

# Bird & Bird

## Digital Platforms and Unfair Contract Terms



In Recommendation 20 of the Final Report of the Digital Platforms Inquiry, the ACCC has recommended that the Australian Consumer Law (ACL) in Schedule 2 to the *Competition and Consumer Act 2010* (Cth) be amended to introduce a prohibition on the use of unfair contract terms in standard form consumer or small business contracts. The prohibition would be backed up by penalties that apply to breaches of the new provisions.

In its report, the ACCC highlighted particular concerns regarding the collection, use and disclosure of personal information by businesses operating on digital platforms. The ACCC noted that it considers privacy policies to be standard form contracts, and that due to the significant information asymmetries and bargaining power imbalance in the relationship between consumers and digital platforms, consumers are unable to negotiate terms relating to the collection, use and disclosure of personal data. This bargaining imbalance therefore results in potentially unfair terms under the ACL.

The introduction of penalties for unfair contract terms has also been considered on a wider basis. The government is currently undertaking a Regulation Impact Statement (RIS) process as a result of a review by the Treasury of the protections provided to small businesses in relation to unfair contract terms undertaken in late 2018. Proposed amendments being considered include, making unfair contracts illegal and attaching civil penalties to breaches.

If the ACCC's recommendations are introduced, the changes will have implications on all businesses that deal with consumers and small businesses on an economy wide scale, not just those that operate on digital platforms, which were the focus of the ACCC Inquiry. All businesses that deal with consumers and small businesses will need to carefully review standard form contracts and consider whether clauses are unfair in order to avoid the risk of penalties.

### [The current unfair contract terms regime](#)

Under the current unfair contract term regime set out in sections 23 to 28 of the ACL, if a court or tribunal finds a term to be unfair, it will be void and unenforceable, although the remainder of the contract remains in force.

The regime applies to standard form contracts for the supply of goods or services, or the sale or grant of interest in land, to individuals for wholly or predominately personal domestic or household use or consumption (consumer contracts). In addition, since November 2016, the regime also applies to standard form contracts where one party to the contract is a business that employs fewer than 20 persons and either the upfront price payable under the contract does not exceed \$300,000 or, if the contract has a duration of more than 12 months, the upfront price payable does not exceed \$1,000,000 (small business contracts).

Factors that are taken into account when deciding when a contract is a standard form contract include, the relative bargaining power of the parties, whether the consumer or small business has the opportunity to negotiate the terms of the contract and whether the contract takes into account the particular characteristics of a party or the transaction.

A term may be found to be unfair if:

- a it would cause a significant imbalance in the parties' rights and obligations arising under the contract;
- b it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and
- c it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.

The transparency of the term and the effect of the contract as a whole are taken into account when determining if a term is unfair.

Non-exhaustive examples of terms that may be unfair are set out in the legislation and include terms that:

- a enable one party (but not the other) to avoid or limit their obligations under the contract;
- b enable one party (but not the other) to terminate the contract;
- c penalise one party (but not the other) for breaching or terminating the contract; or
- d enable one party (but not the other) to vary the terms of the contract.

The regime, however, does not apply to terms that set the upfront price payable under the contract or define the main subject matter of the contract.

### The proposed changes

Under the changes proposed by the ACCC, the inclusion of unfair contract terms in standard form contracts would be prohibited and attract civil pecuniary penalties, rather than the terms being simply declared void by a court or tribunal, as is currently the case.

Concerns raised in submissions considered by the ACCC about the proposed changes include that:

- a there is uncertainty as to the meaning of "unfair". In a particular, a term may be unfair in some circumstances, but not others;
- b the changes are likely to require a broader consideration and impact assessment than carried out within the scope of the Digital Platforms Inquiry as the proposed changes would affect all consumer and small business contracts, not just those associated with digital platforms; and
- c the ACL already allows for appropriate penalties that can apply to unfair contract terms. For example, by including unenforceable unfair business terms in a contract, even if the business does not rely on them, the business may be engaging in misleading or deceptive conduct in contravention of section 18 of the ACL. Also, relying on an unfair contract term may amount to unconscionable conduct in contravention of section 20 and 21 of the ACL. Breaches of these provisions give rise to a wide range of remedies, including the imposition of monetary penalties. In addition, any loss a consumer suffers as a result of an unfair term may be the subject of a compensation order, which can be claimed by a consumer or the ACCC on behalf of consumers.

Nevertheless, the ACCC believes that the current unfair contract terms regime does not provide sufficient deterrence. It considers that the introduction of penalties would enable the ACCC to hold businesses to account for including unfair contract terms in standard form contracts and will provide a greater deterrent. The ACCC in particular noted that introducing penalties would help to lessen the bargaining imbalance that arises in relation to the terms of use and privacy policies of digital platforms, especially in the case of contracts that do not include a monetary price where the impact of declaring a term void is less likely to have immediate impacts on the parties' financial rights and obligations.

## Effect of the changes

To judge the full effect of the proposed changes, the details of the implementation of the penalty regime will be crucial.

In any event, if the changes are introduced, businesses will need to carefully review the terms of their standard form contracts and consider whether they are unfair in order to avoid the risk of penalties. This includes, making sure terms are clearly expressed in reasonably plain language, considering the effect of the term taking into the account the contract as a whole and considering whether the term is reasonably necessary on order to protect legitimate business interests and whether it would cause detriment (whether financial or otherwise) to the other party if relied on.

A term may be unfair if relied on in particular circumstances, but not in others, may need to be more precisely drafted to ensure it only applies in situations that would not be considered unfair. Businesses must be prepared to justify why the term is reasonably necessary in order to protect their legitimate business interests.

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