

## Australia: Significantly increased CCA/ACL penalties and prohibitions on Unfair Contract Terms are on the horizon

The Treasury Laws Amendment (More Competition, Better Prices) Bill 2022 will, for the first time, apply penalties to unfair contract terms and will increase maximum penalties under the CCA and ACL five-fold

### In brief

On 28 September 2022, the Government introduced the [Treasury Laws Amendment \(More Competition, Better Prices\) Bill 2022](#) ("**Bill**"). If passed, the Bill will:

- Introduce a civil penalty regime prohibiting the use of and reliance on unfair contract terms (UCTs) in standard form contracts
- Increase the maximum penalties that may be awarded for breaches of the civil penalty provisions in Parts IV, IVBA, X and XICA of the Competition and Consumer Act 2010 (CCA) and under the Australian Consumer Law (ACL) to the greater of:
  - AUD 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
- Increase the maximum civil penalty for breaches by telecommunications providers of the Competition Rule, to up to AUD 71 million plus AUD 3 million for every day that a contravention continues in the most serious cases

So as to enable the industry to make any necessary changes to applicable standard form contracts, the amended UCT regime will commence on the day after the period of 12 months after the Bill receives Royal Assent and will apply to standard form contracts that are made or renewed at or after the commencement date.

The amended penalty regime will commence the day after Royal Assent and will apply to offences committed, or contraventions, acts or omissions that occur from that date.

This alert provides an overview of the key changes that are proposed to be introduced and highlights important considerations for businesses.

### Key takeaways

Businesses will need to prepare for the introduction of the new UCT regime by identifying all commercial partners who may fall within the new definitions of "small business" and carefully reviewing all standard form contracts with small businesses and consumers for potential unfair terms. The risks of not doing so are obvious and very significant — we expect that the regulators will closely look at potential contraventions and will not hesitate to take action in appropriate cases.

The review that must now be undertaken of standard form contracts will be significantly different to the review that businesses undertook when the UCT regime was originally introduced. This is because the risk analysis has fundamentally changed — it is no longer possible to leave a 'borderline' unfair term in a contract on the basis that if unfair it will only be void and unenforceable — now that same term if unfair will be illegal and will expose the relevant business to substantial penalties.

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The significant increases in penalties for breaches of the consumer law and for anti-competitive conduct also greatly increase the risks to the business. Whilst we do not anticipate that the courts will immediately impose penalties that are five times the current level, the new regime will provide the courts substantial discretion to order very large penalties in the most serious of cases.

Compliance is critical and businesses should ensure that robust CCA/ACL policies are in place and that staff attends regular training to ensure that they understand their obligations.

## Proposed Increases to Civil Penalty Regime

The amended penalty regime is intended to implement one part of the Government's "Better Competition" election commitment to strengthen Australia's competition laws.

The following table summarises the maximum civil penalties for companies and individuals (per contravention), comparing the current and proposed new regimes:

Relevant Provision	Current Law	Proposed New Law
Breach of a relevant civil penalty provision in Part IV (Anti-competitive conduct), IVBA (News media bargaining code), X (Undertakings), XICA (Electricity Pricing) or the ACL, and the maximum fine for an offence against section 45AF or 45AG of Part IV or the ACL by a body corporate	Greater of: <ul style="list-style-type: none"> <li>AUD 10 million</li> <li>If the court can determine the value of the benefit obtained – three times the value of the benefit</li> <li>If the court cannot determine the value of the benefit – 10% of the annual turnover of the body corporate</li> </ul>	Greater of: <ul style="list-style-type: none"> <li>AUD 50 million</li> <li>If the court can determine the value of the benefit obtained – three times the value of the benefit.</li> <li>If the court cannot determine the value of the benefit – 30% of the adjusted turnover during the breach turnover period for the offence, act or omission.</li> </ul>
Breach of a relevant civil penalty provision under Parts IV, IVBA, X and XICA of the CCA, and offence or civil penalty provision in the ACL by a person that is not a body corporate	AUD 500,000	AUD 2.5 million

## New Concepts

The current definition of 'annual turnover' in the CCA and the ACL will be replaced with the definition of 'adjusted turnover' - penalties under the third limb of the formula will be calculated using a body corporate's turnover during the period of the breach, which may not be an annual period.

'Adjusted turnover' means the sum of the value of all the supplies made by the body corporate or related bodies corporate in connection with Australia's indirect tax zone. Exceptions to this will include supplies made between related corporate bodies, supplies that are not made in connection with the body corporate's business, supplies that are input taxed, or supplies that are not for consideration and are not taxable. The definition of adjusted turnover will rely on terms and definitions used in the **A New Tax System (Goods and Services Tax) Act 1999**, similar to the definition of annual turnover.

The 'breach turnover period' will provide the formula for determining the period of time over which the adjusted turnover may be valued. The breach turnover period will generally begin at the start of the month in which the offence, contravention, act or omission occurred or was committed, or began, and end at the end of the month in which the body corporate ceased the offending, contravention, act or omission. The minimum breach turnover period will be 12 months.

## Effect of Proposed Changes

Save for changes in the 1990s which gave the court power to impose penalties based on the benefit obtained or a percentage of corporate turnover, the maximum penalty of AUD 10 million for breaches of competition law by corporations has remained constant for the last 30 years. The Government's concern is the risk under the existing provisions that some large businesses could see a breach of competition law as an acceptable cost of doing business. This is supported by the 2018 OECD report **Pecuniary Penalties for Competition Law Infringements in Australia** which found that the average and maximum competition penalties in Australia are, in practice, substantially lower than those in comparable international jurisdictions.

The amendments are intended to bring Australia's penalty regime in line with major international jurisdictions such as the EU and US. The aim is to ensure the price of misconduct is high enough to deter unfair activity and improve competition in Australia for the benefit of consumers and small businesses.



Penalties under the ACL were increased as recently as 2018. The further proposed increases, in line with the competition provisions of the CCA, will result in consumer law penalties increasing by nearly 50 fold over a period of less than five years.

## New pecuniary penalties for contraventions in the telecommunications industry ("Part XIB")

The Bill also introduces increased penalties for contraventions of Part XIB, which contains specific prohibitions against anti-competitive conduct in the telecommunications industry.

For corporations in the telecommunications industry, the proposed new penalties are greater:

- If the contravention continued for 21 days or fewer—the sum of AUD 50 million and AUD 1 million for each day that the contravention continued.
- If the contravention continued for more than 21 days—the sum of AUD 71 million and AUD 3 million for each day in excess of 21 that the contravention continued.
- 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 contravention.

The maximum penalties for individuals will increase from AUD 500,000 to AUD 2.5 million.

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## Proposed new UCT regime

The proposed new UCT regime has been foreshadowed for a number of years. In November 2018, the Federal Government released its Review of Unfair Contract Term Protections for Small Business: Discussion Paper, and in late 2020 a Decision Regulation Impact Statement was published.

The key concerns identified in these reviews included the current regime's lack of deterrent effect, particularly given businesses are able to continue to rely on terms found to be unfair in new contracts with different parties. Another key concern was the ambiguity around the definition of "small business" and what amounts to a "small business contract".

## New UCT prohibitions

Under the current UCT regime, a term contained in a consumer contract or small business contract will be void (i.e., not binding on the parties) where the term is unfair and the contract is "standard form". The Bill introduces two new UCT prohibitions where a party:

1. Proposes an unfair term in a standard form consumer or small business contract which the party has entered into.
2. Uses, applies, or relies on (or purports to use, apply to rely on), an unfair contract term in a standard form consumer or small business contract.

A business may breach these prohibitions multiple times in relation to the same contract. For example, a separate contravention will arise for each instance that a UCT is applied or relied on, and each UCT will be considered a separate contravention.

The terms apply or rely on mean to give effect to, or seek to enforce, an unfair term of a contract. It will be possible for multiple contraventions to arise in relation to the same contract or unfair term of a contract if a party applies or relies on multiple unfair terms or an unfair term on multiple occasions.

## Expanded scope of the UCT regime

Under the ACL, the scope of the UCT regime will be significantly expanded to apply to small business contracts where one party to the contract is a business that:

- Employs fewer than 100 employees (increased from the current limit of 20 employees).
- Has a turnover of less than AUD 10 million (in the last financial year). This removes the upfront contract value threshold, which can sometimes be difficult to determine on entry into the contract.

## Broader remedies

The Bill retains the current automatic voiding provisions, but will broaden the court's powers to respond to breaches of the UCT regime. These include, for example:



- The introduction of pecuniary penalties for breaches of the UCT regime. This will align the UCT regime with other contraventions of the ACL and the new maximum penalties set out above will apply.
- Orders to void, vary or refuse to enforce part or all of a contract if the court considers it appropriate to prevent or reduce loss or damage that may be caused from the contravention. This differs from the current test which requires that loss or damage has occurred or is likely to occur.
- On application by the ACCC, orders relating to terms that are the same or substantially similar to a term that has been declared as unfair can also apply to non-parties (both consumers and small businesses). For example, the court may make orders preventing terms from being included in any future contracts, or may make orders to prevent or reduce loss or damage that may be caused by these terms, or prevent a person from including, applying or relying on these terms in other contracts captured by the UCT regime.
- The Bill also extends the court's powers to make orders disqualifying a person from managing a company and adverse publicity orders.

These remedies will significantly expand the scope of intervention available to Courts in relation to the UCT regime. The introduction of penalties is a very significant change and has the potential to result in substantial penalties, given the court's ability to find multiple contraventions in relation to a single contract.

## Clarifying the UCT regime

The Bill includes the following provisions that clarify the existing regime:

- **Standard form contract.** When determining whether a contract is "standard form", the Courts will need to consider whether the party has used the same or a similar contract previously. This goes to the concept of repeat usage.
- **Effective opportunity to negotiate.** When considering whether a party has had an effective opportunity to negotiate, the court will disregard whether the party had an opportunity to negotiate minor or insubstantial changes to terms in the contract or was able to select a term from a range of pre-determined options and the extent to which a party to a similar contract was given an effective opportunity to negotiate.
- **Minimum standards provisions excluded.** The Bill clarifies that the UCT regime does not apply to certain terms that are read into a contract by operation of a Commonwealth, State or Territory law (for example, some tenancy protections may be implied by law).
- **Certain categories of contract will be excluded from the UCT regime:**
  - The operating rules of licensed financial markets
  - The operating rules of licensed clearing and settlement facilities
  - Certain life insurance contracts
  - Real time gross settlement systems approved as payment and settlement systems by the RBA

## Commencement of the new regime

So as to enable the industry to make any necessary changes prior to commencement, the amended UCT regime will commence on the day after the period of 12 months after the Bill receives Royal Assent. It will apply to:

- New standard form contracts that are made at or after the commencement
- A renewed contract on and from the day on which the renewal takes effect
- A term of a contract varied after the commencement. If there has not already been a renewal of the contract, the new regime will apply only to the term or terms that have been varied, on and from the day on which the variation takes effect, and as if the contract as varied had been made on the variation day

For advice and assistance in navigating the proposed changes, please contact one of our experts.

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