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*Crisp Law Newsletter*

*Unfair Contract Terms  
2024 Amendments*

*In this newsletter, we explore the new dispute resolution framework within the Fair Work Commission for unfair contract terms in independent contractor agreements. We provide an analysis of the new provisions under the Fair Work Legislation Amendment Act 2024. This includes an overview of the criteria used to assess unfair terms, relevant definitions and the application process for remedies. Our aim is to equip businesses with a comprehensive understanding of this new jurisdiction and its implications for services contracts.*

## Introduction

### Scope

Significant workplace relations reforms were introduced with the enactment of the Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024, which revised the Fair Work Act 2009 (Cth). Notably, as of the **26th of August**, an unfair contract disputes jurisdiction within the Fair Work Commission (FWC) took effect, allowing independent contractors **earning below a specified high-income threshold** to request the variation or annulment of a services contract with unfair terms.

The new provisions aim to establish a “quick, flexible and informal” procedure for addressing unfair contract terms (UCT), offer appropriate remedies and level the playing field between independent contractors and principals. These amendments add a new risk factor for businesses, complementing the 9 November 2023 changes to the unfair contract terms regime, which expanded the definition of “small business” and raised civil penalties for non-compliance.

### Definitions

The FWC may make an order **setting aside** all or part of a services contract or make an order **amending or varying** all or part of a services contract.<sup>1</sup> However, an order in relation to a services contract can only be made if the FWC is satisfied that the services contract includes one or more unfair contract terms which **relates to workplace relations matters** in an **employment relationship**.

Workplace relation matters are defined as being:<sup>2</sup>

- (a) remuneration, allowances or other amounts payable to employees;*
- (b) leave entitlements of employees;*
- (c) hours of work of employees;*
- (d) enforcing or terminating contracts of employment;*

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<sup>1</sup> Ibid 536NC.

<sup>2</sup> Ibid 536JQ (1).

- (e) making, enforcing or terminating agreements (not being contracts of employment) determining terms and conditions of employment;*
- (f) disputes between employees and employers,*
- (g) industrial action by employees or employers;*
- (h) any other matter that is substantially the same as a matter that relates to employees or employers*

There is also an explicitly stated list of issues which are not considered a workplace relations matter, some of which include superannuation, occupation health and safety deductions from wages or salaries.<sup>3</sup>

An employment relationship involves the relationship between an employer and employee – both terms understood in their ordinary meaning.<sup>4</sup> In ascertaining the true nature of the relationship, the totality of the relationship is considered, whether that be the terms of the contract governing the relationship, how the contract is performed in practice or any other relevant factors.<sup>5</sup>

## Key Provisions

### **Assessment of contract terms**

The FWC must account for fairness between the parties concerned in deciding whether to make an order under this Division, and the kind of order to make. Certain factors may be considered at the time of review in determining whether a term of a services contract is a UCT. These include:

- (1) In determining whether a term of a services contract is an unfair contract term, the FWC may take into account the following matters:*
  - (a) the **relative bargaining power** of the parties to the services contract;*
  - (b) whether the services contract as a whole displays a **significant imbalance** between the rights and obligations of the parties;*
  - (c) whether the contract term under consideration is **reasonably necessary** to protect the legitimate interests of a party to the contract;*
  - (d) whether the contract term under consideration imposes a **harsh, unjust or unreasonable requirement** on a party to the contract;*
  - (e) whether the services contract as a whole provides for a total remuneration for performing work that is:*

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<sup>3</sup> Ibid 536 JQ (2).

<sup>4</sup> Ibid 15AA (1).

<sup>5</sup> Ibid 15AA (2).

(i) less than regulated workers performing the same or similar work would receive under a minimum standards order or minimum standards guidelines; or  
(ii) less than employees performing the same or similar work would receive;

### ***Application for an unfair contract remedy***

The FWC may only make an order granting a remedy on the basis of an UCT if a person has made an application. There are fees which may be accompanied with an application to the FWC.<sup>6</sup> The FWC can conduct a conference taking into account the wishes of the parties, or it may hold a hearing where it believes it would be appropriate and efficient to do so.<sup>7</sup> Appeals from a decision made by a FWC can only be made on the ground that the decision involved significant error of fact and where the FWC believes it is in the public interests to do so.<sup>8</sup>

It is important to note that an unfair contract remedy will only be available to any independent contractor who earns less than the contractor **high income threshold** of \$175 000 as of 1 July 2024.<sup>9</sup> Independent contractors who earn above the contractor high income threshold will still be able to access remedies for unfair or harsh contract terms under the *Independent Contractors Act 2006 (Cth)*.

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<sup>6</sup> Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024 (No. 2, 2024), 536NE.

<sup>7</sup> Ibid 536LY, 536LZ.

<sup>8</sup> Ibid 536MA.

<sup>9</sup> Fair Work Commission *Contractor High Income Threshold*.