

AUGUST 2022

## Important information for businesses that use standard form B2B contracts

From 16 August 2022, the Commerce Commission has the power to seek declarations from the courts that a term in a standard form business-to-business (**B2B**) contract is unfair as an **Unfair Contract Term**, or **UCT**, following an amendment to the Fair Trading Act 1986 (**FTA**).

A contract term which is declared unfair must not be included in a B2B standard form contract, nor can a party to the contract seek to apply, enforce, or rely on the unfair term. This restriction is the same as the one already in place for standard form consumer contracts, simply now extended to also include certain B2B contracts (aligning with the Australian regime, but with different thresholds).

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### When does the B2B UCT regime apply?

The B2B UCT regime applies to all businesses, large and small, if all of the criteria below applies:

- there is a standard form contract – the contract is provided by one party generally in a ‘take it or leave it’ form, with little ability for the other party to effectively negotiate the terms;
- each party to the contract carries on business;
- the contract is not a consumer contract – the contract is not with a person acquiring goods or services for personal or domestic use; and
- the contracts between the parties when the trading relationship first arises have a value of less than NZ\$250,000 (including GST) per year.

### Are there any exceptions to the B2B UCT regime?

If all the criteria are met, there are no exceptions. This includes contracts that grant an interest in land (such as commercial leases), as well as those contracts for the purchase and supply of goods or services.

If any of the criterion isn't satisfied, the B2B UCT regime does not apply. For example, if the value of your initial contract(s) is greater than NZ\$250,000 (including GST), the B2B UCT regime does not apply.

### How is annual value measured?

The annual value of the trading relationship is measured when the trading relationship ‘first arises’ – this means the value of the first contract(s) between the parties. Even if you later enter into standard form contracts with the same party exceeding NZ\$250,000 (including GST) per year, the B2B UCT regime will continue to apply.

## When is a term unfair?

A term in a standard form small trade contract is unfair if it:

- would cause a significant imbalance in the parties' rights and obligations;
- is not reasonably necessary to protect the legitimate interests of the party who receives the benefit of the term; and
- would cause financial or other detriment to a party if it is applied, enforced or relied on.

There is no exhaustive list of unfair terms. It is entirely possible for the same term found in two separate contracts to be deemed fair in one, and unfair in the other. The question of whether a contract term is unfair is highly contextual, depending on the specific circumstances.

The Australian UCT regime has provided insight into the types of terms which are more at risk of being deemed unfair, as set out below:

Type of term
Clauses allowing one party to avoid or limit performance of the contract
One-sided or wide rights to terminate or assign the contract
Clauses limiting or excluding the liability of one party
Clauses allowing a party to unilaterally vary the terms of the contract
Unilateral or automatic renewal provisions
Other provisions limiting the means available to the other party to seek legal redress
One-sided penalty terms

## What should you do to prepare?

Businesses should review any contracts they enter into with other businesses that could be considered 'standard form' to prepare for the B2B UCT regime coming into effect soon.

Some helpful points to consider:

- Record internally (for example, on your contract template) your justification for the inclusion of any potentially unfair term.
- Can any existing unilateral terms be applied mutually? Consider if it is unnecessary for the term to apply unilaterally to protect your legitimate commercial interests.
- Can a reasonable notice period can be included to 'neutralise' a unilateral right, such as the right to terminate for convenience, change terms, or renew the contract.

The Commerce Commission has not had to seek many declarations under the equivalent UCT regime for standard form consumer contracts, because most businesses have taken steps to comply with the regime, particularly where the Commerce Commission has received a complaint and engaged with the relevant business. We expect to see a similar response in relation to B2B standard form contracts.

Our experts are happy to assist with your review and update of your B2B contracts, or to respond to any questions or concerns you have.

## Key contact



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