

# Unfair Contract Terms Guidelines

**Applying to standard form consumer and small trade contracts**

Updated August 2022 to reflect the extension to small trade contracts



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## Purpose and scope

- 1 The Commerce Commission is responsible for enforcing the Fair Trading Act 1986 (the Fair Trading Act), which prohibits misleading, deceptive and unfair trade practices.
- 2 Since March 2015, Fair Trading Act provisions prohibiting the use of unfair contract terms (UCT provisions) have applied to standard form consumer contracts. The UCT provisions also apply to standard form small trade contracts entered into, renewed or varied from 16 August 2022.
- 3 The Commission can apply to the District Court or the High Court for a declaration that a term in a standard form consumer or small trade contract is an unfair contract term. If a term is declared to be unfair, a person cannot include it in a standard form consumer or small trade 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.
- 4 These guidelines:
  - 4.1 explain the UCT provisions;
  - 4.2 explain how we will assess whether a term in a standard form consumer or small trade contract may be unfair and the principles we think are likely to be applied by the courts;
  - 4.3 identify examples of terms that may be unfair and those that may not be unfair; and
  - 4.4 describe our approach to enforcement of the UCT provisions.
- 5 These guidelines were first published in February 2015 before the UCT provisions applying to standard form consumer contracts came into force. The guidelines have been updated to reflect developments in the law, including the application of the UCT provisions to standard form small trade contracts.
- 6 The guidelines are intended to assist parties to standard form consumer or small trade contracts to think about how the UCT provisions apply to them. Some businesses may need to consider the UCT provisions both as a supplier and as a customer. The guidelines are not exhaustive and are not intended to be legally binding.

## Use of examples

- 7 The Fair Trading Act specifies a range of factors to be taken into account when identifying a relevant standard form consumer or small trade contract and when determining whether a term in such a contract is unfair. Each case must be considered on its own unique facts, applying the statutory requirements in light of all the circumstances and with reference to the contract as a whole.
- 8 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.
- 9 Examples are used to illustrate 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.

- 10 Examples provide only limited guidance about how the courts may interpret and apply the UCT provisions. The best guidance is obtained from established case law. We will apply for court declarations in suitable cases that meet our published enforcement criteria<sup>1</sup> and in cases that present opportunities to develop case law on important points.
- 11 For example, in these guidelines, we have considered the Court’s decision in *Commerce Commission v Home Direct Limited*, the first declaration of an unfair contract term in a standard form consumer contract sought by the Commission in 2019.<sup>2</sup>
- 12 We may revise the guidelines from time to time to reflect developments in the law and our organisational objectives and priorities. The most up-to- date version of the guidelines is the version published on our website.

## Contracts subject to the UCT provisions

- 13 The UCT provisions apply terms in 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.<sup>3</sup> The UCT provisions also apply to standard form small trade contracts entered into, varied or renewed on or after 16 August 2022 (with the exception of insurance contracts, as noted below).
- 14 There are certain exceptions to the UCT provisions that apply to insurance contracts:
  - 14.1 The UCT provisions do not apply to consumer insurance contracts entered into before 17 March 2015, even if they are renewed or varied after that date.<sup>4</sup>
  - 14.2 Similarly, the UCT provisions do not apply to small trade insurance contracts entered into before 1 April 2025 (or any earlier date specified by the Governor-General by Order in Council), even if they are renewed or varied after that date.<sup>5</sup> The UCT provisions also do not apply to new small trade insurance contracts entered into after that date if they have the effect of operating as renewals of contracts entered into before that date.
- 15 Parties to a standard form consumer or small trade contract cannot contract out of the UCT provisions. Any attempt to do so may breach other provisions of the Fair Trading Act.
- 16 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.<sup>6</sup>

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1. Our enforcement criteria and Enforcement Response Guidelines are available at <http://www.comcom.govt.nz/about-us/our-policies-and-guidelines/investigations-and-enforcement>

2. *Commerce Commission v Home Direct Limited* [2019] NZHC 2943. See: <https://comcom.govt.nz/case-register/case-register-entries/home-direct-limited2>

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 130–131 “consumer insurance contracts”.

5. Fair Trading Amendment Act 2021, schedule 1AA. Refer to paragraphs 132–133 “small trade insurance contracts”.

6. 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 or setting the upfront price payable under the contract or terms expressly required or permitted by another enactment. We refer in these guidelines to exempt terms, even though sometimes only part of a term may address exempt matters. Refer to paragraphs 62–65 “What terms are exempt from being declared unfair?” and paragraphs 105–107 “Terms that cannot be declared unfair”.

## Overview of UCT provisions

- 17 The UCT provisions apply to standard form consumer and small trade contracts. A contract is a standard form contract if its terms (other than exempt terms) have not been subject to effective negotiation between the parties.<sup>7</sup> The contract is offered on a “take it or leave it” basis.
- 18 If we think that a standard form contract term is unfair, the Commission 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. We can either apply:
  - 18.1 on our own initiative; or
  - 18.2 after we have assessed a request of a party to the standard form contract, for example, a consumer or business.<sup>8</sup>
- 19 We will exercise our enforcement discretion when deciding whether to seek a declaration in respect of any term.<sup>9</sup> Consumers or businesses can complain to us regardless of any other dispute resolution mechanisms that might apply to the contract.
- 20 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:<sup>10</sup>
  - 20.1 the term is in a contract that is a **consumer or small trade contract**;
  - 20.2 the contract is a **standard form contract** (as determined in accordance with section 46J);
  - 20.3 the declaration is **not prohibited** by section 46K(1); and
  - 20.4 the **term is unfair** in the sense described in section 46L.
- 21 The court may declare a term to be unfair if it meets all three of the following requirements:<sup>11</sup>
  - 21.1 The term would cause a significant imbalance in the parties’ rights and obligations arising under the contract.
  - 21.2 The term is not reasonably necessary to protect the legitimate interests of the party who would be advantaged by it.
  - 21.3 The term would cause detriment (whether financial or otherwise) to a party if it were applied, enforced or relied on.



7. 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 or small trade contract.

8. Section 46H(2).

9. For further guidance on the enforcement discretion see our Enforcement Response Guidelines available online at <https://comcom.govt.nz/about-us/our-policies-and-guidelines/investigations-and-enforcement/enforcement-response-guidelines>

10. Section 46I(2).

11. Section 46L(1).

- 22 The court must be satisfied that all of these requirements are met. For example, a term may impose detriment on a party to the contract 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 while at the same time being reasonably necessary to protect the advantaged party's legitimate business interests. In such cases, the term would not be unfair because only some of the requirements for unfairness would be met.
- 23 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**.<sup>12</sup> The Commission and a court can therefore have regard to a wide range of considerations when assessing unfairness.
- 24 Some terms cannot be declared unfair. We refer to these as "exempt terms". A term is exempt if it:
- 24.1 defines the main subject matter of the contract;
  - 24.2 sets the upfront price payable under the contract to the extent that the price term is transparent; or
  - 24.3 is required or expressly permitted by any enactment.<sup>13</sup>
- 25 If a term is not exempt, we can ask the court to assess its fairness. Whether the court finds the term to be unfair will depend on all of the circumstances and the application of the statutory tests.
- 26 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.<sup>14</sup>
- 27 If a term has been declared unfair by a court, the business must not use the term in a standard form consumer or small trade contract unless it is included in a way that complies with the terms (if any) of the court's decision and the business cannot apply, enforce or rely on that term. If the business 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.<sup>15</sup>
- 28 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.
- 29 A declaration of unfairness will apply directly to the term in the standard form consumer or small trade contract that the court has scrutinised. We consider that, if the same contract has been used by the business 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.

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12. Section 46L(2).

13. Section 46K(1).

14. Section 46(3)(b).

15. Section 40.

- 30 We will publicise any declarations of unfairness that we obtain.<sup>16</sup> Businesses 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 or small trade 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.
- 31 An unfair term may also breach the Fair Trading Act if it is false, misleading or deceptive.<sup>17</sup>

## UCT provisions apply only to standard form consumer and small trade contracts

- 32 From 16 August 2022, the UCT provisions apply not only to standard form consumer contracts but also to standard form small trade contracts.<sup>18</sup>

### What is a standard form contract?

- 33 The Fair Trading Act does not prescribe all the features of a standard form contract but does stipulate that it must be a contract in which the terms (other than exempt terms<sup>19</sup>) “have not been subject to effective negotiation between the parties”.<sup>20</sup>
- 34 The court must determine whether a contract is a standard form contract based on the particular circumstances of the case.
- 35 In deciding whether the contract is a standard form contract, a court must take into account at least the following factors (and any others that it considers relevant):<sup>21</sup>
- 35.1 Whether one of the parties had all or most of the bargaining power in the transaction.
  - 35.2 Whether the contract was prepared by one party before any discussion took place about the transaction.
  - 35.3 Whether a party was, in effect, required to accept or reject the terms of the contract in the form in which they were presented.
  - 35.4 The extent to which the parties had an effective opportunity to negotiate<sup>22</sup> the terms of the contract.
  - 35.5 The extent to which the terms of the contract take into account the specific characteristics of any party to it.

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16. For example, the Home Direct Limited declaration in 2019: <https://comcom.govt.nz/case-register/case-register-entries/home-direct-limited2>

17. It is possible that we could seek to take action under both the UCT provisions and other provisions of the Fair Trading Act. Individuals also have a right of action under other provisions of the Fair Trading Act. Guidance on the Fair Trading Act can be found on our website.

18. Aside from exempt terms, which cannot be declared unfair under sections 46K and 46L(4), and the insurance contract exceptions noted.

19. Section 46K(1). Some terms may 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 terms expressly required or permitted by other enactments.

20. Section 46J(1).

21. Section 46J(2).

22. Section 2(1). “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).

- 36 Importantly, if we allege that a contract is a standard form contract, the contract is presumed to be so unless any other party to the proceeding proves otherwise.<sup>23</sup> The burden of proof is on the party arguing that the contract is not a standard form contract.
- 37 In practical terms, we think that a business seeking to deny that a contract is a standard form 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.

#### Example of a standard form small trade contract

Charley makes plans to open a food truck selling fried chicken. She shops around for chicken suppliers. She discusses her likely supply needs with various sales teams and decides to go with one supplier. They send her a standard set of terms and conditions. The standard terms are provided without an opportunity to negotiate them. This is likely to be a standard form small trade contract.<sup>24</sup>



23. Section 46J(3).

24. Assuming that the contract falls within the annual value threshold of \$250,000 when the relationship first arises (refer to paragraphs 46–61 “What is a small trade contract?”).



## What is a consumer contract?

- 38 A **consumer contract**<sup>25</sup> is a contract between:
- 38.1 a supplier of goods and services in trade and a consumer; or
  - 38.2 a person disposing of an interest in land in trade (for example, a property developer) and a consumer.
- 39 A person or supplier is **in trade**<sup>26</sup> 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.
- 40 A **supplier**<sup>27</sup> is not just a person or business that sells goods or services but:
- 40.1 in the case of goods includes supply by gift, exchange, lease, hire or hire purchase; and
  - 40.2 in the case of services, includes providing, granting or conferring services.
- 41 **Consumer**<sup>28</sup> or **business** ie, means a person or business who:
- 41.1 acquires from a supplier goods or services of a kind ordinarily acquired for personal, domestic, or household use or consumption; and
  - 41.2 does not acquire the goods or services or hold themselves out as acquiring the goods or services for the purpose of:
    - a) resupplying them in trade;
    - b) consuming them in the course of a process of production or manufacture; or
    - c) in the case of goods, repairing or treating in trade other goods or fixtures on land.
- 42 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 that 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.
- 43 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.<sup>29</sup>

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25. Section 2(1). Definition of “consumer contract”.

26. Section 2(1). Definition of “trade”.

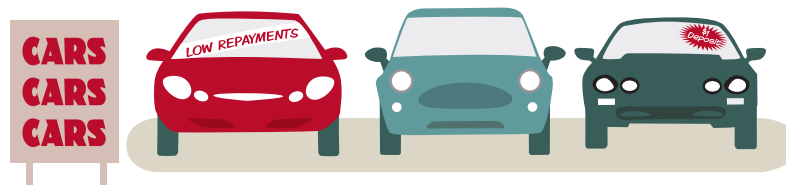
27. Section 2(1). Definition of “supply”.

28. Section 2(1). Definition of “consumer”.

29. A business can also benefit from the UCT provisions if it is party to a small trade contract, irrespective of the goods or services acquired or the use to which it intends to put them. Refer to paragraphs 46–61 “What is a small trade contract?”.

44 The UCT provisions rely on a definition of “consumer” that has been copied from the Consumer Guarantees Act 1993. The following has been held in that context:

- 44.1 It is a matter of fact and degree whether goods can be said to be of a kind ordinarily acquired for private use.<sup>30</sup> 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.<sup>31</sup> 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.
- 44.2 It is also possible to have goods that are of a kind ordinarily acquired for private use that 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<sup>32</sup> – 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.
- 44.3 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.<sup>33</sup>
- 44.4 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.<sup>34</sup>
- 44.5 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.<sup>35</sup>
- 44.6 “Holding yourself out” as having a business purpose simply means representing this by words or conduct.<sup>36</sup> It is not enough that the seller thought or assumed that the buyer had a commercial purpose.



30. *Nesbit v Porter* (2000) 9 TCLR 395 (Court of Appeal) at [26].

31. *Nesbit* at [27].

32. *Nesbit* at [26].

33. *Kerry Stone Ltd v Knowles* (2006) 11 TCLR 768 (High Court).

34. *Kerry Stone* at [24].

35. *Kerry Stone* at [32]–[33], [38], [53]–[55].

36. *Kerry Stone* at [49].

- 45 Standard form consumer contracts are common in many industries, including:
- 45.1 car parking;
  - 45.2 childcare centres;
  - 45.3 daily deal or coupon specials;
  - 45.4 events and entertainment;
  - 45.5 finance;<sup>37</sup>
  - 45.6 gym membership;<sup>38</sup>
  - 45.7 hire purchase;
  - 45.8 motor vehicle sales;
  - 45.9 online and mobile apps and software;
  - 45.10 online entertainment subscriptions;
  - 45.11 rental of appliances or goods;
  - 45.12 residential construction;
  - 45.13 residential tenancy and real estate;
  - 45.14 retirement villages;
  - 45.15 self-storage facilities;
  - 45.16 telecommunications;<sup>39</sup>
  - 45.17 travel and tourism (such as airfares, rental cars and tours); and
  - 45.18 utilities such as electricity or gas services.<sup>40</sup>

### Examples of consumer contracts

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.

Wheely Good Mobile Cleaning Limited purchases 10 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). The standard form contract under which these cars were purchased would be considered a standard form consumer contract 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, in which case the small trade contract provisions might apply (if they meet the definition below).

37. 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 or small trade contracts used in the financial services sector.
38. The Commission has reviewed several industry sectors for compliance with the UCT provisions, including the gym and fitness industry. See the Commission's report from August 2017 on standard form consumer contracts used in the gym and fitness industry: [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0020/86123/Unfair-contract-terms-Gym-contracts-review-August-2017.PDF](https://comcom.govt.nz/_data/assets/pdf_file/0020/86123/Unfair-contract-terms-Gym-contracts-review-August-2017.PDF)
39. See the Commission's report from February 2016 on standard form consumer contracts used in the telecommunications sector: [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0018/86121/Unfair-contract-terms-Telecommunications-contracts-review-February-2016.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0018/86121/Unfair-contract-terms-Telecommunications-contracts-review-February-2016.pdf)
40. See the Commission's report from August 2016 on standard form consumer contracts used in the energy retail sector: [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0019/86122/Unfair-contract-terms-Energy-retail-contracts-review-August-2016.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0019/86122/Unfair-contract-terms-Energy-retail-contracts-review-August-2016.pdf)

## What is a small trade contract?

- 46 A contract is a small trade contract if:
- 46.1 each party is **engaged in trade** (as defined above);
  - 46.2 it is not a consumer contract (as defined above); and
  - 46.3 it does not comprise or form part of a **trading relationship** that exceeds an annual value threshold of \$250,000 (including GST, if applicable) when the trading relationship first arises.<sup>41</sup>
- 47 Like standard form consumer contracts, standard form small trade contracts are common across many industries. These types of contracts are often low value or routine and used for repeat business on a “take it or leave it” basis.
- 48 Small trade contracts can be entered into by small or large businesses – the question of whether the UCT provisions apply focuses on the value of the trading relationship between the parties. For example, it is possible for a standard form contract between two large companies to fall within the definition of a small trade contract if the trading relationship does not exceed the annual value threshold. However, the contract still needs to be a standard form contract that meets the requirements for a standard form contract discussed above at paragraphs 33–37.<sup>42</sup>
- 49 Businesses entering into standard form contracts as part of a trading relationship that exceeds the annual value threshold cannot rely upon the UCT provisions to protect against unfair contract terms in those contracts.
- 50 In proceedings taken in relation to UCTs in standard form small trade contracts, if a party alleges that a contract is a small trade contract, that contract is presumed to be a small trade contract unless proven otherwise by another party to the proceeding.<sup>43</sup>

### *What is a trading relationship?*

- 51 A trading relationship between parties to a contract means a relationship consisting of that contract and any other contract (whether current or prospective) between the same parties on the same or substantially similar terms.<sup>44</sup> When assessing what constitutes the trading relationship and its value, it is therefore necessary to consider:
- 51.1 when the relationship first arises; and
  - 51.2 which contracts between the parties are on the “same or substantially similar terms”; and
  - 51.3 whether the relationship exceeds the annual value threshold.



41. Section 26C(1).

42. Section 46J(1) and (2).

43. Section 26C(2).

44. Section 26D(2).

### *When does the trading relationship first arise?*

- 52 A trading relationship first arises when the first or only contract of the relationship is entered into.<sup>45</sup> For example, Joe's Oranges Limited signs a standard form contract with Orange Juicing Company to supply oranges for Orange Juicing Company's fruit juice business. When this contract is agreed and signed by both parties, this is the start of their trading relationship.
- 53 Standard form small trade contracts entered into before 16 August 2022 will become subject to the UCT provisions if varied or renewed after 16 August 2022 (with the exception of insurance contracts as discussed at paragraph 14 above). The date of variation or renewal will be the date that the trading relationship first arises for the purpose of assessing the annual value of the relationship even if the relationship has already existed for many years.<sup>46</sup>

### *When are contracts on the same or substantially similar terms?*

- 54 The upfront price and subject matter of the contracts must be disregarded when assessing whether the contracts are on the same or substantially similar terms. That is, two standard form contracts that differ only in respect of price and subject matter of the contract will be considered to be the same and form part of a single trading relationship.
- 55 Whether two or more standard form contracts are on substantially similar terms will be a matter of fact and degree. Standard form contracts that vary only in minor respects will likely be on substantially similar terms. In Example 2 below, which is included in the Fair Trading Act, although the two contracts relate to different subject matter (grapes and apples), they are otherwise on the same terms and therefore considered part of the same trading relationship.

### *Considering the annual value threshold*

- 56 The UCT provisions for small trade contracts will apply if the contract forms or comprises part of a trading relationship that does not exceed an annual value threshold of \$250,000 (including GST, if applicable) when that relationship first arises.
- 57 A trading relationship will exceed the annual value threshold if, at the time that relationship first arises:
  - 57.1 it includes a transparent term providing for consideration of \$250,000 or more (including GST, if applicable) to be paid under it, in relation to any annual period for the goods, services or interest in land; or
  - 57.2 consideration (including GST, if applicable) worth \$250,000 or more is otherwise more likely than not to become payable under the relationship in relation to any annual period for the goods, services or interest in land.
- 58 "More likely than not" is intended to be an objective test and consistent with the civil standard of proof (on the balance of probabilities).<sup>47</sup> What is "likely" will be situation-specific but may be influenced by factors such as previous communication between the parties regarding their intentions, the supplier's output capacity and the purchaser's previous rate of use or on-sale of the particular good or service, among other factors.<sup>48</sup>

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45. Section 26D(3).

46. Schedule 1AA 1(2).

47. Fair Trading Amendment Bill 2019 (213-1) (select committee report) at 52, which refers to *Commerce Commission v Woolworths Limited and others* [2008] NZCA 276.

48. Fair Trading Amendment Bill 2019 (213-1) (initial briefing) at 11.

- 59 The annual value threshold relates to an annual period, which is defined in the Fair Trading Act as being a period that begins with the date that the trading relationship first arises, or an anniversary of that date and ending 12 months later. This means that annual value could be calculated based on a fixed-term contract of 1 year in duration, or on the first year of trade and on each subsequent year of trade under an open-ended contract. For the purposes of assessing whether a trading relationship is subject to the UCT provisions, its value in any annual period must not or must not be likely to exceed the annual value threshold.
- 60 If a business knows or it is more likely than not that the value of its trading relationship will exceed \$250,000 in any year in the future (even if not in the first year of a trading relationship), the UCT provisions may not apply to standard form contracts on the same or substantially similar terms entered into during that trading relationship. Similarly, if a business did not know and it was not more likely than not that the value of the trading relationship would exceed \$250,000 in any year in the future, even if the trading relationship grows in the future, the UCT provisions will apply to any standard form contracts entered into between the parties that meet the other requirements of the UCT provisions.

### Statutory examples of small trade contracts

The Fair Trading Act sets out some examples to assist businesses with assessing whether their contracts are small trade contracts.<sup>49</sup>

#### Example 1

A and B enter into a contract on 1 December 2022. The contract includes a transparent term under which A is to pay B \$253,000 (\$220,000 plus GST) for services to be provided before 1 December 2023. On 1 November 2023, A and B enter into a contract on substantially similar terms. The second contract includes a transparent term for A to pay B \$57,500 (\$50,000 plus GST) for services to be provided in 2024.

Neither contract is a small trade contract because the annual value threshold is exceeded when the trading relationship first arises.

#### Example 2

C and D are both engaged in trade. They enter into 2 contracts for C to buy fruit from D. The contracts are on the same terms except that the first contract relates to grapes and is entered into on 1 January 2023, and the second contract relates to apples and is entered into a year later, on 1 January 2024. Neither contract is a consumer contract and there are no other contracts in the trading relationship.

The parties' expectation when entering into the first contract is that C will spend approximately \$120,000 per year under it and that from 2024 it will also spend \$180,000 per year under the second contract.

Neither contract is a small trade contract because, despite the different subject matter, they form part of the same trading relationship, and the annual value threshold is exceeded when the trading relationship first arises.

49. Section 26D.

### Example 3

On 1 May 2024, E and F, who are both engaged in trade, enter into an open-ended contract for E to supply stationery to F. The contract is not a consumer contract, and the trading relationship contains no other contracts.

The contract does not include transparent terms setting out the consideration to be paid but based on their previous interactions the parties expect that F will spend \$100,000 under it each year. However, after several years F is purchasing significantly more stationery than originally anticipated. E is now supplying \$300,000 worth of stationery to F each year. There has been no variation of the contract.

The contract starts as and remains a small trade contract because the annual value threshold is not exceeded when the trading relationship first arises.

- 61 Assessment of the annual value (or likely annual value) of the trading relationship when it first arises provides a degree of certainty to the parties at the point that they enter into a trading relationship whether or not the arrangement is covered by the UCT provisions for the life of the trading relationship. It also ensures that the UCT provisions do not cease partway through a contract if the value of the trading relationship unexpectedly increases.<sup>50</sup>

### What terms are exempt from being declared unfair?

- 62 Some terms cannot be declared unfair.<sup>51</sup> We refer to these as “exempt terms”, and they are discussed in depth at paragraphs 105–129.
- 63 These are terms that:
- 63.1 define the main subject matter of the contract;<sup>52</sup> or
  - 63.2 set the upfront price payable under the contract, to the extent that the price term is transparent;<sup>53</sup> or
  - 63.3 are required or expressly permitted by any enactment.<sup>54</sup>
- 64 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 exempt terms

If a term clearly describes the price of each unit of the product to be supplied, this cannot be declared to be unfair because it sets the upfront price payable under the contract.

If another 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.

- 65 If a term is not exempt, the court may assess its fairness in all of the circumstances and applying the statutory tests for unfairness.

50. Fair Trading Amendment Bill 2019 (213-1) (initial briefing) at 11.

51. Section 46I(2)(c). The court is prohibited from making a declaration of unfairness in respect of such terms.

52. Section 46K(1)(a).

53. Section 46K(1)(b).

54. Section 46K(1)(c).

## Terms that may be unfair

- 66 A term can be declared unfair only if the court is satisfied that **all of the following three requirements are met**.<sup>55</sup> These requirements apply to both consumer and small trade contracts:
- 66.1 The term would cause a **significant imbalance** in the parties' rights and obligations arising under the contract.
  - 66.2 The term is **not reasonably necessary to protect the legitimate interests** of the party that would be advantaged by the term.
  - 66.3 The term would cause **detriment** (whether financial or otherwise) to a party if the term were applied, relied on or enforced.
- 67 We are required to prove requirements (1) significant imbalance and (3) potential for detriment. The onus is on the party advantaged by the term to persuade the court in relation to requirement (2) that its term is reasonably necessary to protect its legitimate interests. The UCT provisions contain a presumption that a challenged term is not reasonably necessary.<sup>56</sup>
- 68 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:<sup>57</sup>
- 68.1 The extent to which the term is **transparent**.
  - 68.2 The **contract as a whole**.
- 69 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 if it were relied upon because the term favours one party at the expense of another.
- 70 We also consider below how the High Court applied each of the three requirements and mandatory considerations in *Commerce Commission v Home Direct Limited*, the first case in which the Commission sought a declaration that a term contained in a standard form consumer contract was unfair.<sup>58</sup> The terms declared to be unfair in *Home Direct* related to a voucher entitlement scheme under which customers continued to make direct debit payments after they had paid off their goods. These payments were converted into voucher entitlements that could be used to buy more goods from Home Direct. The contract terms declared to be unfair provided that the vouchers were not refundable for cash and, if they were not used to buy more goods, they would expire after 12 months and Home Direct would retain the money used to acquire the vouchers.
- 71 Although *Home Direct* related to a standard form consumer contract, we consider that the relevant principles will also be applicable to the assessment of the fairness of terms included in standard form small trade contracts.



55. Section 46L(1).

56. Section 46L(3).

57. Section 46L(2).

58. *Commerce Commission v Home Direct Limited* [2019] NZHC 2943.



## First requirement: significant imbalance between the parties

- 72 The first requirement is that the term would cause a significant imbalance between the parties' rights and obligations arising under the contract.<sup>59</sup> 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.
- 73 Whether a contract term creates a significant imbalance between the parties' rights and obligations will depend on the facts of each case.
- 74 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.
- 75 The court is likely to make an overall assessment of the interests involved rather than apply the test mechanically.
- 76 Examples of terms that may cause a significant imbalance between the parties' rights and obligations arising under the contract include:
  - 76.1 a term that advantages one party in a way that puts the other party at a significant disadvantage;
  - 76.2 a term that shifts risks to a party that the other party is better placed to manage;<sup>60</sup>
  - 76.3 a term penalising one party for breach of contract but not another;<sup>61</sup>
  - 76.4 penalty terms purporting to create mutual penalties under the contract where it is improbable that one party is ever likely to suffer a penalty (and very plausible that the other party may); or
  - 76.5 a term purporting to confer a valuable benefit on a party in return for consideration provided by the other party where in any practical sense, the benefit is illusory and unlikely to be realised.

### Example of significant imbalance

#### Standard form small trade contract

Charley has contracted a tradesperson to fit out her new food truck. Terms and conditions in the tradesperson's contract for service say that Charley will have no claim against the tradesperson for any damage done by the tradesperson to Charley's property, including through their negligence. This term shifts a considerable risk on to Charley's business that the tradesperson should be better placed to manage.

59. Section 46L(1)(a).

60. Note that the Fair Trading Act provides an example list of terms that may be unfair in section 46M (discussed at paragraphs 96–101). 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.

61. Section 46M(c).

## Example of significant imbalance

### Standard form consumer contract

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 did so when Hannah was not available to inspect it. If the business argues that Hannah has accepted the bookcase on delivery, the exclusion-of-liability term might be unfair.

- 77 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.
- 78 When assessing whether the terms caused a significant imbalance in *Home Direct*, the High Court summarised the following principles from Australian case law:
- 78.1 When assessing whether there is a significant imbalance, it is useful to assess the impact of the relevant term on the parties' rights and obligations by comparing the effect of the contract with the term and the effect it would have without it.<sup>62</sup>
- 78.2 The significant imbalance assessment requires the court to compare the trader's rights and liabilities because of the relevant term, with the consumer's rights and liabilities as the result of that term, to see whether there is a significant imbalance between the two. Attention is directed to the substantive unfairness of the contract, which needs to be considered in the context of the contract as a whole.<sup>63</sup>
- 78.3 The significant imbalance requirement will be met if a term is so weighted in favour of the supplier as to tilt the parties' rights and obligations under the contract significantly in its favour.<sup>64</sup> In this context, "significant" means "significantly large to be important".<sup>65</sup>
- 78.4 A term is less likely to give rise to a significant imbalance if there is a meaningful relationship between the term and the protection of a party, and that relationship is reasonably foreseeable at the time of contracting.<sup>66</sup>
- 78.5 A significant imbalance may be created by a term allowing a party to charge customers for services it has not rendered for reasons beyond the customer's control.<sup>67</sup>

62. *Director General of Fair Trading v First National Plc* [2001] UKHL 52, [2002] 1 AC 481 at [54], cited in *ACCC v CLA Trading Pty Limited* [2016] FCA 377 at [54](c).

63. *ACCC v CLA Trading Pty Limited* [2016] FCA 377 at [54](b), [57].

64. *ACCC v CLA Trading Pty Limited* [2016] FCA 377 at [54](d), *ACC v ACN 117 372 915 Pty Limited (in liq)* [2015] FCA 368 at [950].

65. *ACCC v CLA Trading Pty Limited* [2016] FCA 377 at [54](e), *Jetstar Airways Pty Limited v Free* [2008] VSC 539 at [104]–[105].

66. *Paciocco v Australia & New Zealand Banking Group Ltd* [2016] HCA 28, (2016) 258 CLR 525 at [201]; *ACCC v JJ Richards & Sons Pty Ltd* [2017] FCA 1224 at [56]; *ACCC v TPG Internet Pty Limited* [2019] FCA 1677.

67. *ACCC v JJ Richards & Sons Pty Ltd* [2017] FCA 1224 at [31].

78.6 When considering the contract as a whole, not each and every term of the contract is equally relevant or necessarily relevant at all. The main requirement is to consider terms that might reasonably be seen as tending to counterbalance the term in question.<sup>68</sup>

### Home Direct example

The High Court was satisfied that there were significant benefits to Home Direct from the use of the terms in question:<sup>69</sup>

- a) The no refunds term prevented customers from obtaining a refund of payments made, requiring vouchers to be spent on Home Direct products or be forfeited. This gave Home Direct guaranteed future income.
- b) The no refunds term meant that Home Direct obtained the interest-free use of the money until a purchase was ultimately made.
- c) The 12-month expiry term gave rise to the prospect (ultimately realised) of a windfall benefit for vouchers not spent within that period.

In contrast, the High Court found that “the scheme did not provide any corresponding benefit to customers”. The Court was ultimately satisfied that “the significant benefits” that Home Direct obtained from these terms and the “absence of any countervailing benefit to consumers resulted in a significant imbalance to the parties’ rights and obligations arising under the Home Direct Contract”.<sup>70</sup>

## Second requirement: not reasonably necessary to protect legitimate business interests

- 79 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.<sup>71</sup>
- 80 In court, we do not need to prove that a term is not reasonably necessary.<sup>72</sup> 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).



68. *Jetstar Airways Pty Ltd v Free* [2008] VSC 539 at [128], cited in *ACCC v CLA Trading Pty Ltd* [2016] FCA 377 at [54](g).

69. *Home Direct* at [39]–[40].

70. *Home Direct* at [42]–[44].

71. Section 46L(1)(b).

72. Section 46L(3).

- 81 The Fair Trading Act provides little guidance as to when a term will be reasonably necessary. Given the Fair Trading Act's consumer protection purposes, the party will likely need to show that the interest being protected by the term:
- 81.1 is a legitimate interest requiring protection; and
  - 81.2 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 its standard form mortgagee 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 bank has had no opportunity to inspect the property.

- 82 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.
- 83 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.
- 84 *Chitty on Contracts* provides the following example:<sup>73</sup>

*... [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.*

### Example of reasonable necessity

In *Home Direct*, the High Court reiterated that Home Direct had:

*... no legitimate interest in holding its customers' funds interest free against potential future purchases and with no option for them to be refunded. Nor did it have a legitimate interest in forfeiting such funds if a customer did not purchase goods within 12 months of having acquired the relevant voucher.*<sup>74</sup>

73. *Chitty on Contracts* 31st edition, 2013 at 15-083.

74. *Commerce Commission v Home Direct Limited* [2019] NZHC 2943 at [45].

## Third requirement: term would cause detriment

- 85 The third requirement is that the term would cause detriment to a party if it was to be applied, enforced or relied upon.<sup>75</sup> 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.
- 86 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 party because of the unfair term.

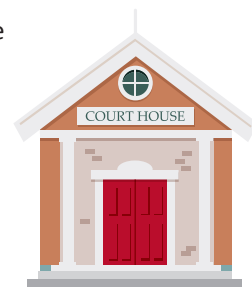
### Home Direct example

The High Court in *Home Direct* accepted that detriment was caused in the following respects:<sup>76</sup>

- a) Voucher entitlements were non-interest bearing.
- b) Consumers were effectively locked in to purchasing goods from Home Direct when their circumstances may have dictated more efficient application of their savings and whether or not more favourable terms of purchase were available from other suppliers.
- c) The expiry term had the potential to cause obvious detriment in the event that vouchers were not applied to new purchases within the relevant period because the term effectively forced consumers into the purchase of products they may not have needed. This was exacerbated by the no refunds term which prevented customers from withdrawing their funds as an alternative to spending them with Home Direct.

## What the court must also consider

- 87 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.<sup>77</sup> The Commission and a court can therefore have regard to a wide range of considerations when assessing unfairness.
- 88 The "any matters" formulation is expansive and flexible. We anticipate that it can accommodate considerations such as, for example, whether the seller has put pressure on the consumer or business to conclude the contract in haste without time to think about its implications. These are matters that likely would go to the court's assessment of whether a term is unfair.



75. Section 46L(1)(c).

76. *Commerce Commission v Home Direct Limited* [2019] NZHC 2943 at [46]–[47].

77. Section 46L(2).

## Transparency

- 89 If a term is not transparent it is more likely to be unfair because consumers or businesses may not be aware of its existence or effect. Terms that are not transparent may also breach the Fair Trading Act’s prohibition against misleading or deceptive conduct. Therefore, it is important that businesses make contract terms as transparent as possible.
- 90 A term is transparent if it is expressed in reasonably plain language, is legible and clearly presented and is readily available.<sup>78</sup> 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 transparent and therefore fair.
- 91 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.
- 92 Transparency affects whether the “upfront price” exemption applies.<sup>79</sup> A price term that is not transparent will not be upfront and can be challenged as unfair. Upfront price terms that are transparent will in most cases be exempt.
- 93 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.

### Home Direct example

In *Home Direct*, the High Court found that the relevant terms were not transparent, having regard to their content and how they were presented. In making this assessment, the Court referred to the location and clarity of references to the terms, the terms and conditions being insufficiently clear and the overall opacity of the scheme. It also found that the references were in small font in a condensed box, deep in the document, which created the risk that consumers could easily have missed them. In combination, the Court found that these considerations meant that the relevant terms were “far from transparent”.<sup>80</sup>

## The contract as a whole

- 94 The court must also take into account the contract as a whole when considering the three requirements for unfairness.<sup>81</sup> 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.

78. Section 2(1).

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

80. *Commerce Commission v Home Direct Limited* [2019] NZHC 2943 at [48]–[57].

81. 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).

- 95 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. However, 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.

### Home Direct example

In *Home Direct*, the Court considered the terms within the contract as a whole, and in particular it considered the overall opacity of the voucher entitlement scheme. The Court highlighted that the terms were not balanced by any right to interest on accrued balances or discounts on future purchases and there were no countervailing obligations on Home Direct, so the terms were in a sense "one-way traffic".<sup>82</sup>



82. *Commerce Commission v Home Direct Limited* [2019] NZHC 2943 at [51] and [58].

## Types of terms that may be unfair

- 96 The Fair Trading Act lists examples of the types of terms that a court may regard as unfair when used in a standard form consumer or small trade contract.<sup>83</sup> 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.
- 97 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:
- 97.1 vary the terms of the contract;
  - 97.2 avoid or limit performance of the contract;
  - 97.3 terminate the contract;
  - 97.4 penalise another party for breaching or ending the contract;
  - 97.5 renew or not renew the contract;
  - 97.6 vary the upfront price payable under the contract without the right of another party to terminate the contract;
  - 97.7 vary the characteristics of the goods or services to be supplied or the interest in land to be sold or granted under the contract;
  - 97.8 assign the contract to the detriment of another party without that party's consent; or
  - 97.9 determine whether a contract has been breached or interpret its meaning.
- 98 The examples also include terms that limit or have the effect of limiting:
- 98.1 one party's legal liability for its agents;
  - 98.2 one party's right to sue another party; or
  - 98.3 the evidence one party can present in proceedings relating to the contract.
- 99 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.
- 100 We will pay particular attention to standard form consumer or small trade 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.

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83. Section 46M.



## Terms allowing changes to be made by one party

- 101 Some contracts may allow one party to make changes to the terms of a contract without the agreement of the other party. This is often referred to as unilateral variation. 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 contracting parties should have the right to cancel the contract without penalty where the changes are detrimental. In these cases, the contracting party should not be worse off as a result of the business choosing to vary the terms.

### Examples of terms allowing changes to be made by one party

#### Standard form small trade contract

Business X supplies raw materials to Derrick's 3D printing business. Its standard form contract states that businesses must agree to receive its materials for a minimum term of 12 months.

Business X has included a term in its contract that enables it to change the price it charges at any time before the expiry of the minimum 12-month term. Derrick's business has no right of early termination if this happens.

This term is likely to be unfair if it allows Business X to unilaterally change the price of the materials provided and Derrick's business has no ability to resist any increase or to exit the contract without penalty. Although the term setting the price would be exempt because it sets the upfront price, the term that allows for unilateral variation of the price can be assessed for unfairness.

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

#### Standard form consumer contract

Marama signs a 12-month contract with a pay television business, choosing to subscribe to several sports channels. After a few months, the business 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 business 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 was 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

- 102 Where a party is prevented from enforcing their legal rights against a business, for example, for breach of contract, the party 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 advantaged party 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 internet provider breaches the contract or is negligent with no wrongdoing on the part of its consumer or business customer. This is likely to be unfair as it creates a significant imbalance in the parties' rights and obligations under the contract and causes detriment to the consumer or business 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 or business is left to bear the risk and cost of liability, even where the internet provider is at fault.

- 103 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 business includes a term in its standard form contracts saying that the business has no responsibility for things said by its sales representatives. Customers 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 business's responsibility or liability for representations made to prospective customers 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 customer's rights to take action against the sales business.<sup>84</sup>

## Penalty terms

- 104 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 117–128 "Penalites distinguished from upfront price".

84. Section 5C.

## Terms that cannot be declared unfair

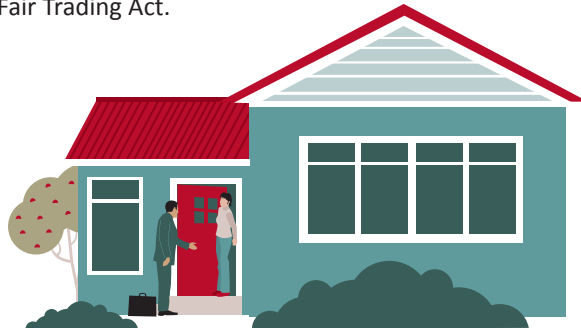
- 105 Some contract terms cannot be declared unfair.<sup>85</sup> These exempt terms include:
- 105.1 terms that define the **main subject matter** of the contract;<sup>86</sup>
  - 105.2 terms that set the **upfront price** payable under the contract to the extent that the price term is transparent;<sup>87</sup> and
  - 105.3 terms required or **expressly permitted** by any enactment.<sup>88</sup>
- 106 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.
- 107 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

Shopping Solutions 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 business 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 business 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

- 108 The main subject matter of a standard form contract is the good or service or interest in land that the customer (consumer or business) 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 customer is unlikely to misunderstand what they are acquiring.<sup>89</sup> If the customer is misled about what they are acquiring, the matter might be considered misleading or deceptive under applicable provisions of the Fair Trading Act.



85. Section 46I(2)(c).

86. Section 46K(1)(a).

87. Section 46K(1)(b).

88. Section 46K(1)(c).

89. In *Office of Fair Trading v Abbey National plc & others* [2009] UKSC 6 at [79], Phillips SCJ observed 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.”

- 109 More than one thing can be the main subject matter as long as it is a good or service acquired under the contract.<sup>90</sup>

#### Example of subject matter of the contract

Joe buys a smartphone from a telecommunications business and agrees to a 24-month voice and data plan. The main subject matter of the contract encompasses the purchase of the smartphone and 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 upfront price payable under the contract

- 110 Terms that set the upfront price payable under the contract cannot be declared unfair.
- 111 “Upfront price” is defined<sup>91</sup> 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

- 112 There are, therefore, two elements to upfront price:
- 112.1 The consideration that is payable under the contract (including on the occurrence or non-occurrence of an event).
- 112.2 Transparency of the consideration term.
- 113 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.<sup>92</sup>
- 114 Transparency is discussed at paragraphs 89–93.
- 115 Upfront price will include all amounts that the consumer or business 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.
- 116 Upfront price can include per-unit pricing where consumption determines overall cost such as in some energy or telecommunications contracts.

### Penalties distinguished from upfront price

- 117 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.

90. *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.”

91. Section 46K(2).

92. *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].

- 118 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.<sup>93</sup>
- 119 In a United Kingdom Supreme Court case, the Court accepted the argument<sup>94</sup> 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.

- 120 Whether a term is a price term or not will be determined by the objective assessment of the court.<sup>95</sup> The United Kingdom Supreme Court has noted that the courts will be astute to prevent businesses from drafting contracts so as to convert what is in effect a penalty into a price, simply through the wording of the contract.
- 121 Unilateral penalty terms have a particular tendency to be unfair, as recognised by the Fair Trading 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.*

- 122 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.



93. *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".

94. *Abbey National*, framed under a similar European Community law.

95. *Abbey National* at [113] per Mance SCJ.

- 123 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 of the term’s fairness.<sup>96</sup>

### Examples of price and penalty

#### Standard form small trade contract

A hireage contract specifies that a business customer will be fined \$200 for each half day that the hired equipment is returned late. The initial hire cost is \$30 per day, and rentals are for 24 hours only. The purpose of the \$400 per day fine is likely to be to deter late returns, and it is unlikely to represent a reasonable pre-estimate of the hireage business’s losses. It is likely to be treated as a penalty and not part of the upfront price. It is not exempt and can be subject to a fairness assessment.

#### Standard form consumer contract

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 is, it is unlikely to be a penalty.

- 124 If a term dealing with price is not transparent (as described in paragraphs 89–93), it will not be an exempt upfront price term and the term can be subjected to the fairness assessment.
- 125 Because price is often a critical factor for consumers or businesses when entering into a contract, we will be concerned about all price terms that have not been transparently disclosed.
- 126 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.
- 127 We will look at a term carefully to assess whether it is “in effect” a penalty,<sup>97</sup> 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.

96. *Director General of Fair Trading v First National Bank plc* [2001] UKHL 52.

97. Section 46M. The examples 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.

- 128 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 one party would ever suffer a penalty.

## Terms required or expressly permitted by any enactment

- 129 The UCT provisions do not apply to contract terms that are required or expressly permitted by any enactment.<sup>98</sup>

### 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.

## Insurance contracts

### *Consumer insurance contracts*

- 130 There is a special set of exclusions in the Fair Trading Act for insurance contracts. As with all other contracts, the UCT provisions do not apply to insurance contracts entered into before 17 March 2015. 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.<sup>99</sup>
- 131 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.<sup>100</sup> These are terms that:
- 131.1 identify the subject matter or risk insured against, including terms identifying an uncertain event;
  - 131.2 specify the sum(s) insured;
  - 131.3 exclude or limit the liability of the insurer to indemnify the insured;
  - 131.4 describe the basis on which claims may be settled or that specify any sums to be contributed by the insured, such as an excess;
  - 131.5 provide for the payment of the premium;
  - 131.6 relate to the duty of utmost good faith owed by all parties; and
  - 131.7 specify the requirements for disclosure or relate to the effect of any non-disclosure or misrepresentation by the insured.

98. Section 46K(1)(c).

99. Section 26A(3).

100. Section 46L(4).

### *Small trade insurance contracts*

- 132 The UCT provisions do not apply to small trade insurance contracts entered into before 1 April 2025 (or any earlier date specified by the Governor-General by Order in Council), even if they are renewed or varied after that date.<sup>101</sup>
- 133 Unlike other small trade contracts, new small trade insurance contracts entered into after 1 April 2025 also will not be subject to the UCT provisions if they have the effect of operating as renewals of contracts entered into before that date.

## Enforcement

- 134 There are significant consequences for including an unfair term in a standard form consumer or small trade contract.
- 135 We may apply to the District Court or High Court for a declaration that a term in a standard form consumer or small trade contract is unfair.<sup>102</sup> We may do this on our own initiative or after we have assessed a request of a party to the relevant contract. We will exercise our enforcement discretion in deciding whether to seek a declaration in respect of any term.<sup>103</sup> People who consider they are impacted by unfair contract terms cannot make their own applications to the District Court or the High Court.
- 136 In making a declaration of unfairness, the court:<sup>104</sup>
  - 136.1 must identify the contract to which the declaration applies by reference to at least one of the parties to the contract; and
  - 136.2 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.
- 137 If the court decides that a term in a business's standard form consumer or small trade contract is an unfair contract term, the Fair Trading Act prohibits that business from:<sup>105</sup>
  - 137.1 including the term in a standard form consumer or small trade contract (unless the term can be included in a way that complies with the court's decision); or
  - 137.2 applying, enforcing or relying on the term (even if the term was included in the contract before the declaration was made).
- 138 If that business continues to use or enforce the term, it may face:<sup>106</sup>
  - 138.1 conviction and a fine of up to \$200,000 (in the case of an individual) or \$600,000 (in the case of a business); and/or
  - 138.2 an injunction restraining the business from including, applying, enforcing or relying on the term; and/or
  - 138.3 orders directing it to refund money or pay damages.

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101. Schedule 1AA.

102. Section 46(1).

103. For further guidance on the enforcement discretion see our Enforcement Response Guidelines available online at <https://comcom.govt.nz/about-us/our-policies-and-guidelines/investigations-and-enforcement/enforcement-response-guidelines>

104. Section 46(3).

105. Section 26A(1).

106. Section 40.



## If you think a term in your contract is unfair

- 139 Speak to the other party to the contract to try to understand the reasons for the term. If you still think it is unfair, ask the other party to remove the term or amend it so it is no longer unfair.
- 140 Talk to a lawyer.
- 141 If you wish to contact us with a complaint about a potentially unfair contract term:  
**Phone:** 0800 943 600  
**Write:** Commerce Commission, PO Box 2351, Wellington 6140  
**Email:** [contact@comcom.govt.nz](mailto:contact@comcom.govt.nz)

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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

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