

## Unfair Contract Terms

### Australian Consumer Law

Australian Consumer Law (“**ACL**”) is regulated by the Australian Competition & Consumer Commission (“**ACCC**”) and the state and territory consumer protection agencies. ALC has been developed to help business understand their responsibilities under the law.

The *unfair contract terms* law is part of the ACL. Amendments came into effect on 12 November 2016. Contracts entered into on or after the 12 November 2016, or contracts varied on or after the 12 November 2016 are affected.

### Contracts covered

The law applies to standard form consumer contracts. A standard form contract is one where the contract has been prepared by one party and the other party has little or no opportunity to negotiate the contract terms. Therefore the contract is offered on a take it or leave it basis. A consumer contract is one for the supply of goods or services, or the sale of an interest in land, to an individual for personal, domestic or household use.

Rules in relation to contracts covered by the law are:

- for the supply of goods or services or the sale or grant of an interest in land;
- at least one of the parties is a small business (employs less than 20 people, including casual employees employed on a regular and systematic basis;
- the upfront price payable under the contract is no more than \$300 000 or \$1 million if the contract is for more than 12 months.

### Contract terms that may be considered unfair

The law sets out examples of terms that may be determined as unfair, such as:

- terms that enable one party (but not another) to avoid or limit their obligations under the contract;
- terms that enable one party (but not another) to terminate the contract;
- terms that penalise one party (but not another) for breaching or terminating the contract;
- terms that enable one party (but not another) to vary the terms of the contract.

However only a court or tribunal can determine if a contract term is unfair.

## What happens if a contract term is unfair

If a court or tribunal finds that a contract term is unfair, the contract term will be void, therefore not binding on the parties. The rest of the contract will continue to bind the parties to the extent that the contract is capable of functioning with the unfair term removed.

## Types of contracts that are not covered

The unfair contract terms laws cover most standard form consumer contracts and contractual terms, however there are some exceptions.

Excluded contracts:

- those 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;
- some insurance contracts (e.g. car insurance);
- contracts in sectors exempted by the Minister (no sectors are currently exempt).

Excluded terms in contracts:

- terms that define the main subject matter of the contract;
- terms that set the upfront price payable;
- terms that are required or expressly permitted by a law of the Commonwealth, or a state or a territory (e.g. permitted under the Franchising Code or another prescribed industry code).

## More information

The ACCC have more information on their website: <https://www.accc.gov.au/> and have produced a publication called “Unfair Contract terms – A guide for business and legal practitioners which can be found here: <https://www.accc.gov.au/system/files/Unfair%20contract%20terms%20-%20A%20guide%20for%20businesses%20and%20legal%20practitioners.pdf>