

Unfair contract terms

Fair terms for your customers

(an introductory guide for businesses)

If you are a **business** that deals with **consumers** and you use standard form contracts, you need to make sure your terms are fair. The Fair Trading Act aims to protect consumers against unfair terms in standard form consumer contracts.



If your contract with your customer is for goods or services normally acquired for personal or domestic use, then it is likely to be a consumer contract.

If there is little or no opportunity for your customer to negotiate the terms of the contract with you, then it is likely to be a standard form consumer contract. For example, you may offer a standard form consumer contract on a 'take it or leave it' basis. It is likely to be the same as, or similar to, the contracts you offer your other customers.

The terms used in standard form consumer contracts need to be fair.

For the purpose of these quick guides we often use the word '**you**' to refer to the business and '**customer**' to mean consumer.



- **Contracts help protect you** – they help define your relationship with your customer so you each know your rights and obligations.
- Businesses are at risk if they try to rely on unfair terms. If a court declares a term in your standard form consumer contract to be unfair, then it will not be legally binding on your customers.
- Your customers should be able to **easily understand** what they are signing up to.

The Commerce Commission can take action to stop you using an **unfair term** in a standard form consumer contract. If a court declares the term to be **unfair**, then it will **not be legally binding** on your customer.

What is “Unfair”?

Generally terms in a standard form consumer contract are unfair if they put your customer at an unfair disadvantage by creating a significant imbalance in the rights and obligations between you and your customer. The law applies a ‘fairness test’ that starts by asking whether the wording tilts the rights and responsibilities between you and your customer too much in your favour. The law also asks whether the term would cause detriment to your customer if it was relied upon, and



whether it is reasonably necessary to protect your legitimate business needs.

The test also looks at the contract as a whole. It takes into consideration the words and how they could be used, what is

being supplied and how the term relates to other terms in the contract. It also looks at whether the term is legible, understandable and presented clearly to your customer in reasonably plain language.

There are some terms that cannot be declared unfair. They are terms and conditions that describe the main subject matter of the contract (eg, what is being bought and sold) and terms that set the upfront price (ie, how much is being charged) provided that the price term is

clear and transparent. There is also an exemption for terms which are required or expressly permitted by law. Examples of the types of terms that a court may regard as unfair when used in a standard form consumer contract can be found in the Fair Trading Act.

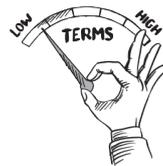
Other Quick Guides in this series discuss:



Cancelling a contract – when and how



Responsibility if things go wrong



Changing the terms of a contract



Subscriptions and automatic rollover

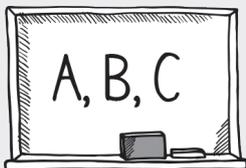


Other terms that can be unfair

All terms in standard form consumer contracts must be:

Plain and intelligible

All contract terms should be transparent and use easy-to-understand plain English to present your terms in a clear way.



Up-front and open

It is important to be up-front about important terms that could have a significant impact on your customers. Take extra steps to bring these types of terms to their attention.



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-/>