

Unfair contract terms

A GUIDE FOR BUSINESSES AND LEGAL PRACTITIONERS

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Important note:

The information in this guide relates only to the business to consumer unfair contract terms law as set out under the Australian Consumer Law.

Amendments to the unfair contract terms law, which apply to business to business transactions, will take effect on 12 November 2016.

The ACCC has produced guidance on the application of this new law, which is available at www.accc.gov.au/uct

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Introduction

About this guide

This is one of six guides to the Australian Consumer Law (ACL), developed by Australia's consumer protection agencies to help businesses understand their responsibilities under the law.

This guide will help businesses and legal practitioners understand the unfair contract terms of the ACL.

It covers what an unfair contract term is and which contracts are affected by the law.

While the guide includes examples of the types of terms that may be considered unfair, it does not present a definitive list of what is unfair—or, by omission, fair—under the law. Ultimately, a court or tribunal will determine if a term in a standard form consumer contract is unfair.

These guides:

- explain the law in simple language but are no substitute for the legislation
- give general information and examples—not legal advice or a definitive list of situations where the law applies.
- include examples of the ACL's application by Australian Consumer Protection regulators and by Australian courts.

About the other guides

The other guides in this series cover:

- **Consumer guarantees**
Covers supplier, manufacturer and importer responsibilities when there is a problem with goods and services; refunds, replacements, repairs and other remedies.
- **Sales practices**
Covers unsolicited supplies, unsolicited consumer agreements (door to door and telemarketing), lay-by, pricing, proof of transaction and itemised bills, referral selling, pyramid schemes, harassment and coercion.
- **Avoiding unfair business practices**
Covers misleading or deceptive conduct, unconscionable conduct, country of origin, false and misleading representations.
- **Compliance and enforcement**
Covers how regulators enforce the ACL.
- **Consumer product safety**
Covers safety standards, recalls, bans, safety warning notices and mandatory reporting requirements.

Further information and copies of these and other publications are available from the Australian Consumer Law website www.consumerlaw.gov.au

About the Australian Consumer Law

The ACL aims to protect consumers and ensure fair trading in Australia.

The ACL came into force on 1 January 2011 and replaced the *Trade Practices Act 1974* and previous Commonwealth, state and territory consumer protection legislation. It is contained in Schedule 2 to the *Competition and Consumer Act 2010* (Cth) (CCA) and is applied as a law of each state and territory by state or territory legislation.

Under the ACL, consumers have the same protections, and businesses have the same obligations and responsibilities, across Australia.

Australian courts and tribunals (including those of the states and territories) can enforce the ACL.

The regulators of the ACL are:

- the Australian Competition and Consumer Commission (ACCC), in respect of conduct engaged in by corporations, and conduct involving the use of postal, telephonic and internet services; and
- state and territory consumer protection agencies, in respect of conduct engaged in by persons carrying on a business in, or connected with, the respective state or territory.

Some of the consumer protection provisions in the ACL are mirrored in the *Australian Securities and Investments Commission Act 2001* (Cth) (ASIC Act) in relation to financial products and services. The Australian Securities and Investments Commission (ASIC) is responsible for administering and enforcing the ASIC Act.

The ACL aims to protect consumers and ensure fair trading in Australia.

What types of contracts does the law apply to?

Summary

A contract is an agreement made between two or more parties that is intended to be legally enforceable.

The unfair contract terms provisions apply to standard form consumer contracts.

A standard form contract will typically be one prepared by one party to the contract and not negotiated between the parties—it is offered on a ‘take it or leave it’ basis.

The ACL and the ASIC Act define ‘consumer contract’ as a contract for the supply of goods or services, or the sale or grant of an interest in land, to an individual for personal, domestic or household use or consumption.

A court can declare a term of a standard form consumer contract to be unfair. Once a term is declared to be unfair, it will be void (not operative). However, the remainder of the contract will continue to apply, if it can continue without the void term.

Individuals can apply to a court to have a term of a standard form contract they entered into declared unfair and accordingly, void.

ACL regulators (the ACCC and state and territory consumer protection agencies) can also apply to have a term of a particular standard form contract declared unfair. If it is so declared, the term will be void in that particular contract and in all standard form contracts entered into by the business that contain that term.

The law does not impose penalties on a business that includes or seeks to rely on an unfair contract term. However consumers and ACL regulators can seek redress for any loss that is incurred as a result of a term of a standard form contract that is declared to be unfair.

What is a contract?

A contract is an agreement made between two or more parties that is intended to be legally enforceable. A contract arises when one party makes an offer and the other party communicates acceptance of that offer.

Contracts can be in writing or made orally and can be entered into in a variety of ways, including:

- signing a document
- agreeing over the phone
- clicking an ‘I agree’ button on a web page
- starting to act in accordance with the contract, having communicated acceptance of the terms of the contract to the other party.

What is a consumer contract?

The unfair contract terms laws apply to ‘consumer contracts’ as defined by both the ACL and the ASIC Act.

Under the ACL, a ‘consumer contract’ is a contract for:

- the supply of goods or services or
- the sale or grant of an interest in land

to an individual who acquires it wholly or predominantly for personal, domestic or household use or consumption.

ACL reference: section 23 (3)

Under the ASIC Act, a similar definition of a consumer contract applies in relation to financial products and services.

ASIC Act reference: section 12BF

What types of contracts does the law apply to? continued

The information in this guide relates only to the business to consumer unfair contract terms law as set out under the Australian Consumer Law.

Amendments to the unfair contract terms law, which apply to business to business transactions, will take effect on 12 November 2016.

The ACCC has produced guidance on the applications of this new law, which is available at www.accc.gov.au/uct

What is a standard form contract?

The unfair contract terms laws do not define ‘standard form contract’. However, in broad terms, a standard form contract will typically be one that has been prepared by one party to the contract and is not subject to negotiation between the parties—that is, it is offered on a ‘take it or leave it’ basis. Standard form contracts are typically used for the supply of goods and services to consumers in many industries, including:

- telecommunications
- finance
- domestic building
- gyms
- motor vehicle rentals
- travel
- utilities.

In deciding whether a contract is a standard form consumer contract, a court may consider a range of relevant matters but must take into account:

- whether one of the parties has all or most of the bargaining power in the transaction
- whether the contract was prepared by one party before any discussion occurred between the parties about the transaction
- whether the other party was, in effect, required to either accept or reject the terms of the contract in the form in which it was presented
- whether the other party was given an effective opportunity to negotiate the terms of the contract
- whether the terms of the contract take into account the specific characteristics of the other party or the particular transaction.

ACL reference: section 27(2)

The Commonwealth Minister (responsible for competition policy and consumer affairs) may make regulations listing other matters that must be considered by a court in determining whether a contract is a standard form contract. No such regulation had been made at the time of this publication.

ACL reference: section 27(2)(f)

What if there is a dispute about whether a contract is standard form?

A consumer contract is presumed to be a standard form contract unless the business relying on the term proves otherwise. The business may present evidence to rebut the presumption in the particular circumstances, including that any of the factors a court must consider were not present in that particular circumstance. For example, a contract is not a standard form contract where a consumer can negotiate many of the terms.

Whether a contract is in fact a standard form contract is properly assessed on an individual case-by-case basis, having regard to the matters previously outlined.

What standard form consumer contracts or terms are exempt?

Summary

The unfair contract terms laws do not apply to standard form consumer contract terms that:

- define the main subject matter of a consumer contract
- set the upfront price payable under the contract or
- are required, or expressly permitted, by a law of the Commonwealth or a state or territory.

The following consumer contracts are excluded:

- certain shipping contracts
- contracts that are constitutions of companies, managed investment schemes or other kinds of bodies
- contracts covered by the *Insurance Contracts Act 1984* (Cth).

Terms excluded from the unfair contract terms laws

Terms that define the main subject matter of a contract

The unfair contract terms laws do not apply to terms that define the main subject matter of a contract. The main subject matter of a contract refers to the goods or services (including land, financial services or financial products) that the consumer is acquiring under the contract.

Where a consumer has decided to purchase particular goods or services, they cannot then challenge the fairness of a term that defines these goods or services, given that they had a choice of whether or not to make the purchase on the basis of what was offered. For example, a consumer cannot allege that a term is unfair on the basis that they have changed their mind about, or no longer require, the good or service that they have agreed to purchase.

The main subject matter of the contract may also include a term that is necessary in order for the product or service to be supplied.

EXAMPLE

- When a consumer agrees to buy a product over the internet and agrees to have that product delivered by post, the consumer cannot later challenge the delivery term as being unfair, if delivery is necessary for the product they agreed to buy to be supplied.
-

Terms that set the 'upfront price' payable under the contract

The unfair contract terms laws do not apply to the upfront price payable under the contract provided it was disclosed before the contract was entered into. The upfront price in a standard form consumer contract is the amount that the consumer agrees to pay under the contract, or to be paid for the supply, sale or grant under the contract. This includes the cash price of, or a series of payments for, a good or service or sale or grant of an interest in land, or an interest rate for credit.

ACL reference: section 48

The definition of upfront price in the laws would also cover a future payment or series of future payments provided these were disclosed at the time the contract is entered into. In considering whether a future payment, or a series of future payments, forms part of the upfront price, a court may take into account whether these payments were disclosed to the consumer in a transparent way. A court may also consider whether the consumer was made aware of the basis on which such payments would be determined, at or before the time the contract was made.

Reference: Explanatory Memorandum to the Trade Practices Amendment (Australian Consumer Law) Bill (No.1) 2009 (Cth), cl [2.73]

The upfront price would not include terms that impose fees and charges levied as a consequence of something happening or not happening at some point over the period of the contract. These fees and charges are not payments necessary for the provision of the supply, sale or grant under the contract, but are additional costs to the upfront price. For example, terms that impose additional fees for a default or exit would be excluded from the upfront price.

What standard form consumer contracts or terms are exempt? continued

In the context of a financial product or service—for example, a consumer credit agreement—the upfront price includes the amount borrowed and the interest payable and any fees disclosed at the time the contract is entered into. It does not include contingent fees, such as default fees. As a result, principal and interest cannot be challenged under the unfair contract terms provisions.

ASIC Act reference: section 12BI(2) and (3)

Terms that are required or permitted by a law

The unfair contract terms laws do not apply to terms of contracts that are required or expressly permitted by a law of the Commonwealth, or a state or a territory.

There are many examples of terms expressly permitted to be included in consumer contracts as a matter of public policy, some of which may be necessary to ensure the validity of specific transactions.

An example of such a term can be found in section 105 of the *Motor Dealers and Chattel Auctioneers Act 2014* (Qld)*, which provides that a contract for the sale of a used motor vehicle must contain a clause providing for a cooling-off period of one business day. The contract will be a consumer contract if it was entered into by an individual. This term could not then be found to be unfair, for example, on the grounds that the cooling off period of one business day was too short.

*Similar provisions are in force in some other states and territories

Terms that have been negotiated

If a term has been subject to negotiation between the parties and has not been presented on a ‘take it or leave it’ basis, it is less likely that it will be considered to be an unfair term. This is because a party would need to claim that a term that it had input into and was able to negotiate was unfair. It may also be the case that a contract with negotiated terms would not be found to be a standard form contract. In the case of *Director of Consumer Affairs Victoria v Craig Langley Pty Ltd & Matrix Pilates and Yoga Pty Ltd (Civil Claims)*, the Victorian Civil and Administrative Tribunal (VCAT) stated:

[T]erms of a consumer contract which have been the subject of genuine negotiation should not be lightly declared unfair. This legislation is designed to protect consumers from unfair contracts, not to allow a party to a contract who has genuinely reflected on its terms and negotiated them, to be released from a contract term from which he or she later wishes to resile.

Legal reference: Director of Consumer Affairs Victoria v Craig Langley Pty Ltd & Matrix Pilates and Yoga Pty Ltd (Civil Claims) [2008] VCAT 482 at [66]

Contracts excluded from the unfair contract terms laws

Some contracts are excluded from the unfair contract terms laws, including:

Shipping contracts

Shipping contracts that are excluded include:

- contracts of marine salvage or towage
- a charter party of a ship
- a contract for the carriage of goods by ship.

Shipping contracts are subject to a comprehensive legal framework (nationally and internationally) that deals with maritime contracts.

Constitutions of companies, managed investment schemes or other kinds of bodies

The unfair contract terms laws do not apply to contracts that are constitutions of companies, managed investment schemes or other kinds of bodies. A constitution is defined in the *Corporations Act 2001*.

Corporations Act reference: section 9

Insurance contracts

Unfair contract terms provisions do not apply to terms regulated by the *Insurance Contracts Act 1984*.

Insurance Contracts Act reference: section 15

Private health insurance contracts, state and Commonwealth government insurance contracts and re-insurance contracts (among others) are not regulated by the Insurance Contracts Act and are therefore subject to the unfair contract terms laws.

Insurance Contracts Act reference: section 9

When is a term ‘unfair’?

Summary

If a court finds a term is unfair, that term is void (treated as if it never existed). If the contract can operate without the unfair term, it will still be binding on all parties.

A term of a consumer contract is unfair if it:

- would cause a significant imbalance in the parties’ rights and obligations arising under the contract
- is not reasonably necessary to protect the legitimate interests of the party who would be advantaged by the term; and
- would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.

In deciding whether a term is unfair, a court may take into account the matters that it considers relevant but must take into account:

- the extent to which the term is transparent; and
- the contract as a whole.

Meaning of ‘unfair’

In deciding whether a term in a standard form consumer contract is unfair, the court or tribunal will apply the three–limbed test for unfairness. The test for unfairness, states that a term of a consumer contract is unfair if it:

- would cause a significant imbalance in the parties’ rights and obligations arising under the contract; and
- is not reasonably necessary to protect the legitimate interests of the party who would be advantaged by the term; and
- would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.

All three limbs of the unfairness test must be proven to exist, on the balance of probabilities, for a court to decide that a term is unfair.

ACL reference: section 24(1)

ASIC Act reference: section 12BG

A ‘significant imbalance’

In considering whether a term of a consumer contract would cause a significant imbalance in the parties’ rights and obligations, this would involve a factual assessment of the available evidence. The claimant has to prove that, on the balance of probabilities, a term of a consumer contract would cause a significant imbalance in the parties’ rights and obligations arising under the contract.

‘Not reasonably necessary’

A court must find that the term is not reasonably necessary to protect the legitimate interests of the party that would be advantaged by the term. The meaning of legitimate interest is open to interpretation by the court.

A term is presumed not to be reasonably necessary to protect the party’s interests unless that party proves otherwise. The party advantaged by the term needs to provide evidence that its legitimate interest is sufficiently compelling to overcome any detriment caused to the consumer, and that therefore the term was ‘reasonably necessary’.

Such evidence might include relevant material relating to a business’s costs and structure, the need to mitigate risks, or particular industry practices.

Detriment

The court would need to find that the term would cause detriment to a party if it were applied or relied on.

The court will consider whether the term causes detriment such as financial detriment, delay or distress for the consumer as a result of the unfair term. A claimant does not need to show proof of having suffered actual detriment, but must show more than a hypothetical case in which he or she would suffer detriment.

Reference: Explanatory Memorandum to the Trade Practices Amendment (Australian Consumer Law) Bill (No.2) 2010, paragraph 5.31

What will a court consider in determining whether or not a term is unfair?

In determining whether a term of a standard form consumer contract is unfair, a court may consider any matter that it thinks relevant. It must take into consideration:

- the extent to which the term is transparent; and
- the contract as a whole.

A transparent term

A lack of transparency in a term of a standard form consumer contract may cause a significant imbalance in the parties' rights and obligations.

A term is considered to be transparent if it is:

- expressed in reasonably plain language
- legible
- presented clearly
- readily available to any party affected by the term.

Again, it is important to note that only a court can determine what a transparent term is for the purposes of the unfair contract terms provisions. Examples of terms that may not be considered transparent include terms that are hidden in fine print or schedules, phrased in legalese or in complex or technical language, or are ambiguous or contradictory.

A term that is not transparent will not necessarily be unfair. Further, transparency alone will not necessarily overcome underlying unfairness in a contract term.

The United Kingdom's unfair contract terms provisions use the term 'plain and intelligible language' rather than 'transparent'.

Reference: The Unfair Terms in Consumer Contracts Regulations 1999 (UK) Regulation 6

Despite the difference in terminology, the finding of Lord Bingham in *Director General of Fair Trading v First National Bank* may provide some guidance:

'Transparency requires that the terms should be expressed fully, clearly and legibly, containing no concealed pitfalls or traps. Appropriate prominence should be given to terms which might operate disadvantageously to the customer.'

Legal reference: Director General of Fair Trading v First National Bank [2002] 1 AC 482; [2001] UKHL 52

The 'contract as a whole'

The fairness of a particular contractual term cannot be considered in isolation but must be assessed in light of the contract as a whole. Some terms that might seem quite unfair in one context may not be unfair in another. Conversely, if a particular term was decided by a court in one case to be fair, this does not mean it will always be fair.

An apparently unfair term may be regarded in a better light when seen in the context of other counterbalancing terms. For example, a potentially unfair term may be included in a consumer contract but may be counterbalanced by additional benefits—such as a lower price—being offered to the customer.

However, even if a contract contains terms that favour the consumer, such favourable terms may not counterbalance an unfair term if the consumer is unaware of them. Examples include implied terms, or terms hidden in fine print, in a schedule or in another document, or written in legalese. This may result in an information imbalance in favour of the business.

Legal reference: Director of Consumer Affairs Victoria v AAPT Ltd (Civil Claims) [2006] VCAT 1493

In considering the contract as a whole, a court will often need to balance the legitimate commercial interests of the business against the detriment the term would cause to a consumer if it were enforced.

Some businesses often include terms that allow them to make unilateral changes to the contract or limit the extent of what they are promising, with no resultant remedy for the consumer. These terms may sometimes appear to be unfair. However, businesses use these terms to manage risk and keep their costs low. For example, if a business had to renegotiate with every customer when its circumstances changed, this would be expensive and the business would probably need to increase its prices to offset the cost of potential renegotiations. In these circumstances, the management of risk and minimising cost may be viewed by a court as legitimate business interests. However, this will always depend on the particular circumstances.

Examples of the types of terms in a standard form consumer contract that may be unfair

About the examples

Examples of terms in a standard form consumer contract that a court may regard as unfair can be found in:

- the unfair contract terms laws and related regulations
- guidance from industry bodies; for example, the Telecommunications Consumer Protections Code (C628:2007) provides guidance for the telecommunications industry.

ACL reference: section 25

ASIC Act reference: 12BH

These examples provide guidance but do not prohibit the use of these terms or create a legal presumption that they are unfair.

For instance, many of the examples below are terms that allow a business to make changes to a contract on a unilateral basis, but these are not prohibited or presumed to be unfair. Parts 4 and 5 of the Uniform Consumer Credit Code include specific instances where contract terms may be unilaterally varied.

Any consideration of a contract term is subject to the test set out in section 24 of the ACL and section 12BG(1) of the ASIC Act. For instance, a term may be reasonably necessary to protect a business's legitimate interests.

ACL reference: section 24

ASIC Act reference: 12BG (1)

A term that effectively permits one party (but not another party) to avoid or limit performance of the contract

Terms that permit a business to avoid or limit meeting its obligations under a contract, such as an exclusion clause, have the potential to cause a significant imbalance in the parties' rights and obligations under the contract.

Terms may be less likely to be considered unfair if they are qualified in such a way that consumers understand when and how they are likely to be affected, or if the terms outline reimbursements available to the consumer when such terms are relied upon by the business. For example, an exclusion clause may not be unfair where a consumer understands the effect of the term or is given reasonable notice of its effect.

ACL reference: section 25 (1)(a)

ASIC Act reference: section 12BH (1)(a)

There are many instances where limitations of liability are expressly permitted by Commonwealth, state or territory legislation for public policy reasons—for example, terms that allow a business to limit its liability under the CCA for recreational services.

CCA reference: section 139A

CASE STUDIES

The following terms and conditions for a car parking site would be considered to be seeking to limit the company's liability:

Subject to any statutory rights which cannot be varied or exempted. You agree that the Operator shall not in any circumstances whatsoever be liable for any loss of or damage to your vehicle whether or not such loss or damage is caused by negligence or actions constituting fundamental breach of contract or the misdelivery of your vehicle to an unauthorised person or theft or vandalism or trickery and you further agree that if this exemption of liability does not apply then to the extent that you may lawfully do so you agree to limit the liability of the operator to pay you for the loss and damage to an amount not exceeding \$300.

The car parking sites involved acknowledged the terms were unfair and agreed with the consumer protection agency to change them accordingly.

A review of a motor vehicle repairer's contracts found a number of terms and conditions regarding limitation of liability—

I agree that you shall not be liable for fire, loss or damage to the vehicle whilst under your control or the loss of my contents thereof, equipment radio, tolls etc.

This limitation of liability was considered too broad and would potentially leave the consumer out of pocket even if the repairer drove the vehicle negligently and damaged it.

A term that allows one party (but not another party) to terminate the contract

Terms that allow a business to cancel a contract at will, without it being reasonably necessary to protect the business's legitimate interests or, for example, in response to an inconsequential breach of contract by the consumer, may be considered unfair by a court or tribunal.

ACL reference: section 25(1)(b)

ASIC Act reference: section 12BH(a)(b)

CASE STUDY

A mobile phone contract that had an immediate termination clause for any breach potentially had an application so broad that it was considered unfair. VCAT found:

A customer may have breached the agreement in a manner which is inconsequential, yet faces the prospect of having the service terminated. Further, if the customer changes his or her address (which will not necessarily be the address for receipt of billing information) this will also provide a ground to AAPT to terminate the Agreement. Because these provisions are so broadly drawn, and are one-sided in their operation, they are unfair terms within the meaning of the FTA.

Legal reference: Director of Consumer Affairs Victoria v AAPT Limited [2006] VCAT 1493 at [53]

Terms may also be considered unfair if they undermine the consumer's right to terminate the contract. Terms that state or imply that the consumer cannot cancel the contract under any circumstances or only with the business's agreement, regardless of the business's action or omission under the contract, may be considered unfair.

CASE STUDY

A telecommunications service provider's standard form consumer contracts contained a provision for the provider to cancel or suspend services in the event of 'excessive or unusual use'.

A regulator raised concerns with the provider, and subsequently the contracts were amended to provide a definition of excessive and unusual use, which satisfactorily addressed the regulator's concerns about this clause, and provided greater transparency to the consumer about when the provider's rights would be exercised to cancel or suspend the services.

A term that penalises one party (but not another party) for a breach or termination of the contract

Terms imposing penalties for trivial breaches of a contract by consumers may be unfair.

A term may also be considered unfair if it threatens sanctions over and above those that can be imposed by law. A penalty imposed by a contract should bear a reasonable relationship to the loss likely to be suffered by the business as a result of the breach or early termination, and should not be an arbitrary sum.

A term that imposes a penalty on a consumer for terminating a contract because the business has not complied with its obligations under the contract is likely to be considered unfair. An example of this may be where a business is unable to supply a product ordered by a consumer by the date specified in the contract, but also refuses to refund any money paid by the consumer if they attempt to terminate the contract due to the non-delivery.

ACL reference: section 25(1)(c)

ASIC Act reference: section 12BH(1)(c)

CASE STUDY

A review of the terms and conditions of major stadiums was conducted in Queensland. The terms that were considered unfair included:

Items may be confiscated at the discretion of management as per the 'Confiscated Items Policy'.

Certain items, such as cameras with lenses over 200 millimetres, were prohibited as a condition of entry. The 'confiscated items policy' sought to give management the right to confiscate a person's property without returning it or compensating the consumer for taking it.

The trader changed the term to request the consumer to 'check' the item for return upon exit or request the consumer to leave for breaching a condition of entry (that is, bringing in the prohibited item).

Any recordings or recording devices which are confiscated will become the property of the owner.

The legitimate interests of stadium management may have been to protect intellectual property rights. However, confiscating and taking ownership of recording devices such as phones and cameras was not seen as reasonably necessary to protect those interests.

Entrants voluntarily assume all risk of damage and loss, personal injury (fatal and non-fatal)... whatsoever and however arising (including by negligence).

This term seeks to limit liability for any loss or damage caused to consumers, even in the event of negligence of the stadium or its employees. Stadium management agreed this term needed to be changed.

A term that allows one party (but not another party) to vary the terms of the contract

A contract term that allows the business to alter the terms of the contract after it has been agreed may be unfair. This may operate similarly to a term that permits the business (but not the consumer) to avoid or limit performance of the contract. For example, if a term could require a consumer to accept increased costs or penalties, new requirements or reduced benefits, it may be considered unfair.

ACL reference: section 25(1)(d)

ASIC Act reference: section 12BH(1)(d)

CASE STUDY

A clause in a consumer contract allowing a health club operator to unilaterally change the location of the club within a 12 kilometre radius of the club's original location, among other things, was found to be unfair because 'it is a term to which the consumers' attention is not specifically drawn, and which may operate in a way in which the consumer may not expect and to his or her disadvantage'.

Legal reference: Director of Consumer Affairs Victoria v Trainstation Health Clubs Pty Ltd (Civil Claims) [2008] VCAT 2092

A unilateral variation clause may cause a significant imbalance in the rights of the parties to the contract.

A variation clause may be more likely to be acceptable if it permits either party to vary the contract and only for legitimate reasons stated in the contract which are clear and specific enough to ensure the power to vary cannot be used by the business at will to suit its interests, or in a manner that would be detrimental to consumers. For example, a unilateral variation clause may be acceptable where:

- the circumstances are clearly expressed in the contract
- it is reasonably necessary to protect the legitimate interests of the business, such as managing costs or risk; or
- where the consumer has a right to cancel the contract, without penalty, if the change is detrimental to the consumer.

CASE STUDY

In 2013, following action by the ACCC, the Federal Court declared that four clauses in ByteCard's standard form consumer contract were unfair contract terms and therefore void. ByteCard Pty Ltd is a business that provides internet and fixed-line telephony and web design services.

The clauses that were declared unfair enabled ByteCard to:

- » unilaterally vary the price under an existing contract without also providing the customer with a right to terminate
- » exclude liability, while providing ByteCard with virtually unlimited indemnity
- » unilaterally terminate the contract at any time with or without cause or reason.

The court declared that the clauses were unfair because they:

- » created a significant imbalance in the parties' rights and obligations
- » were not reasonably necessary to protect ByteCard's legitimate interests; and
- » if applied or relied upon, would cause financial detriment to a consumer.

Legal reference: Australian Competition and Consumer Commission v Bytecard Pty Limited (Federal Court of Australia, Jessup J, unreported, orders made 24 July 2013)

A term that allows one party (but not another party) to renew or not renew the contract

If a term of a standard form consumer contract only allows a business, and not the consumer, the right of renewal (or not), the business may be unfairly advantaged. The consumer may suffer detriment, including delay or distress, where a contract is not renewed or is automatically renewed without their consent.

For example, where the contract involved is a continuing contract and the business unilaterally decides not to renew the agreement without providing adequate notice to the consumer, the consumer may be caught unawares and suffer detriment because of the sudden absence of the product or service and the need to find a replacement. Likewise, the consumer could suffer detriment with the automatic renewal of a contract without their consent.

However, there may be instances where the automatic renewal of a contract is reasonably necessary and does not cause a significant imbalance between the parties. Automatic renewal for a reasonably short period is common practice in some industries and can benefit the consumer.

For example, ongoing service contracts, such as some utilities contracts, may benefit consumers with the business having a limited ability to renew a contract and continue supply. Provided that the consumer, prior to the expiration of the contract, is given the right not to have the contract renewed or is not required to pay a fee if they wish to withdraw from the agreement following the automatic renewal, the term may not be considered unfair.

ACL reference: section 25(1)(e)

ASIC Act reference: section 12BH(1)(e)

A term that allows one party to vary the upfront price payable under the contract without the right of another party to terminate the contract

In the ordinary course of business, a consumer would expect to receive the goods or services they were promised in exchange for providing the agreed price. A term allowing the business to unilaterally increase the price—varying one of the most important terms in the contract—has significant potential for unfairness.

In some cases, there may be a legitimate interest for including the term. An example of this may be a domestic building contract where the business is able to vary the up-front price based on the consumer opting to use a more expensive type of material or furnishing after the contract has been entered into. This term would need to be transparent and adequately drawn to the consumer's attention prior to entering into the contract.

In some circumstances, a term that allows the business to set or vary a price after the consumer has agreed to an amount may be unfair, even if there is a right to cancel. For example, a term allowing the business to charge a price on delivery of goods or services different from the price quoted to the consumer when ordering those goods or services may be unfair.

In some cases, a variation clause relating to the up-front price payable under the contract is less likely to be considered unfair if consumers are able to end the contract if they do not agree to the variation. To be genuinely free to end the contract, the consumer should not be worse off for having entered into the contract—for example, by experiencing financial loss such as forfeiting a prepayment. In most cases, however, the consumer should be entitled to receive the goods or services at the agreed price.

As always, whether or not a term that allows one party to vary the up-front price without the right of another party to terminate the contract is unfair will be subject to the court's application of the test for unfairness.

ACL reference: section 25(1)(f)

ASIC Act reference: section 12BH(1)(f)

CASE STUDY

A review by the ACCC of standard form contracts used by businesses trading online identified problematic terms allowing the business to alter the terms and conditions during the life of the contract. For example, the following term was identified as a concern in the standard form consumer contracts used by a major online retailer:

We may change or update this website and the terms and conditions at any time without providing you with prior notice.

The retailer amended this provision providing for due notice to be given to consumers; however, those amendments did not resolve the ACCC's concern in relation to changes being made to the terms and conditions after the sale is concluded:

We may change or update this website and the terms and conditions at any time by giving you notice as outlined below (by email, conventional mail or by posting it on the retailer's website).

When similar concerns were raised with other online businesses, their general approach was to resolve these concerns by amending such terms to provide balance to the contract, as follows:

For future orders, these terms may be different and so we recommend you read these terms carefully each time you agree to them during the ordering process.

We will not change any terms and conditions for an existing order that has been accepted by us; the terms and conditions that will apply to the order are the terms and conditions that applied at the time you placed the order.

A term that allows one party unilaterally to vary the characteristics of the goods or services to be supplied, or the interest in land to be sold or granted, or the financial goods or services to be supplied under the contract

A unilateral variation clause may allow a business to substitute a different product or service than the business originally agreed to supply to the consumer. This may conflict with the consumer's expectation of receiving a product or service that they agreed to purchase, not merely something similar or equivalent.

ACL reference: section 25(1)(g)

ASIC Act reference: section 12BH(1)(g)

CASE STUDY

A term in a contract for mobile phone services allowed one party to 'vary a Supplier or its products, or vary charges from time to time without notice to you [the consumer]'. VCAT found:

This term causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer. For example, it would enable AAPT to reduce the number of calls that a person could make pursuant to a prepaid mobile phone service which the person had entered into in good faith. This term was an unfair term.

Legal reference: Director of Consumer Affairs Victoria v AAPT Limited [2006] VCAT 1493 at [54]

If the intention of a unilateral variation clause is to permit changes that are limited in scope and the consumer understands and agrees to the changes in advance, it may be less likely to be considered unfair. This may involve:

- setting out clearly the variation that might be made and in what circumstances
- defining how far the variation can extend; or
- providing the consumer with the right to terminate the contract without penalty if the business cannot supply the product or service agreed to in the contract.

The ability to unilaterally vary the characteristics of the goods or services to be supplied may not be unfair where notice of such variation is given and the consumer is offered the option of terminating the contract for a period after the notice is given.

In some circumstances, there may be a legitimate interest for including the term. An example of this may be a provisional sum clause in a domestic building contract, where the consumer requests variations to the furnishing or material that is used.

A term that allows one party unilaterally to determine whether the contract has been breached or to interpret its meaning

A term that allows a business to reserve the right to determine whether it has performed its contractual obligations properly may be considered unfair. Such a term would allow the business to unfairly refuse to acknowledge that it has breached its obligations, thereby denying redress to the consumer. An example might be a term that limits any testing or inspection of an alleged faulty product to testing or inspection by the business. In this situation, it may be considered fairer for the term to provide for the product or service to be independently assessed.

Also, a term of a standard form consumer contract may be unfair where it allows a business to reserve the right to decide the meaning or interpretation of a contractual term. The business is effectively able to manipulate the contract to its best advantage in a way that may disadvantage a consumer. Such a term gives rise to the same objections as a unilateral right to vary terms.

ACL reference: section 25(1)(h)

ASIC Act reference: section 12BH(1)(h)

A term that limits one party's vicarious liability for its agents

Consumers often rely on what is said to them by a sales representative, employee or agent of a business before or when they are entering into a contract. A contractual term that seeks to disclaim the business's responsibility or liability for representations made to prospective consumers by its agents at the point of sale may be unfair.

Where limited liability terms are required or expressly permitted by a law of the Commonwealth or a state or territory, such terms will not come within the ambit of the unfair contract terms provisions.

ACL reference: section 25(1)(i)

ASIC Act reference: section 12BH(1)(i)

A term that allows one party to assign the contract to the detriment of another party without that other party's consent

If a business is sold, its contractual relationships with its customers are often 'assigned' to the purchaser of the business. In certain circumstances, this may be considered unfair if the assignment detrimentally affects a consumer's rights under those contracts.

ACL reference: section 25(1)(j)

ASIC Act reference: section 12BH(1)(i)

CASE STUDY

A term in a removalist contract that allowed the removalist company to 'assign its rights and the rights of any persons on behalf of whom it is acting, to collect all charges and payments from Clients to the Contractor' was unfair for the purposes of the *Fair Trading Act 1999* (Vic). VCAT stated that the term was unfair because it:

'has the object or effect of assigning rights in respect of the contract to an unidentified non-party' and because it 'creates uncertainty for the consumer because the 'Contractor' is not a party to the removalist services contract'.

Legal reference: Director of Consumer Affairs Victoria v Backloads.com Pty Ltd (Civil Claims) [2009] VCAT 754 at [4]

Alternatively, an assignment clause may be less likely to be considered unfair if it operates in circumstances where a consumer's rights under the contract will not be detrimentally affected by the assignment. For example, with respect to credit agreements, many lenders have a legitimate interest in assigning contracts under securitisation arrangements.

Where assignment clauses are required or expressly permitted by a law of the Commonwealth or a state or territory, such terms will not come within the ambit of the unfair contract terms provisions.

A term that limits one party's right to sue another party

A term which could be used—even if that is not the intention—to prevent or hinder a consumer from enforcing his or her rights against the business when the business has breached the contract may place the consumer at a significant disadvantage and may be considered unfair. Excluding or limiting a party's right to sue the business under a contract may in effect allow the business to act unreasonably or negligently towards the consumer without any legal consequences. This may be unfair. Terms that require a consumer to bring legal proceedings in a foreign court may also be unfair.

ACL reference: section 25(1)(k)

ASIC Act reference: section 12BH(1)(k)

A term that limits the evidence one party can present if taking legal action

Including a term in a contract that limits the evidence that a consumer can present in proceedings against the business may be unfair because it limits the consumer's legal rights or their perception of their legal rights in court proceedings. An example may be a term that limits presentable evidence to the contract itself and excludes any evidence on pre-contractual negotiations. While court rules may allow the presentation of such evidence in certain circumstances, consumers may not be aware of the rules of evidence and may be deterred from taking action against the business, including seeking legal advice, because of the term.

ACL reference: section 25(1)(l)

ASIC Act reference: section 12BH(1)(l)

CASE STUDY

A telecommunications business had the following term in its standard form consumer contract:

You acknowledge that you enter into this agreement entirely as a result of your own enquiries and that you do not rely on any statement, representation or promise by us or on our behalf not expressly set out in this agreement.

A regulator considered that this clause demonstrated significant non-compliance with the law. Following discussions with the regulator, the telecommunications business deleted the term from its standard form contract.

A term prescribed by the regulations

The Governor-General may make regulations setting out types of terms or terms that have a certain effect that may be unfair. Before recommending such regulations, the Commonwealth Minister (responsible for competition policy and consumer affairs) must take into consideration:

- the detriment that a term of that kind would cause to consumers
- the impact on business generally of prescribing that kind of term or effect
- the public interest.

No such regulations have been made as at the date of this publication.

ACL reference: sections 25(1)(m) and 25 (2)

ASIC Act reference: sections 12BH(1)(n) and 12BH (2)

A term that imposes the burden of proof on one party

The effect of this provision is similar to that of restricting the evidence that a consumer could rely on in court proceedings—it creates the potential for a consumer to be deterred from taking action against a business. For example, a term that requires a consumer to prove unreasonable or potentially unprovable elements of a dispute, such as the authority of a staff member of the business to make representations where such information is in the hands of the business and not the consumer, may be unfair.

ACL reference: section 25(1)(m)

ASIC Act reference: section 12BH(1)(m)

Enforcement of the law

Summary

Enforcement of the unfair contract terms laws is shared between the ACCC, ASIC and the state and territory consumer protection agencies. The agencies work together to ensure a consistent approach to compliance and enforcement.

Individual consumers can also seek to enforce their rights under the law.

Unfair terms in contracts for consumer goods and services

The unfair contract terms laws for consumer goods and services are enforced by both Commonwealth and state and territory consumer protection agencies.

At the Commonwealth level, the ACCC has responsibility for enforcing the unfair contract terms laws by taking action in the Federal Court (except in relation to financial services and products—see below). The states and territories also enforce these laws in their respective jurisdictions and can also take action in the Federal Court. The agencies work together to ensure a consistent approach to compliance and enforcement.

Unfair terms in contracts for financial products and financial services

ASIC is the Commonwealth regulator of financial products and services. ASIC has responsibility for enforcing the consumer protection provisions, including the unfair contract terms laws, in the ASIC Act in relation to financial products and services.

ASIC has released guidance for mortgage lenders that sets out how the National Credit Code and unfair contract terms provisions apply to mortgage early termination fees (exit fees). Regulatory Guide 220 *Early termination fees for residential loans: unconscionable fees and unfair contract terms* is available at www.asic.gov.au

From time to time, enforcement matters involve both general issues and issues relating to financial products and services. Functions can be delegated to the most appropriate agency to deal with a particular matter.

The role of the courts

The role of the courts is to determine whether a term in a standard form consumer contract is unfair. Once a term is declared by the court to be unfair, the term is void.

Regulatory agencies and individual consumers can apply to a court for a declaration that a term of a standard form contract is void.

Although regulators will ask businesses to co-operate by removing terms considered to be unfair, it is not the role of any regulator to endorse contract terms or to state categorically that they are unfair. Only a court can determine whether a term of a standard form consumer contract is unfair.

The court to which an enforcement action may be brought by a regulator or a consumer may differ depending on which agency takes action, or where the consumer and/or business are based.

Some state and territory consumer protection legislation also allows action to be brought in a tribunal rather than a court.

Remedies that may be sought

The inclusion of a term in a standard form contract that is declared to be unfair does not attract a pecuniary penalty.

However, a business that asserts that a term is legitimate or seeks to enforce or rely on it when it has been declared unfair by a court may be misrepresenting the true position to the consumer. This could be false or misleading conduct, in breach of section 29(1)(m) of the ACL. If so, the usual remedies, which include pecuniary penalties, would apply.

The first step for a regulator or a party to the contract in enforcing the unfair contract terms laws is to seek a declaration under s250 of the ACL that the contract term is unfair. If the contract can operate without the unfair term, the remainder of it will still be binding.

If a party to a contract seeks to apply or rely upon a term that a court has declared unfair, the court may grant:

- an injunction restraining the other party from acting upon the term
- compensation
- an order to provide redress to non-party consumers
- any other orders the court thinks appropriate.

Non-party consumer redress

The ACCC, state and territory regulators and ASIC have power under the ACL and the ASIC Act respectively to apply to the court to seek certain orders for the benefit of persons that are not parties to proceedings where:

- the respondent is a party to a consumer contract and is advantaged by a term of the contract that the court has declared to be an unfair term
- the declared term has caused or is likely to cause a class of people to suffer loss or damage
- the class includes people who have not been a party to enforcement action in relation to the declared term.

ACL reference: section 239

ASIC Act reference: section 12GNB

The orders that the court can make to redress the loss or damage suffered by non-party consumers include all or any of the following:

- declaring all or part of a contract to be void (either before or after the date that the order is made, including from its very beginning)
- varying a contract or arrangement as the court sees fit (either before or after the date that the order is made)
- refusing to enforce all or any of the terms of a contract or arrangement
- directing the respondent to refund money or return property to a non-party consumer
- directing the respondent, at their expense, to repair or provide parts for a product provided under a contract
- directing the respondent, at their expense, to provide specified services to the non-party consumer
- directing the respondent to terminate or vary an interest in land that was created or transferred by the contract.

State and territory consumer protection agencies may be able to take similar proceedings under the relevant legislation.

ACL reference: section 243

ASIC Act reference: section 12GNC

Can consumers take action?

The ACL and the ASIC Act both provide for consumers to commence private actions to enforce their rights or to recover loss or damage incurred for specific breaches of each Act.

Under the ACL and the ASIC Act, a party to a standard form consumer contract can apply to the court for a declaration that a term is unfair. If the court finds the term to be unfair, it can make a declaration that the term is void.

Ultimately, only a court can determine whether a term to a standard form consumer contract is unfair.

In some instances, unfair contract term disputes may be able to be resolved through external dispute resolution schemes.

ACL reference: section 250

ASIC Act reference: section 12GND

Glossary and abbreviations

TERM	DEFINITION
claimant	A person who brings a claim in court proceedings. Generally this will be a consumer or regulator.
Commonwealth minister (or minister)	The Commonwealth minister responsible for competition policy and consumer affairs.
injunction	An order by the court for a party to do, or to refrain from doing, certain acts.
non-party	Persons that are not parties to proceedings.
respondent	A person who refutes a claim brought in court proceedings. Generally this will be a business.
VCAT	Victorian Civil and Administrative Tribunal

Abbreviations

ACCC	Australian Competition and Consumer Commission
ACL	Australian Consumer Law
ASIC	Australian Securities and Investments Commission
ASIC Act	<i>Australian Securities and Investments Commission Act 2001</i> (Cth)
CCA	<i>Competition and Consumer Act 2010</i> (Cth)
VCAT	Victorian Civil and Administrative Tribunal

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