

# Australia's unfair contract terms (UCT) regime: ACCC action against Fuji

## Fuji contract terms declared unfair and void

In the recent decision of *Australian Competition and Consumer Commission v Fujifilm Business Innovation Australia Pty Ltd*, the Federal Court declared that 38 contract terms included in 11 types of standard form contracts used with many small businesses by Fujifilm Business Innovation Australia Pty Ltd or Fujifilm Leasing Australia Ltd (together, **Fuji**) are unfair, and therefore void and unenforceable, under the UCT regimes in the *Australian Consumer Law (ACL)* and the *Australian Securities and Investments Commission Act 2001 (ASIC Act)*.

This decision provides important guidance for businesses about terms that may be considered to be 'unfair'. In light of significant reforms to the UCT regimes enacted in November 2022, it has become even more important for businesses and their advisors to re-examine their standard form contracts and make any necessary amendments before the reforms come into force in November 2023. (Please see our separate article, available [here](#), where we discuss the reforms in detail.)

## A recap of the proceedings

Under the ACL, terms in standard form consumer and small business contracts which are found to be 'unfair', are void and unenforceable. The ASIC Act contains equivalent provisions relating to unfair terms in standard form consumer and small business contracts for financial products and services.

In October 2020, the ACCC commenced proceedings in the Federal Court against Fuji, alleging that various template contracts used with small business customers were standard form small business contracts and contained numerous unfair contract terms.

The ACCC sought:

- declarations that various terms across the template contracts were unfair and therefore void
- injunctions to prevent Fuji from relying on the terms in its current contracts or entering into future contracts that contain the terms
- an order for a corrective notice, a compliance program, and costs.

## The Federal Court's findings

In October 2021, the parties were ordered to attend mediation and they ultimately reached agreement in relation to the relief they considered appropriate to resolve the proceeding. The Court made orders largely in the form submitted by the parties, having found (as per the parties' agreed facts) that:

- between November 2016 and December 2021, Fuji had used 21 template contract forms as a basis for entering into contracts with its customers
- some 34,000 contracts were entered into or renewed using the template contracts, some of which were still in force at the date of the decision
- each contract entered into using one of the templates was a standard form contract for the purposes of the UCT regime
- Fuji used the templates to enter into "small business contracts" within the meaning of the UCT regime (and this meant they fell within the scope of the UCT protections).

## The terms found to be unfair

The parties made detailed submissions as to the terms said to be unfair in the relevant template contracts. Across the various templates, a total of nearly 300 individual terms were impugned.

As set out in paragraph 6 of the Court's reasons for judgment, the parties submitted that each identified clause, either by itself or read in conjunction with other clauses, is an unfair term for one or more of the following reasons:

1. "It allows Fuji to **unilaterally vary** either the price charged to the customers and/or the rights and obligations between Fuji and the customer.
2. It provides for **automatic renewal** of the contract unless the customer gives notice to cancel the contract in circumstances where there is no obligation on Fuji to notify the customer that the renewal will occur.
3. It **incorporates additional contractual terms** by reference to one or more extraneous documents, which documents are difficult for the customer to locate or identify, and which Fuji can unilaterally vary with no obligation to give notice of the variation.
4. It **limits Fuji's liability for any delay** in supplying or delivering equipment to the customer in circumstances where the customer has no right to be excused from charges payable for the period of the delay.
5. It provides that the **customer must pay Fuji all costs and expenses** Fuji incurs in exercising its rights under the contract on a full indemnity basis, in circumstances where there is no corresponding right on the part of the customer and where there is no requirement on Fuji to minimise its costs.
6. The **customer warrants** by the term **that it has read each document forming part of the contract, including extraneous documents that Fuji may not have provided**, and that it enters into the contract solely on the contents of the contract, thereby purporting to exclude any liability on the part of Fuji for pre-contractual representations.
7. It provides a **significant cap, reduction or limitation on Fuji's total liability** to the customer and excludes a claim for consequential loss in circumstances where the customer's liability has no limit.
8. It requires the customer to indemnify Fuji for loss or damage to the products, including all associated costs, with exclusions only for limited wear and tear and anything directly attributable to Fuji's negligence, thereby **requiring the customer to indemnify Fuji for damage caused by third parties, or accidentally or indirectly by Fuji**.
9. It **entitles Fuji to suspend the provision of services** where the customer breaches any term while **still requiring the customer to pay** for services that are suspended.
10. It **entitles Fuji to terminate the contract** immediately on notice and for cause if the customer breaches any term **with no corresponding right of the customer and no right for the customer to remedy the breach**.
11. It provides for **payments to Fuji upon Fuji exercising a right to terminate**, including payments for the remaining term of the contract in circumstances where the customer receives nothing in return and forfeits any prepayments.

12. It provides that, at the end of the minimum contract term, **the customer must** either:

- a. stay in possession of the equipment and **pay Fuji the residual value, without receiving title to the equipment**; or
- b. **pay Fuji the shortfall** between the residual value and market value as determined by Fuji.

13. It provides that, by signing and returning the contract to Fuji, **the customer makes an irrevocable offer** to acquire the goods and services but that **Fuji is not bound until the customer has been advised that the contract has been accepted or until Fuji commences providing services** – leaving the customer bound yet without the required goods or services for an indefinite period.

14. It provides that **Fuji can invoice** the customer **regardless of whether the goods and services** the subject of the contract **have been provided.**" (our emphasis)

## The undertakings by Fuji and the Court's orders

As Fuji was not aware how many of the 34,000 contracts it had entered using the relevant templates were with small businesses, it undertook to send a communication to relevant customers to verify if they are a small business. If they are, Fuji undertook to send a communication to them setting out the terms of that party's contract which are void and unenforceable.

On Fuji giving those undertakings, the Court made the following declarations and other orders by consent of the parties:

- **Terms are void and unenforceable:** The specified terms are unfair contract terms within the meaning of the UCT regime, and are therefore void and unenforceable.
- **Fuji cannot rely on any unfair contract terms.** Fuji is restrained from applying or relying on any term declared to be unfair and, further, for a period of 5 years, from entering into small business contracts that are made using the 21 template contracts which contain the terms that the Court has declared to be void.
- **Fuji to publish a corrective notice:** Fuji must publish a corrective notice on its various websites which notifies its customers of the Court's orders.
- **Fuji to contact its current customers:** Fuji must contact its customers who are party to a relevant small business contract, and who have had proceedings commenced against them in which Fuji is relying on any of the unfair terms, to notify them that certain terms of the contract have been declared unfair, and are therefore void and unenforceable.
- **Compliance program:** Fuji must implement a compliance program within 3 months.
- **Costs contribution:** Fuji must pay a contribution of \$250,000 to the ACCC's costs.

## Recommendations for businesses

The ACCC's proceedings against Fuji demonstrate that it is prepared to take legal action when unfair contract terms are used.

Business should take the opportunity to review their standard form contracts now, to identify any terms that may be considered unfair. The terms declared to be unfair in the Fuji case will assist businesses and their advisors in this exercise.

As mentioned above, this review has become even more critical for businesses in light of amendments to the UCT regime enacted in November 2022 which strengthen the regime in various significant ways. Among the changes to the UCT regime is the introduction of prohibitions on proposing, applying, or relying on, unfair terms in standard form consumer or small business contracts. Civil penalties may be imposed where these prohibitions are contravened. The amendments will come into force in November 2023, and businesses should use the intervening time to prepare for the new regime. Further information about the reforms is available in our article, available [here](#).

## Contact



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