



Consumers and unfair contract terms

April 2021

As a consumer, you probably enter into a number of contracts every day – even if you don't realise it. Each time you make a purchase, hire a tradesperson, book a holiday, join the gym, top up your phone account or download music, you are entering into a contract.

A contract is any agreement that you make with another party that is intended to be legally enforceable. A contract does not generally have to be in writing; it can be verbal, or agreed to with the click of a mouse. Often it involves the payment of money, but not always.

Terms and conditions set out the rights and responsibilities of each party to the contract. While you may have the opportunity to negotiate before you agree, these days it is more common for you to be offered a contract that is the same as, or similar to, everyone else's: this is known as a standard form contract.

Although businesses may use standard form contracts for efficiency, it is important that businesses take account of your consumer rights when preparing their contracts.

An Australia-wide law protecting you from unfair terms in standard form consumer contracts came into effect on 1 July 2010. The law applies to contracts that are entered into on or after 1 July 2010 and to terms of existing contracts that are renewed or changed on or after 1 July 2010.

The law offers you increased protection in circumstances where you have little or no opportunity to negotiate with the business.

Remember that contracts are legal agreements. You should do your best to understand your rights and obligations under any contract *before* you agree to it. Ask questions and seek independent advice if there is anything you are unsure about or do not understand. If the contract does not meet your needs, don't be afraid to negotiate or shop around. If a business gives you an explanation of particular terms or words in a contract, ask for the explanation to be put in writing and attach it to the contract.

How can I tell if a term in my contract is unfair?

The following questions can help you recognise a potentially unfair term, but it is important to note that the final decision on whether a term is unfair can only be made by a court.

You should also be aware that the fairness of a term must be considered in the context of the contract as a whole. For example, a term that seems unfair in one context might not be unfair in another.

- Does the term cause a **significant imbalance** between your rights and obligations and those of the business?
 - Does the business have more power than you? Are you penalised if the contract is terminated (through no fault of your own) but the business is not penalised? Can the business change important terms of the contract without asking you? Can only the business decide whether the contract has been breached?
- Is the term **reasonably necessary** to protect the legitimate interests of the business?
 - While it may appear to you that a term is unfair, the business may have a genuine commercial reason for including it. However, it is up to the business to prove to the court that it has a good reason.
- Would the term cause you **detriment** (financial or non-financial) if the business tried to enforce it?
 - Would you lose money or suffer inconvenience, delay or distress if the term was enforced?
- How **transparent** is the term?

Can you understand what the term says? Is the term presented clearly and expressed in reasonably plain language? Or is it hidden in fine print or written in complex technical language?

Are there any terms or contracts that the law does not apply to?

The unfair contract terms law covers most terms in standard form consumer contracts. However, terms in consumer contracts that set the price of, or define, the product or service being supplied are exempt from the test for unfairness.

Terms that are required or permitted by another law, such as terms limiting liability that are permitted by the *Competition and Consumer Act 2010* (Cth) (formerly the *Trade Practices Act 1974* (Cth)), are also exempt.

There are also contracts for certain goods and services that the law does not apply to, including:

- constitutions, including the constitutions of many superannuation funds, companies and managed investment schemes
- contracts for the shipping of goods.

What can I do if there is an unfair term in my contract?

If you think a term in your contract is unfair and you cannot resolve the issue with the business, you have several options.

ACCC, ASIC and state and territory consumer protection agencies

The Australian Competition and Consumer Commission (ACCC) and state and territory consumer protection agencies can provide you with general information on the unfair contract terms law as it applies to everyday goods and services. The Australian Securities and Investments Commission (ASIC) can provide similar information about the unfair contract terms law as it applies to financial products and services, for example, credit card and insurance contracts.

If you have a concern, these agencies may be able to assist you to identify the options available to you to resolve it.

These agencies can also take action through the legal system to have a term declared unfair. If this action is successful, it will result in the term being void. The agencies may also apply to a court for various orders, including compensation for consumers who have suffered loss as a result of an unfair term declared by a court to be unfair.

Alternative dispute resolution schemes

Alternative dispute resolution schemes can help consumers to resolve issues with businesses without going to court. Ombudsman services, for example, provide dispute resolution services in many industries, including telecommunications, finance, and energy and water supply services.

Take action yourself

If you think a term in your contract is unfair, you can take action through the legal system. This can include legal action to recover money or to seek compensation for damage that you have suffered because of the unfair term. You should consider seeking legal advice before taking up this option. Your lawyer or local community legal centre may be able to provide you with information and assistance.

Remember that only a court can make the final decision about the fairness of a term, and the contract will continue to operate to the extent that it can without the unfair term.

Further information

If you would like to learn more about the law, *A Guide to the Unfair Contract Terms Law* offers more detailed information. The guide has been designed to assist businesses, legal practitioners and consumer advocates understand the law. The guide is available to download from the ACCC website at www.accc.gov.au

ACCC contacts

Infocentre: business and consumer inquiries **1300 302 502** Website: www.accc.gov.au

Callers who are deaf or have a hearing or speech impairment can contact the ACCC through the National Relay Service www.relayservice.com.au

Australian Competition and Consumer Commission
23 Marcus Clarke Street, Canberra, Australian Capital Territory 2601

Important notice

The information in this publication is for general guidance only. It does not constitute legal or other professional advice, and should not be relied on as a statement of the law in any jurisdiction. Because it is intended only as a general guide, it may contain generalisations. You should obtain professional advice if you have any specific concern.

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