



This guide was developed by:

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- Australian Competition and Consumer Commission
- Australian Securities and Investments Commission
- Consumer Affairs and Fair Trading Tasmania
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- Consumer and Business Services South Australia
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This guide will help legal practitioners and consumer advocates recognise unfair terms in contracts for window and floor coverings (curtains, blinds, carpets and hard floor coverings)<sup>1</sup>.

It will also help them understand how Australian consumer protection agencies apply unfair contract term legislation to such contracts.

This legislation is part of the Australian Consumer Law (ACL) and reproduced in Chapter 3 of this guide. It gives consumers, and the agencies that protect their interests, a new avenue to address the content of consumer contracts.

This guide is based on a Consumer Affairs Victoria review of window and floor covering agreements. The review was prompted by complaints about retailers in this industry. A large number of these complaints were about the fairness of terms in consumer contracts.

The guide explains why consumer protection agencies consider some common terms unfair, outlines the basis on which they are likely to take enforcement action, and includes examples of types of terms that may be considered unfair. These examples are not a definitive list of what is unfair under the legislation. Ultimately, courts and tribunals decide if a term is



The legislation sets out some examples of possible unfair terms.

This includes terms that permit the supplier but not the consumer to:

- > avoid or limit performance of the contract



The following terms would normally be considered as unfair:

- > Please note you are hereby accepting the C.O.D. payment to the layer as detailed above, and all the conditions on the face hereof.
- > You will be required to pay the balance of the price on collection of the goods or prior to installation of the goods.

When a consumer defaults on payment, the supplier is entitled to charge reasonable costs for collecting the debt.

Consumer Affairs Victoria found examples of terms that sought to charge defaulting consumers for a number of costs considered unfair. These included solicitor-to-client costs in legal proceedings or commissions paid to debt collectors.

The fair interest rate on overdue amounts is considered to be the rate prescribed by penalty interest rate legislation in each state and territory as applying to judgement debts. The contract rate should not exceed it, unless a supplier can show that a higher rate is not unfair – for instance, because the higher rate represents the supplier's actual cost-of-funds.

The following terms would normally be considered unfair:

- > Any collection charges, legal expenses and commissions incurred in attempting to recover payment shall be payable by the customer.
- > If the customer defaults in payment by the due date then all money becomes immediately due and payable and the company may, without prejudice to any other remedy available to it:

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## Consumer

A number of terms restricted a consumer's right to cancel their contract, without penalty, if the supplier was unable to fulfil the entire order or if there was a delay in supplying the goods as agreed.

A failure or inability of the business to supply a substantial or significant part of the order is a fundamental breach of the contract. It entitles the consumer to cancel the whole contract without penalty, even if the failure or inability is beyond the supplier's control. A term that only allows the consumer to cancel the affected part of a contract is considered unfair.

Examples of such terms are:

- > In the event of the company be2Tr267pply a





Most contracts reviewed by Consumer Affairs Victoria warned consumers that the installed product might differ from the sample shown before they entered into the contract. Some also sought to exclude liability for such variations, for example:

- > Variations of shade can occur in the manufacturing of different materials. [Supplier] will take every care to obtain the best effect but cannot assume responsibility for variations in colour or grain structure.
- > Some cut-pile carpets may exhibit an appearance change of random light and dark areas after installation. This is known as shading, tracking, pile reversal or watermarking and is caused by movement of the carpet fibres in different directions as the result of normal use. The customer acknowledges that this does not indicate the floor coverings are defective.
- > Whilst manufacturers make every effort to match dye lots, the customer acknowledges that colour shades may vary from the samples shown.
- > [Supplier] accepts no responsibility for changes in length shrinkage or dropping of material, and [supplier] shall not be liable in any way for loss or damage as a consequence therefore. Any variations in quality shall be the responsibility of goods, the

## 2. Common unfair terms in window and floor covering agreements

### Unilateral variation powers

Some contracts attempt to provide for problems due to errors or misunderstandings in the quoting process. They do this by inserting a unilateral variation power, which gives them the power to change the contract details – for example:

- > Any errors or omissions in quantities and/or measurements made by [supplier] are excepted, and [supplier] reserves the right to make any variations to the quotation, the order and the price arising out of any such errors or omissions.

Consumer protection agencies have serious concerns about unilateral variation powers in short-term, one-off contracts such as those it reviewed. They can be used to defeat the legitimate expectations of the consumer, based on a signed contract<sup>4</sup>.

Best practice is to discuss the error or misunderstanding with the consumer and together agree to contract changes and put them in writing or, if that proves impossible, to allow the consumer to cancel the contract, without penalty.

### Clear access to windows

Some suppliers quoted prices on the assumption that consumers would provide them with clear access to windows, remove existing floor coverings or otherwise prepare the workplace.

A supplier should make it clear to the consumer, before work starts, what they will charge for pre-installation work. General statements that consumers will have to carry the cost are insufficient. This should be part of the quotation, so the consumer can choose not to proceed if the cost is unacceptable.

The following terms show the need for transparency:

- > The price for installation of the goods specified in the quotation is subject to the windows being clear of existing coverings and the provision of reasonable access to the windows at the time of installation. If at the time of installation, the windows are not clear of existing coverings and reasonable access is not provided to us to effectively and efficiently install the goods then we reserve the right to adjust the installation price specified in the quotation to cover our reasonable costs of removing the existing coverings and to obtain reasonable access to the windows.
- > It is the customer's responsibility to ensure there is a suitable fixing point prior to installation. Items to be cleared from in front of the window to allow a one metre access to the window at the time of installation. Where customers are responsible for the removal of any existing window coverings, a charge will apply if a contract fitter is required to remove any existing window coverings on the actual date of installation.

This also applies to terms that allow for contingencies, such as:

- > installation of window coverings at a height over three metres may be subjected to additional charges for scaffolding, high ladders and safety equipment.

<sup>4</sup> In longer-term contracts, unilateral variation powers can often be justified because of the likelihood of a change of circumstances during the term of the contract. In these cases, any unfairness to the consumer can usually be ameliorated by allowing the consumer to cancel, without penalty, if they do not accept a change.

## 2. Common unfair terms in window and floor covering agreements

Several contracts contained terms that claimed to deny all liability for damage arising from the consumer's failure to identify problems with the work site – for example:

- > it is the customer's responsibility to advise the retailer of any defects or irregularities in the subfloor prior to installation of the floor coverings. No loss or damage will be accepted by the retailer for any reason whatsoever as a result of defects in the subfloor.

It is not unfair to require consumers to advise the supplier of matters within their knowledge. However, these terms are considered unfair to the extent that they absolve the supplier from responsibility to ask the consumer relevant questions before starting work and to apply expertise in assessing the site.

These terms claim to absolve the supplier's liability for any damage that its installers cause. This conflicts with the consumer's statutory right to have services provided with due care and skill, and which are reasonably fit for their purpose.

**E** 'Entire agreement' terms state that the entire agreement between the parties is contained in the written contract. They deny the power of any associated oral agreement or any oral representations made to the consumer, by the supplier or its employees and agents.

These terms are normally ineffective in legal cases. But they can mislead or deter consumers from exercising their rights. They are considered an unfair limitation on:

- > a consumer's right to sue the supplier
- > the evidence a consumer can lead in proceedings on the contract.

Consumer protection agencies have similar concerns about terms that:

- > require the consumer to acknowledge that no representations have been made that are not in the written contract, or
- > specify that the only valid representations, amendments or waivers are those in writing signed by a senior officer of the supplier.

It is acceptable for a contract to specify that such things must be in writing and signed by a senior officer of the supplier. It is not acceptable that these are the only valid representations, amendments or waivers.

For example:

- > it is agreed between the parties that the terms and conditions constitute the entire agreement between the parties and that oral statements made prior to this agreement neither induced its execution nor form part of it.

## 23

- (1) A term of a consumer contract is void if:
  - (a) the term is unfair; and
  - (b) the contract is a standard form contract.
- (2) The contract continues to bind the parties if it is capable of operating without the unfair term.
- (3) A consumer contract is a contract for:
  - (a) a supply of goods or services; or
  - (b) a sale or grant of an interest in land;to an individual whose acquisition of the goods, services or interest is wholly or predominantly for personal, domestic or household use or consumption.

## 24 M

- (1) A term of a consumer contract is unfair if:
  - (a) it would cause a significant imbalance in the parties' rights and obligations arising under the contract; and
  - (b) it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and
  - (c) it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.
- (2) In determining whether a term of a consumer contract is unfair under subsection (1), a court may take into account such matters as it thinks relevant, but must take into account the following:
  - (a) the extent to which the term is transparent;
  - (b) the contract as a whole.

- (3) A term is transparent if the term is:
  - (a) expressed in reasonably plain language; and
  - (b) legible; and
  - (c) presented clearly; and
  - (d) readily available to any party affected by the term.
- (4) For the purposes of subsection (1)(b), a term of a consumer contract is presumed not to be reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term, unless that party proves otherwise.

## 25 E

- (1) Without limiting section 24, the following are examples of the kinds of terms of a consumer contract that may be unfair:
  - (a) a term that permits, or has the effect of permitting, one party (but not another party) to avoid or limit performance of the contract;
  - (b) a term that permits, or has the effect of permitting, one party (but not another party) to terminate the contract;
  - (c) a term that penalises, or has the effect of penalising, one party (but not another party) for a breach or termination of the contract;
  - (d) a term that permits, or has the effect of permitting, one party (but not another party) to vary the terms of the contract;
  - (e) a term that permits, or has the effect of permitting, one party (but not another party) to renew or not renew the contract;
  - (f) a term that permits, or has the effect of permitting, one party to vary the upfront price payable under the contract without the right of another party to terminate the contract;

- (g) a term that permits, or has the effect of permitting, 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, under the contract;
  - (h) a term that permits, or has the effect of permitting, one party unilaterally to determine whether the contract has been breached or to interpret its meaning;
  - (i) a term that limits, or has the effect of limiting, one party's vicarious liability for its agents;
  - (j) a term that permits, or has the effect of permitting, one party to assign the contract to the detriment of another party without that other party's consent;
  - (k) a term that limits, or has the effect of limiting, one party's right to sue another party;
  - (l) a term that limits, or has the effect of limiting, the evidence one party can adduce in proceedings relating to the contract;
  - (m) a term that imposes, or has the effect of imposing, the evidential burden on one party in proceedings relating to the contract;
  - (n) a term of a kind, or a term that has an effect of a kind, prescribed by the regulations.
- (2) Before the Governor-General makes a regulation for the purposes of subsection (1)(n) prescribing a kind of term, or a kind of effect that a term has, the minister must take into consideration:
- (a) the detriment that a term of that kind would cause to consumers; and
  - (b) the impact on business generally of prescribing that kind of term or effect; and
  - (c) the public interest.

- (1) Section 23 does not apply to a term of a consumer contract to the extent, but only to the extent, that the term is a term of a kind, or a term that has an effect





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