

# Australia's unfair contract terms laws and your contracts

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## Key Takeaways

- There are significant penalties in Australia for including unfair contract terms in **standard form contracts** for each breach are significant.
- The Australian unfair contract terms (UCT) regime is broad and far reaching – capturing many standard form contracts with **consumers** or **small businesses** (small business being a party with <AU\$10m turnover or <100 employees).
- Standard form contracts made, renewed or varied on or after **9 November 2023** affected.
- Audit your existing contracts and amend your contract templates.

## What are the penalties and when are you at risk?

In addition to UCTs being unenforceable, penalties apply to anyone either proposing or including UCTs in their **standard form contracts** with **consumers** or small **businesses**. Maximum penalties are:

### Maximum penalties for UCTs

<b>Corporation</b>	The greater of: <ol style="list-style-type: none"> <li><b>AU\$50 million;</b></li> <li><b>three times the value</b> of the benefit obtained; or</li> <li>where benefit value cannot be determined, <b>30%</b> of turnover during the breach period.</li> </ol>
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<b>Individual</b>	<b>AU\$2.5 million</b>
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## Types of contracts that might be impacted

Standard form contracts commonly used in businesses include:

- online browse wrap/click wrap terms and conditions (including website terms of use, terms and conditions of sale or end-user licensing agreements)
- template purchase order/supply terms and conditions
- template non-disclosure agreements, term sheets or heads of agreement
- template agreements for premises leases or the licences/leases
- template guarantees
- template licensing / distribution / reseller / agency or franchise agreements

## What is a standard form contract?

The term “**standard form contract**” is not defined in the UCT laws. Instead, courts must consider factors such as whether:

- a party had all or most of the bargaining power
- a party prepared and made other contracts with the same or substantially similar terms (and how many)
- the contract was prepared before discussions (so not bespoke) and whether the other party’s specific characteristics or the specific transaction was taken into account
- a party was required to accept or reject the terms in the form presented or it was given a genuine opportunity to negotiate and, if so, which terms.

## What is a small business contract?

Apart from contracts with consumers, the Australian UCT regime applies to standard form contracts with **small businesses** – defined as a business that:

- employs fewer than **100** people; or
- has a turnover of less than **AU\$10million**.

## What makes a term unfair?

A term will be unfair if it:

- causes a significant imbalance in the rights and obligations of the contracting parties; and
- is not reasonably necessary to protect the legitimate interests of the party wanting to rely on it; and
- causes detriment (financial or otherwise) to a party if applied or relied upon.

Courts will consider the contract as a whole and also if the term was transparent. Potential unfair terms include one-sided:

- limitations or exclusions of liability (including limiting vicarious liability for agents)
- limits on a party’s right to sue the other party or on evidence a party can adduce in proceedings or other one-sided evidential burdens.
- penalties for breach or termination
- rights such as rights to:
  - determine if the contract has been breached
  - terminate
  - interpret the contract meaning
  - vary terms, or characteristics of goods or services to be supplied or prices (where there is no right of the other party to terminate)
  - renew or not renew
  - assign the contract without consent

## What should you do?

- **Assess:** Consider how the UCT regime changes impact or might impact your contracting approach.
- **Audit:** Audit your standard form contracts used for consumers or small businesses. Identify those at risk of having unfair terms including those being renewed or varied on or after **9 November 2023**.
- **Amend:** Action the advice received from Dentons about the changes needed to your standard form templates and contracting processes (including processes to identify if the counterparty is a small business or consumer).
- **Apply:** Implement the updated terms and changes to acceptance procedures and notices. Execute changes to contracting processes and checklists.

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