



BUSINESS OWNERS: WATCH YOUR STEP! AUSTRALIAN CONSUMER LAW CHANGES TO BE AWARE OF

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This article features a summary of the recent consumer law changes affecting businesses in trade and commerce.

In February 2022, the *Treasury Laws Amendment (More Competition, Better Prices) Bill 2022 (Cth)* was introduced and later received Royal Assent in November 2022. This Bill amends the Australian Consumer Law (Schedule 2 of the *Competition and Consumer Act 2010 (Cth)*) and the *Australian Securities and Investments Commission Act 2001 (Cth)*. Some amendments commenced on 10 November 2022, while the changes to unfair contract terms will commence on 9 November 2023.

The Bill states these amendments are aimed at:

- strengthening consumer protections;
- promoting fair competition between businesses; and
- ensuring improved corporate behaviour.

TAKE NOTE:

Two of the most important amendments are:

- the penalties for anti-competitive behaviour are being increased (ie, false and misleading representations, harassment and coercion, non-compliant products);
- a review and tightening of the unfair contract terms provisions.ⁱ

The Australian Competition and Consumer Commission (ACCC) states in media release 153/22, '... these maximum penalty changes will allow the courts to ensure that the penalties imposed for competition and consumer law breaches are not seen as a cost of doing business, but rather as a significant impost and something likely to raise the serious attention of owners or shareholders.'ⁱⁱ

For businesses, this means you should reconsider your current conduct (including business marketing strategies) to ensure they are not in contravention of any anti-competitive behaviour. In addition, you should conduct a comprehensive review of any standard form contracts you use to ensure they comply with the new legislation in force from November 2023.

PENALTIES FOR ANTI-COMPETITIVE BEHAVIOUR

For corporations, the penalties are the greater of:

- \$50 million (currently, \$10 million);
- 3 times the value of reasonably attributable benefit obtained from the conduct (same as the current penalty); or
- If value cannot be determined then 30% of the body corporate's turnover during the period it engaged in the conduct (currently, 10%).

For individuals, the penalties are up to \$2.5 million (currently, \$500,000).

The Bill states the purpose of the increased penalties is not only to ensure a 'robust level of protection' for consumers, but also to deter 'anti-competitive behaviour and unfair activity'.ⁱⁱⁱ

CIVIL PENALTIES FOR UNFAIR CONTRACT TERMS

As part of the changes to the unfair contract term provisions, there will be civil penalties introduced for any breaches. 'The amendments introduce civil penalty provisions prohibiting the use of, and reliance on, unfair terms in standard form contracts. This enables the regulator to seek a civil penalty from a court.'^{iv}

Civil penalties for unfair contract terms are a new addition to the legislation.

Currently, a court may declare a term to be unfair in standard form contracts (with consumers and small businesses), and therefore void. However, this approach has not provided the deterrence effect expected as unfair contract terms remain in standard form contracts. Cue the introduction of penalties.

What is a standard-form contract?

Whether your contract is a standard form contract is determined on a case-by-case basis. If your contracts are on a 'sign or walk' basis — then you likely use a standard form contract. A standard form contract includes 'small business contracts' and 'consumer contracts'.

- A small business contract is where one party employs fewer than 100 persons or has a turnover for the last income year of less than \$10 million.^v
- A consumer contract is a contract for the 'supply of goods or services' or the 'sale or grant of an interest in land' for personal, domestic or household use or consumption.^{vi}
- Nonetheless, a consumer contract is presumed to be a standard form contract unless successfully rebutted.

It is necessary to have a proactive approach whether you use a consumer and/or small business contract, to ensure you and your business are adequately protected and does not fall foul of the new rules. These penalties will come into effect in late 2023.

What to do right now?

The ACCC states there will be a 12-month grace period for businesses to update their standard form contracts to ensure they are compliant. However, the above mentioned harsher penalties for anti-competitive behaviour are currently in force and will apply to any conduct post-amendments to the Act.

We recommend obtaining legal advice to review any relevant standard form contracts you have to discuss whether there are any unfair contract terms that could be declared void, in turn risking the enforceability of the contract.

ⁱ *Treasury Laws Amendment (More Competition, Better Prices) Bill 2022*, pp 25-58.

ⁱⁱ Australian Competition and Consumer Commission, ACCC welcomes new penalties and expansion of the unfair contract terms laws, 1 November 2022 (media release number 153/22).

ⁱⁱⁱ *Treasury Laws Amendment (More Competition, Better Prices) Bill 2022*: Explanatory memorandum, p 1.

^{iv} Assistant Minister for Competition, 'Second Reading Speech, Treasury Laws Amendment (More Competition, Better Prices) Bill 2022', Speeches (Web Page, 28 September 2022), <https://ministers.treasury.gov.au/ministers/andrew-leigh-2022/speeches/second-reading-speech-treasury-laws-amendment-more-competition>.

^v This was updated with the amendments of the Act: Schedule 2, item 47, proposed subsections 23(4)-(7) of Schedule 2 of the *Competition and Consumer Act 2010*.

^{vi} Schedule 2 of the *Competition and Consumer Act 2010 section 23(3)*.