

Unfair contract terms

Unfair contract terms provisions introduced in July 2010 become part of the Australian Consumer Law (ACL) on 1 January 2011.

The law introduces national unfair contract terms, improving protection for consumers by removing unfair terms in standard form consumer contracts.

The law aims to reduce circumstances where consumers suffer a loss or other disadvantage due to unfair contract terms.

The law applies to new contracts entered into on, or after 1 July 2010 and terms of existing contracts renewed or varied on or after 1 July 2010.

What type of contracts does the law apply to?

The law applies to standard form consumer contracts. Most insurance contracts are not covered. For information about business-to-business contracts visit the Contracts page in the Businesses section of the Fair Trading website.

Consumer contracts

Consumer contracts are contracts for the supply of goods and services, or for the sale or grant of an interest in land, to an individual for personal, domestic or household use.

Standard form contracts

Generally, a standard form contract is one that:

- is prepared by the business
- contains a set of generic terms and conditions
- is not negotiated between parties
- is presented on a 'take it or leave it' basis.

Consumers enter standard form contracts every day, typically for home loans, credit cards, mobile phones, gym memberships, travel and health insurance and utilities.

Are there contract terms excluded from the laws?

The law does not apply to:

- terms that describe the goods, services or land that a consumer has agreed to buy
- terms that set the upfront price payable under the contract, provided the price is disclosed before the contract is entered into
- terms that are required or permitted by law as a matter of public policy.

When is a term unfair?

Under the provisions, a term is unfair if the following three conditions are met:

- it would cause a significant imbalance in the parties' rights and obligations arising under the contract, and
- it is not reasonably necessary in order 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.

In other words:

- if the contract term is one-sided and greatly favours the business over the consumer, and
- there is no satisfactory commercial reason why the business needs such a term, and
- the consumer will suffer financial loss, inconvenience or other disadvantage if the term is enforced, then it may be unfair.

What types of terms might be unfair?

The law contains a list of the types of terms that may be considered unfair. Contracts can still include these terms,

as they are not banned, but when used in certain circumstances they could be unfair. Some examples are:

- terms that allow the business to make unilateral changes to important aspects of the contract, such as increasing charges or varying the type of product to be supplied, with no right for the consumer to cancel the contract without penalty
- terms that avoid, limit, or restrict the liability of a supplier, its employees or agents for a breach of the contract
- terms that require consumers who breach the contract or end it early to pay an excessive amount in compensation or cancellation charges.

Who decides if a term is unfair?

Only a court or the NSW Civil and Administrative Tribunal can decide if a term is unfair.

The court or Tribunal must consider:

- whether the term meets the 3 tests of unfairness
- how the term was expressed in the contract. For example, it may be hidden in fine print or written in legalese.
- the contract as a whole. A term that seems unfair may be reasonable if it is balanced by other terms offering benefits such as lower prices.

What happens to a contract that contains an unfair term?

If a court or Tribunal finds that a term is unfair, it is void. The term is treated as if it never existed and cannot be enforced or relied on. However, the contract will still bind the consumer and trader if it can operate without the unfair term.

What can I do if I think a contract term is unfair?

If you think a term in your contract is unfair, you should first try to resolve the issue with the trader.

NSW Fair Trading, the Australian Competition and Consumer Commission and the Australian Securities and Investments Commission can provide you with general

information on the way the unfair contract terms law works.

If you have not been able to resolve a dispute over a contract for the supply of goods or services directly with the trader, you can lodge a complaint with NSW Fair Trading who then acts as an informal negotiator.

If the dispute is still not resolved, you may be able to make an application to the NSW Civil and Administrative Tribunal.

A consumer can make application to the Supreme Court for a declaration that a contract term is unfair, but only with the leave of the Court. You should seek legal advice if considering this option.

What action can NSW Fair Trading take if a contract term is unfair?

NSW Fair Trading may seek the cooperation of business in removing terms that seem unfair, but it cannot make a decision that a term is unfair.

NSW Fair Trading can seek a declaration from the Supreme Court that a term in a standard form consumer contract is unfair.

What is the effect of a declaration?

A declaration binds all parties to consumer contracts of that kind, unless the Supreme Court orders otherwise.

A declared unfair term is void. A trader who tries to enforce a declared unfair term against a consumer is in breach of the Fair Trading Act. NSW Fair Trading may then apply to the Supreme Court for:

- an order to provide redress to consumers
- an injunction, or
- any other order the Court sees fit to make.

Who will enforce the law?

The following agencies will enforce provisions relating to consumer goods and services:

- Australian Competition and Consumer Commission (ACCC)

- NSW Fair Trading, and
- other State and Territory consumer protection agencies.

The Australian Securities and Investments Commission (ASIC) will enforce provisions relating to financial products and services.

Who should I contact for complaints or enquiries?

For complaints and enquiries on consumer goods and services, contact:

NSW Fair Trading

Tel: 13 32 20

Website: www.fairtrading.nsw.gov.au through the Lodge a complaint form - applies to general complaint form and the Home building form.

ACCC

Tel: Infocentre 1300 302 502

Website: www.accc.gov.au through the Complaints and Inquiries online forms.

In writing to the ACCC office in your State or Territory.

For complaints and enquiries on financial contracts, contact:

ASIC

Tel: 1300 300 630

Website: www.asic.gov.au