FEBRUARY 2018
Unfair Contract Terms Guidelines
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Purpose and scope

1. The Commerce Commission is responsible for enforcing the Fair Trading Act 1986 (the Act), which prohibits misleading, deceptive and unfair trade practices. The Fair Trading Amendment Act 2013 made a number of changes to the Act including introducing the unfair contract terms provisions (UCT provisions).\(^1\)

2. The UCT provisions enable the Commerce Commission to apply to the District Court or the High Court for a declaration that a term in a standard form consumer contract is an unfair contract term. If a term is declared to be unfair, a person cannot include it in a standard form consumer contract (unless it is included in a way that complies with the court’s decision) and cannot apply, enforce or rely on the unfair contract term.

3. We have issued these guidelines to:
   - Explain the UCT provisions.
   - Explain how we will assess whether a term may be unfair, and the principles we think are likely to be applied by the courts.
   - Identify some kinds of terms that may be unfair, and those that may not be unfair.
   - Describe our approach to enforcement of the UCT provisions.

4. These guidelines are intended to assist parties to standard form consumer contracts to think about how the UCT provisions apply to them. The guidelines are not exhaustive, and are not intended to be legally binding.

Use of examples

5. We have included some examples in these guidelines. All examples are intended to be indicative, and to help readers think about how the UCT provisions might apply in realistic – but in each case hypothetical – situations.

6. Examples are used to indicate a specific point (for example, what it means for a term to create ‘significant imbalance between the parties’.) The points being highlighted are labelled in each example. We acknowledge that any real-world fact pattern would be more complex, and that all elements of the UCT provisions would need to be considered in order to determine whether a term should be declared to be unfair. Each case will be considered on its own unique facts.

7. Examples can provide only limited guidance until the courts provide case law on the UCT provisions. We will apply for court declarations in suitable cases that meet our published enforcement criteria,\(^2\) and in cases that present the opportunity to develop case-law on important points.

8. We may revise the guidelines from time to time in accordance with legal developments and our organisational objectives and priorities.

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\(^1\) All section references in these guidelines are to the Act as amended in 2013.
\(^2\) The Commission’s enforcement criteria and Enforcement Response Guidelines are available at http://www.comcom.govt.nz/the-commission/commission-policies/
Contracts subject to the UCT provisions

9 The UCT provisions apply to all standard form consumer contracts entered into on or after 17 March 2015, and also to standard form consumer contracts (except insurance contracts) that are renewed or varied after that date.3 No insurance contracts entered into before 17 March 2015 are covered by the UCT provisions even if they are renewed or varied after that date.4

10 Parties to a standard form consumer contract cannot contract out of the UCT provisions. Any attempt to do so may breach other provisions of the Act.

11 In this document, term means all or part of a term, clause or provision. If a term addresses multiple matters, each matter is subject to its own assessment under the UCT provisions. In some cases, the UCT provisions provide that part of the term may be altogether exempt from review for fairness, while some or all of the rest of the term is not exempt and can be assessed as to its fairness.5

Overview of UCT provisions

12 The UCT provisions apply to standard form consumer contracts.

13 The main hallmarks of a standard form consumer contract are:

13.1 The contract is in a standard-form: the terms of it (other than the exempt terms) have not been subject to effective negotiation between the parties;6 the contract is offered on a “take it or leave it” basis; and

13.2 The contract is a consumer contract: the goods or services are supplied in trade, they are of a kind ordinarily acquired for personal, domestic or household use or consumption, and under the particular contract in question, they are not acquired for any of the commercial purposes listed in the Act.7

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3. Section 26A(2). Where a contract (except an insurance contract) is varied or renewed on or after 17 March 2015, the whole contract becomes subject to the UCT provisions. In our view, a renewal of a contract requires extension of the contract either with or without variation to its terms. We consider that variation to a contract requires an amendment to any of the terms (regardless of how material the term is).

4. Section 26A(3). Refer to paragraphs 108–109 – “Insurance contracts”.

5. Section 46K(1): all or part of some terms may not be declared unfair. These are terms, or parts of terms, defining the main subject-matter of the contract; setting the up-front price payable under the contract; or terms expressly required or permitted by another enactment. We refer in this guideline to exempt terms, even though sometimes only part of a term may address exempt matters. Refer to paragraphs 43–46 – “What terms are exempt?” and paragraphs 83–85 “Some contract terms cannot be declared unfair”.

6. Section 46J(1). Section 46J(2) lists a range of factors that the court must take into account when determining whether a contract is a standard form consumer contract.

7. Under s 2(1) “consumer” means a person who does not acquire the goods or services for the commercial purposes of – (i) resupplying them in trade, (ii) consuming them in the course of a process of production or manufacture, or (iii) in the case of goods, repairing or treating, in trade, other goods or fixtures on land.
14 Standard form consumer contracts are common in many industries, including:

- car parking
- childcare centres
- daily deal or coupon specials
- events and entertainment
- finance
- gym membership
- hire purchase
- motor vehicle sales
- online and mobile apps and software
- pay TV
- professional services
- rental of appliances or goods
- residential construction
- residential tenancy and real estate
- retirement villages
- self-storage facilities
- telecommunications
- travel and tourism (such as airfares, rental cars and tours)
- utilities, such as electricity or gas services.

15 If we think that a standard form consumer contract term is unfair, we can go to the District Court or High Court and seek a declaration that it is unfair. Only the Commission can apply to the court for such a declaration.

16 We can either apply on our own initiative or at the request of a party to the contract, for example a consumer. We will exercise our enforcement discretion in deciding whether to seek a declaration in respect of any term. Consumers can complain to the Commission regardless of any other dispute resolution mechanisms that might apply to the contract.

8. Financial services contracts also fall under the jurisdiction of the Financial Markets Authority. However, its jurisdiction does not currently extend to assessing the unfairness of terms contained in standard form consumer contracts used in the financial services sector.

9. Section 46H(2).

10. For further guidance on the enforcement discretion see the Commission’s Enforcement Response Guidelines available online at http://www.comcom.govt.nz/the-commission/commission-policies/enforcement-response-guidelines/
If we apply to the court for a declaration, the court may make a declaration that a term is an unfair term only if it is satisfied that:

17.1 the term is in a contract that is a consumer contract; and

17.2 the consumer contract is a standard form contract (as determined in accordance with section 46J); and

17.3 the declaration is not prohibited by section 46K(1); and

17.4 the term is unfair in the sense described in section 46L.

The court may declare a term to be unfair if it meets all three of the following requirements:

18.1 the term would cause a significant imbalance in the parties’ rights and obligations arising under the contract; and

18.2 the term is not reasonably necessary to protect the legitimate interests of the party who would be advantaged by it; and

18.3 the term would cause detriment (whether financial or otherwise) to a party if it were applied, enforced or relied on.

The court must be satisfied that all of these requirements are met. For example, a term may impose detriment on a consumer without causing a significant imbalance in the parties’ rights under the contract. Or a term may cause a significant imbalance in the parties’ rights under the contract and cause detriment to the consumer while at the same time being reasonably necessary to protect the legitimate business interests of the supplier. In such cases, the terms would not be unfair because only some of the requirements for unfairness would be met.

In determining whether the requirements for unfairness are met, the court can consider any matter that it thinks relevant, but it must take into account the contract as a whole and the extent to which the term is transparent. The Commission and a court can therefore have regard to a wide range of considerations when assessing unfairness.

Some terms cannot be declared unfair. We refer to these as ‘exempt terms’. A term is exempt if it:

21.1 defines the main subject-matter of the contract; or

21.2 sets the up-front price payable under the contract, to the extent that the price term is transparent; or

21.3 is required or expressly permitted by any enactment.

In this document, term means all or part of a term, clause or provision. If a term addresses multiple matters, each matter is subject to its own assessment under the UCT provisions. In some cases, the UCT provisions provide that part of the term may be altogether exempt from review for fairness, while some or all of the rest of the term is not exempt and can be assessed as to its fairness.

11. Section 46I(2).
12. Section 46L(1).
13. Section 46L(2).
14. Section 46K(1).
If a term is not exempt, the court may assess its fairness if we ask it to do so. Whether the court finds the term to be unfair will depend on all of the circumstances, and the application of the statutory tests.

In making a declaration of unfairness, the court may describe the context or conditions in which the term’s inclusion in a standard form contract means that the term is an unfair contract term.\textsuperscript{15}

If a term has been declared unfair by a court, the supplier must not use the term in a standard form consumer contract unless it is included in a way that complies with the terms (if any) of the court’s decision. Neither can the supplier apply, enforce or rely on that term. If the supplier uses or enforces the unfair term it may be convicted and fined under the Fair Trading Act (companies up to $600,000 per breach, individuals up to $200,000 per breach) and can be ordered to pay damages or to refund money to the other contracting party.\textsuperscript{16}

A declaration that a term is unfair does not end the contract as a whole. Other terms of the contract will continue to bind the parties.

A declaration of unfairness will apply directly to the term in the standard form consumer contract that the court has scrutinised. We consider that if the same contract has been used by the trader multiple times, the declaration of unfairness is likely to extend to all of the same terms contained in all of those contracts. It may also extend to other kinds of contracts containing the same term, depending on the contract’s content and the terms of any court declaration. The wider impact and effect of a court declaration is likely to be an issue on which case-law can helpfully be developed.

The Commission will publicise any declarations of unfairness that we obtain. Traders should carefully consider the court’s findings and exercise caution before incorporating such terms in their contracts. A term declared to be unfair in one contract may not necessarily be unfair in a different standard form consumer contract containing other, materially different terms that alleviate any potential unfairness. However, before including a term that has previously been declared unfair businesses should satisfy themselves that the term’s inclusion in their contracts would not be unfair having regard to the tests prescribed by the UCT provisions, including the contract as a whole.

An unfair term may also breach the Act if it is false, misleading or deceptive.\textsuperscript{17}

\begin{itemize}
\item \textsuperscript{15} Section 46I(3)(b).
\item \textsuperscript{16} Section 40.
\item \textsuperscript{17} It is possible that the Commission could seek to take action under both the unfair contract provisions and other provisions of the Act. Individuals also have a right of action under other provisions of the Act. Guidance on the Act can be found on our website \url{http://www.comcom.govt.nz/fair-trading/fair-trading-act-fact-sheets/}
\end{itemize}
UCT provisions apply only to standard form consumer contracts

The UCT provisions apply to all standard form consumer contracts, although exempt terms cannot be declared unfair.18

What is a consumer contract?

A consumer contract19 is a contract between:

- a supplier of goods and services in trade and a consumer; or
- a person disposing of an interest in land in trade (for example, a property developer) and a consumer.

A person or supplier is in trade20 if they undertake any trade, business, industry, profession, occupation, activity of commerce or undertaking relating to the supply of goods or services or interests in land.

A supplier21 is not just a person or business that sells goods or services, but:

- for goods includes supply by gift, exchange, lease, hire or hire purchase; and
- for services includes providing, granting or conferring services.

Consumer22 means a person who:

- acquires from a supplier goods or services of a kind ordinarily acquired for personal, domestic, or household use or consumption; and
- does not acquire the goods or services, or hold himself or herself out as acquiring the goods or services, for the purpose of:
  - resupplying them in trade; or
  - consuming them in the course of a process of production or manufacture; or
  - in the case of goods, repairing or treating, in trade, other goods or fixtures on land.

A contract between two individuals in their personal capacities will not be a consumer contract. For example, a conventional sale and purchase agreement for a residential property which is entered into between a vendor in a personal capacity and a purchaser in a personal capacity is not a consumer contract. However, if the seller is in trade (such as a property developer) the contract will be a consumer contract if the property is acquired for personal, domestic or residential purposes.

A business can be a consumer where the goods or services are ordinarily acquired for domestic purposes rather than commercial purposes, and the buyer does not intend to sell them in trade or consume them in production. This means that the law can treat a business as a “consumer” for the purposes of the UCT provisions depending on the ordinary use of the goods or services acquired and the use to which the business intends to put them.

18. Sections 46K and 46L(4).
19. Section 2(1).
20. Section 2(1) definition of “trade.”
21. Section 2(1) definition of “supply.”
22. Section 2(1) definition of “consumer.”
The UCT amendments rely on a new definition of “consumer” that has been copied from the Consumer Guarantees Act 1993. It has been held in that context that:

37.1 It is a matter of fact and degree whether goods can be said to be of a kind ordinarily acquired for private use. It is clear from the definition of “consumer” that Parliament contemplated that goods or services can have several uses, and that some buyers might intend mixed private and commercial uses. The fact that a good or service is often acquired for commercial uses does not necessarily prevent it also from being ‘ordinarily acquired’ for private uses.

37.2 It is also possible to have goods that are of a kind ordinarily acquired for private use which are acquired by a particular purchaser for a commercial use, without excluding the buyer from being a “consumer” for the purposes of the UCT provisions. For example, a business can be a “consumer” when it buys a sofa for its reception area—a sofa is a household-type good ordinarily acquired for private use. It is purchased by a business for use in its business premises, but the use of it in the reception area is not a resupply, or consumption in the course of production or manufacture, or repair or treatment of other goods or fixtures on land. The business is therefore a “consumer” when making the sofa purchase.

37.3 In another example, a car was accepted as being ordinarily acquired for private uses, and the lease of the car to the buyer’s business during business hours was not a ‘resupply in trade’ because, on the evidence, the car was bought primarily for the buyer’s own personal use. The fact that the car was also for work and was leased to the buyer’s business for that purpose did not alter the personal purpose for which the car was bought.

37.4 The phrase ‘resupply in trade’ contemplates that the goods are resupplied in the course of the buyer’s business, rather than the resupply being incidental to the business. In the car example, the business of the respondent was accountancy services, not the leasing of motor vehicles. There was no ‘resupply in trade’ of the vehicle.

37.5 Written evidence as to the buyer’s purpose is relevant, and can show what the buyer represented that its purpose was, but will be weighed alongside other evidence as to purpose, and may not be definitive.

37.6 ‘Holding yourself out’ as having a business purpose simply means representing this by words or conduct. It is not enough that the seller thought or assumed that the buyer had a commercial purpose.

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24. *Nesbit* at [27].
25. *Nesbit* at [26].
27. *Kerry Stone* at [24].
28. See *Kerry Stone* at [32]–[33], [38], [53]–[55].
29. *Kerry Stone* at [49].
Examples of consumer contracts

Aroha owns a small business. She purchases a household refrigerator on hire purchase for use in the tea room in her office.

Although Aroha is in business, the contract is a consumer contract because the refrigerator is of the kind usually acquired for personal, domestic, or household use, and Aroha does not intend to resell the fridge or use it in the course of production or manufacture.

Aroha’s office electricity may however be a good that is consumed in the course of production. If that were the case, Aroha’s electricity supply contract would not be a consumer contract.

Much will depend on what kind of business Aroha operates, and how naturally it can be said that the good is “consumed” in production or manufacture.

Wheely Good Mobile Cleaning Ltd purchases ten cars for its staff to use. Although purchased by a business, the cars are goods of a kind ordinarily acquired for personal, domestic or household use (they can equally be used by both domestic and business users). These cars would be covered by the UCT provisions unless the cars were treated by the court as being resupplied in trade or consumed in the course of a process of production or manufacture.

What is a standard form consumer contract?

The Act does not prescribe all the features of a standard form consumer contract, but does stipulate that it must be a contract in which the terms (other than exempt terms) “have not been subject to effective negotiation between the parties.”

The court must determine whether a consumer contract is a standard form consumer contract based on the particular circumstances of the case.

In deciding whether the contract is a standard form consumer contract, a court must take into account at least the following factors (and any other that it considers relevant):

1. whether one of the parties had all or most of the bargaining power in the transaction;
2. whether the contract was prepared by one party before any discussion took place about the transaction;
3. whether a party was, in effect, required to accept or reject the terms of the contract in the form in which they were presented;
4. the extent to which the parties had an effective opportunity to negotiate the terms of the contract; and
5. the extent to which the terms of the contract take into account the specific characteristics of any party to it.

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30. Section 46K(1): some terms might not be declared unfair. These are terms defining the main subject-matter of the contract; terms setting the upfront price payable under the contract; or a term expressly required or permitted by another enactment.
31. Section 46J(1).
32. Section 46J(2).
33. “Negotiation” in relation to an agreement or proposed agreement includes any discussion or dealing directed towards making the agreement or proposed agreement (whether or not the terms of the agreement or proposed agreement are open to any discussion or dealing); s 2(1).
Importantly, if the Commission alleges that a contract is a standard form consumer contract, the contract is presumed to be so unless any other party to the proceeding proves otherwise. The burden of proof is on the party arguing that the contract is not a standard form consumer contract.

In practical terms, we think that the business seeking to rely on the consumer contract will need to provide evidence to show that each party had some opportunity to influence the terms ultimately agreed (other than the exempt terms.)

Example of a standard form consumer contract

Gary moves house and needs phone and power services. He shops around, comparing prices for packages that cover his typical usage of each service. He discusses his usage with the sales teams to ensure he has chosen the most appropriate plans. Once Gary applies to become a customer, each supplier sends him a standard set of terms and conditions. The standard terms are provided without an opportunity to negotiate them – Gary is expected to accept or reject the set of terms and conditions. These are likely to be standard form consumer contracts.

What terms are exempt from being declared unfair?

Some terms cannot be declared unfair. We refer to these as “exempt terms”.

These are terms that:

1. define the main subject matter of the contract; or
2. set the upfront price payable under the contract, to the extent that the price term is transparent; or
3. are required or expressly permitted by any enactment.

The exempt terms are only exempt “to the extent that” they address exempt matters. If a term addresses multiple matters, part of the term may be exempt while the rest of the term is not.

Example of an exempt term

If a term describes the product to be supplied, this cannot be declared unfair because it defines the main subject matter of the contract. However if the same term also excludes liability for the condition of the product on delivery to the purchaser regardless of fault, this aspect of the term could be subject to the unfairness assessment – these words deal not with the main subject-matter of the contract, but with excluding liability.

If a term is not exempt, this will simply mean that the court may assess its fairness. That will depend on all of the circumstances, and the application of the statutory tests for unfairness.

34. Section 46J(3).
35. The Court is prohibited from making a declaration of unfairness in respect of such terms: s46J(2)(c).
36. Section 46K(1)(a)
37. Section 46K(1)(b)
38. Section 46K(1)(c)
Terms that may be unfair

A term can be declared unfair only if the court is satisfied that **all of the following three requirements are met**.\(^{39}\)

47.1 the term would cause a **significant imbalance** in the parties’ rights and obligations arising under the contract; and

47.2 the term is **not reasonably necessary to protect the legitimate interests** of the party who would be advantaged by the term; and

47.3 the term would cause **detriment** (whether financial or otherwise) to a party if the term were applied, relied on or enforced.

The Commission is required to prove requirements (1) significant imbalance and (3) potential for detriment. However the onus is on the trader to persuade the Court of requirement (2) that its term is reasonably necessary to protect the trader’s legitimate interest; the UCT provisions contain a presumption that a challenged term is not reasonably necessary.\(^{40}\)

In determining whether a term is unfair, the court can consider any matter that it thinks relevant, but must take into account two mandatory considerations:\(^{41}\)

49.1 the extent to which the term is transparent; and

49.2 the **contract as a whole**.

We discuss the three requirements below, plus the two mandatory considerations. In practice, the factors are likely to overlap. For example, a contract term that creates a significant imbalance between the parties’ rights and obligations might also cause detriment to the consumer if it were relied upon because the term favours one party at the expense of another.

First requirement: significant imbalance between the parties

The first requirement is that the term would cause a significant imbalance between the parties’ rights and obligations arising under the contract.\(^{42}\) This requirement looks only to identify a significant imbalance. If a significant imbalance is identified, the court must go on to consider whether the following two requirements are also met: whether the term is reasonably necessary to protect the legitimate business interests of the party who would be advantaged by it, and whether the term would cause detriment to a party.

Whether a contract term creates a significant imbalance between the parties’ rights and obligations will depend on the facts of each case.

There is a causal connection required in this test: it is the **term** that creates an imbalance. There is a magnitude requirement also: the term must cause a **significant** imbalance. Finally, the imbalance must relate to the parties’ rights and obligations under the contract as a whole, and not only under the term itself.

We expect that the court is likely to make an overall assessment of the interests involved, rather than apply the test mechanistically.

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39. Section 46L(1).
40. Section 46L(3).
41. Section 46L(2).
42. Section 46L(1)(a).
Examples of terms that may cause a significant imbalance between the parties’ rights and obligations arising under the contract include:

55.1 A term that advantages the supplier in a way that puts the consumer at a significant disadvantage.

55.2 A term that shifts risks to the consumer that the business is better placed to manage.

55.3 A term penalising one party for breach of contract, but not another.

55.4 Penalty terms purporting to create mutual penalties under the contract, where it is improbable that the supplier is ever likely to suffer a penalty (and very plausible that the consumer may).

55.5 A term purporting to confer a valuable benefit on the consumer in return for consideration provided by the consumer, where in any practical sense the benefit is illusory and unlikely to be realised.

Examples of significant imbalance

Terms and conditions in a tradesman’s contract for service say that the customer will have no claim against the tradesman for any damage done by the tradesman to the customer’s property, including through his negligence. This term shifts a considerable risk on to the customer that the tradesman should be better placed to manage.

Hannah purchases a bookcase from Bookcases Are Us, which provides home delivery. The bookcase is delivered to Hannah’s home while she is at work, and no proper opportunity has been provided for Hannah to inspect the goods before accepting delivery.

Under the standard terms of the home delivery contract, Hannah is required to check the invoice details and condition of the goods before accepting delivery. Acceptance of the goods removes any right to complain about the goods delivered, including any damage to the goods.

This term has the potential to meet the significant imbalance requirement of the unfairness test. It shifts the risk of the bookcase being damaged onto Hannah, where that risk should rest with Bookcases Are Us, which is responsible for delivering the bookcase and which did so when Hannah was not available. If the trader argues that Hannah has ‘accepted’ the bookcase merely because it was delivered, the exclusion-of-liability term might be unfair.

In each case, when considering whether a term causes a significant imbalance between the parties’ rights and obligations under the contract a court will consider other terms that might reasonably be seen as counterbalancing the effect of the term in question.

43. Note that the Act provides an example list of terms that may be unfair in section 46M (discussed at paragraphs 74–78). An important feature of the examples is that they involve situations where “one party (but not another party)” has a right under the contract. Whether this imbalance amounts to a significant imbalance requires consideration of the parties’ rights and obligations arising under the contract.

44. Section 46M(c).
Second requirement: not reasonably necessary to protect legitimate business interests

The second requirement is that the term is not reasonably necessary to protect the legitimate interests of the party that would be advantaged by it. In court, the Commission does not need to prove that a term is not reasonably necessary. Rather, the party that would be advantaged by the term must justify that it is reasonably necessary (and therefore that party bears the burden of proof, to the balance of probabilities civil standard).

The Act provides little guidance as to when a term will be reasonably necessary. Given the Act’s consumer protection purposes, the supplier will likely need to show that the interest being protected by the term:

1. is a legitimate interest requiring protection; and
2. cannot reasonably be protected by fairer means.

Example of reasonable necessity

XYZ bank is conducting a mortgagee sale of a house, and is in trade. The bank includes in the sale agreement a term excluding the standard vendor warranties.

This is a term that may cause significant imbalance in the parties’ rights and obligations – the bank avoids providing the usual vendor warranties and the purchaser has none of the usual protections. It may also cause harm to the buyer – the purchaser may acquire a damaged or occupied property.

However, even if the term has these effects, such a term may be reasonably necessary to protect the bank’s legitimate business interests, such as where that the bank has had no opportunity to inspect the property.

Because the law presumes a challenged term to be not reasonably necessary, we expect that the party advantaged by the term will need to provide relevant evidence to the court to demonstrate reasonable necessity. This might include evidence relating to the business’s costs, operations, business structure, regulatory or contractual obligations, risks and methods of mitigating risks.

For example, a party advantaged by a penalty term may be able to establish to the court’s satisfaction that the penalty is reasonably necessary to protect legitimate business interests by ensuring that the business recovers losses, costs or damages flowing from breach of contract.

Chitty on Contracts provides the following example:

...[which arises] in the context of clauses allowing the forfeiture of a purchaser’s deposit in contracts of sale of land. Here, at first sight the loss of ten per cent of the purchase price if the purchaser withdraws from the contract suggests that such a clause is unfair, but it may not be given the need of the seller to cover transaction costs and also to be indemnified for likely loss of profit on the transaction.

45. Section 46L(1)(b).
46. Section 46L(3).
Third requirement: term would cause detriment

63 The third requirement is that the term would cause detriment to a party if it were to be applied, enforced or relied upon.\textsuperscript{48} A term cannot be unfair if it would cause detriment to a party but it does not cause a significant imbalance in the parties’ rights and obligations arising under the contract and/or is reasonably necessary to protect the legitimate business interests of the party who would be advantaged by it.

64 Detriment is not limited to financial detriment. The court may consider other forms of detriment, such as delay in receiving the goods or services, or distress suffered by a consumer as a result of the unfair term.

What the court must also consider

65 In determining whether the three requirements are met, the court may consider any matters that it considers relevant, but must take into account the two mandatory considerations: the extent to which the term is transparent, and the contract as a whole.\textsuperscript{49} The Commission and a court can therefore have regard to a wide range of considerations when assessing unfairness.

66 The “any matters” formulation is deliberately expansive and flexible. We anticipate that it can accommodate considerations like, for example, whether the seller has put pressure on the consumer to conclude the contract in haste, without time to think about its implications. These are relevant matters that would go to the court’s assessment of whether a term is unfair.

Transparency

67 If a term is not transparent it is more likely to be unfair, because consumers may not be aware of its existence or effect. Terms that are not transparent may also breach the Act’s prohibition against misleading or deceptive conduct. Therefore, it is important that suppliers make contract terms as transparent as possible.

68 A term is transparent if it is expressed in “reasonably plain language,” is legible and clearly presented, and is readily available.\textsuperscript{50} For example, a seller who provides pre-contractual material making clear the otherwise surprising terms on which it deals, or whose staff follow a practice of advising customers of the terms in a clear and intelligible manner, may succeed in arguing that a term is fair.

69 A term may not be transparent if it is obscured or hidden, for example, in fine print or schedules, on a different webpage or in a different part of a document from other similar terms, or if it is phrased in complex legal or technical language.

\textsuperscript{48} Section 46L(1)(c).

\textsuperscript{49} Section 46L(2).

\textsuperscript{50} Section 2(1).
Transparency affects whether the ‘up-front price’ exemption applies.\(^{51}\) A price term that is not transparent will not be ‘up-front’ and can be challenged as unfair. Upfront price terms that are transparent will in most cases be exempt. Their subject matter and their transparency means they cannot be declared unfair.

In all other cases, transparency – or lack of transparency – will not in itself determine whether a term is unfair. However, it is a key mandatory consideration, capable of influencing the court’s view of whether or not a challenged term is unfair having regard to the three requirements discussed above.

The contract as a whole

The court must also take into account the “contract as a whole” when considering the three requirements for unfairness.\(^{52}\) This means that the court cannot consider a term in isolation when weighing its unfairness, but needs to look at the whole contract to see how the terms interrelate and what is the overall effect.

This means that a term that might appear unfair on its face may not be unfair when read in the context of the other terms of a contract. For example, a potentially unfair term limiting rights to cancel a contract may be counterbalanced by additional benefits such as a lower price. Similarly, an apparently fair term may be unfair when the other contract terms are taken into account.

**Example of considering the contract as a whole**

A gym membership contract allows the gym unilaterally to change location, prices, and the timing and content of any personal training session.

The changes could inconvenience members or make it impossible for them to use the gym, causing them detriment. But looking at the contract as a whole, if the gym can only exercise its right on reasonable grounds and members in return have a right to terminate on reasonable notice without penalty, the term may not cause a significant imbalance in the parties’ rights and obligations and/or the changes may be reasonably necessary to protect the gym’s legitimate business interests.

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51. Section 46K(2): if a price term is not transparent, the term is not exempt and it is subject to the fairness assessment.

52. Section 46L(2)(b). The court must also consider the parties’ rights and obligations under the contract as a whole when considering whether a term may cause a significant imbalance under s46L(1)(a).
Types of terms that may be unfair

The Act lists examples of the types of terms that a court may regard as unfair when used in a standard form consumer contract. The examples provide guidance only and should not be taken to be unfair in all circumstances. The list is not exhaustive. A term not appearing on the list may still be declared to be unfair, as long as it is not an exempt term. In every case, the assessment of fairness will be undertaken with reference to the three requirements in light of all the circumstances and with reference to the contract as a whole.

Many of the examples are of terms that allow a business to make changes to the contract or to what they are supplying, without an equivalent right being provided to the other party. These include terms that permit, or have the effect of permitting, one party (but not the other) to:

75.1 vary the terms of the contract;
75.2 avoid or limit performance of the contract;
75.3 terminate the contract;
75.4 penalise another party for breaching or ending the contract;
75.5 renew or not renew the contract;
75.6 vary the upfront price payable under the contract without the right of another party to terminate the contract;
75.7 vary the characteristics of the goods or services to be supplied, or the interest in land to be sold or granted, under the contract;
75.8 assign the contract to the detriment of another party without that party’s consent; or
75.9 determine whether a contract has been breached, or interpret its meaning.

The examples also include terms that limit, or have the effect of limiting:

76.1 one party’s legal liability for its agents;
76.2 one party’s right to sue another party;
76.3 the evidence one party can present in proceedings relating to the contract.

Similarly, the examples include terms that impose, or have the effect of imposing, the evidential burden on one party in proceedings relating to the contract.

The Commission will pay particular attention to standard form consumer contracts that contain any of the types of listed terms. These are terms that have a real tendency to be unfair as, by their nature, they are likely to create a significant imbalance in the parties’ rights and obligations, where the affected party has no counterbalancing and practicable right such as a right to exit the contract or to receive a compensating benefit.

53. Section 46M.
Terms allowing unilateral alteration

In some cases, businesses may have a legitimate need to be able to vary their terms, such as where they want to accommodate market developments. However, we consider that businesses should give adequate notice of such changes and consumers should have the right to cancel the contract without penalty where the changes are detrimental. In these cases, the consumer should not be worse off as a result of the business choosing to vary the terms.

Examples of one-sided variation terms

Telco X supplies high-speed residential broadband. Its standard form contract states that consumers must agree to receive its service for a minimum term of 12 months. Telco X has included a term in its contract that enables it to change the price it charges, before the expiry of the minimum 12 month term. The customer has no right of early termination if this happens.

This term is likely to be unfair if it allows Telco X to unilaterally change the price of the service provided, and the customer has no ability to resist any increase or to exit the contract without penalty.

If Telco X had included a term that allowed customers to cancel the contract without penalty where the price was changed, the potential for unfairness would be greatly reduced.

Marama signs a 12-month contract with a pay television company, choosing to subscribe to several sports channels. After a few months, the company reduces the number of sports channels that Marama was subscribing to and increases the number of cooking channels. When Marama complains about the change in her subscription, she is told that the contract she signed allows the company to vary the service it provides to her. Marama has no right to cancel the agreement early, and must accept the change of service.

This term is likely to be unfair as it permits one party to unilaterally vary the goods or services supplied under the contract.

If Marama were given the option to exit the contract without penalty or to pay a lower fee for a package that suits her needs, the potential for unfairness would be greatly reduced.
Terms limiting or avoiding liability

80 Where a consumer is prevented from enforcing their legal rights against a business, for example for breach of contract, the consumer may be significantly disadvantaged. Excluding or limiting one party’s right to sue another under a contract may also have the effect of allowing one party to act unreasonably or negligently towards the other without any legal consequences. We are likely to consider these terms to be unfair, unless the supplier can demonstrate otherwise in the context of the particular contract.

Example of liability limitation

An internet provider includes terms in its supply contracts to limit its liability. It excludes liability in all circumstances, even where, for example, the company breaches the contract or is negligent with no wrongdoing on the part of the consumer. This is likely to be unfair as it creates a significant imbalance in the parties’ rights and obligations under the contract, causes detriment to the consumer who would otherwise be able to sue for breach of contract or negligence, and the term is unlikely to be reasonably necessary to protect the internet provider. The consumer is left to bear the risk and cost of liability, even where the internet provider is at fault.

81 A term that seeks to limit or avoid a business’s liability for any representation made to prospective customers by a third-party agent of the business may also be unfair.

Example of liability limitation

A sales company includes a term in its standard form consumer contracts saying that the company has no responsibility for things said by its sales representatives. Consumers often rely on what is said to them by sales representatives before or when they are entering into a contract. A term that seeks to avoid or limit the company’s responsibility or liability for representations made to prospective consumers by its representatives at the point of sale is likely to be unfair.

This is also likely to breach the ‘contracting out’ provisions of the Act and could misrepresent the consumer’s rights to take action against the sales company.\(^{54}\)

Penalty terms

82 Terms that have the effect of penalising one party to a contract for terminating or breaching the contract may be unfair. These terms are discussed in paragraphs 95-106 in the ‘upfront price’ discussion.
Terms that cannot be declared unfair

Some contract terms cannot be declared unfair. These exempt terms include:

83.1 terms that define the main subject-matter of the contract;
83.2 terms that set the upfront price payable under the contract, to the extent that the price term is transparent; and
83.3 terms required or expressly permitted by any enactment.

Such terms are only exempt “to the extent that” they address exempt matters. If a term addresses multiple matters, part of the term may be exempt while the rest of the term is not.

If a term is not exempt, the court may assess its fairness. That will depend on all of the circumstances, and the application of the statutory tests for unfairness.

Example of exempt terms

Company Y is a door to door seller. It has a clause in its standard form contract that describes the type of goods to be provided, but states that, subject to availability, the company reserves the right to change the type of goods provided without notice. The part of the term that describes the goods to be provided is exempt because it defines the main subject-matter of the contract. However, the part of the term that allows the company to unilaterally vary the type of goods provided is not exempt and can be assessed for unfairness.

Terms defining the main subject-matter of the contract

The main subject-matter of a standard form consumer contract is the good or service or interest in land that the consumer is acquiring under the contract. Terms defining the main subject-matter of the contract are often subject to genuine negotiation or the customer is provided with a clear choice among several options. Usually those terms are transparent and because of the importance of the main subject-matter to the contract as a whole, the consumer is unlikely to misunderstand what they are acquiring.

More than one thing can be the “main subject-matter”, as long as it is a good or service acquired under the contract.

55. Section 46(2)(c).
56. Section 46K(1)(a).
57. Section 46K(1)(b).
58. Section 46K(1)(c).
59. In Office of Fair Trading v Abbey National plc & ors [2009] UKSC 6, Phillips SCJ observed (at [79]) – of the similar European law – that “The object of Regulation 6(2) is to exclude from assessment for fairness that part of the bargain that will be the focus of a customer’s attention when entering into a contract, that is to say the goods or services that he wishes to acquire and the price he will have to pay for doing so.”
60. Abbey National at [39] per Walker SCJ: “The main subject-matter may be goods or services. If it is goods, it may be a single item (a car or a dishwasher) or a multiplicity of items. If for instance a customer orders a variety of goods from a mail-order catalogue – say clothing, blinds, kitchen utensils and toys – there is no possible basis on which the court can decide that some items are more essential to the contract than others. The main subject matter is simply consumer goods ordered from a catalogue.” And at [40]: “Similarly, a supply of services may be simple (an entertainer booked to perform for an hour at a children’s party) or composite (a week’s stay at a five-star hotel offering a wide variety of services)... [A]gain the main subject matter must be described in general terms – hotel services.”
Example of subject-matter of the contract

Joe buys a smartphone from a telecommunications company and agrees to a 24-month voice and data plan. The main subject-matter of the contract encompasses (a) the purchase of the smartphone and (b) the 24-month plan. This is because Joe is acquiring both the good of the smartphone and the service of the voice and data plan.

Terms setting the up-front price payable under the contract

88 Terms that set the upfront price payable under the contract cannot be declared unfair.

89 “Upfront price” is defined as the consideration payable under the contract, including any consideration that is contingent upon the occurrence or non-occurrence of a particular event — but only to the extent that the consideration is set out in a term that is transparent.

Upfront price defined

90 There are, therefore, two elements to upfront price:

90.1 the consideration that is payable under the contract (including on the occurrence or non-occurrence of an event); and

90.2 transparency of the consideration term.

91 “Consideration” is something of value that is given by one party to another in exchange for goods or services, including any package or bundle of goods or services.

92 “Transparent” is discussed at paragraphs 67-71.

93 Upfront price will include all amounts that the consumer agrees to pay for the goods or services, including all future payments to be made, such as instalment payments or interest payable under a credit arrangement.

94 Upfront price can include per-unit pricing, where consumption determines overall cost, such as in some energy or telecommunications contracts.

61. Section 46K(2).

62. See Abbey National at [42], per Walker SCJ: “Lawyers are very used to speaking of a package (or bundle) of rights and obligations, and in that sense every obligation which a consumer undertakes by a consumer contract could be seen as part of the price or remuneration received by the supplier.” See also Phillips SCJ at [74].
Penalties distinguished from upfront price

Penalties can be distinguished from an upfront price. The terms “price” and “consideration”, as used in the UCT provisions, involve the concept of exchange: something is given in exchange for something.

A penalty does not involve an exchange. The purpose of a penalty term is to sanction a party for breaching or ending a contract, or to deter it from doing so.\(^\text{63}\)

In a United Kingdom Supreme Court case, the court accepted the argument\(^\text{64}\) that bank charges were in that case part of the price rather than a penalty. The bank was cross-subsidising some services that were part of a banking package through charges imposed for other component services. The court commented that without the charges the bank would not be able to profitably offer current account services without a monthly fee. These pricing components were held to be legitimate even though they covered services that only some personal current account holders would use.

**Example of price and penalty**

An airline offers cheap $50 fares. Travellers who ask to change their flights after purchasing these fares are charged a fee of $250.

The $250 fee is likely to be an upfront price term. It is the consideration payable when the traveller asks to change their flight, and in exchange the airline provides a rescheduling service. As long as this price is transparent it will be exempt from challenge.

\(^{63}\) *Abbey National* at [83], per Phillips SCJ: “... a penalty at common law is a payment that becomes payable upon a breach of contract.” See also Chitty at 15-109: “... the disproportionately high nature of a sum to be paid on breach is an element within the distinction between a penalty and a (valid) liquidated damages clause.”

\(^{64}\) *Abbey National*, framed under a similar European Community law.
Whether a term is a price term or not will be determined by the objective assessment of the court. The United Kingdom Supreme Court has noted that the Courts will be astute to prevent traders from drafting contracts so as to convert what is in effect a penalty, into a price, simply through the wording of the contract.

Unilateral penalty terms have a particular tendency to be unfair, as recognised by the Act:

Section 46M Examples of unfair contract terms

... (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.

The distinction between a price and a penalty is not always easy to draw, and each situation will be assessed on its particular facts and with regard to the contract as a whole.

In the United Kingdom First National case, for example, the House of Lords held that a term requiring the payment of interest on default under the contract was not a price term, but that (undertaking the fairness assessment) the interest was part of the “essential bargain” between the parties and that factor weighed in favour if the term’s fairness.

Examples of price and penalty

A DVD rental contract specifies that the customer will be fined $20 for each half-day that the DVD is returned late. The initial hire cost is $3 per day, and rentals are for 24 hours only. The purpose of the $40-per-day fine is likely to be to deter late returns and it is unlikely to represent a reasonable pre-estimate of the DVD store’s losses. It is likely to be treated as a penalty, and not part of the up-front price. It is not exempt and can be subject to a fairness assessment.

Telco A sells Joe the latest smartphone for $5 when he takes out a 24-month calling and data package. After 12 months Joe wants to end the contract as Telco B has a newer phone that he wants to buy. Telco A relies on a termination clause in its contract with Joe, which means that it would cost Joe $600 to end his contract early.

Joe complains that the termination clause is unfair. But Telco A may argue that the termination clause is a reasonable estimate of its losses and part of the upfront price. This is because when it sold the smartphone for only $5 it was as part of a bundle where the calling and data contract cross-subsidised the cost of the handset. Telco A would recoup the cost of the handset only if the 24-month contract ran its full term (or through the termination charge imposed if the contract were ended earlier.)

In assessing whether the term was part of the upfront price or an unfair penalty, the court must consider whether the termination clause is a reasonable estimate of Telco A’s losses arising from early termination. If it does, it is unlikely to be a penalty.

65. Abbey National at [113] per Mance SCJ.

If a term dealing with price is not transparent – as described in paragraphs 67-71 – it will not be an exempt “upfront price” term and the term can be subjected to the fairness assessment.

Because price is often a critical factor for consumers when entering into a contract, we will be concerned about all price terms that have not been transparently disclosed.

If it is not clear whether an amount payable is a penalty or part of the upfront price, we are likely to require evidence from the business that seeks to justify the term.

We will look at a term carefully to assess whether it is “in effect” a penalty, no matter whether it is described as a penalty term or otherwise. Factors that will be relevant can include the amount payable, whether there is an exchange of value and whether the payment is disproportionate to any cost incurred or loss suffered by the business.

We will in each case consider the substance of penalty provisions, rather than their form. For example, if there are terms allowing for penalties against both parties to the contract, they may still have the tendency to be unfair if it is factually improbable that the business would ever suffer a penalty.

Terms required or expressly permitted by any enactment

The UCT provisions do not apply to contract terms that are required or expressly permitted by any enactment.

Examples of expressly permitted terms

Joshua is selling a property, but directs his real estate agent not to disclose defects in the land. The standard form agency agreement contains a term allowing the agent to unilaterally cancel the agreement in these circumstances, as required by real estate regulations. This unilateral cancellation is expressly permitted by regulation so cannot be an unfair contract term.

67. The examples in s46M are phrased to require consideration of whether a term (for example) “penalises, or has the effect of penalising...” The substantive effect of a term, rather than how it is phrased, is critical.

68. Section 46K(1)(c).
Insurance contracts

108 There is a special set of exclusions in the Act for insurance contracts. As with all other contracts, the UCT provisions do not apply to insurance contracts entered into before 17 March 2015. But unlike most contracts, the UCT provisions also do not apply to variations of the terms of pre-existing insurance contracts or to new insurance contracts that effectively renew pre-existing contracts.\(^{69}\)

109 For new insurance contracts entered into after March 2015, some terms are deemed to be reasonably necessary to protect the interests of the insurer and are exempt from being declared unfair terms.\(^{70}\) These are terms that:

109.1 identify the subject matter or risk insured against, including terms identifying an uncertain event;

109.2 specify the sum(s) insured;

109.3 exclude or limit the liability of the insurer to indemnify the insured;

109.4 describe the basis on which claims may be settled or that specifies any sums to be contributed by the insured, such as an excess;

109.5 provide for the payment of the premium;

109.6 relate to the duty of utmost good faith owed by all parties; and

109.7 specify the requirements for disclosure or relate to the effect of any non-disclosure or misrepresentation by the insured.

\(^{69}\) Section 26A(3).

\(^{70}\) Section 46L(4).
Enforcement

110 There are significant consequences for having an unfair term in a standard form consumer contract.

111 The Commission may apply to the District Court or High Court for a declaration that a term in a standard form consumer contract is unfair.\(^7\) We may do this on our own initiative or at the request of a party to the relevant contract. Consumers cannot make their own applications to the District Court or the High Court.

112 In making a declaration of unfairness, the court:\(^2\)

112.1 must identify the contract to which the declaration applies, by reference to at least 1 of the parties to the contract; and

112.2 may describe the context or conditions in which the term’s inclusion in a standard form contract means that a term is an unfair contract term.

113 If the court decides that a term in a standard form consumer contract is an unfair contract term, then the Act prohibits that business from:\(^3\)

113.1 including the term in a standard form consumer contract (unless the term can be included in a way which complies with the court’s decision); or

113.2 applying, enforcing or relying on the term (even if the term was included in the contract before the declaration was made).

114 If that business continues to use or enforce the term, it may face:\(^4\)

114.1 conviction and a fine of up to $200,000 (in the case of an individual) or $600,000 (in the case of a body corporate); and/or

114.2 an injunction restraining the business from including, applying, enforcing or relying on the term; and/or

114.3 orders directing it to refund money or pay damages.

Complaints

115 If you wish to contact the Commission with a complaint about a potentially unfair contract term, please contact us:

Phone: 0800 943 600

Write: Commerce Commission, PO Box 2351, Wellington 6140

Email: contact@comcom.govt.nz

www.comcom.govt.nz

71. Section 46(1).
72. Section 46(3).
73. Section 26A(1).
74. Section 40.