

# 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 happens if a contract term is unfair?
- ▶ 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’s 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 is removed from the rest of the contract.

For contracts entered into, renewed or varied on or after 9 November 2023, that party could also face financial penalties



### Disclaimer

This fact sheet provides general information about unfair contract terms under the *Competition and Consumer Act 2010* (Cth).

This fact sheet does not cover unfair contract terms in relation to financial products and services, which are regulated under the *ASIC Act 2001* (Cth).

The information in this fact sheet is intended as a guide only and is not legal advice. If you or your organisation has a specific legal issue, you should seek legal advice before deciding what to do.

Please refer to [the full disclaimer](#) that applies to this fact sheet.

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.



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



### Note – reforms to the Unfair Contract Terms

On 9 November 2023, reforms to the Unfair Contract Terms came into effect.

These reforms included:

- **expanding the type of small businesses covered** – the Unfair Contract Terms protections now apply to standard form small business contracts where at least one party either:
  - employs fewer than 100 persons (instead of 20), or
  - has an annual turnover during the previous financial year of less than \$10 million

In addition, the threshold of upfront price payable was removed.

- **new penalties** – a business that proposes, uses, applies or relies upon an Unfair Contract Term could face substantial penalties

These reforms apply to:

- standard form contracts made on or after 9 November 2023
- a standard form contract that is renewed on or after 9 November 2023, and
- a term of a contract that is varied after 9 November 2023 (in which case, the Unfair Contract Terms provisions will apply only to the term or terms that have been varied on and from the day on which the variation takes effect)

## 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 in the ACL)
- and**

- no exemptions apply

Current exemptions include contracts for carriage of goods by ship, marine salvage, marine towage. These concepts are discussed further below.



### 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 subject to the Unfair Contract Terms protections. This also includes contracts that are renewed or varied after 5 April 2021.



### Note

Contracts for a financial product, or the supply of a financial services, are governed by the *Australian Securities Investment Commission Act 2001* (Cth) (**ASIC Act**). If you or your organisation has a specific legal issue regarding a contract for a financial product or financial services, you should seek legal advice before deciding what to do.

The ASIC Act regime is not covered in this fact sheet.

## How to determine whether your organisation can benefit from Unfair Contract Term protections

### Has your organisation entered into, or is it contemplating entering into, 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 agreements that 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 not given any real opportunity to negotiate the terms of the contract
- the terms of the contract do not take into account the specific characteristics of the other party or the particular transaction, or
- the party has used the same or a substantially similar form of contract previously



### Note

A contract may still be in a standard form even if a party may have had the opportunity to negotiate minor or insubstantial changes to the contract.



## 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)

## Is your organisation considered to be a small business?

Under the ACL, for standard form contracts entered into, renewed or varied **after** 9 November 2023, the definition of '**small business**' captures a business that:

- employs less than 100 employees at the time the contract is entered into (not including casual employees unless employed on a regular or systematic basis, but including part-time employees as an appropriate fraction of a full-time equivalent) **or**
- has a turnover of less than \$10 million in the last income year

## 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

The following contracts are also exempt from Unfair Contract Terms protections:

- operating rules of licensed financial markets and licensed clearing and settlement facilities
- certain life insurance contracts, and
- settlement systems approved by the Reserve Bank of Australia

# What is an 'Unfair Contract Term'?

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

- |    |   |
|----|---|
| 1. | • <b>one sided</b> – it causes a significant imbalance in the parties' rights and obligations                                     |
| 2. | • <b>unjustified</b> – it's not reasonably necessary to protect the legitimate interests of the party advantaged by the term, and |
| 3. | • <b>onerous</b> – 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 court will assess the unfairness of a standard form contract at the time the contract is formed (and not, for example, when the term is later relied on).

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

- limit one party's rights or waive liability (legal responsibility for something happening)
- permit one party to assign the contract to the detriment of another party without that party's consent
- limit or impose rights with regards to proceedings relating to the contract (such as limiting evidence a party can adduce in proceedings or imposing the evidential burden on one party)
- renew or not renew the contract
- vary the contract (for example, to vary the price payable without the right of another party to terminate the contract)
- terminate the contract
- unilaterally 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



## Termination term examples – telecommunications

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

### Example of a unilateral termination term that is likely to be an unfair contract term:

- The agreement can be terminated by the Supplier at any time without notice. On termination, your services will stop immediately and all outstanding fees will be due and payable. You may also lose the deposit you paid at the start of the contract without any right to recover it.

### Example of a unilateral termination term that is less likely to be an unfair contract term:

- If the Supplier reasonably suspects fraud, the 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.

**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:

- depending on the circumstances, automatic rollover clauses (such as where cancellation is difficult or 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



### Unfair contract term examples – employee assistance program

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

#### Example of a term that is likely to be an unfair contract term:

- The agreement can be varied by the Supplier by notice on its website (including price) and the Customer will have no right to terminate.

#### Example of a term that is less likely to be an unfair contract term:

- In the event of safety concerns, the 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 if the change in service does not satisfy the reasonable business needs of the Customer.

**Rationale:** It's generally considered a legitimate business need for service providers to ensure the safety of their staff when they are on third-party premises. This includes the requirement to introduce terms regarding the standard of equipment and the appropriateness of the premises to ensure that their staff are always protected from harm.



### Unfair contract term examples – subcontract

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, and the other party may be entitled to include onerous terms in a contract if it is necessary to do so to protect a legitimate interest.
- Your organisation should carefully consider whether it's in a position to comply with the terms being imposed on it as the sub-contractor, the effect this will have on your organisation's operation, and whether you need to raise the issue with the other party before signing the sub-contract.

**Note – the terms below 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 happens if a contract term is unfair?

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 onerous (see the examples below).

**Consequences of an unfair contract term – negative reviews**

Your organisation issues its standard form contract to another business (the other party) for the provision of goods and services.

Your standard form contract contains a clause which prohibits the other party from posting negative reviews about your organisation on social media without your permission. The clause also requires the other party to compensate your organisation for any losses suffered from enforcing this requirement (the contract clauses).

The other party posts a negative review of your business online, as you are in dispute over the performance of the contract. You attempt to rely on the contract clauses. The matter can't be settled by alternative forms of dispute resolution and is brought to court.

The court may find that the contract clauses are unfair and therefore void. However, the remaining provisions of the contract will continue to be binding on the parties.

The making of Unfair Contract Terms is prohibited under the ACL, as is the attempt to rely on Unfair Contract Terms. Accordingly, the court may find that your organisation has breached the ACL by making, and attempting to rely on the contract clauses.

If the court finds that there has been a breach of the ACL, your organisation could face financial penalties for each unfair term and each occasion your organisation has applied or relied on the contract clauses.



### 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 outstanding payments, while also entitling JJ Richards to continue charging customers for equipment rental after the 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 the risk of detriment to JJ Richards' customers.

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

## Penalties

For contracts entered into, renewed or varied **after** 9 November 2023, a party may be liable for penalties if they breach the following prohibitions:

- proposing an Unfair Contract Term in a standard form consumer or small business contract which the party has entered into, or
- using, applying or relying on (or attempting to use, apply or rely on), an Unfair Contract Term in a standard form consumer or small business contract



### Note

A person who makes an Unfair Contract Term and attempts to apply or rely on that term is in contravention of the ACL.

The party making the Unfair Contract Term may be liable for penalties with respect to each contract term that is deemed unfair. In other words, each Unfair Contract Term will be a separate contravention of the ACL.

This means that multiple contraventions may arise from the same contract, including each time a party attempts to apply or rely on an unfair term of a contract.



For each contravention, a party may be liable to pay a penalty, being the greater of:

- \$50 million
- three times the value of the 'reasonably attributable' benefit obtained from the contract, or
- 30% of the business's adjusted turnover during the breach turnover period (being a minimum of 12 months) (if the benefit of the contract is unable to be determined)



### Note

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



### Case example

In proceedings brought by the ACCC, the ACCC alleged that 38 terms used by Fujifilm, in some of its standard-form small business contracts, were 'unfair' and therefore unlawful.

The Unfair Contract Terms included terms related to automatic renewals, unilateral variations, unfair payment terms, incorporation of terms of supplementary documents, unfair suspension rights, disproportionate suspension rights, termination payments, one sided force majeure, limitation of liability, caps on liability, broad indemnities, and unfair warranties.

The court ordered Fujifilm to stop enforcing the Unfair Contract Terms and restrained Fujifilm from relying on the terms in the future.

Fujifilm was ordered to:

- publish notices on its website explaining that the terms were declared void and unenforceable
- implement a compliance program for employees involved in drafting, negotiating, and enforcing contracts, and
- pay \$250,000 towards the ACCC's costs

*Australian Competition and Consumer Commission v Fujifilm Business Innovation Australia Pty Ltd [2022] FCA 928*

## 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 may 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, 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

If you are the party issuing a standard form contract with a potentially unfair term, give serious consideration to the risks associated with making a contract of that nature. You should undertake a risk analysis and amend your standard form contract to avoid the potentially significant financial penalties.



### Caution

A third party may not be receptive to having their terms and conditions challenged as containing an 'Unfair Contract Term'. If you challenge the term before entering into the contract, it could lead to delays in getting your service from that provider. You might want to consider other service providers who don't have the unfair term in their contracts.

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.



The [ACCC website](#) provides further information on this topic:

- [Unfair Contract Terms](#)
- [Media release regarding changes relating to Unfair Contract Terms](#)
- ['Unfair Contract Terms: A guide for businesses and legal practitioners'](#)

**Note** – Exercise caution when relying on materials regarding Unfair Contract Terms and always check the publication date of materials to confirm whether they have been updated and are still valid.