

# Preventing unfair terms in window and floor covering agreements

A guide for legal practitioners and consumer advocates



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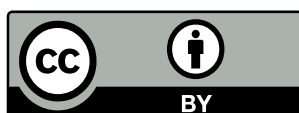
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# Introduction

This guide will help legal practitioners and consumer advocates recognise unfair terms in contracts for window and floor coverings (curtains, blinds, carpets and hard floor coverings)<sup>1</sup>.

It will also help them understand how Australian consumer protection agencies apply unfair contract term legislation to such contracts.

This legislation is part of the Australian Consumer Law (ACL) and reproduced in Chapter 3 of this guide. It gives consumers, and the agencies that protect their interests, a new avenue to address the content of consumer contracts.

This guide is based on a Consumer Affairs Victoria review of window and floor covering agreements. The review was prompted by complaints about retailers in this industry. A large number of these complaints were about the fairness of terms in consumer contracts.

The guide explains why consumer protection agencies consider some common terms unfair, outlines the basis on which they are likely to take enforcement action, and includes examples of types of terms that may be considered unfair. These examples are not a definitive list of what is unfair under the legislation. Ultimately, courts and tribunals decide if a term is unfair.

Consumer protection agencies believe that fair contracts benefit consumers and businesses, by helping to create a fair and open marketplace. Legal practitioners should use this guide to review terms, and change or remove any unfair terms, in agreements they prepare for this industry. We will monitor industry compliance with the unfair contract term legislation.

In this guide:

- > 'unfair contract term legislation' means the legislation in Part 2-3 of Schedule 2 of the *Competition and Consumer Act 2010*
- > 'consumer guarantees' in relation to defective goods or services mean the consumer guarantees set out in Division 1 of Part 3-2 of Schedule 2 of the *Competition and Consumer Act 2010*.

This guide and other publications about unfair consumer contract terms are available at [www.consumerlaw.gov.au](http://www.consumerlaw.gov.au).

<sup>1</sup> The words 'contract' and 'agreement' have the same meaning, and both are used in this document.



# 1. Understanding Australia's unfair contract term legislation

## How does unfair contract term legislation work?

The legislation empowers consumers and consumer protection agencies to seek a court or tribunal:

- > declaration that a term in a consumer contract is unfair
- > injunction against the business using the term in its consumer contracts
- > remedial order for any losses suffered.

Enforcement of unfair contract term legislation is shared by the:

- > Australian Competition and Consumer Commission (ACCC)
- > Australian Securities and Investments Commission (ASIC)
- > state and territory consumer protection agencies.

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

## What is an unfair term?

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

- > causes a significant imbalance in the parties' rights and obligations under the contract
- > is not reasonably necessary to protect a legitimate interest of the business, and
- > would cause detriment (financial or otherwise) if it were to be applied or relied upon.

In assessing whether a term is unfair, the legislation requires that:

- > the contract as a whole be taken into account, including any countervailing favourable terms
- > the transparency of the term be taken into account; that is, whether the term is:
  - expressed in reasonably plain language
  - legible
  - presented clearly
  - readily available to the consumer or any party affected by the term.

A term does not come under the unfair contract terms legislation if it:

- > defines the main subject matter of the contract
- > sets the up-front price, or
- > is permitted by another law.

A term can be unfair regardless of the business's intention or whether the term has been relied upon.

A significant imbalance in the parties' rights and obligations under the contract is created when a term:

- > gives powers to the business that it would not otherwise or usually have
- > protects the business in a way that puts the consumer at a disadvantage
- > alters their position under the ordinary rules of contract or the general law
- > shifts risks to the consumer that the business is better placed to manage.

## 1 Understanding Australia's unfair term legislation

The legislation sets out some examples of possible unfair terms.

This includes terms that permit the supplier but not the consumer to:

- > avoid or limit performance of the contract
- > terminate the contract
- > change the terms of the contract
- > renew or not renew the contract.

It also includes terms that permit the supplier to:

- > vary the price without the consumer having the right to terminate the contract
- > unilaterally vary the characteristics of the goods or services to be supplied under the contract
- > unilaterally determine whether the contract has been breached or to interpret its meaning
- > assign the contract to the consumer's detriment, without the consumer's consent.

Other examples of possible unfair terms given in the legislation include those that:

- > penalise the consumer but not the supplier for a breach or termination of the contract
- > limit the supplier's vicarious liability for its agents
- > limit the consumer's right to sue the supplier
- > limit the evidence the consumer can produce in legal proceedings relating to the contract
- > impose the evidential burden on the consumer in such legal proceedings.

### What is a 'standard form' 'consumer contract'?

A 'consumer contract' is a contract for the supply of goods or services to an individual consumer (that is, not to a company) who buys them wholly or predominantly for personal, domestic or household use or consumption.

The legislation does not explain what constitutes a 'standard form' consumer contract. However, it is essentially a pre-prepared contract that a business uses for its customers that is not open to negotiation by the consumer.

Assessing whether a contract is a 'standard form' contract takes into account whether the:

- > supplier has all or most of the bargaining power
- > contract was prepared by the supplier before any discussion relating to the transaction occurred with the consumer
- > consumer was, in effect, required either to accept or reject the contract terms in the form in which they were presented
- > consumer was given an effective opportunity to negotiate the contract terms
- > contract terms take into account the specific characteristics of the consumer or the particular transaction.

### What is the effect of an unfair term?

If a term in a standard form contract is declared unfair, it is void. However, the contract continues to bind the parties unless it cannot operate without the unfair term.

### What is the aim of enforcement action?

By taking enforcement action, consumer protection agencies aim to change behaviour to promote compliance and stop offending behaviour.

### Will using this guide protect a business from having a term made void?

Using this guide cannot protect a business from having a term in its agreement declared unfair by a court or tribunal; it is not to be relied upon as legal advice. If you are unsure whether a term is unfair, obtain independent legal advice.

## 2. Common unfair terms in window and floor covering agreements

This section discusses unfair terms that Consumer Affairs Victoria identified in its analysis of window and floor covering contracts.

The contracts covered similar content, including:

- > deposits and part payments
- > payment before completion of work
- > payment default
- > reservation of ownership of goods
- > cancellation
- > liability exclusions
- > contract variations
- > pre-installation work
- > reliance on consumer expertise.

### Deposits and part payments

A number of contracts required consumers to lodge large deposits. For example:

- > A deposit of one-third upon order is required, the balance to be paid when collecting goods from the store or before installation or otherwise agreed to by [supplier].
- > 50 per cent deposit to be paid before work can commence. Payment of the balance is due and payable upon notification by [supplier] that the window coverings are available for installation.

Consumer protection agencies consider a genuine deposit to be an amount that ensures that the consumer is serious about going ahead with the contract. It is also an amount that ensures the supplier will:

- > limit dealings with other potential buyers
- > start allocating resources to the contract
- > spend time and effort preparing for the contract.

The deposit should be no more than the minimum needed to achieve these goals – normally, not more than 10 per cent of the price. This is because a genuine deposit can be forfeited if the consumer does not go ahead with the contract – regardless of the supplier's actual losses, and not affecting the supplier's right to recover losses greater than the deposit.

When an upfront payment exceeds 10 per cent of the price, the excess should be treated as part payment of the price.

Part payments are different to deposits. Unlike deposits, part payments are refundable if the consumer opts out of the contract – less any actual (and reasonable) losses suffered by the supplier, if the deposit does not cover these.

Requiring part payment is not unfair if limited to the amount necessary to start work on the contract. In some cases, it will be fair even if the part payment also covers the cost of materials necessary for the job, particularly if the materials are specialised, as is often the case with window and floor coverings.

A term that entitles the supplier to keep all of a part payment if the consumer cancels the contract would be considered unfair. It may also be a common law penalty (and unenforceable) because it would be difficult to claim it was a genuine pre-estimate of the supplier's loss from the cancellation.

Excessive deposits or part payments leave the consumer vulnerable to being out-of-pocket if the business goes bankrupt before the job is finished.

### Payment before completion of work

A number of contracts required the consumer to pay the price or the balance of the account prior to installation. The normal right of consumers is to pay the full price only on installation, and if the product and workmanship are satisfactory. Consumers should have an opportunity to inspect the work before payment.

## 2. Common unfair terms in window and floor covering agreements

The following terms would normally be considered as unfair:

- > Please note you are hereby accepting the C.O.D. payment to the layer as detailed above, and all the conditions on the face hereof.
- > You will be required to pay the balance of the price on collection of the goods or prior to installation of the goods.

### Payment default

When a consumer defaults on payment, the supplier is entitled to charge reasonable costs for collecting the debt.

Consumer Affairs Victoria found examples of terms that sought to charge defaulting consumers for a number of costs considered unfair. These included solicitor-to-client costs in legal proceedings or commissions paid to debt collectors.

The fair interest rate on overdue amounts is considered to be the rate prescribed by penalty interest rate legislation in each state and territory as applying to judgement debts. The contract rate should not exceed it, unless a supplier can show that a higher rate is not unfair – for instance, because the higher rate represents the supplier's actual cost-of-funds.

The following terms would normally be considered unfair:

- > Any collection charges, legal expenses and commissions incurred in attempting to recover payment shall be payable by the customer.
- > If the customer defaults in payment by the due date then all money becomes immediately due and payable and the company may, without prejudice to any other remedy available to it:
  - (a) charge the customer interest at the rate of 1.5 per cent per month [i.e. 18 per cent per annum at a time when the rate under the penalty interest rate legislation was 10.5 per cent per annum] until the date of payment in full
  - (b) charge the customer for all costs and expenses resulting from the default.

### Reservation of ownership of goods

To secure payment, many suppliers insert a term in their contracts stating that ownership in the goods they sell does not pass to the consumer until the total price is paid. If the consumer defaults in payment, the term will enable the business to recover the goods on the basis that it still owns them – including recovering the goods by entering the consumer's premises. This is not unfair, although the business should not include or exercise any right to enter the consumer's premises forcefully or without consent. It should seek a court order to enforce its right to enter.

But it is unfair when the term enables the supplier to damage the consumer's premises, or its value. This will most likely be the case when the goods have already been affixed to the consumer's land or house: for example, a hardwood-floor supplier exercising a right to enter the consumer's house to remove flooring that was installed but not paid for.

In these cases, the business should pursue the consumer for the debt in the courts.

The following term would normally be considered unfair:

- > Ownership of goods on this order will not pass to the customer until the invoice is paid in full and until paid the customer will allow the retailer access to the job address to retrieve the goods if requested to do so.



## 2. Common unfair terms in window and floor covering agreements

### Cancellation

A number of terms restricted a consumer's right to cancel their contract, without penalty, if the supplier was unable to fulfil the entire order or if there was a delay in supplying the goods as agreed.

A failure or inability of the business to supply a substantial or significant part of the order is a fundamental breach of the contract. It entitles the consumer to cancel the whole contract without penalty, even if the failure or inability is beyond the supplier's control. A term that only allows the consumer to cancel the affected part of a contract is considered unfair.

Examples of such terms are:

- > In the event of the company being unable to supply part of this order and the company accepts cancellation of that part, cancellation applies to such part only.
- > Where multiple goods have been ordered by you under this contract, you will not be entitled to terminate this contract in its entirety if any of those goods has been delayed for any of the reasons specified in clause 4. In such case, you may terminate only that part of the contract which has been affected by such delay and we will refund any monies you have paid to us relating to the affected goods less any reasonable costs incurred by us.

Terms that prevent the consumer from cancelling a contract, without penalty, if the supplier is unable to supply on time are considered unfair – even if the delay is beyond the supplier's control. While it is not unfair for a supplier to deny liability for loss or damage caused to a consumer from causes outside the supplier's control, it is unfair if this extends to disallowing the consumer from cancelling the contract, without penalty.

'Inability to supply on time' means supply:

- > beyond any exact date contracted for
- > beyond a reasonably short time after an approximate date given, or
- > if no date (exact or approximate) was specified, beyond a reasonable time after entering the contract.

The following terms would normally be considered unfair to the extent that they relate to the consumer's inability to cancel, without penalty:

- > The delivery time quoted by [supplier] is an estimate only and we cannot be held responsible for fabric or material delays, industrial action, strikes or manufacturing delays.
- > [Supplier] will not be responsible for delay in completing or failure to complete such work caused by circumstances for which [supplier] is not responsible or has no control over, for example transport strikes, industrial disputation or manufacturing delays.

When consumers simply change their mind and cancel the contract, it is considered unfair to require them to pay a cancellation fee unrelated to the supplier's reasonable costs caused by the early termination – for example, a requirement to pay all of the supplier's costs and expenses or an arbitrary fee.

The following term would normally be considered unfair:

- > In the event of a cancellation by the customer after the material has been cut or specially ordered for you from any supplier, the customer agrees to pay, as liquidated damages a sum equal to 40 per cent of the total purchase price.

## 2. Common unfair terms in window and floor covering agreements

### Offences under the ACL

The supplier commits an offence under the ACL if it fails to supply all the agreed goods or services by the agreed time unless:

- > the failure was due to something beyond its control; or
- > it took reasonable precautions and exercised due diligence to avoid the failure; or
- > the consumer agrees to accept replacement goods or services.

The supplier also commits an offence under the ACL if, when it accepts payment:

- > it intends not to supply the goods or services; or
- > it intends to supply something different from that agreed; or
- > it is reckless about whether it will be able to supply the goods or services by the agreed time.

### Liability exclusions

The statutory consumer guarantees under the ACL require that goods match any description or sample (see further below) and be reasonably:

- > fit for their common or any specified purposes
- > acceptable in appearance or finish
- > free from defects
- > safe
- > durable.

They also require that services, such as window and floor covering installation services, be rendered with due care and skill<sup>2</sup> and be completed by a reasonable time (if no time is specified in the contract).

If the consumer specifies a particular purpose for the services when the contract is made, the services must be reasonably fit for that purpose. If the consumer specifies any result that the services should achieve when the contract is made, the services must be of a nature, quality, state or condition that would reasonably be expected to achieve that result.

In the case of Cavalier Marketing (Australia) Pty Ltd v Rasell<sup>3</sup>, the Queensland Court of Appeal held that a carpet with pile reversal or watermarking substantial enough to affect its 'decorative use', or the purchaser's 'aesthetic appreciation' of it, breached the consumer guarantees.

The consumer guarantees for goods apply not just to new or off-the-shelf goods but also to seconds, sale items, bespoke items, and goods taken 'on approval' and then purchased.

It is an offence for a supplier to attempt to exclude, restrict or modify these rights or its liability for a breach – including placing time limits on claims shorter than those allowed under the legislation. Such terms are void. Broad exclusions or limitations of liability are also void because, whether intentional or not, they claim to apply to the consumer guarantees.

For example:

- > In the event that installers assist with removal of furniture and effects then neither they nor the company will be responsible for any loss or damage thereto.
- > No exchange, credit or refund on goods taken on "Home Approval" and then subsequently purchased.
- > No exchange, credit or refund on cut length goods or \*special buy-ins (\*rugs ordered to a specific size or make up, i.e. not normally available from our standard range).
- > [Supplier] will not be liable for any loss or damage suffered by the Customer as a result of any act, omission or statement made by [supplier], its employees, contractors or agents whether in contract, negligence or howsoever otherwise, except that nothing in these conditions limits any liability imposed by any statute unless or to the extent that it is lawful to do so.

One of the problems with the last term is that, legally, suppliers are liable for their own and their employees' and agents' negligence or lack of due care and skill.

<sup>2</sup> The duty to render services with due care and skill is analogous to the common law duty not to render services negligently.

<sup>3</sup> (1990) 96 ALR 375

## 2. Common unfair terms in window and floor covering agreements

Consumer protection agencies also consider such terms unfair as they:

- > permit or have the effect of permitting the supplier to avoid or limit performance of the contract
- > limit or have the effect of limiting the consumer's right to sue the supplier
- > limit or have the effect of limiting the supplier's vicarious liability for its employees or agents
- > alter the legal position that would otherwise have applied.

Examples of limitations or modifications of the statutory rights that are not allowed are terms that:

- > put a monetary limit on compensation
- > place a time limit on claims shorter than provided for under the legislation
- > exclude pure economic loss.

For example:

- > Exchange, credit or refund only on goods returned within 48 hours of date of purchase and in original condition.
- > Goods subject to manufacturer fault must be returned within seven days of date of purchase and can only be exchanged for goods of equal or greater value.

Many terms that exclude or limit a supplier's liability for loss or damage indirectly attempt to cater for the statutory rights. For example: '...except that nothing in these conditions limits any liability imposed by any statute unless or to the extent that it is lawful to do so' (see above).

Such terms are likely to be considered unfair terms that limit or have the effect of limiting the consumer's right to sue the supplier for a breach of a statutory right, because most consumers will not know what that 'law' is.

These terms also tend to mislead consumers about their rights. While giving the appearance of complying with the law, they do not help consumers who are ignorant of their rights and who will think the term prevents them making a claim.

It is the lack of transparency that makes such terms unfair – they are not presented clearly and are misleading.

Liability exclusions must clearly direct consumers to their statutory rights, or consumer protection agencies will consider such terms unfair. For example:

- > For consumers, our goods come with non-excludable guarantees under the ACL, such as that we are the rightful owner, the goods are reasonably fit for their purpose, are not damaged and match any description or sample. You are entitled, at your option, to a refund, repair or replacement for a major failure, and to compensation for any other loss.

These rights are separate from any manufacturer's warranty. In addition, the ACL requires the manufacturer or importer to compensate you for any loss if the goods are, for example, not reasonably fit for their purpose. You have the option of seeking compensation from the manufacturer/importer or from us.

- > For consumers, our services come with non-excludable guarantees under the ACL that they will be provided with due care and skill and be reasonably fit for their purpose. You are entitled, at your option, to a refund or the re-supply of the services for a major failure, and to compensation for any other loss.

## 2. Common unfair terms in window and floor covering agreements

### Variations from samples

Most contracts reviewed by Consumer Affairs Victoria warned consumers that the installed product might differ from the sample shown before they entered into the contract. Some also sought to exclude liability for such variations, for example:

- > Variations of shade can occur in the manufacturing of different materials. [Supplier] will take every care to obtain the best effect but cannot assume responsibility for variations in colour or grain structure.
- > Some cut-pile carpets may exhibit an appearance change of random light and dark areas after installation. This is known as shading, tracking, pile reversal or watermarking and is caused by movement of the carpet fibres in different directions as the result of normal use. The customer acknowledges that this does not indicate the floor coverings are defective.
- > Whilst manufacturers make every effort to match dye lots, the customer acknowledges that colour shades may vary from the samples shown.
- > [Supplier] accepts no responsibility for changes in length shrinkage or dropping of material, and [supplier] shall not be liable in any way for loss or damage as a consequence therefore. Any alterations due to this will be charged.

When a sample is used in the supply of goods, the ACL's statutory consumer guarantees require that the:

- > goods match the sample in quality
- > consumer will have a reasonable opportunity to compare the goods with the sample
- > goods will be free from hidden defects that the consumer was not aware of at the time of sale.

Consumer protection agencies recognise that using natural materials can lead to differences between samples and the goods supplied. For example, differences in the:

- > shading or piling of carpet caused by unavoidable differences in the wool
- > colouring of wood flooring caused by different levels of sunlight exposure.

If businesses use contract terms to disclaim or exclude liability for particular aspects of the product from a sample, they must ensure consumers' rights in relation to guarantees are clear and transparent.

General or vague warnings also do not overcome the problems. For example:

- > The sample that you have been shown represents a species not a colour. Colour variations within the panel, and from panel to panel can be extreme. Timber is likely to change colour quite dramatically when exposed to UV light. The panel you have viewed may appear different from the timber in the pack.
- > The colour and texture of timber blinds may vary by 15 per cent to the sample.

It is not enough simply to inform the consumer that the installed product may differ from the sample. A supplier must tell the consumer exactly how the installed product might differ from the sample (specifying a percentage is insufficient), or provide a sample that shows the actual differences.



## 2. Common unfair terms in window and floor covering agreements

### Contract variations

Some contracts attempt to provide for problems due to errors or misunderstandings in the quoting process. They do this by inserting a unilateral variation power, which gives them the power to change the contract details – for example:

- > Any errors or omissions in quantities and/or measurements made by [supplier] are excepted, and [supplier] reserves the right to make any variations to the quotation, the order and the price arising out of any such errors or omissions.

Consumer protection agencies have serious concerns about unilateral variation powers in short-term, one-off contracts such as those it reviewed. They can be used to defeat the legitimate expectations of the consumer, based on a signed contract<sup>4</sup>.

Best practice is to discuss the error or misunderstanding with the consumer and together agree to contract changes and put them in writing or, if that proves impossible, to allow the consumer to cancel the contract, without penalty.

### Pre-installation work

Some suppliers quoted prices on the assumption that consumers would provide them with clear access to windows, remove existing floor coverings or otherwise prepare the workplace.

A supplier should make it clear to the consumer, before work starts, what they will charge for pre-installation work. General statements that consumers will have to carry the cost are insufficient. This should be part of the quotation, so the consumer can choose not to proceed if the cost is unacceptable.

The following terms show the need for transparency:

- > The price for installation of the goods specified in the quotation is subject to the windows being clear of existing coverings and the provision of reasonable access to the windows at the time of installation. If at the time of installation, the windows are not clear of existing coverings and reasonable access is not provided to us to effectively and efficiently install the goods then we reserve the right to adjust the installation price specified in the quotation to cover our reasonable costs of removing the existing coverings and to obtain reasonable access to the windows.
- > It is the customer's responsibility to ensure there is a suitable fixing point prior to installation. Items to be cleared from in front of the window to allow a one metre access to the window at the time of installation. Where customers are responsible for the removal of any existing window coverings, a charge will apply if a contract fitter is required to remove any existing window coverings on the actual date of installation.

This also applies to terms that allow for contingencies, such as:

- > installation of window coverings at a height over three metres may be subjected to additional charges for scaffolding, high ladders and safety equipment.

<sup>4</sup> In longer-term contracts, unilateral variation powers can often be justified because of the likelihood of a change of circumstances during the term of the contract. In these cases, any unfairness to the consumer can usually be ameliorated by allowing the consumer to cancel, without penalty, if they do not accept a change.

## 2. Common unfair terms in window and floor covering agreements

### Reliance on consumer's expertise

Several contracts contained terms that claimed to deny all liability for damage arising from the consumer's failure to identify problems with the work site – for example:

- > it is the customer's responsibility to advise the retailer of any defects or irregularities in the subfloor prior to installation of the floor coverings. No loss or damage will be accepted by the retailer for any reason whatsoever as a result of defects in the subfloor.

It is not unfair to require consumers to advise the supplier of matters within their knowledge. However, these terms are considered unfair to the extent that they absolve the supplier from responsibility to ask the consumer relevant questions before starting work and to apply expertise in assessing the site.

These terms claim to absolve the supplier's liability for any damage that its installers cause. This conflicts with the consumer's statutory right to have services provided with due care and skill, and which are reasonably fit for their purpose.

### 'Entire agreement' terms

'Entire agreement' terms state that the entire agreement between the parties is contained in the written contract. They deny the power of any associated oral agreement or any oral representations made to the consumer, by the supplier or its employees and agents.

These terms are normally ineffective in legal cases. But they can mislead or deter consumers from exercising their rights. They are considered an unfair limitation on:

- > a consumer's right to sue the supplier
- > the evidence a consumer can lead in proceedings on the contract.

Consumer protection agencies have similar concerns about terms that:

- > require the consumer to acknowledge that no representations have been made that are not in the written contract, or
- > specify that the only valid representations, amendments or waivers are those in writing signed by a senior officer of the supplier.

It is acceptable for a contract to specify that such things must be in writing and signed by a senior officer of the supplier. It is not acceptable that these are the only valid representations, amendments or waivers.

For example:

- > it is agreed between the parties that the terms and conditions constitute the entire agreement between the parties and that oral statements made prior to this agreement neither induced its execution nor form part of it.

# 3. Australian Consumer Law unfair contract term legislation

## Section 23 – Unfair terms of consumer contracts

- (1) A term of a consumer contract is void if:
  - (a) the term is unfair; and
  - (b) the contract is a standard form contract.
- (2) The contract continues to bind the parties if it is capable of operating without the unfair term.
- (3) A consumer contract is a contract for:
  - (a) a supply of goods or services; or
  - (b) a sale or grant of an interest in land;to an individual whose acquisition of the goods, services or interest is wholly or predominantly for personal, domestic or household use or consumption.

## Section 24 – Meaning of unfair

- (1) A term of a consumer contract is unfair if:
  - (a) it would cause a significant imbalance in the parties' rights and obligations arising under the contract; and
  - (b) it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and
  - (c) it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.
- (2) In determining whether a term of a consumer contract is unfair under subsection (1), a court may take into account such matters as it thinks relevant, but must take into account the following:
  - (a) the extent to which the term is transparent;
  - (b) the contract as a whole.

- (3) A term is transparent if the term is:
  - (a) expressed in reasonably plain language; and
  - (b) legible; and
  - (c) presented clearly; and
  - (d) readily available to any party affected by the term.
- (4) For the purposes of subsection (1)(b), a term of a consumer contract is presumed not to be reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term, unless that party proves otherwise.

## Section 25 – Examples of unfair terms

- (1) Without limiting section 24, the following are examples of the kinds of terms of a consumer contract that may be unfair:
  - (a) a term that permits, or has the effect of permitting, one party (but not another party) to avoid or limit performance of the contract;
  - (b) a term that permits, or has the effect of permitting, one party (but not another party) to terminate the contract;
  - (c) a term that penalises, or has the effect of penalising, one party (but not another party) for a breach or termination of the contract;
  - (d) a term that permits, or has the effect of permitting, one party (but not another party) to vary the terms of the contract;
  - (e) a term that permits, or has the effect of permitting, one party (but not another party) to renew or not renew the contract;
  - (f) 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;

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- (g) 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, under the contract;
  - (h) 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;
  - (i) a term that limits, or has the effect of limiting, one party's vicarious liability for its agents;
  - (j) 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;
  - (k) a term that limits, or has the effect of limiting, one party's right to sue another party;
  - (l) a term that limits, or has the effect of limiting, the evidence one party can adduce in proceedings relating to the contract;
  - (m) a term that imposes, or has the effect of imposing, the evidential burden on one party in proceedings relating to the contract;
  - (n) a term of a kind, or a term that has an effect of a kind, prescribed by the regulations.
- (2) Before the Governor-General makes a regulation for the purposes of subsection (1)(n) prescribing a kind of term, or a kind of effect that a term has, the minister must take into consideration:
- (a) the detriment that a term of that kind would cause to consumers; and
  - (b) the impact on business generally of prescribing that kind of term or effect; and
  - (c) the public interest.

#### **Section 26 – Terms that define main subject matter of consumer contracts etc. are unaffected**

- (1) Section 23 does not apply to a term of a consumer contract to the extent, but only to the extent, that the term:
- (a) defines the main subject matter of the contract; or
  - (b) sets the upfront price payable under the contract; or
  - (c) is a term required, or expressly permitted, by a law of the Commonwealth, a State or a Territory.
- (2) The upfront price payable under a consumer contract is the consideration that:
- (a) is provided, or is to be provided, for the supply, sale or grant under the contract; and
  - (b) is disclosed at or before the time the contract is entered into;
- but does not include any other consideration that is contingent on the occurrence or non-occurrence of a particular event.



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#### Section 27 – Standard form contracts

- (1) If a party to a proceeding alleges that a contract is a standard form contract, it is presumed to be a standard form contract unless another party to the proceeding proves otherwise.
- (2) In determining whether a contract is a standard form contract, a court may take into account such matters as it thinks relevant, but must take into account the following:
  - (a) whether one of the parties has all or most of the bargaining power relating to the transaction;
  - (b) whether the contract was prepared by one party before any discussion relating to the transaction occurred between the parties;
  - (c) whether another party was, in effect, required either to accept or reject the terms of the contract (other than the terms referred to in section 26(1)) in the form in which they were presented;
  - (d) whether another party was given an effective opportunity to negotiate the terms of the contract that were not the terms referred to in section 26(1);
  - (e) whether the terms of the contract (other than the terms referred to in section 26(1)) take into account the specific characteristics of another party or the particular transaction;
  - (f) any other matter prescribed by the regulations.

#### Section 28 – Contracts to which this Part does not apply

- (1) This Part does not apply to:
  - (a) a contract of marine salvage or towage; or
  - (b) a charter party of a ship; or
  - (c) a contract for the carriage of goods by ship.
- (2) Without limiting subsection (1)(c), the reference in that subsection to a contract for the carriage of goods by ship includes a reference to any contract covered by a sea carriage document within the meaning of the amended Hague Rules referred to in section 7(1) of the *Carriage of Goods by Sea Act 1991*.
- (3) This Part does not apply to a contract that is the constitution (within the meaning of section 9 of the *Corporations Act 2001*) of a company, managed investment scheme or other kind of body.

# Contacts

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Commonwealth

**Australian Competition and  
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GPO Box 3131  
Canberra ACT 2601  
T. 1300 302 502  
[acc.gov.au](http://acc.gov.au)

**Australian Securities and  
Investments Commission**

PO Box 9827  
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New South Wales

**NSW Fair Trading**

PO Box 972  
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