

The Fair Trading Act

Consumers and unfair contract terms



This fact sheet explains what unfair contract terms are and what to look out for when signing a standard form consumer contract.

As a consumer, you probably enter into a number of contracts every day—even if you don't realise it. For example, each time you hire a car, book a flight, join the gym or get a mobile phone, you are entering into a contract. If a contract is for a good or service normally for personal or domestic use it is likely to be a consumer contract.

Terms and conditions set out the rights and responsibilities of each party to the contract. While you may have the opportunity to negotiate before you agree, it is common for you to be offered a contract that is the same as, or similar to, everyone else's. This is known as a standard form contract.



You should expect terms in a standard form consumer contract to be fair.

The law about unfair contract terms apply to standard form consumer contracts that are entered into on or after 17 March 2015 and to terms of existing contracts that are renewed or changed on or after 17 March 2015.

The law offers you increased protection in circumstances where you have little or no opportunity to negotiate with the business you are contracting with.



Remember that contracts are legal agreements. You should do your best to understand your rights and obligations under any contract before you agree to it. Ask questions and seek independent advice if there is anything you are unsure about or do not understand. If the contract does not meet your needs, you can negotiate or shop around. If a business gives you an explanation of particular terms or words in a contract, ask for the explanation to be put in writing and attach it to the contract.

How can I tell if a term in my contract is unfair?

For a term to be unfair, three requirements have to be met:

1. The term must cause a significant imbalance between the parties.
2. The term must not be reasonably necessary to protect the legitimate interests of the business.
3. The term causes detriment.

The following questions can help you recognise a potentially unfair term.

Does the term cause a significant imbalance between your rights and obligations and those of the business?

For example:

- Are you penalised if the contract is terminated but the business is not penalised?
- Can the business change important terms of the contract without your permission, or without letting you cancel the contract?
- Can only the business decide whether the contract has been breached?

Is the term reasonably necessary to protect the legitimate interests of the business?

While it may appear to you that a term is unfair, the business may have a genuine commercial reason for including it.

However, it is up to the business to prove to the court that it has a good reason.

Would the term cause you detriment (financial or non-financial) if the business tried to enforce it?

For example:

- Would you lose money or suffer inconvenience, delay or distress if the term was enforced?

How transparent is the term?

For example:

- Is the term presented clearly and expressed in reasonably plain language?
- Or is it hidden in fine print or written in complex technical language?

You should also be aware that the fairness of a term must be considered in the context of the **contract as a whole**. 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.

🔗 You can read more about *unfair contract terms* in our guidelines document at www.comcom.govt.nz/fair-trading/guidelines/unfair-contract-term-guidelines/



This fact sheet provides guidance only. It is not intended to be definitive and should not be used in place of legal advice. You are responsible for staying up to date with legislative changes.

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Contact us with information about possible breaches of the laws we enforce:

Phone: 0800 943 600 **Write:** Enquiries Team, PO Box 2351, Wellington 6140 **Email:** contact@comcom.govt.nz

Are there any terms or contracts that the law does not apply to?

The unfair contract terms law covers most terms in standard form consumer contracts. However, terms in consumer contracts that define, or set the price of the product or service being supplied are exempt from the test for unfairness. This includes any fees or costs you may be charged. But, these are only exempt if they are transparently disclosed.

Terms that are required or permitted by another law, are also exempt.

There are also contracts for certain goods and services that the new law does not apply to, including most insurance contracts.

What can I do if there is an unfair term in my contract?

Only the Commerce Commission can ask a court to make a declaration on whether a term is unfair. If a court decides a term is unfair a business cannot enforce it.

If a business continues to use an unfair term, it is liable for prosecution by the Commission.

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

Phone: 0800 943 600

Write: Enquiries Team, PO Box 2351, Wellington 6140

Email: contact@comcom.govt.nz

