



# Unfair contact terms: practical tips for businesses

All businesses should proactively review their standard form consumer contracts and standard form small business contracts to identify whether they contain any terms that may be 'unfair'. If a standard form contract contains any unfair terms, businesses must take action to address them. This may include deleting or amending the term, or adding or amending another term in the contract, in order to eliminate the potential unfairness.

The following is not legal advice so you should seek legal advice when required. However, there are some straightforward tips that can help all businesses when reviewing their standard form contracts:

- **Consider both points of view:** If you think a term is necessary to protect your business's legitimate interests, consider the term, and any detriment it could cause, from the other party's point of view.
- **Include counter-balancing terms:** Check whether your contract has appropriate counter-balancing terms. For example, if you consider that your business needs the ability to unilaterally change the product or service being supplied under the contract, does the contract also allow your customers to exit the contract without penalty when this occurs?
- **Avoid broad terms:** Check for reasonableness and ensure terms are only as broad as *reasonably* necessary to protect your business's legitimate interests. Some examples of terms that may go too broad are noted in the list of examples below.
- **Meet your obligations under the Australian Consumer Law:** Don't have terms that seek to avoid your business's obligations under the Australian Consumer Law (ACL) – for example, terms that seek to limit your customers' consumer guarantees rights, or terms that seek to disclaim any representations your business may have made outside of the contract.
- **Be clear:** Use clear and simple language in your contracts.
- **Be transparent:** Look for ways to ensure key terms are clearly drawn to the attention of your customers during the sign-up process, and any renewal process.

## Examples of common unfair contract terms

There are some common types of terms that can often raise concerns under the unfair contract terms law. These types of terms should be used carefully in contracts, or you should consider whether you include the term at all. You should think about how they work within the broader contract when considering how to remove any potential unfairness.

This is a non-exhaustive list, and whether a particular term is unfair will ultimately depend on the particular contract as a whole. Only a court can make determinations about whether any particular contract term is unfair.

Type of term	Examples
Unrestrained ability to terminate	Terms may be unfair when they give one party (but not the other) the right to terminate for any reason, or for no reason at all.

Unilateral variation	Terms may be unfair when they give one party (but not the other) the ability to vary the terms of the contract. For example, varying product or service being supplied, performance indicators, timelines, or price during the period of the contract, without giving the other party an opportunity to negotiate the changes and/or an opportunity to terminate the contract without penalty.
Automatic renewal	Terms that provide for the automatic renewal of contracts may be unfair, particularly when the automatic renewal term isn't adequately disclosed prior to the parties entering the contract. Other relevant factors may include whether reasonable notice is given that the contract will be automatically renewed unless cancelled by a particular date, and whether the other party will incur significant early termination charges if they cancel after the contract has been automatically renewed.
Limited liability	<p>Limited liability terms are used by businesses to limit their legal responsibilities, duties, or obligations towards the other party to a contract. These terms may be unfair if they are broad and overreaching. For example terms that purport to:</p> <ul style="list-style-type: none"> <li>• exclude or significantly limit the business's liability in relation to any loss or damage resulting from the contractual relationship, or</li> <li>• exclude consumer guarantee rights available to the other party under the ACL,</li> </ul> <p>risk being unfair, particularly if the other party's liability under the contract is not correspondingly reduced.</p>
Wide indemnities	<p>An indemnity is a promise by one party to protect the other party to the agreement from loss or damage that may be incurred as a consequence of a particular event. These terms may be unfair if they are broad and overreaching. For example:</p> <ul style="list-style-type: none"> <li>• A business's standard form contract including terms that purport to hold its customers liable for loss or damage caused or contributed to by the business.</li> <li>• Terms that require one party to indemnify the other for all loss or damage caused by the acts or omissions of a third party.</li> </ul>
Excessive penalties	<p>Terms may be unfair if they impose penalties on one party (but not the other) for breach of the contract. A term is more likely to be a 'penalty' when it's grossly disproportionate to the breach and the protection of the business's legitimate commercial interests.</p> <p>Terms may also be unfair if they allow the business to withhold a refund of a deposit when the other party wants to terminate because the business has not met its obligations under the contract.</p>
Unfair payment terms	For example, terms allowing a business to charge the other party for goods or services the business did not provide.
Restraint of trade	<p>Restraint of trade clauses that seek to limit when and/or where the other party can supply their goods or services for a period of time, once the contract ends, may be unfair if the restraints are broader than what is reasonably necessary to protect the legitimate interests of the business issuing the contract.</p> <p>These clauses can be common in franchise agreements and independent contractor agreements.</p>