

australian
consumer law

Unfair contract terms

A GUIDE FOR BUSINESSES AND LEGAL PRACTITIONERS

This guide was developed by:

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- Australian Securities and Investments Commission
- Consumer Affairs Victoria
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- Consumer, Building and Occupational Services, Tasmania
- New South Wales Fair Trading
- Northern Territory Consumer Affairs
- Queensland Office of Fair Trading
- Western Australia Department of Commerce, Consumer Protection

Information:

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 1 November 2017.

The ACCC has produced guidance on the application of this new law, which is available at www.accc.gov.au/consumers/unfair-contract-terms

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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 Australian Consumer Credit Act 1988 and previous Commonwealth, state and territory consumer protection legislation. It is contained in Schedule 2 to the Australian Consumer Law Act 2011 (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.

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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

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

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 th
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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 lack of transparency

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.

Case 11-1582-DIE

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

Handwritten text, likely representing the terms and conditions of a car parking site. The text is mostly illegible due to blurring and is contained within a rectangular box.

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—

Handwritten text, likely representing the terms and conditions of a motor vehicle repairer's contracts. The text is mostly illegible due to blurring and is contained within a rectangular box.

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.

Article 17 of the Australian Consumer and Competition Act (2010)

Terms that allow a business to cancel a contract at will, without it being reasonably necessary to

Arbitration clauses (Consumer Credit Act 2008)

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: [13.19\(1\)](#)

ASIC ACFR reference: [13.19BH\(1\)](#)

CASE STUDY

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

Stadiums Queensland Pty Ltd v Queensland Rugby Union Ltd [2015] 1 Qd 121

Certain items, such as cameras with lenses over 100 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).

Stadiums Queensland Pty Ltd v Queensland Rugby Union Ltd [2015] 1 Qd 121

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.

Stadiums Queensland Pty Ltd v Queensland Rugby Union Ltd [2015] 1 Qd 121

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.

Arbitration clauses (Consumer Credit Act 2008)

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: [13.19\(1\)](#)

ASIC ACFR reference: [13.19BH\(1\)](#)

CASE STUDY

A clause in a consumer contract allowing a health club operator to unilaterally change the location of the club within a 10 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'.

Lifestyle Fitness Pty Ltd v Duffell [2015] 1 Qd 121

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

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

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 to (a)1.7 (l)-86.7 (l).h w aoitose

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 18(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 section 12 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 consumers

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, s 12(1)(a) : 12(1)(a)

ASIC Act, s 12(1)(a) : 12(1)(a) GNB

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, s 12(1)(b) : 12(1)(b)

ASIC Act, s 12(1)(b) : 12(1)(b) GNC

Can consumers take action?

The ACL and the ASIC Act both provide for consumers to commence private actions to

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

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ACCC Australian Competition and Consumer Commission

ACL Australian Consumer Law

ASIC Australian Securities and Investments Commission

ASIC Act Australian Securities and Investments Commission Act 2001 (Cth)

CCA Competition and Consumer Act 2010 (Cth)

CA Victorian Civil and Administrative Tribunal



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