contingent fees, including early termination, default fees, etc, enforcement expenses, agent commissioning fees;
- impose excessive interest rates on outstanding moneys; or
- affect, or limit, a party's ability of redress or remedies for breach by the other party.

Unfair terms may also include those that enable only one party to:

- avoid or limit performance of the contract, or limit liability;
- vary or terminate the contract;
- renew or not renew the contract;
- vary the price or characteristics of what is to be supplied (without the other party being able to terminate the contract);
- assign the contract without consent;
- impose an evidential burden on the other party in legal proceedings or limit the other party's right to sue or obtain evidence;
- determine if a breach has occurred or impose a penalty for a breach or termination

If businesses wish to rely on such provisions, particularly unilateral ones, they will need to demonstrate a legitimate business need. Regardless, a reasonable balance needs to be found between businesses protecting their own interests and balancing that with the rights of the other party.

In demonstrating how businesses meet their unfair contract terms obligations, they should operationally:

- Ensure all standard form contracts have been reviewed and revised to remove unfair contract terms
- Justify the basis for the retention of any terms or conditions that may be viewed as unfair
- Ensure only the revised contracts are in place
- Implement processes to identify when current contracts are rolled over and amend any potential unfair terms prior to the rollover
- Ensure staff are trained and understand how to deal with any complaints or challenges to the terms or conditions of any standard form contracts

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*This Compliance Guide provides a high level explanation of how the current law may impact on finance sector businesses. However, the application of the law may vary according to circumstances and readers should seek legal advice for their specific situation.*

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