

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 (or operate) small businesses may be protected against a term of a standard form contract that is 'unfair'.

If the organisation can show a term is unfair, it may assert that the term is void (that is, not valid or legally binding), or seek a Court declaration to that effect. If a term is void, the party seeking to benefit from the term can't enforce or rely on it, and the specific term would be removed from the rest of 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.

The ACL protects consumers and small businesses in Australia from unscrupulous or unethical business practices, such as being misled or deceived. Under the ACL, consumers and small businesses are protected from unfair contract terms in standard form contracts (**Unfair Contract Terms**).

At a national level the Australian Competition and Consumer Commission (**ACCC**) oversees and enforces the protections available to consumers and small businesses under the ACL. Mirror legislation enforced by the fair trading bodies in the states and territories also enforce the ACL, including the protections against unfair contract terms.



Related Not-for-profit Law resource

For more information about the ACL, see [our webpage on advertising](#).



Note

From 12 November 2016 the Unfair Contract Term protections were extended to apply to small businesses (before then they only applied to individuals). From 4 April 2021, the Unfair Contracts Terms protections were further extended to apply to insurance contracts.

There are also **separate proposals** to change the definition of small business contract to:

- remove the current limit on upfront price payable under the contract (currently not more than \$300,000 for a contract with a duration of up to 12 months, or \$1 million for a contract with a duration of more than 12 months), and
- to allow a business to rely on the Unfair Contract Term protections if it employs up to 100 employees (currently 20) or its annual turnover is no more than \$10 million

Who is covered by Unfair Contract Terms?

The **business to business** unfair contracts terms provisions under the ACL apply to:

- ✓ **standard form contracts** entered into or renewed on or after 12 November 2016 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**' as defined
 - ✓ where 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

Current exemptions include contracts for shipping of goods, salvage, towage (shipping contracts).



Note

Insurance contracts regulated under the *Insurance Contracts Act 1984* (Cth) (including both general and life insurance contracts) which are entered into on or after 5 April 2021, are now subject to the Unfair Contract Terms protections. This also includes if a contract was renewed or varied after 5 April 2021.

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, pre-printed or 'tick box' type contracts in a standard form (including online terms and conditions and have not been negotiated) are considered to be standard form contracts if they are used to:

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

In determining whether a contract is a standard form contract, a court will consider whether:

- one of the parties has all or most of the bargaining power in the transaction
- the contract was prepared by one party before any discussion occurred between the parties about the transaction
- 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 (that is, the contract was presented on a 'take it or leave it' basis)
- the other party was given any real opportunity to negotiate the terms of the contract, and
- the terms of the contract take into account the specific characteristics of the other party or the particular transaction



Examples

Common scenarios where you may receive standard form contracts are:

- contracts available online that you must accept before being able to receive the goods or services (for example, an online application for internet services that requires you to tick a box that says 'I agree to these terms')
- terms that are pre-recorded and played to you over the phone when taking up a service (for example, 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 (for example, opening a deposit account or renting a car 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 or systematic basis).

Note – there is a proposal to change this to less than 100 people.

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.

Not all contracts have an upfront price. You should seek advice if you think your contract may come under the unfair terms law.



Note

The upfront price payable currently 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

There is a proposal to remove this requirement.

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, 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 is:

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

In assessing whether a term is unfair, a court will consider:

- the contract as a whole, including how the relevant term operates with the other terms of the contract and 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)

The appropriate time to assess unfairness for the purpose of the ACL is the time at which the contract is formed (not when the term is relied on later).

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

- limit or waive 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



Note

The ACCC can't declare a term of a contract which is 'unfair' to be void and enforceable – only a Court can do that.



Generally, if a court finds that a term is unfair, the term 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 (ie, the 'unfair' term will be removed).

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 the examples below).



Example – 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 stop immediately and all outstanding fees are due and payable. You may also lose the deposit you paid at the start of the contract without any right to recover it.

This type of unilateral termination term is likely to be an 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 stop and all outstanding fees are due and payable.

This type of termination term is less likely to be an unfair contract term

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

Other types of potentially 'unfair' terms in standard form contracts include:

- automatic rollover clauses (including where cancellation fees are high for opting out), and
- indemnity clauses requiring the small business to indemnify the Supplier for any loss even where the small business has not contributed to the loss



Example – 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 will have no right to terminate.

This is likely to be an unfair contract term.

- ✓ In the event of safety concerns, this agreement may be varied by the Supplier on providing thirty 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.

This is less likely to be an unfair contract term

Rationale: It's generally considered a legitimate business need that service providers must 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 – your organisation wants to be appointed as a subcontractor to another organisation (the other 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.

Proposed approach: Sub-contracts are often provided on a 'take it or leave it' basis with no room for negotiation. If you raise your Unfair Contract Term protections with the other party, the other party is unlikely to negotiate the agreement it has with the Government, or you. Practically, signing the agreement won't waive your rights at law, so your Unfair Contract Term protections will continue to exist – but your most direct claim is against the other party not the head contractor. Your organisation should think carefully about whether it's in a position to comply with the terms being imposed on it as sub-contractor, what effect this will have on the operations of your organisation and whether you raise the issue with the other party before signing a sub-contract.



Real example - JJ Richards

JJ Richards is a large privately-owned waste management company in Australia which provides recycling, sanitary and green waste collection services.

JJ Richards' standard form contracts with small businesses contained the terms which had the effect of:

- binding customers to subsequent contracts unless they cancelled the contract within 30 days before the end of the term
- allowing JJ Richards to unilaterally increase its prices
- removing any liability for JJ Richards where its performance is 'prevented or hindered in any way'
- allowing JJ Richards to charge customers for services not rendered, even when caused by reasons beyond the customer's control
- allowing JJ Richards to suspend its service but continue to charge the customer if payment was not made after seven days
- creating an unlimited indemnity in favour of JJ Richards, and
- preventing customers from terminating their contracts if they had payments outstanding and entitling JJ Richards to continue charging customers equipment rental after termination of the contract

The Court declared that the above terms were 'unfair' and consequently void.

The Court said that these terms tended to exacerbate each other, increasing the overall imbalance between the parties and risk of detriment to JJ Richards' customers.

JJ Richards consented to court orders restraining it from relying on the unfair terms in existing small business contracts and from using the terms in future contracts with small businesses.



Note

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 (for example, 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's 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 fair trading body (see the resources section below), 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 can't be resolved



Caution

A third party may not be receptive to having their terms and conditions challenged as contained an 'unfair contract term'. If you challenge the term before you enter into the agreement, this may lead to delays in getting your service from that provider, and you might want to think about other service providers that don't have the unfair term.

Be prepared for this operational challenge.



Tip

If your organisation entered into a contract after 12 November 2016 and has 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 the third party about your concern and seek to have it rectified.

Resources

Not-for-profit Law resources

The [Not-for-profit Law website](#) provides further information on the following related topics:

▶ [Intellectual Property](#)

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

▶ [Important agreements](#)

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

▶ [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](#) 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.

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.

The ACL is found in Volume 3, Schedule 2 of the Act. The Unfair Contract Term provisions are found in Part 2-3 of the ACL.

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

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