



Important changes to contract laws affecting the gambling industry

All gambling industry participants are strongly encouraged to review their standard form contracts and to remove or amend any “unfair contract terms” ahead of important changes to the law taking effect.

From 9 November 2023, Australia’s unfair contract terms regime or “**UCT Regime**” will apply to a much larger group of contracts than it has previously and will attract potentially significant penalties for non-compliance.

Businesses in the gambling industry which have standard contracts with customers and small businesses (for example, general terms and conditions and service supply agreements) should take notice and take action to ensure they are not exposed to penalties which could now exceed a maximum of \$50 million.

What are the new changes?

For individuals and businesses in the gambling and entertainment industries, the key changes are as follows:

1. **Application to a broader class of contracts:** The UCT Regime applies to standard form contracts entered into with consumers and small businesses.

From 9 November 2023, the meaning of a ‘small business’ will expand to capture any business which:

- a. employs less than 100 people (previously, 20 people); or
- b. has an annual turnover of less than \$10 million.

There will also no longer be any maximum ‘contract value’ thresholds to which the UCT Regime applies. The changes also make clear that a contract can be a ‘standard form contract’ despite there being opportunity for a party to negotiate changes to terms prior to signing.

All of these changes mean that a larger pool of contracts will be subject to the UCT Regime requirements.

2. **Penalties introduced:** For the first time, a penalty can be imposed on an individual or company merely for proposing to enter into a contract which includes an ‘unfair’ contract term. Previously, if the court determined that an unfair term has been included in a contract, it would only be considered void and unenforceable.

The maximum penalty for a company which breaches the UCT Regime will also increase to be the *greatest* of:

- a. \$50 million;
- b. three times the value of the “reasonably attributable” benefit obtained by the company from the conduct (if that amount can be determined); or
- c. if a court cannot determine the value of the benefit, 30% of the company’s adjusted turnover during the breach period.

The maximum penalty for an individual who breaches the UCT Regime will also increase to \$2.5 million.

3. **Greater powers given to the Court:** The courts are also being given a broader set of powers in relation to contracts which contain unfair terms.

These extra powers include:

- a. being able to make orders with respect to the entirety of the contract including to void, vary or refuse to enforce the whole contract if that will prevent loss or damage that is likely to be caused. Previously, the courts’ powers were largely confined to orders affecting only the particular unfair term;
- b. when making orders, the court is no longer required to consider whether its orders will remedy actual loss or damage; and
- c. the courts can also now make various orders if asked by the regulator including to stop a party from using the same (or similar) term in the future. This means that a party would be breaching a court order if it attempted to use a similar term in the future and would be exposed to greater consequences.

In light of these changes, individuals and businesses who deal with customers and suppliers should take time now to ensure that their standard form contracts do not contain any terms which may be deemed unfair.

What is an 'unfair' term?

The meaning of an 'unfair' term remains the same under the UCT Regime, being any term which:

- a. causes a significant imbalance in the parties' rights and obligations;
- b. is not reasonably necessary to protect the legitimate interests of the party relying on the term; and
- c. would cause detriment to the other party if it was relied on.

How do the changes affect the gambling industry?

In our experience, the most common types of standard form contracts used by individuals and businesses in the gambling industry include:

1. **(Betting account and reward and loyalty program terms and conditions and betting rules)** These include the standard form terms that customers sign up to when opening an account with a wagering service provider or participating in a wagering or gaming rewards or loyalty program.
2. **(Service agreements)** Service agreements between gambling operators, technology, payment and other service providers.

Common types of contract terms which run the risk of contravening the UCT Regime include:

- a. auto-renewal clauses;
- b. indemnity or liability clauses which are one-sided or imbalanced;
- c. dispute resolution and complaint procedure clauses;
- d. jurisdiction or choice of law clauses;
- e. terms which enable unilateral price increases or the setting of prices after a contract is signed; and
- f. terms that allow one party to vary the terms on which products or services are provided (such as updating terms without notice or changing a product description or service level).

What you should do next

We recommend that businesses review all of their contracts with customers and suppliers which may be considered 'small businesses' under the newly expanded definition. In particular, careful attention should be paid to any contracts which arose in circumstances where a party had little (or no) power or influence to negotiate changes prior to signing.

When reviewing your contracts, we recommend (per ACCC guidance), that:

1. terms are clear and expressed in simple language;
2. both points of view are assessed when deciding whether a term is in the business's legitimate interest;
3. counter-balancing terms are included where one party is given a significant power or right under the contract;
4. broad terms are avoided and that terms are as specific as possible in relation to the parties' rights and obligations;
5. all terms comply with the Australian Consumer Law or "ACL". In particular, care should be taken to avoid using terms which limit or exclude liability or consumer guarantees; and
6. key terms are drawn to the attention of the other party during negotiations and renewal processes.

Please contact us if you would like to discuss these changes and how they might impact on your business:

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More details about the upcoming changes to the UCT Regime can be found on the ACCC website here: <https://www.accc.gov.au/media-release/businesses-urged-to-remove-unfair-contract-terms-ahead-of-law-changes>.