

Unfair contract terms

Terms that may be unfair

When a business enters into a contract with a customer and there is little or no opportunity for the customer to negotiate the terms then this is likely to be a standard form consumer contract. Under the Fair Trading Act, all the terms in a standard form consumer contract must be fair.

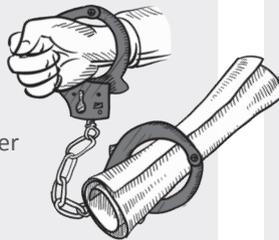
Our **'quick'** guides provide a starting point for understanding some of the common terms that can potentially be unfair in consumer contracts, but this is not all that you should watch out for.



Terms that may be unfair include:

Terms that bind your customer to hidden terms.

Your customer should have a real opportunity to see and understand all your contract terms before they sign up to them. If a term requires your customer to accept wording they have not seen, the term could be challenged as unfair.

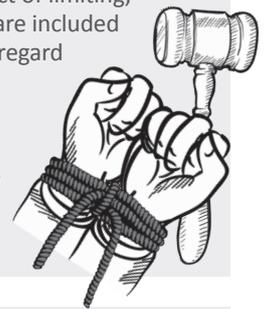


EXAMPLE

“...all orders are subject to our standard terms, which will be supplied with the goods.”

Terms that restrict or prevent your customers from taking legal action.

Your customer should be able to seek redress (eg, compensation), in the courts, when you are at fault. Terms that limit, or have the effect of limiting, one party's right to sue another party are included in examples of terms that a court may regard as unfair under the Fair Trading Act.

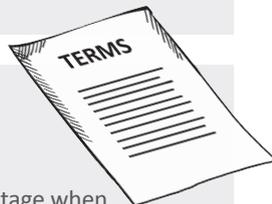


EXAMPLE

“Any dispute that cannot be resolved will be referred to arbitration.”

Terms that give you the 'right of final decision'.

Your customers could be at a disadvantage when a term gives you the right to decide how the contract is interpreted or whether it has been breached. These types of terms effectively allow you to change the way the contract works to suit yourself. They may also mean that your customer may not get the redress (eg, compensation) which they are entitled to.



EXAMPLE

“Any dispute or difference which may arise in regard to the interpretation of the Rules shall be determined by the Management, whose decision shall be final.”

Terms denying liability for statements made by agents or employees (entire agreement clauses).

There is scope for unfairness if a business can argue that it isn't bound by oral promises made by its employees or sales agents.

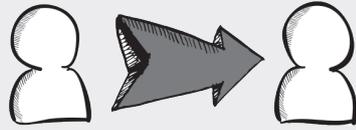


EXAMPLE

“The company accepts no responsibility for any verbal claims or offers made by its distributors or agents in conjunction with this offer.”

Terms that reserve your right to transfer an agreement to someone else without getting permission from the customer first.

Terms such as this may be particularly unfair if the third party could provide a poorer quality product or service to the detriment of the customer.



EXAMPLE

“We may at any time transfer this agreement to a third party.”

Terms that unduly restrict a customer from transferring their rights under the contract.

EXAMPLE

“This guarantee is personal to the customer and may not be transferred to anyone else.”

Terms that try to make your customer bear inappropriate risks.

Particularly when you can insure against these and your customer cannot (or at least not cheaply and easily).



EXAMPLE

“The customer will pay for any damage caused to the company’s equipment caused by adverse weather conditions...”

Requiring a customer to make disadvantageous declarations.

Such as asking them to confirm they have ‘fully read and understood’ your Terms & Conditions. The purpose behind this is to bind customers to the ‘terms’ of a contract regardless of whether they have in fact fully understood them or not.

EXAMPLE

“I confirm that I have read and understood the conditions of sale overleaf.”

Terms that allow you to impose excessive burdens or requirements on your customers.

Especially wording that could allow excessive and unexpected financial burdens.

EXAMPLE

“We may at any time require payment of such security deposit as is deemed necessary.”



For further information read the Commission’s **Unfair Contract Term Guidelines** and you may wish to seek legal advice.

Having clear and fair terms in your contract will:



- Save you time
- Help prevent disputes and reputational damage
- Protect your business if something goes wrong

A term in your contract that is declared unfair by a court, cannot be used, enforced or relied on. If you continue to use or enforce the term you could be prosecuted and face conviction, fines and other legal sanctions.

Want to know more?

Unfair Contract Term Guidelines – <http://www.comcom.govt.nz/fair-trading/guidelines/unfair-contract-term-guidelines/>

Other quick guides and videos – <http://www.comcom.govt.nz/fair-trading/guidelines/business-guide-to-unfair-contract-terms/>

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