

Unfair Contract Terms

Legal information for community organisations

This fact sheet covers:

- ✔ Who is covered by the Unfair Contract Term protections?
- ✔ What is an unfair contract term?
- ✔ What do you do if you think a term in your contract is unfair?

Community organisations that are small businesses may argue that a term of a standard form contract is “unfair”. If this can be demonstrated, the organisation may seek for the term to be void, that is, not valid or legally binding. This would prevent the other party (to the contract) from being able to enforce its right, or from you having to satisfy the obligation in the contract.

The Australian Consumer Law (set out in Schedule 2 of the *Competition and Consumer Act 2010 (Cth)*) (ACL) regulates a range of activities in trade and commerce and ensures individuals and, in some contexts, small businesses benefit from certain legal protections when receiving goods and services in Australia. Under the ACL, consumers and small businesses are protected from having to agree to unfair contract terms in standard form contracts (**Unfair Contract Terms**).

The Australian Competition and Consumer Commission (**the ACCC**) oversees and enforces the protections available to persons under the Australian Consumer Law (ACL). For more information about the ACL, see the Not-for-profit Law Information Hub at www.nfplaw.org.au/advertising.

NOTE

On 12 November 2016 the Unfair Contract Term protections were extended to apply to small businesses (before then they only applied to individuals). The prohibitions against Unfair Contract Terms are set out in Part 2-3 of the ACL.

Who is covered by Unfair Contract Terms?

The Unfair Contract Term provisions under the ACL apply to:

- ✔ **standard form contracts** relating to the supply of goods or services or the sale or grant of an interest in land
- ✔ where at least one party to the contract is a **small business**, and
- ✔ the **upfront price** payable under that contract is:
 - \$300,000 or less, where the contract term (duration) is up to 12 months, or
 - \$1,000,000 or less, where the contract term is greater than 12 months, and
- ✔ where no exemptions apply.

These concepts are discussed further below. Work through the following questions to help determine whether your organisation can benefit from Unfair Contract Term protections.

STEP 1 - Has our organisation entered into or is it contemplating a **standard form contract**?

Generally, a “standard form contract” is one that has been prepared by one party without any genuine negotiation between the parties about its terms.

A contract is presumed to be a standard form contract, unless proven otherwise. Generally, contracts used to do the following are considered standard form contracts:

- ✓ supply goods or services to small businesses,
- ✓ acquire goods or services from small businesses, or
- ✓ sell, grant or acquire an interest in land to/from small businesses.

In circumstances where it is not as clear, a court may need to decide whether a contract is standard form and in doing so, 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 any real opportunity to negotiate the terms of the contract, and
- whether the terms of the contract take into account the specific characteristics of the other party or the particular transaction.

EXAMPLES

Common scenarios where you will receive standard form contracts are:

- contracts available online that you must accept before being able to receive the goods or services (ie. an online application for internet services that requires you tick a box that say “I agree to these terms”)
- terms that are pre-recorded and played to you over the phone when taking up a service (ie. a utility contract that is entered into by telling the operator “I accept” after hearing those terms being played), or
- a printed set of terms and conditions that are handed to you over the counter without being tailored to you (ie. opening a deposit account and being handed a terms and conditions booklet).

STEP 2 - Is our organisation considered to be a **small business**?

Under the ACL, a ‘small business’ is defined as a business that employs less than 20 people at the time the contract is entered into (not including casual employees unless employed on a regular/systematic basis).

STEP 3 - Is an upfront price payable?

The 'upfront price' means any payment for the supply, sale or grant under the contract, which is disclosed before or at the time the contract is entered into. This excludes any payment that is contingent on the occurrence or non-occurrence of a particular event.

NOTE

Remember the upfront price payable must be:

- \$300,000 or less, where the contract term (duration) is up to 12 months, or
- \$1,000,000 or less, where the contract term is greater than 12 months.



STEP 4 - Do any exclusions apply?

The following contracts are exempt from the Unfair Contract Term protections:

- contracts entered into before 12 November 2016 (unless renewed on or after this date)
- shipping contracts
- constitutions of companies, managed investment schemes or other kinds of bodies
- certain insurance contracts (e.g. car insurance), and
- contracts in sectors exempted by the Minister – no sectors are currently exempt.

What is an “Unfair Contract Term”?

A term in a standard form contract is “unfair” if it:

- 1. causes a significant imbalance in the parties' rights and obligations**
- 2. is not reasonably necessary to protect the legitimate interests of the party advantaged by the term, and**
- 3. would cause detriment (in other words, harm, whether financial or otherwise) to a party if relied on.**

In assessing this, a court will consider:

- the contract as a whole (in other words, the overall rights and obligations of each party under the contract), and
- the transparency of the relevant term (for example, whether the term is presented clearly and expressed in reasonably plain language, and whether it was brought to the other party's attention).

Terms that are more likely to be considered unfair are those that allow one party, but not the other party to:

- limit liability (legal responsibility for something happening)
- renew or not renew the contract
- vary the contract
- terminate the contract
- vary the characteristics of what is supplied

- avoid or limit their obligations under the contract, or
- determine if a breach has occurred or impose a penalty for a breach or termination.

Generally, if a court finds that a term is unfair, it will be declared void and the rest of the contract will continue to bind the parties to the extent it is capable of operating without the unfair term. However, in some circumstances, if it can be shown there is a legitimate business need for the term, it may be kept in the contract despite it being an unfair term (see examples below).

EXAMPLE ONE

Your organisation purchases telecommunication services from a well-known provider (the Supplier):

- ✘ *This agreement can be terminated by the Supplier at any time without notice. On termination your services will cease and all outstanding fees are due and payable = unfair contract term.*
- ✔ *In the event the Supplier reasonably suspects fraud this agreement can be terminated by the Supplier at any time without notice. On termination your services will cease and all outstanding fees are due and payable = not an unfair contract term.*

Rationale: It is generally considered a legitimate business need for service providers to be able to cease providing services to protect their business against fraud.

EXAMPLE TWO

Your organisation engages a business (the Supplier) to administer an employee assistance program in your organisation (onsite).

- ✘ *This agreement can be varied by the Supplier by notice on its website (including price) and the Customer shall have no right to terminate = unfair contract term.*
- ✔ *In the event of safety concerns, this agreement may be varied by the Supplier on providing thirty (30) days' notice in writing to the Customer to address those safety concerns. The Customer has the right to terminate the agreement in the event that the change in service does not satisfy the reasonable business needs of the Customer = not an unfair contract term.*

Rationale: It is generally considered a legitimate business that service providers need to ensure the safety of their staff when they are on third party premises, ie. the requirement to introduce terms regarding the standard of equipment and appropriateness of the premises so that their staff are protected from harm at all times.

EXAMPLE THREE



Your organisation wants to be appointed as a subcontractor to another organisation (the counter-party) who offers services to the Government or a large organisation (the end customer) under a head agreement. The subcontract contains flow down provisions from the head agreement that are potentially unfair.

You are keen to act as a subcontractor and provide services for the benefit of the end customer. However, the nature of the terms doesn't give your organisation the rights you'd typically want to protect your business.

Recommended approach: In this scenario, sub-contracts are often provided on a "take it or leave it" basis with no room for negotiation. Should you raise your Unfair Contract Term protections the counter-party will be unlikely to negotiate the agreement. Practically, signing the agreement won't waive your rights at law, so your protections will continue to exist. Conversely, the counter-party may argue that it is a legitimate interest for the flow down provisions to be imposed but that argument will become weaker the more unfair the term. As yet, this scenario has not been tested before the courts. Therefore, the likely outcome of a dispute of this nature is unclear. Your organisation should think carefully about whether it's in a position to comply with the terms, what effect this will have on the operations of the your organisation and whether you raise the issue with the counter-party.

The below terms are **not** considered "unfair":

- terms that define the main subject matter of the contract
- terms that set the upfront price payable, and
- terms that are required or expressly permitted by a law of the Commonwealth, or a state or a territory (eg. permitted under the Franchising Code or another prescribed industry code).

What do you do if you think a term in your contract is unfair?

It is important to carefully read and understand all terms of any contract you are looking to enter. If you believe a term is unfair, you can:

- ask the other party to remove the term or amend it so it is no longer unfair
- contact your local state or territory consumer protection agency (see Resources section), which can provide you with information about your rights and options
- if the contract relates to a financial product or service, contact the Australian Securities and Investments Commission (**ASIC**), or
- talk to a lawyer if the matter cannot be resolved.

NOTE

You can't automatically terminate a standard form contract just because one clause is "unfair". The rest of a contract will continue to bind both parties to the extent it is capable of operating without the unfair term.

CAUTION

A third party may not be receptive to having their terms and conditions challenged as being an "unfair contract term". If you challenge the term before you enter into the agreement it may lead to lengthy time delays in getting your service from that provider. Be prepared for this operational challenge.



TIP

If your organisation entered into a contract after 12 November 2016 and have now realised some terms may be unfair, don't despair the law protects you at all times of the contracting process so it's not too late to approach third party about your concern.



Resources

Related Not-for-profit Law Resources

The Not-for-profit Law Information Hub at www.nfplaw.org.au provides further information on the following related topics

✔ Intellectual Property – www.nfplaw.org.au/IP

This page features a Guide to Intellectual Property Law covering copyright, moral rights, trade marks, patents, designs and confidential information.

✔ Important agreements – www.nfplaw.org.au/agreements

This section of the Information Hub provides resources to help organisations navigate contracts, government funding agreements, IT agreements and leases.

✔ Advertising – www.nfplaw.org.au/advertising

This page looks at some of the common law issues which may arise for community organisations when advertising and raising money.

Related Resources

✔ The ACCC website at www.accc.gov.au provides further information on this topic:

- [Unfair Contract Terms](#)
- [Determining whether a contract term is unfair](#)

✔ Australian Consumer Law Guide

For a complete guide on key terms read “[Unfair Contract Terms: A guide for businesses and legal practitioners](#)” produced in 2016 by various state regulators.

Related legislation

✔ [Competition and Consumer Act 2010 \(Cth\)](#)

This is the Act that contains the Australian Consumer Law that regulates fair trading in Australia including the Unfair Contract Term provisions.

✔ [Competition and Consumer Regulations 2010 \(Cth\)](#)

These Regulations set out the details to the laws contained in the Competition and Consumer Act 2010 (Cth).

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