



Unfair contract terms

New protection for small businesses

As a business, you may be required to enter into standard form contracts with other businesses for goods (e.g. equipment, stock) and services (e.g. internet, banking, utilities). Section 23 of the Australian Consumer Law (ACL) now prohibits unfair contract terms in most of these contracts.

What contracts are covered?

The law applies to standard form contracts entered into or renewed on or after 12 November 2016.

If a business prepares and offers you a contract on a 'take it or leave it' basis (i.e. you have little or no opportunity to negotiate the terms), it is likely to be a standard form contract.

The business-to-business unfair contract terms law applies to contracts for the supply of goods, services, or the sale or grant of an interest in land, where:

- at least one of the parties is a small business¹
- the upfront price payable² under the contract is no more than \$300 000 (or \$1 million if the contract is for more than 12 months).

¹ A small business is one that employs less than 20 employees, including casual employees that work on a systematic basis.

² The upfront price payable includes any payments to be provided for the supply, sale or grant under the contract that are clearly disclosed at or before the time the contract is entered into.

If an existing standard form contract is varied on or after 12 November 2016, the law will apply to the varied terms.

Types of terms that may be unfair

To be unfair, a term must:

- cause a significant imbalance in the parties' rights and obligations, and
- not be reasonably necessary to protect the legitimate interests of the party advantaged by the term, and
- cause detriment (e.g. financial) to a small business if it were applied or relied upon.

The law sets out examples of terms that may be unfair, including those that enable one party (but not the other) to:

- avoid or limit their obligations under the contract
- Example:** A contract for removal services that allows the removalist to avoid responsibility for any property damage caused by their negligence.

- terminate the contract for any reason
Example: A franchise agreement that allows a franchisor to terminate a franchisee for committing a certain number of breaches of the agreement, regardless of the severity of the breach or whether the franchisee remedied the breaches.
- penalise the other party for breaching or terminating the contract
Example: A contract for waste management services that penalises businesses for cancelling their contract before the end of the term, while allowing the provider to cancel at any time without penalty.
- vary the terms of the contract
Example: A contract for internet services that allows the provider to change their pricing at any time, without giving the small business an opportunity to cancel the contract in return.

For further information about how a court determines whether a term is unfair, and examples of unfair terms, see: [Determining whether a contract term is unfair](#) on the ACCC website.

Effect of having an unfair contract term

Ultimately, only a court or tribunal (not the ACCC) can decide that a term is unfair.

If a court or tribunal finds that a term is 'unfair', the term will be void—this means it is not binding on the parties. The rest of the contract will continue to bind the parties to the extent it is capable of operating without the unfair term.

Contracts and terms that are not covered

The unfair contract terms law applies to most standard form contracts. For example, your advertising, mobile phone, and building retail-leasing contracts are all likely to be covered (as long as they meet the criteria outlined above). But there are a number of exceptions:

- 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)
- contracts in sectors exempted by the Minister—no sectors are currently exempt.

Excluded terms

The law will not apply to terms that:

- define the main subject matter of the contract
- set the upfront price payable – that is, what you need to pay to enter the contract
- are required or expressly permitted by a law
- have been negotiated

If you think a term in your contract is unfair

- Ask the other party to remove the term or amend it so it is no longer unfair.
- Contact the Australian Small Business and Family Enterprise Ombudsman, or a Small Business Commissioner in your state.
- Contact your local state or territory consumer protection agency.
- Contact the ACCC (or the Australian Securities and Investments Commission, if the contract relates to financial products and services e.g. banking).
- Talk to a lawyer.

More information

Would you like to keep up with the latest news and events relevant to small business? You can subscribe to our Small Business Information Network by visiting www.accc.gov.au/media/subscriptions.

[Our website](#) also contains more information on:

- Unfair contract terms FAQs
- Determining whether a contract term is unfair
- Unfair terms in business-consumer contracts.

We cover unfair contract terms in the [online education program for small business](#) on our website. The program also explains a number of other topics including pricing, advertising, and consumer rights.

Contact us

ACCC Small Business Helpline: 1300 302 021

ACCC website: www.accc.gov.au/smallbusiness

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