australian consumer law

A guide to the unfair contract terms law

This guide has been developed jointly by the Australian Competition and Consumer Commission, the Australian Securities and Investments Commission and the state and territory consumer protection agencies.

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Introduction

In March 2010, the first part of the Australian Consumer Law was passed as the *Trade Practices Amendment (Australian Consumer Law) Act (No.1) 2010* (in this guide, this Act will be referred to as the ACL). The ACL introduced a single, national consumer law which will apply the same way nationally as in each state and territory.

The ACL introduces new laws relating to unfair contract terms. Under the ACL, from 1 July 2010 unfair terms in standard form consumer contracts will be void. However, a contract will continue to bind the parties to the contract to the extent that the contract is capable of operating without the unfair term.

Key features of the unfair contract terms laws are as follows:

- A term is unfair when it causes a significant imbalance in the parties' rights and obligations arising under the contract and it is not reasonably necessary to protect the legitimate interests of the business and it would cause detriment to another party if it were to be applied or relied on.
- Only a court can decide that a term of a standard form consumer contract is unfair.
- In deciding whether a term is unfair, the court must take into account the transparency of the term and the contract as a whole.
- The laws apply to standard form consumer contracts entered into on or after 1 July 2010 and to terms of existing contracts as renewed or varied after 1 July 2010.
- The laws apply to contracts in all forms, including written and oral, and in all mediums, including online, over the phone or face to face.
- A business must prove that the contract is not a standard form consumer contract.
- The laws exclude the upfront price of the good or service provided under the contract, the main subject matter of the contract and contract terms required or permitted by law.

This guide has been developed jointly by the Australian Competition and Consumer Commission (ACCC), the Australian Securities and Investments Commission (ASIC) and the state and territory consumer protection agencies.

The guide has been designed to assist businesses and legal practitioners to understand the unfair contract terms laws. The purpose of the guide is to explain the unfair contract terms laws as simply as possible. However, it is not a substitute for the actual words of the ACL or the *Australian Securities and Investments Commission Act 2001* (ASIC Act).

About the guide

What the guide covers

The guide provides information for businesses and legal practitioners about the unfair contract terms laws, how they apply and the effect of the laws.

Sections 1 and 2 of the guide outline the types of consumer contracts and terms the law will and will not apply to. They also provide information on what happens when there is a dispute about whether a contract is a standard form consumer contract.

Section 3 explains the test for unfairness and the factors the court must take into account when deciding whether a term in a consumer contract is unfair. Examples of terms that may be unfair are outlined in section 4.

Section 5 outlines who can take action under the new law and the remedies available.

The guide is current as the law presently stands but may be updated over time as case law develops through the courts.

What the guide cannot do

The guide is intended to provide general information only and is not intended to provide legal advice.

While the guide includes examples of the types of terms that may be considered unfair, it does not present a definitive list of what is unfair—or, by omission, fair—under the law.

Ultimately, a court will determine if a term in a standard form consumer contract is unfair, having regard to factors outlined in the law as well as any other matter the court thinks relevant.

1 What sorts of contracts does the law apply to?

The unfair contract terms provisions will apply to standard form consumer contracts.

1.1 What is a contract?

A contract is an agreement made between two or more parties that is intended to be legally enforceable. A contract arises when one party makes an offer and the other party communicates an intention to accept it.

Contracts can be in writing or made orally and can be entered into in a variety of ways, including:

- signing a document
- agreeing over the phone
- clicking an 'I agree' button on a web page.

1.2 What is a consumer contract?

The unfair contract terms laws apply to 'consumer contracts' as defined by both the ACL and the ASIC Act.

Under the ACL, a 'consumer contract' is a contract for:

- the supply of goods or services or
- the sale or grant of an interest in land

to an individual who acquires it wholly or predominantly for personal, domestic or household use or consumption.[1]

Under the ASIC Act, a similar definition of a consumer contract applies in relation to financial products and services.[2]

The unfair contract terms laws do not apply to a contract to supply goods or services or financial products or services from one business to another for business use.

1 *Trade Practices Act 1974* (Cth) [TPA], Sch 2, Part 2, s. 2(3).

2 *Australian Securities and Investments Commission Act 2001* (Cth), s. 12BF.

1.3 What is a standard form contract?

The unfair contract terms laws do not define 'standard form contract'. However, in broad terms a standard form contract will typically be one that has been prepared by one party to the contract and is not subject to negotiation between the parties—that is, it is offered on a 'take it or leave it' basis. Standard form contracts are typically used for the supply of goods and services to consumers in many industries, including:

- telecommunications
- finance
- domestic building
- gyms
- motor vehicles
- travel
- utilities.

In deciding whether a contract is a standard form consumer contract, a court may take into account the matters that it considers relevant but must take into account the following:

- 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
- whether the terms of the contract take into account the specific characteristics of the other party or the particular transaction.[3]

In addition, the Commonwealth Minister may make regulations listing other matters that must be considered by a court in determining whether a contract is a standard form contract.[4]

3 TPA, Sch 2, Part 2, s. 7(2).

4 TPA, Sch 2, Part 2, s. 7(2)(f).

1.4 What if there is a dispute about whether a contract is standard form?

A consumer contract is presumed to be a standard form contract unless the business relying on the term proves otherwise. The presumption is rebuttable. This means that the business against whom the presumption applies may present evidence to show that the presumption is not appropriate in the particular circumstances. If a business wishes to rebut the presumption, they will need to provide evidence to show that the contract is not standard form.

Whether a contract is in fact a standard form contract is properly assessed on an individual contract-by-contract basis based on how each of the factors applies to the facts of the case.

2 What standard form consumer contracts or terms are exempt?

The unfair contract terms laws do not apply to the following terms of a standard form consumer contract:

- terms that define the main subject matter of a consumer contract
- terms that set the upfront price payable under the contract or
- terms that 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
- contracts that are constitutions of companies, managed investment schemes or other kinds of bodies or
- contracts covered by the *Insurance Contracts Act 1984*.

2.1 Terms excluded from the unfair contract terms laws

2.1.1 Terms that define the main subject matter of a contract

The main subject matter of a contract refers to the goods or services (including land, financial services or financial products) that the consumer is acquiring under the contract. For example, a consumer cannot allege that a term is unfair on the basis that they have changed their mind about the good or service that they have agreed to purchase.

The main subject matter may also include a term that is necessary to give effect to the supply or grant under the contract, or without which the supply or grant could not occur. For example, where a consumer agrees to buy a product over the internet and agrees to have that product delivered by post, the consumer cannot later challenge the delivery term as being unfair, because it is necessary to effect the supply of the product that they agreed to buy.

Terms defining the main subject matter of a consumer contract will invariably be the subject of genuine negotiation and therefore are excluded from the unfair contract terms laws. In the Victorian case of *Director of Consumer Affairs Victoria v Craig Langley Pty Ltd & Matrix Pilates and Yoga Pty Ltd* (Civil Claims),[5] Judge Harbison stated:

> [T]erms of a consumer contract which have been the subject of genuine negotiation should not be lightly declared unfair. This legislation is designed to protect consumers from unfair contracts, not to allow a party to a contract who has genuinely reflected on its terms and negotiated them, to be released from a contract term from which he or she later wishes to resile.

2.1.2 Terms that set the 'upfront price' payable under the contract

The unfair contract terms laws do not apply to the upfront price payable under the contract provided it was disclosed before the contract was entered into. For the purposes of the laws in general, the upfront price in a standard form consumer contract is the amount that the consumer agrees to provide under the contract, or to be provided for the supply, sale or grant under the contract.[6] This includes the cash price of, or a series of payments for, a good or service or sale or grant of an interest in land, or an interest rate for credit.

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, but does not include contingent fees, such as default fees (see s. 12BI(3) of the ASIC Act). As a result, principal and interest cannot be challenged under the unfair contract terms provisions.

The definition of upfront price in the laws would also cover a future payment or series of future payments provided these are disclosed at the time the contract is entered into. In considering whether a future payment, or a series of future payments, forms part of the upfront price, a court may take into account whether these payments were disclosed to the consumer in a transparent way. A court may also consider whether the consumer was also made aware of the basis on which such payments would be determined, at or before the time the contract was made.[7]

5 [2008] VCAT 482 at [66].

6 See also s. 53C of the TPA regarding obligation for a single price to be stated in certain circumstances.

7 Explanatory Memorandum to the Trade Practices Amendment (Australian Consumer Law) Bill (No.1) 2009 (Cth), cl [2.73].

The upfront price would not include terms which impose fees and charges levied as a consequence of something happening or not happening at some point over the period of the contract. These are not payments that are necessary for the provision of the supply, sale or grant under the contract, but are additional to the upfront price. This would exclude from the upfront price, for example, terms that impose additional fees for a default or exit, over and above the price for the goods or services acquired.

2.1.3 Terms that are required or permitted by a law

The laws do not apply to terms of contracts that are required or expressly permitted by a law of the Commonwealth, or a state or a territory, but only to the extent that they are required or permitted.

There are many examples of terms expressly permitted to be included in consumer contracts as a matter of public policy and these may be necessary to ensure the validity of specific transactions. An example of such a term can be found in s. 68B of the *Trade Practices Act 1974* (TPA), which states that a term of a contract for the supply of recreational services will not be void by reason only that the term excludes, restricts or modifies the implied warranties in s. 74 of the TPA.

2.2 Contracts excluded from the unfair contract terms laws

Some contracts are excluded from the unfair contract terms laws, including the following.

2.2.1 Shipping contracts

Shipping contracts that are excluded include:

- contracts of marine salvage or towage
- a charter party of a ship or
- a contract for the carriage of goods by ship.

They are subject to a comprehensive legal framework (nationally and internationally) that deals with maritime contracts.

2.2.2 Constitutions of companies, managed investment schemes or other kinds of bodies

The unfair contract terms laws will not apply to contracts which are constitutions of companies, managed investment schemes or other kinds of bodies. A constitution is defined in s. 9 of the *Corporations Act 2001*.

2.2.3 Insurance contracts

Section 15 of the Insurance Contracts Act has the effect that the unfair contract terms provisions will not apply to those terms that are regulated by the Insurance Contracts Act.

Private health insurance contracts, state and Commonwealth government insurance contracts and re-insurance contracts (among others) are not regulated by the Insurance Contracts Act[8] and are subject to the unfair contract terms laws.

8 *Insurance Contracts Act 1984* (Cth), s. 9.

3 When is a term 'unfair'?

A finding by a court that a term is unfair, and therefore void, means that the term is treated as if it never existed. However, the contract will continue to bind the affected parties to the extent that the contract is capable of operating without the unfair term.

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
- it is not reasonably necessary to protect the legitimate interests of the party who would be advantaged by the term and
- it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.

3.1 Meaning of 'unfair'

In deciding whether a term in a standard form consumer contract is unfair, the court will apply the three-limbed test for unfairness. The test for unfairness, under s. 3 of the ACL and s. 12BG of the ASIC Act, 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
- it is not reasonably necessary to protect the legitimate interests of the party who would be advantaged by the term and
- it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.

All three limbs of the unfairness test must be proven, on the balance of probabilities, to exist for a court to decide that a term is unfair.

3.1.1 A 'significant imbalance'

The first limb of the test requires the court to consider whether a term of a consumer contract would cause a significant imbalance in the parties' rights and obligations arising under the contract. This would involve a factual assessment of the available evidence.

Under this limb of the test, the claimant is required to prove that, on the balance of probabilities, a term of a consumer contract would cause a significant imbalance in the parties' rights and obligations arising under the contract.

3.1.2 'Not reasonably necessary'

Under the second limb of the test for unfairness, a court must find that the term is not reasonably necessary to protect the legitimate interests of the party that would be advantaged by the term. The meaning of legitimate interest is open to interpretation by the court.

This limb requires that the party advantaged by the term provide evidence to the court to demonstrate why it is necessary for the contract to include the term.

Such evidence might include material relating to the business's costs and business structure, the need for the mitigation of risks or particular industry practices to the extent that such material is relevant.

3.1.3 Detriment

The third limb of the test for unfairness requires the court to find that the term would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.

Detriment is not limited to financial detriment. The court will be allowed to consider situations where there may be other forms of detriment such as delay or distress suffered by the consumer as a result of the unfair term.

3.2 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 take into consideration any matter that it thinks relevant. It must, however, take into consideration:

- the extent to which the term is transparent and
- the contract as a whole.

3.2.1 A transparent term

A lack of transparency regarding a term in 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 the court can determine what a transparent term is for the purposes of the unfair contract terms provisions. Examples of terms which may not be considered transparent include terms that are hidden in fine print or schedules, or that are phrased in legalese or in complex or technical language.

Although the court must take into account the transparency requirement, a term that does not meet the transparency requirement will not necessarily be unfair. Further, transparency, on its own account, will not necessarily overcome underlying unfairness in a contract term.

The United Kingdom unfair contract terms provisions[9] use the term 'plain and intelligible language' rather than 'transparent'. Despite the difference in terminology, the finding of Smith J in *Office of Fair Trading v Abbey National plc*[10] may provide some guidance:

> Regulation 6(2) … requires not only the actual wording of individual clauses or conditions be comprehensible to consumers, but that the typical consumer can understand how the term affects the rights and obligations that he and the seller or supplier have under the contract.

3.2.2 The 'contract as a whole'

The fairness of a particular contractual term cannot be considered in isolation but must be assessed in light of the contract as a whole. Some terms that might seem quite unfair in one context may not be unfair in another. Conversely, if a particular term was decided by a court in one case to be fair, this does not mean it will always be fair.

An apparently unfair term may be regarded in a better light when seen in the context of other counterbalancing terms. For example, a potentially unfair term may be included in a consumer contract but may be counterbalanced by additional benefits—such as a lower price—being offered to the other party.

However, even if a contract contains terms that favour the consumer, such favourable terms may not counterbalance an unfair term if the consumer is unaware of them. Examples include implied terms, or terms that are hidden in fine print, in a schedule or in another document, or are written in legalese. This may result in an information imbalance in favour of the business.[11]

9 The Unfair Terms in Consumer Contracts Regulations 1999 (UK), reg. 6.

10 [2009] UKSC 6.

11 *Director of Consumer Affairs Victoria v AAPT Ltd* (Civil Claims) [2006] VCAT 1493.

4 Examples of the types of terms in a standard form consumer contract that may be unfair

The unfair contract terms laws include a non-exhaustive list of examples of the types of terms in a standard form consumer contract that the court may regard as unfair. The examples provide guidance only; they do not prohibit the use of those terms. They should not be taken to be unfair in all circumstances nor do they create a legal presumption that the terms listed are unfair. The regulations may add to the list by prescribing additional examples that may be regarded as unfair, after certain considerations have been taken into account.[12]

Other examples of terms that may be unfair may be found in guidance provided by industry bodies; for example, the Telecommunications Consumer Protections Code (C628:2007) provides guidance specific to the telecommunications industry on these issues.

Many of the examples listed below are of terms that allow a party to make changes to a contract on a unilateral basis. The inclusion of these examples does not prohibit the use of unilateral variation terms or create a presumption that these terms are unfair. For instance, the unilateral variation of contract terms is expressly contemplated by legislation in specific contexts, such as in parts 4 and 5 of the Uniform Consumer Credit Code.

Any consideration of a term of a type listed as an example in this section is subject to the test set out in s. 3(1) of the ACL and s. 12BG(1) of the ASIC Act. In this context, there may be circumstances in which the use of such a term may be fair. For example, it may be reasonably necessary to protect a party's legitimate business interests.

The following examples from the laws may provide some guidance when considering these common types of terms.

12 Under s. 4 of the ACL and s. 12BH of the ASIC Act, in the making of regulations prescribing additional examples of unfair terms, the relevant Commonwealth Minister must take into consideration:
– the detriment that a term of that kind would cause to consumers
– the impact on business generally of prescribing that kind of term
– the public interest.

A term that permits, or has the effect of permitting, one party (but not another party) to avoid or limit performance of the contract[13]

Terms that permit a business to avoid or limit performance of its obligations under the contract, at its discretion and without liability, such as an exclusion clause, have the potential to cause a significant imbalance in the parties' rights and obligations arising under the contract.

Terms may be less likely to be considered unfair if they are qualified in such a way that consumers understand when and how they are likely to be affected or if the terms outline reimbursements available to the consumer when such terms are relied upon by the business. For example, an exclusion clause may not be unfair where a consumer understands the effect of the term or is given reasonable notice of its effect.

There are many instances in which limitations of liability are expressly permitted by Commonwealth, state or territory legislation for public policy reasons—for example, terms that allow a business to limit its liability under the TPA for recreational services.[14]

A term that permits, or has the effect of permitting, one party (but not another party) to terminate the contract[15]

Terms that allow the business to cancel a contract at will, without it being reasonably necessary to protect the business's legitimate interests or, for example, in response to an inconsequential breach of contract by the consumer, may be considered unfair by a court.

An example of this arose in the Victorian case of *Director of Consumer Affairs Victoria v AAPT Limited,*[16] where Morris J found that an immediate termination clause in a mobile phone contract for any breach potentially had an application so broad that it was considered unfair:

> A customer may have breached the agreement in a manner which is inconsequential, yet faces the prospect of having the service terminated. Further, if the customer changes his or her address (which will not necessarily be the address for receipt of billing information) this will also provide a ground to AAPT to terminate the Agreement. Because these provisions are so broadly drawn, and are one sided in their operation, they are unfair terms within the meaning of the FTA.

13 ASIC Act, s. 4(1)(a); ACL, s. 12BH(1)(a).

14 TPA, s. 68B.

15 ASIC Act, s. 4(1)(b); ACL, s. 12BH(1)(b).

16 [2006] VCAT 1493 at [53].

Terms may also be considered unfair if they undermine the consumer's right to terminate the contract. Terms which state or imply that the consumer cannot cancel the contract under any circumstances or only with the business's agreement, regardless of the business's action or omission under the contract, may be considered unfair.

A term that penalises, or has the effect of penalising, one party (but not another party) for a breach or termination of the contract[17]

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 at 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.

A term that permits, or has the effect of permitting, one party (but not another party) to vary the terms of the contract[18]

A contract term that provides a right for one party to alter the terms of the contract after it has been agreed may be unfair. This may operate similarly to a term that permits one party (but not the other party) to avoid or limit performance of the contract. If a term could require a consumer to accept increased costs or penalties, new requirements or reduced benefits, for example, it may be considered unfair.

An example of an unfair unilateral variation clause was identified in the Victorian case of *Director of Consumer Affairs Victoria v Trainstation Health Clubs Pty Ltd* (Civil Claims).[19] The Victorian Civil and Administrative Tribunal found that a clause in a consumer contract allowing the health club operator to unilaterally change the location of the club within a 12-kilometre radius of the club's original location, among other things, was 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'.

17 ASIC Act, s. 4(1)(c); ACL, s. 12BH(1)(c).

18 ASIC Act, s. 4(1)(d); ACL, s. 12BH(1)(d).

19 [2008] VCAT 2092.

A unilateral variation clause may cause a significant imbalance in the rights of the parties to the contract. This applies to terms giving the business the right to make changes to contracts at its discretion and without liability. While unilateral variation clauses may be justified in some circumstances, such terms must be used in a manner which is reasonably necessary in order to protect the legitimate interests of the party advantaged by the term, will not cause a significant imbalance in the parties' rights and obligations, and will not cause detriment to one of the parties.

A variation clause may be more likely to be acceptable if it permits either party to vary the contract and only for legitimate reasons stated in the contract which are clear and specific enough to ensure the power to vary cannot be used by the business at will to suit its interests, or in a manner that would be detrimental to consumers. For example, a unilateral variation clause may be acceptable where:

- the circumstances are clearly expressed in the contract
- it is reasonably necessary to protect the legitimate interests of the party using the term or
- where the consumer has a right to cancel the contract, without penalty, if the change is detrimental to the consumer.

A term that permits, or has the effect of permitting, one party (but not another party) to renew or not renew the contract[20]

If a term of a standard form consumer contract only allows a business, and not the consumer, the right of renewal (or not), the business may be unfairly advantaged. The consumer may suffer detriment, including delay or distress, where a contract is not renewed or is automatically renewed without their consent.

For example, where the contract involved is a continuing contract and the business unilaterally decides not to renew the agreement without providing adequate notice to the consumer, the consumer may be caught unawares and suffer detriment because of the sudden absence of the product or service and the need to find a replacement. Likewise, the consumer could suffer detriment with the automatic renewal of a contract without their consent.

However, there may be instances where the automatic renewal of a contract is reasonably necessary and does not cause a significant imbalance between the parties. Automatic renewal for a reasonably short period is common practice in some industries and can benefit the consumer.

20 ASIC Act, s. 4(1)(e); ACL, s. 12BH(1)(e).

For example, ongoing service contracts, such as some utilities contracts, may benefit consumers with the business having a limited ability to renew a contract and continue supply. Provided that the consumer, prior to the expiration of the contract, is given the right not to have the contract renewed or is not required to pay a fee if they wish to withdraw from the agreement following the automatic renewal, the term may not be considered unfair.

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[21]

In the ordinary course of business, a consumer would expect to receive the goods or services they were promised in exchange for providing the agreed price. A term allowing the business to unilaterally increase the price—varying one of the most important terms in the contract—has significant potential for unfairness.

In some circumstances, a term that provides a discretionary right for the business to set or vary a price after the consumer has agreed to an amount may be unfair, even if there is a right to cancel. For example, a term allowing the business to charge a price on delivery of goods or services that is different from that which was quoted to the consumer for the same goods or services at the time the order was placed may be unfair.

In some cases, a variation clause detailing the upfront price payable under the contract is less likely to be considered unfair if consumers are able to end the contract if they do not agree to the variation. To be genuinely free to end the contract, the consumer should not be left worse off for having entered into the contract—for example, by experiencing financial loss such as forfeiture of a prepayment. In most cases, however, the consumer should be entitled to receive the goods or services at the agreed price.

As always, a term challenged for allowing one party to vary the upfront price without the right of another party to terminate the contract will be subject to the court's application of the test for unfairness. In some cases there may be a legitimate interest for including the term, and this may justify the term so that it is not unfair. An example of this may be a domestic building contract where the business is able to vary the upfront price based on the type of materials or furnishings selected by the consumer.

21 ASIC Act, s. 4(1)(f); ACL, s. 12BH(1)(f).

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, or the financial goods or services to be supplied under the contract[22]

A unilateral variation clause may allow a business to substitute a different product or service that the business originally agreed to supply to the consumer. This may conflict with the consumer's expectation of receiving a product or service that they agreed to purchase, not merely something similar or equivalent.

An example of such a unilateral variation clause arose in the Victorian case of *Director of Consumer Affairs Victoria v AAPT Limited*,[23] where a term in a contract for mobile phone services allowed AAPT to 'vary a Supplier or its products, or vary [AAPT's] charges from time to time without notice to you [the consumer]'. Morris J found:

> This term causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer. For example, it would enable AAPT to reduce the number of calls that a person could make pursuant to a prepaid mobile phone service which the person had entered into in good faith. This term was an unfair term.

If the intention of a unilateral variation clause is to permit changes that are limited in scope and the consumer understands and agrees to the changes in advance, it may be less likely to be considered unfair. This may involve:

- setting out clearly the variation that might be made and in what circumstances
- defining how far the variation can extend or
- providing the consumer with the right to terminate the contract without penalty if the business cannot supply the product or service agreed to in the contract.

The ability to unilaterally vary the characteristics of the goods or services to be supplied may be fair where notice of such variation is given and the consumer is offered the option of terminating the contract for a period after the notice is given. For example, in the telecommunications industry, s. 5.1.3(d)(ix) of the Telecommunications Consumer Protections Code (C628:2007) notes that a term may be unfair if its effect is to permit a business to unilaterally vary the characteristics of goods or services during a fixed term contract on less than 21 days notice to the consumer without offering the consumer the right to terminate the agreement within 42 days of the date of notice.

22 ASIC Act, s. 4(1)(g); ACL, s. 12BH(1)(g).

23 [2006] VCAT 1493 at [54].

In some circumstances, there may be a legitimate interest for including the term. An example of this may be a provisional sum clause in a domestic building contract, where the consumer requests variations to the furnishing or material that is used.

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[24]

A term that allows a business to reserve the right to determine whether it has performed its contractual obligations properly may be considered unfair. Such a term would allow the business to unfairly refuse to acknowledge that it has breached its obligations, thereby denying redress to the consumer. An example might be a term that limits any testing or inspection of an alleged faulty product to testing or inspection by the business. In this situation, it may be considered fairer for the term to provide for the product or service to be independently assessed.

Also, a term of a standard form consumer contract may be unfair where it allows a business to reserve the right to decide the meaning or interpretation of a contractual term. The business is effectively able to manipulate the contract to its best advantage in a way that may disadvantage a consumer. Such a term gives rise to the same objections as a unilateral right to vary terms.

A term that limits, or has the effect of limiting, one party's vicarious liability for its agents[25]

Consumers often rely on what is said to them by a sales representative, employee or agent of a business before or when they are entering into a contract. A contractual term that seeks to disclaim the business's responsibility or liability for representations made to prospective consumers by its agents at the point of sale may be unfair.[26]

24 ASIC Act, s. 4(1)(h); ACL, s. 12BH(1)(h).

25 ASIC Act, s. 4(1)(i); ACL, s. 12BH(1)(i).

26 Note that where limited liability terms are required or expressly permitted by a law of the Commonwealth or a state or territory, such terms will not come within the ambit of the ACL.

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[27]

If a business is sold, its contractual relationships with its customers are often 'assigned' to the purchaser of the business. In certain circumstances, this may be considered unfair if the assignment detrimentally affects a consumer's rights under those contracts.

For example, in the Victorian case of *Director of Consumer Affairs Victoria v Backloads.com Pty Ltd* (Civil Claims),[28] Judge Harbison found that a term in a removalist contract that allowed the removalist company to 'assign its rights and the rights of any persons on behalf of whom it is acting, to collect all charges and payments from Clients to the Contractor' was unfair for the purposes of the *Fair Trading Act 1999* (Vic). Judge Harbison stated that the term was unfair because it 'has the object or effect of assigning rights in respect of the contract to an unidentified non-party' and because it 'creates uncertainty for the consumer because the "Contractor" is not a party to the removalist services contract'.

Alternatively, an assignment clause may be less likely to be considered unfair if it operates in circumstances where a consumer's rights under the contract will not be detrimentally affected by the assignment.[29] For example, with respect to credit agreements, many lenders have a legitimate interest in assigning contracts under securitisation arrangements.

A term that limits, or has the effect of limiting, one party's right to sue another party[30]

A term which could be used—even if that is not the intention—to prevent or hinder a consumer from enforcing his or her rights against the business when the business has breached the contract may place the consumer at a significant disadvantage and consequently may be considered unfair. Excluding or limiting one party's right to sue another under a contract may have the effect of allowing one party to act unreasonably or negligently towards the other without any legal consequences. This may be unfair. Terms which require a consumer to bring legal proceedings in a foreign court may also be unfair.

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27 ASIC Act, s. 4(1)(j); ACL, s. 12BH(1)(i).

28 [2009] VCAT 754 at [4].

29 Note that where assignment clauses are required or expressly permitted by a law of the Commonwealth or a state or territory, such terms will not come within the ambit of the ACL.

30 ASIC Act, s. 4(1)(k); ACL, s. 12BH(1)(k).

A term that limits, or has the effect of limiting, the evidence one party can adduce in proceedings relating to the contract[31]

Including a term in a contract that has the effect, or potential effect, of limiting the evidence that a consumer can present in proceedings against the business may be unfair because it limits the consumer's legal rights or their perception of their legal rights in court proceedings. An example of such a term may include where evidence that is available for presentation is limited to the contract itself and excluding any evidence on pre-contractual negotiations. While court rules may allow the presentation of such evidence in certain circumstances, consumers may not be aware of the rules of evidence and may be deterred from taking action against another party, including seeking legal advice, because of the term.

A term that imposes, or has the effect of imposing, the evidential burden on one party in proceedings relating to the contract[32]

The effect of this provision is similar to that of restricting the evidence that a party could rely on in court proceedings—it creates the potential for a party to be deterred from taking action against another party. For example, a term that requires a consumer to prove unreasonable or potentially unprovable elements of a dispute, such as the authority of a staff member of the business to make representations where such information is in the hands of the business not the consumer, may be unfair.

A term of a kind, or a term that has an effect of a kind, prescribed by the regulations[33]

The Governor-General may make regulations setting out types of terms or terms that have a certain effect that may be unfair. Before making such regulations, the Minister must take into consideration:

- the detriment that a term of that kind would cause to consumers
- the impact on business generally of prescribing that kind of term or effect
- the public interest.

The elements to be considered by the Minister must ensure that consumer, business and public interests are all considered before a term, or term that has an effect of a kind, is listed as unfair.

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31 ASIC Act, s. 4(1)(l); ACL, s. 12BH(1)(l).

32 ASIC Act, s. 4(1)(m); ACL, s. 12BH(1)(m).

33 ASIC Act, s. 4(1)(n) and s. 4(2); ACL, s. 12BH(1)(n) and s. 12BH(2).

5 Enforcement of the law

Enforcement of the unfair contract terms laws will be shared between the ACCC, ASIC and the state and territory consumer protection agencies. The agencies will work together to ensure a consistent approach to compliance and enforcement.

Individual consumers can also seek to enforce their rights under the law.

5.1 Unfair terms in contracts for consumer goods and services

The unfair contract terms laws for consumer goods and services will be enforced by both Commonwealth and state and territory consumer protection agencies.

At the Commonwealth level, the ACCC will have responsibility for enforcing the unfair contract terms laws (except in relation to financial services and products—see below). The states and territories that enact the unfair contract terms laws as a law of that particular state or territory will also have responsibility for enforcement of these laws in their respective jurisdictions. Regardless, the unfair contract terms laws under the ACL will continue to apply at the Commonwealth level.

The agencies will work together to ensure a consistent approach to compliance and enforcement.

5.2 Unfair terms in contracts for financial products and financial services

ASIC is the Commonwealth regulator of financial products and services. ASIC will take the lead in enforcing the unfair contract terms laws in the ASIC Act in relation to financial products and services.[34] The consumer protection provisions of the TPA do not apply to financial products and services.

From time to time, enforcement matters involve both general issues and issues relating to financial products and services. For this reason, there is provision for the delegation of functions between enforcement agencies to ensure that the most appropriate agency can take effective action to resolve a consumer problem.

34 ASIC has published a consultation paper titled *Mortgage early exit fees: unconscionable fees and unfair contract terms*, which contains proposals about ASIC's expectations for compliance with provisions in the *National Credit Code* and unfair contract terms provisions that apply to setting the price of and explaining mortgage early exit fees. A regulatory guide on this subject will be prepared after responses to the consultation paper have been received. For more information on ASIC's guidance on mortgage early exit fees, visit ASIC's website at www.asic.gov.au.

5.3 The role of the courts

The role of the courts is to determine whether a term in a standard form consumer contract is unfair and to order the appropriate relief if a contravention of the unfair contract terms laws has occurred or is deemed to have occurred. Although regulators will seek the cooperation of business in removing terms considered to be unfair, it is not the role of any regulator to endorse contract terms or to state categorically that they are unfair. Only a court can determine whether a term of a standard form consumer contract is unfair or not.

As there are state, territory and Commonwealth agencies involved in the regulation and enforcement of the unfair contract terms provisions, the court to which an enforcement action may be brought by a regulator or a consumer may differ depending on which agency takes action or the state or territory where the consumer and/or business are based.

Some state and territory consumer protection legislation also allows action to be brought in a tribunal rather than a court.

5.4 Remedies that may be sought

5.4.1 Non-party consumer redress

The ACCC and ASIC have power under the ACL and 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 advantaged by a term of the contract in relation to which the court has made a declaration that it is 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.

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:

- an order declaring all or part of a contract to be void (either before or after the date that the order is made)
- an order varying a contract or arrangement as the court sees fit (either before or after the date that the order is made)

- an order refusing to enforce all or any of the terms of a contract or arrangement
- an order directing the respondent to refund money or return property to a non-party consumer
- an order directing the respondent to repair or provide parts for a product provided under a contract at their expense
- an order directing the respondent to provide services to the non-party consumer at their expense
- an order directing the respondent to terminate or vary an interest in land that was created or transferred by the contract.

When the states and territories apply the ACL in their jurisdictions, state and territory consumer protection agencies may be able to take similar proceedings under the relevant legislation.

5.4.2 Declaration that a term is 'unfair'

Under s. 87AC of the TPA and s. 12GBA of the ASIC Act, the ACCC, ASIC or a party to a standard form consumer contract may apply to the court for a declaration that a term of the contract is an unfair term. When the states and territories apply the ACL in their jurisdictions, they may also allow for similar actions under their respective legislation by the relevant state or territory consumer protection agency or by consumers themselves.

If a court makes a declaration that a term is unfair and a party subsequently seeks to apply or rely upon the unfair term, it is a contravention of the ACL or the ASIC Act, and the court may grant one of the following remedies:

- an injunction (s. 80 of the TPA; s. 12GD of the ASIC Act)
- an order prohibiting payment or transfer of moneys or other property (s. 87A of the TPA; s. 12GN of the ASIC Act)
- an order to provide redress to non-party consumers (s. 87AAA of the TPA; s. 12GNB of the ASIC Act)
- any other orders the court thinks appropriate (s. 87 of the TPA; s. 12GM of the ASIC Act).

5.5 Can consumers take action themselves?

The TPA and the ASIC Act both provide for consumers to commence private actions to enforce their rights or to recover loss or damage incurred for specific breaches of each Act.

Under the ACL and ASIC Act, a party to a standard form consumer contract can apply to the court for a declaration that a term of such a contract is unfair. If the court finds the term to be unfair, it can make a declaration that the term is void.

Ultimately, it is only a court that can determine whether a term to a standard form consumer contract is unfair.

When the states and territories apply the ACL in their jurisdictions, consumers may be able to take similar proceedings under the relevant state and territory legislation.

In some instances, unfair contract term disputes may be able to be resolved through external dispute resolution schemes.

Glossary

ACCC	Australian Competition and Consumer Commission
ACL	*Trade Practices Amendment (Australian Consumer Law) Act (No.1) 2010*
ASIC	Australian Securities and Investments Commission
ASIC Act	*Australian Securities and Investments Commission Act 2001* (Cth)
claimant	A person who brings a claim. 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. Generally this will be a business.
TPA	*Trade Practices Act 1974* (Cth)
VCAT	Victorian Civil and Administrative Tribunal

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