



Unfair terms in small business contracts: A review of selected industries

November 2016



On 12 November 2016, a new law to protect small businesses from unfair terms in business-to-business standard form contracts takes effect across Australia. The law will apply to any new or renewed contract entered into on or after this date. If an existing contract is varied on or after 12 November, the law will also apply to the varied terms.

This report provides a breakdown of the common terms of concern identified in each industry, and discusses the kinds of changes that businesses made.

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Executive summary

On 12 November 2016, a new law to protect small businesses from unfair terms in business-to-business standard form contracts takes effect across Australia. The law will apply to any new or renewed contract entered into on or after this date. If an existing contract is varied on or after 12 November, the law will also apply to the varied terms.

If a particular term in a standard-form contract to which a small business is a signatory is found to be unfair by a court or tribunal, then that clause will be void and the small business will no longer be required to comply with it.

In the lead-up to the new law taking effect, the ACCC has examined standard form contracts in the advertising, telecommunications, retail leasing, independent contracting, franchising, waste management, and agriculture industries. Our goal was to identify terms that may be unfair in business-to-business agreements post 12 November 2016. The ACCC invited a number of major firms in each sector to voluntarily participate in the review, and ultimately examined 46 contracts.

After identifying a range of contract terms that may raise concerns under the new law, the ACCC engaged with businesses about amending or removing the problematic terms. As a result of this engagement, businesses in all seven industries have made positive changes to their standard form contracts to alleviate the ACCC's concerns.

Businesses that participated fully in the review included Australia Post, Bakers Delight, Coca-Cola Amatil, Facebook, Fairfax, Google, News Limited, Optus, Scentre Group (owner of Westfield shopping centres), Uber, Vicinity Centres, and Vodafone.

This report provides a breakdown of the **common terms of concern** identified in each industry, and discusses the kinds of changes that businesses made. The report serves as guidance to these industries, as well as all businesses more broadly, as to the type of terms that may raise concerns under the new law.

Of the contracts reviewed, the most commonly-occurring problems were terms that allowed the contract provider:

- to **unilaterally vary all terms** (or at least those that have a significant bearing on the contractual arrangement, or which could cause detriment if varied) in an unconstrained manner
- potentially **broad and unreasonable powers to protect themselves against loss or damage** at the expense of the small business by imposing broad indemnities or excessive limitations of liabilities
- an **unreasonable ability to cancel or end an agreement** as it suits them.

In the ACCC's view, such clauses are likely to go beyond what is reasonably necessary to protect a business's legitimate interests and are likely to raise concerns under the unfair contract terms law. The ACCC strongly encourages all businesses to review their standard form contracts for such clauses and consider whether the term creates an imbalance of obligations between the parties, is necessary to protect a legitimate business need, and, if not reasonably necessary, whether it could cause detriment to the small business if relied upon.

What to do if you think a term in your contract is unfair

- Ask the other party to remove the term or amend it so it is no longer unfair
- Contact your local state or territory consumer protection agency (fair trading or consumer affairs), the Australian Small Business and Family Enterprise Ombudsman, or your local Small Business Commissioner (if applicable)
- Contact the ACCC's small business helpline on 1300 302 021 or lodge an online complaint form by visiting www.accc.gov.au/contact-us/contact-the-accc/report-a-small-business-issue
- For unfair terms in relation to financial products and services, contact the Australian Securities and Investments Commission's (ASIC) general enquiries helpline on 1300 300 630 or visit www.asic.gov.au
- Talk to a lawyer about your options.

ACCC reviews standard form contracts for unfair terms

Small businesses are commonly required to enter into agreements with other businesses for goods and services in circumstances where they have limited or no opportunity to negotiate the terms.

From 12 November 2016, section 23 of the Australian Consumer Law (ACL) will be extended to protect small businesses from unfair terms in standard form contracts.

This report highlights the outcomes of the ACCC's small business unfair contract terms industry review and identifies terms that are likely to raise concerns under the new law. Going forward, this report will also assist businesses to understand how the law will apply to contracts they propose to enter into or renew.

The report focuses on standard form contracts in the following sectors:

- advertising
- independent contracting
- retail leasing
- telecommunications
- franchising
- waste management.
- agriculture

These industries were selected based on complaints received by the ACCC, the prevalence of standard form contracts in the industries and submissions to the Treasury's 2014 *Extending unfair contract term protections to small businesses* consultation process.

In total, the ACCC has reviewed 46 standard form contracts across the seven industries for potentially unfair clauses. After identifying a range of contract terms of concern, the ACCC engaged with businesses about amending or removing the problematic terms. As a result of this engagement, businesses in all seven industries have made positive changes to their standard form contracts to alleviate the ACCC's concerns.

This report provides a breakdown of the common terms of concern identified in each industry, and provides examples of the kinds of changes that businesses made. While the report includes examples of the types of terms that the ACCC considers may be unfair in business-to-business contracts post 12 November 2016, ultimately, only a court or tribunal can determine if a term in a standard form contract is unfair.

Participating businesses

The ACCC approached some of the largest businesses in each of the seven industries about voluntarily participating in the review. The vast majority of businesses contacted engaged positively with the ACCC about terms that may be problematic under the new law.

Businesses that participated fully in the review included Australia Post, Bakers Delight, Coca-Cola Amatil, Facebook, Fairfax, Google, News Limited, Optus, Scentre Group (owner of Westfield shopping centres), Uber, Vicinity Centres, and Vodafone.

All businesses selected to be part of the review were chosen based on size and/or to provide diversity to the review. Traders were not selected based on complaints to the ACCC that their contracts contained unfair terms.

This report provides guidance to the industries involved in the review about common terms that raised concerns, but also serves as general guidance to businesses operating in other industries about the kinds of terms that may be considered unfair from 12 November 2016.

The views expressed in this report are provided for information purposes only and should not be considered to be legal advice.

A brief overview of the unfair contract terms law

Unfair contract term protections in the Australian Consumer Law (ACL) have applied to standard form business-to-consumer contracts since 1 July 2010. Under the law, a term that is found to be unfair by a court or tribunal will be void – this means it is not binding on the parties. The rest of the contract will continue to bind the parties to the extent it is capable of operating without the unfair term.

The law will also apply to a standard form business-to-business contract entered into or renewed on or after 12 November 2016, where:

- at least one of the parties is a 'small business' (i.e. employs less than 20 people, including casual employees employed on a regular and systematic basis)
- the upfront price payable under the contract is no more than \$300 000 or \$1 million if the contract is for more than 12 months
- it is for the supply of goods or services or the sale or grant of an interest in land.

Although the law does not define what a standard form contract is, it does outline a number of factors that a court or tribunal must take into account in determining whether an agreement is standard form. In general terms, a standard form contract is one that has been prepared by one party to the contract and where the other party has little or no opportunity to negotiate the terms – that is, it is effectively offered on a 'take it or leave it' basis.

It is assumed that an agreement is a standard form contract unless the party that prepared the contract is able to prove that it is not.

To be unfair under the ACL, a term must:

- cause a significant imbalance in the parties' rights and obligations under the contract
- not be reasonably necessary to protect the legitimate interests of the party advantaged by the term, and
- cause detriment (financial or otherwise) to a small business if it were to be applied or relied upon.

All three elements of the unfairness test must be proved in order for a term to be deemed unfair. In determining whether a term is unfair, the court or tribunal must also take into account the transparency of the term, and the contract as a whole.

Enforcing the law

This report marks the conclusion of the ACCC's voluntary compliance and education industry review. As noted above, the small business unfair contract terms law comes into effect on 12 November 2016. From this date, the ACCC will transition to a more focused enforcement approach and will now be targeting businesses that supply standard form contracts to small businesses containing unfair terms.

The ACCC's role

The ACCC is an independent Commonwealth statutory body that administers the Competition and Consumer Act 2010, including the ACL and the unfair contract terms regime. The ACCC promotes compliance with these laws and, where appropriate, takes enforcement action against businesses that breach the law.

The ACCC's role complements that of other ACL regulators, including state and territory consumer affairs agencies who also share responsibility for enforcing these laws.

The ACL's unfair contract terms provisions are also mirrored in the Australian Securities and Investments Commission Act 2001 (Cth) (ASIC Act). ASIC is responsible for administering and enforcing this law in relation to financial products and services.

The ACCC can bring potentially unfair contract terms before a court. But it is ultimately up to the court to determine whether the term is unfair and thus whether it is void.



1. Advertising

Most Australian businesses use advertising to promote their goods and services. In recent years, advertising practices have evolved rapidly, expanding beyond traditional print and directory advertising, television and radio spots to include digital advertising on social media platforms and search engines. For all types of advertising, small businesses are often required to enter into standard form contracts.

The ACCC selected advertising services for inclusion in the review due to the number of complaints received in relation to unfair terms in advertising contracts¹. As part of the review, we approached six companies covering a range of advertising types.

A variety of potentially unfair terms were raised with each of the businesses. Common problematic terms are discussed below.

Right to remove advertisements

A majority of the advertising contracts reviewed contained terms which gave the publisher the ability to remove advertisements for any reason.

A number of traders explained that these terms are necessary to allow the publisher to remove advertising that breaches a law (e.g. defamation laws or intellectual property laws), is offensive or could expose the publisher to legal proceedings. While the ability to remove advertisements for these reasons may be necessary to protect a publisher's legitimate interests, many terms allowed publishers to remove advertisements for *any reason, which is broader than reasonably necessary and is likely to raise concerns under the law*.

Example: Amending of a right to remove advertisements

One standard form contract included a term which allowed the publisher to remove content for any reason without prior notice to the advertiser.

In response to the concerns raised by the ACCC, the publisher amended the term so that it can only remove an advertisement in limited, defined circumstances, including if the advertisement contravenes any law, is likely to infringe on the rights of third parties, or is obscene or defamatory.

¹ In the six month period prior to the selection of industries for the review (1 January to 30 June 2015), advertising services was the industry the ACCC received the most business-to-business unfair contract related complaints about.

Unilateral variation

Most of the standard form contracts reviewed included terms that allowed the publisher to unilaterally vary aspects of the contract. These terms are particularly concerning when:

- they give the publisher the ability to vary the product offering or price, and
- the advertiser does not receive prior notice of any change and is not given the opportunity to terminate the contract once the change has taken effect.

Many of the publishers contacted made positive changes to these terms. One digital publisher amended its standard form contract so that it will be required to provide advertisers with at least 7 days' notice of any material change to its terms. Another publisher is proposing to remove its ability to vary price during the term of a contract.

Example: Limiting a power to unilaterally vary an agreement

Following discussions with the ACCC, one publisher amended its terms and conditions to explicitly state that it cannot vary prices in certain contracts. It also amended its terms to give businesses whose contracts fall under the unfair contract terms law dollar thresholds (\$300 000 for contracts running for up to 12 months) the ability to terminate their agreement if they suffer detriment as the result of a unilateral contract variation.

Limited liability and wide indemnities

All the contracts reviewed by the ACCC in the advertising industry contained terms which limited the publisher's liability towards the advertiser in some way.

As the name suggests, limited liability clauses are used by businesses to limit their legal responsibilities, duties or obligations towards the other party to a contract. By comparison, an indemnity is a promise by one party to protect the other party to the agreement from loss or damage that may be incurred as a consequence of a particular event.

These types of clauses are not necessarily unfair. However, terms that make the advertiser liable for loss or damage caused by a publisher or that attempt to unreasonably limit a publisher's liability are likely to raise concerns under the law.

Example: Limiting a small business's indemnity to a larger business

The ACCC raised concerns about broad indemnity clauses with a number of publishers. In response, two publishers in particular made positive changes to their contracts.

The two contracts both contained a broad indemnity clause that required the advertiser to indemnify the publisher for all liabilities related to the contract. Following consultation with the ACCC, one publisher agreed to amend the terms to provide that the advertiser will be liable to the extent it caused or contributed to any liability, and the other to the extent it caused or contributed to any liability by its wrongful act or breach of contract.

Termination clauses

Two of the standard form contracts reviewed contained terms that allowed the publisher to terminate for any breach of the contract. One publisher has amended its contract to provide that it can only terminate the agreement for a material breach. The other publisher explained the circumstances in which it felt it should be able to terminate the contract, however failed to justify why it is reasonably necessary that it be able to terminate for any possible breach. In the ACCC's view, such a broad, unrestrained term is likely to be unfair.

Automatic renewal

Of the advertising contracts reviewed, one company's contract contained an automatic rollover clause under which the agreement renewed every year on the then current terms. While not necessarily unfair, automatic renewal clauses are concerning when:

- they are not adequately disclosed

- no notice is provided that a contract is about to renew
- the publisher can change the cut-off date for cancellation of the renewal, or
- the customer will incur large early termination charges if they cancel after the contract has automatically renewed.

The publisher in question did not, in the ACCC's view, provide a satisfactory explanation as to why automatically renewing customer contracts is reasonably necessary to protect its legitimate interests, and did not propose to amend the term to limit the right. As such, the term in question continues to raise concerns for the ACCC.

Automatic rollover terms were most recently considered in the ACCC's proceedings against online catalogue retailer Chrisco Hampers Australia Ltd. In 2015, the Federal Court found that Chrisco included an unfair contract term in its 2014 lay-by agreements relating to its 'HeadStart Plan', which allowed Chrisco to continue to take payments by direct debit after the consumer had fully paid for their lay-by order. Consumers were required to 'opt out' in order to avoid having further payments automatically deducted by Chrisco after their lay-by had been paid for.



2. Telecommunications

Telephone and internet services are essential for doing business. They enable businesses to undertake day-to-day activities such as receive payments, place and receive orders, pay bills and attract new customers. Small businesses have been quick to adopt new innovations such as smart mobile and tablet devices, cloud software, data storage and security applications.

Small business owners face similar challenges to ordinary consumers when signing standard form telecommunication contracts and also face detriment as a result of unfair terms. This is why the ACCC has taken a closer look at standard form business contracts offered by five of Australia's major telecommunication firms. During our review, the ACCC identified terms commonly used within the industry that raise potential concerns under the small business unfair contract term law.

This review of business telecommunications contracts follows on from the ACCC's 2013 review of consumer telecommunications contracts², in which the ACCC secured a number of positive changes to standard form consumer agreements. The 2013 consumer contracts review had a flow-on effect for all telecommunications customers, with many of the changes made to consumer contracts also being adopted by providers in their business contracts. The changes made through this review build on these previous amendments.

Unilateral variation

All five contracts reviewed included clauses that allow the telecommunication provider to make changes to the contract without the consent of their small business customer.

In 2015, the ACCC investigated the standard form consumer contracts offered by internet provider Exetel Pty Ltd that allowed it to '*vary any part of the agreement for any reason.*' The ACCC considered this broad unfettered term was unfair to consumers and likely to contravene the ACL. After concerns were raised with Exetel, the company agreed to remove the term from its residential broadband standard form of agreement and compensate affected consumers.

In our view, terms that allow a provider to unilaterally vary the contract are equally problematic in the context of small business standard form contracts.

Some terms in the reviewed contracts were framed broadly to allow providers to make unilateral changes to any aspect of the contract, while others related more specifically to changes to certain matters such as international service charges, retrospective charges, fair or acceptable use policies, or the provider's rights to terminate or suspend services.

² [ACCC, Unfair contract terms industry review outcomes](#), 2013.

In many cases, the unilateral variation clauses contained balancing customer (small business) rights. For example, customers were often entitled to receive individual prior notice of the unilateral change, and if the change had a detrimental impact on them, customers could terminate their contract without incurring early termination fees. These types of 'balancing' provisions were sufficient to address the initial concerns raised by the clause.

However, a number of terms continue to raise concerns. In particular, the ACCC is concerned with charges imposed on customers who choose to cancel their contract in response to a unilateral variation. While most providers agree to waive early termination or penalty fees in this event, they typically refuse to refund other significant charges such as upfront installation fees and equipment costs. In some cases these non-refundable charges may be more than the waived early termination fee. Customers may be left out of pocket with little use for equipment that may become excess or non-compatible when they move to another provider.

To avoid such clauses being unfair, in the ACCC's view, suppliers should consider measures such as giving customers a pro-rata refund of any upfront/equipment costs in the event that they cancel the contract in response to a unilateral variation that causes the customer detriment.

In addition, in all cases customers should receive prior notice of any unilateral variation. Unfortunately, in some cases providers continue to use terms that do not offer adequate (or any) notice to customers of unilateral changes. For example, one provider allows itself up to four months to individually notify customers that it has made a change to their contract. In the ACCC's view the providers have been unable to reasonably explain why such terms are commercially necessary.

The ACCC acknowledges that it may be reasonably necessary for a provider to include a term to allow it to vary charges for international, roaming or premium services to reflect price increases from third party providers. However, terms that allow the provider to vary prices for any reason (rather than, for example, to pass on increased costs) are likely to be unfair.

Early termination charges (ETCs)

Providers impose ETCs on customers that cancel their contracts before the end of the specified term. The inclusion of terms imposing ETCs is common in fixed-term small business contracts for mobile and broadband services, and these terms were found in all contracts except one.

The method for calculating ETCs varied among providers. For example, one provider calculated ETCs as 100 per cent of the amount owing on the remainder of the contract. Other providers applied a percentage (such as 50 per cent), to recoup only a proportion of revenue they would otherwise have earned had the customer not terminated their service before the end of the term.

The ACCC's view is that ETCs should reflect the provider's genuine estimate of its losses if a customer terminates their contract before the term has ended. ETCs that equate to customers paying out the remainder of their contract are likely to be unfair.

To avoid potentially unfair ETC terms, providers should consider the following:

- is the ETC higher than the provider's genuine estimate of the cost from the early cancellation?
- do the ETCs take account of the costs saved by the provider (as it will no longer be required to deliver the service)?

Example: Providers reducing early termination charges

One service provider advised the ACCC that it has removed ETCs for some recent small business mobile phone products, only requiring customers to pay out the remaining cost of the device.

In addition, in response to the ACCC's review, another provider has agreed to review its ETCs to ensure they are fair and reasonable.

Limited liability and wide indemnities

These types of terms are often used by providers to manage their commercial risks, and were found in all telecommunication contracts reviewed.

Limited liability clauses are often used to reduce damages that may be claimed by the customer for the provider's breach of contract. For example, if the provider fails to deliver internet services, their liability may be limited under the contract to the costs associated with resupplying internet services only.

The ACCC raised concerns with providers that included broad and overreaching limited liability clauses that purported to exclude consumer guarantee rights available under the ACL. In response, those providers agreed to amend their contracts to clarify that the contracts do not limit the legal rights that a customer may have to claim for losses under the ACL.

Indemnity clauses are used to require customers to pay for any loss, damage or costs suffered by the provider as a result of misuse of the service or negligence by the customer (or others)—such as in cases where customers use their mobile phone services to commit fraud or other crimes against a third party who then makes a claim against the provider.

The ACCC raised concerns that providers were using overly broad indemnity clauses that appeared to require customers to indemnify the provider even in cases where the provider may have caused or contributed to any loss or damage, either willfully or negligently. In response to the ACCC's concerns, these providers agreed to amend their contracts to clarify that customers will not be liable to the extent that the provider was negligent, or caused or contributed to the misuse of the service.

The ACCC encourages providers to make changes that help increase certainty for small business customers and appropriately allocate risk.



3. Retail leasing

Retail leasing was identified as a potentially problematic industry in a number of submissions to the Treasury's Extending unfair contract term protections to small businesses consultation process. Although retail tenancy is regulated by state and territory laws, these regulations are largely aimed at addressing behaviours in dealings between landlords and tenants and do not explicitly prevent the inclusion of unfair terms in leases.

The Shopping Centre Council of Australia (SCCA) is the national industry group for major shopping centre owners, managers and developers. The SCCA and its landlord members were very proactive and fully cooperated throughout our review, including by providing copies of their standard form retail leases to the ACCC. The ACCC subsequently held a forum with the SCCA and a number of its members to explain and discuss the ACCC's concerns with certain terms.

Following this forum, one landlord approached the ACCC with proposed amendments to its standard lease to address the ACCC's concerns. The ACCC also contacted four of the largest retail landlords in Australia with specific concerns about their leases.

Right to unilaterally vary shopping centre rules

It is common for shopping centres to have a set of guidelines setting out the rules and regulations for the use of the premises. These rules, while often contained in a separate document, can still be incorporated into the terms of the lease.

All five of the reviewed leases contained clauses that provided the landlord with the power to unilaterally vary shopping centre rules and to terminate the lease if the tenant breached the rules.

In discussions with the ACCC about these provisions, landlords argued that the ability to vary centre rules is necessary to ensure the good management and efficient running of a shopping centre. While this may be the case, terms that place no limitations whatsoever on the landlord's ability to vary the rules are unlikely to be necessary to protect their legitimate interests and likely to raise concerns under the law.

Following discussions with the ACCC, one landlord amended the relevant term in its agreement so that it can only vary the centre rules if the change does not take away any of the tenant's material rights under the lease. While this is a positive change, the fact that the lease and rules cover different rights and obligations, means that this change may not limit the landlord's ability to change the rules in a meaningful way.

Another landlord added a requirement that tenants be notified prior to any change to the centre rules. While this is also a positive change, the ACCC considers that the requirement to notify tenants of changes does not provide sufficient protection to a tenant where the landlord has the ability to vary the centre rules in any way.

Example: Limiting a landlord's unilateral power to vary centre rules

One landlord's lease provided that it could make and vary its shopping centre rules and regulations, provided the rules were not inconsistent with a tenant's rights under the lease and were required for management of the centre. The landlord did not have to provide prior notice of any variations to the rules or regulations.

Following engagement with the ACCC, the contract was amended to provide that the landlord can only make reasonable rules and regulations (and reasonable variations) that are not inconsistent with, and do not detract from, a tenant's rights under the agreement. The landlord also amended its contract to require that tenants be given prior notice of any variations to rules or regulations.

The changes alleviate the ACCC's concerns with the term.

Termination clauses

Two of the agreements reviewed gave the landlord the ability to terminate the lease for any breach, regardless of how trivial, without having to provide the tenant with an opportunity to remedy. In the ACCC's view, terms that allow a landlord to terminate for any possible failure to comply, and which do not include a measure such as giving the tenant an opportunity to remedy the breach, raise serious concerns under the law.

The two landlords in question amended their leases to address the ACCC's concern.

Example: Placing an appropriate limitation on a landlord's right to terminate

One lease reviewed by the ACCC provided that the landlord was entitled to immediately terminate a lease if the tenant failed to comply with an obligation under the lease.

Following the review, the lease was amended so that the landlord would only be entitled to terminate after first notifying the tenant of its intention to terminate and then providing the tenant with a reasonable period to remedy the breach.

Right to recover costs from a tenant

All five agreements reviewed contain clauses that allow the landlord to recover costs from a tenant in certain situations. These types of terms often require the tenant to reimburse the landlord for costs incurred in remedying a breach or fixing damage caused by the tenant.

While it may be reasonable for landlords to recover costs from a tenant in certain circumstances, clauses that do not place any limit on recoverable costs are likely to be unfair.

The ACCC has worked with landlords to secure a large number of positive amendments to these types of clauses. Four of the five landlords agreed to amendments that limit the amount of costs they can recover to reasonable costs.

Rights to property at expiry of lease

The ACCC's review identified a number of clauses that gave the landlord the right to take possession of and deal with the tenant's property at the expiry of the lease without prior notice.

Landlords described these types of clauses as necessary to ensure a smooth transition from one tenant to another. Landlords also noted that in the case of a lease expiring or ending due to default, leases generally provided a built-in notice period that allowed tenants to make end-of-lease arrangements.

The ACCC's view is that in order to be fair, terms that give the landlord the right to retain or deal with a tenant's property must require the landlord to provide the tenant with reasonable notice of these rights being exercised. The terms should also limit the costs the landlord can pass on to the tenant for dealing with

the property. After working with the ACCC, two landlords made amendments that addressed the ACCC's concerns and another landlord is currently considering amendments.

Example: How a landlord amended their agreement to balance their right to recover property

One lease provided that if a tenant left property on the premises at the end of a lease, it would become the property of landlord and that the landlord would be entitled to deal with the property at the tenant's expense.

After working with the ACCC, the landlord agreed to amend its agreement to introduce the following limitations on this power:

- provide the franchisee with 14 days' notice before taking possession of the property or arranging for its removal, and
- limiting the costs that the landlord is entitled to recover from the Franchisee for removal to reasonable costs.

Wide indemnities

In the retail leasing context a landlord might require the tenant to indemnify them for any loss or damage that a tenant might cause and which is outside of the control of the landlord. In the course of reviewing the five leases the ACCC identified a number of clauses that provided an indemnity that appeared unreasonably broad and/or indemnified the landlord in circumstances where the landlord had caused or contributed to the loss.

All five landlords agreed to make changes to address the ACCC's concerns. Most changes made the clauses clearer about the types of losses that the landlord would be indemnified from and those that they would not (i.e. losses caused or contributed to by the landlord).

Example: How an indemnity clause was amended to be clearer and more appropriate in its scope

Following preliminary discussions with the ACCC about the kinds of clauses that the ACCC would have concerns about, one landlord made a series of voluntary amendments to its agreement.

For example, one agreement required the tenant to indemnify the landlord except for any liability that resulted from the landlord's negligence. One change made to address the ACCC's concerns in this instance was amending the lease to provide that the tenant will indemnify the landlord, except to the extent that any liability was caused *or contributed to* by the landlord's negligence *or breach of the lease*.



4. Independent contracting

Independent contractors are sometimes referred to as consultants or freelancers. Unlike employees, independent contractors run their own business, hiring out their services to other organisations. Approximately one million people in Australia qualify as independent contractors.³

Independent subcontracting is common in areas such as design, engineering, architecture, information technology and surveying. Taxi drivers and couriers that operate as owner-drivers are also usually independent contractors. Standard form contracts are used widely in independent contracting.

Independent contracting was selected for the review due to concerns raised by industry associations in submissions to the Treasury's Extending unfair contract term protections to small businesses consultation process about the imbalance in bargaining power between the independent contractor and the other party. As part of this review, the ACCC reviewed three standard form independent subcontracting agreements.

Unilateral variation

The most common clauses of concern in independent subcontracting agreements were clauses that allowed the large business to unilaterally vary the agreement at any time.

The ACCC identified concerns with unilateral variation clauses in the contracts of the three businesses reviewed. These terms allowed the larger business to vary any term in the contract, or aspects of it, including policies, procedures or key performance indicators. All three businesses agreed to amend their contracts to address the ACCC's concerns.

These amendments generally provided subcontractors with balancing rights that counteracted the right to unilaterally vary, including the right to end the agreement if the subcontractor did not agree with the varied term, and providing a notice period prior to the amendment coming into effect.

³ Australian Bureau of Statistics, '6333.0 - Characteristics of Employment, Australia, August 2015', released 31 August 2016, available at www.abs.gov.au/ausstats/abs@.nsf/mf/6333.0.

Example: How a business amended its agreement to remove a unilateral variation power

One reviewed contract provided that a subcontractor would be required to comply with certain policies, procedures and key performance indicators that the large business could unilaterally vary at any time.

After working with the ACCC, the large business agreed to insert a new clause into the agreement providing that any amendments to the contract would only apply to projects accepted by the subcontractor 10 business days after the subcontractor was notified of the amendment. This means that the large business cannot vary contracts for projects already accepted by the subcontractor.

Limited liability and wide indemnities

Clauses that appeared to place an unreasonable limitation of liability on the independent contractor, and clauses that appeared to unreasonably limit the larger business' liability, were also prominent in the contracts reviewed.

The ACCC identified numerous indemnity clauses that raised potential concerns, the most common being terms that required the contractor to indemnify the larger business even to the extent that the larger business caused or contributed to any loss or damage.

Terms that limited the liability of the larger business ranged in scope from limiting liability in relation to any loss or damage arising as a result of the business relationship, to terms limiting liability in relation to specific conduct (e.g. non-compliance with occupational health and safety laws or reporting obligations or damage to third-party property).

Following discussions between the ACCC and the three businesses, many of those clauses were amended to address the ACCC's concerns. Of the clauses that were amended, the majority of these changes were to reflect that the larger business would be liable for loss or damage to the extent that they had caused or contributed to it.

Termination clauses

All three agreements reviewed included clauses that the ACCC considered provided traders with an inappropriate right to terminate the agreement. Following discussions with the ACCC, traders agreed to amend a number of these clauses.

Changes to clauses included establishing the right for a subcontractor to rectify a breach, increasing the length of an existing rectification period, and limiting grounds for termination to those that are reasonable.

Of the clauses that were not amended, one trader proposed an amendment that did not address the ACCC's concerns and another trader decided against making an amendment.

Example: Making a right to terminate more reasonable

A vending services agreement reviewed by the ACCC provided that the business was entitled to immediately terminate a contract if the contractor engaged in any conduct that, in its view, had an adverse impact on the company.

The business amended its agreement so that it can only terminate an agreement where it had reasonable grounds to consider the ongoing agreement detrimental to its best interests, and where the conduct was incapable of being remedied.

The agreement also included a term that allowed the business to terminate the agreement immediately if the contractor did not comply with the company code of conduct. The business amended the agreement to provide that it can only terminate the agreement if it has given the contractor the opportunity to remedy the conduct (if the breach is capable of being remedied).

In the ACCC's view, these amendments make the termination clauses fairer.

Misleading statements about rights at law

Two of the three subcontracting agreements contained clauses that the ACCC considered provided an incorrect or misleading statement about a contractor's rights at law. 'Entire agreement' clauses are terms to the effect that the document, as executed between the parties, represents the 'whole contract' i.e. all of the parties' rights and obligations. The ACCC was concerned that the clauses identified could mislead a subcontractor in instances where they may have additional rights at law (for instance, based on pre-contractual representations made by the larger business).

After working with the ACCC, one trader agreed to amend its contract to address the ACCC's concerns. The other trader provided amendments that failed to address the ACCC's concerns.

Example: How a business amended its agreement to more accurately reflect a subcontractor's rights at law.

One agreement contained a clause which stated that the contract between the business and the subcontractor superseded all previous agreements, undertakings and communications, whether written or oral, between the parties.

The ACCC considered that this clause could represent an incorrect or misleading statement about a subcontractor's rights at law, and in particular may give the false impression that a subcontractor cannot rely on any pre-contractual representations made by the business.

The business agreed to amend the clause to read that the agreement superseded all previous written agreements. Following this amendment, subcontractors are less likely to be misled about their rights, including their ability to rely on oral representations made by the business prior to the agreement being signed.



5. Franchising

Franchising in Australia is a \$146 billion sector, covering diverse industries such as food retailing, health, accommodation, administration and support services, motor vehicle retailing and repair and information technology services. As of 2016, there are an estimated 1120 franchisors operating in the country and an estimated 79 000 franchises.⁴ Franchisors and franchisees are required to comply with the mandatory Franchising Code of Conduct, which is administered by the ACCC.

The franchising sector was selected for the review due to the prevalence of standard form contracts in the sector, together with the fact that the franchising relationship is characterised by an inherent imbalance of power between franchisors and franchisees.

The ACCC requested that seven franchisors participate in the review. Three, including two major car brands, elected not to participate fully.

A variety of potentially unfair terms were raised with each of the traders, including the right to unilaterally vary operations manuals, unreasonable liquidated damages clauses, and terms that give the franchisor the right to terminate the agreement if the franchisee or manager is incapacitated.

Right to unilaterally vary operations manual

In assessing whether a unilateral variation term is unfair, it will be relevant to consider the nature of the obligations subject to the power to vary, as well as any limitations on the exercise of that power.

The ACCC is of the view that terms that allow one party to unilaterally vary key aspects of the franchise agreement, especially in a largely unrestrained manner, are likely to raise concerns under the unfair contract terms law.

In franchising, it is common for a franchisor to require its franchisees to comply with an operations manual, which sets out core business information as well as detailed policies and procedures. While operations manuals are usually a separate document from the franchise agreement, they often set out substantive rights and obligations of the franchisee during the term of their franchise. Franchise agreements often incorporate the terms of the operations manual into the agreement, and otherwise require the franchisee to comply with the terms of such manuals.

All franchise agreements reviewed contain terms that allow the franchisor to unilaterally vary the operations manual. When the ACCC raised concerns about these terms, franchisors maintained that the ability to

⁴ Griffith University, [Franchising Australia 2016 Survey, Executive Summary](#).

unilaterally vary the operations manual is essential to allow the franchisor the flexibility to adapt its system to a changing marketplace.

While the ability to vary the manual in some way may be reasonably necessary to protect a franchisor's legitimate interests, terms that allow the franchisor to vary the entirety of a manual in an unconstrained manner may raise concerns under the unfair contract terms law, particularly if the manual includes substantive rights and obligations, or there are detrimental consequences for the franchisee if the operations manual is not complied with.

In response to the ACCC's concern, one franchisor amended a term that allowed it to vary the operations manual at any time to provide that it can only make a variation if it is reasonably required. Such a limitation on the right to amend the operations manual may, in appropriate cases, alleviate the ACCC's concerns.

Not all franchisor responses were satisfactory. For example, another franchisor amended its contract to provide that it could only unilaterally vary its manual if the change improved the franchise system. In the ACCC's view, such a term does not adequately limit the franchisor's otherwise unfettered power to unilaterally vary the contract. Changes made to 'improve' the system could still cause a significant imbalance to the parties rights and obligations, not be reasonably necessary to protect the legitimate interests of the franchisor, and may cause detriment to franchisees.

A third franchisor claimed that its power to vary the operations manual was mitigated by a requirement to consult with its franchisee panel before making any changes. However, the panel's recommendations were not binding on the franchisor, and as such the requirement to consult did not provide a sufficient limitation on the franchisor's power to vary. The ACCC is of the view that the term could still raise concerns if, despite a requirement to consult, the franchisor can ignore the franchisee panel when varying the manual.

The remaining franchisors argued that unilateral variation clauses are fair where franchisees are given prior notice of any changes to the operations manual. The ACCC acknowledges that the provision of notice and the reasonableness of the notice period (in light of the changes that may be made) will be relevant considerations that go towards assessing whether the variation term is unfair. However, prior notice alone may not always be sufficient to stop a term being unfair. In particular, prior notice is unlikely to be sufficient where the variation power is otherwise largely unconstrained and detrimentally impacts on significant aspects of the franchisee's business.

The ACCC strongly recommends that franchisors ensure that appropriate limits are placed on any terms which enable them to unilaterally vary franchise agreements and/or operations manuals, or risk action under the unfair contract terms law.

Liquidated damages

Terms that provide for the payment of liquidated damages (i.e. a fixed sum) to the franchisor if the franchisee breaches the agreement or engages in certain conduct, are relatively common in franchising.

The ACCC's view is that the amount of liquidated damages should reflect the franchisor's genuine estimate of its losses relating to the breach or conduct. Liquidated damages clauses that appear to simply penalise a franchisee may be unfair.

Example: Fairly reflecting a business's losses in the event a franchisee fails to attend training

One franchise agreement reviewed by the ACCC provides that franchisees are required to attend refresher training courses or meetings from time to time. The agreement also provided that a franchisee would have to pay \$1000 if they failed to attend training or a meeting.

The ACCC was concerned that this amount did not appear to be a genuine pre-estimate of loss that the franchisor would suffer as a result of a franchisee's failure to attend.

Following engagement with the ACCC, the franchisor amended the term to provide that if a franchisee fails to attend, they will only pay an amount equal to the total cost of the training or meeting, divided by the number of franchisees in the network.

Restraint of trade

A large majority of franchise agreements contain restraint of trade clauses that seek to limit the line of work and area a franchisee can work in for a period of time after exiting the franchise system.

What constitutes a fair restraint of trade clause will depend on the relevant industry. However, generally, when forming a view on whether a restraint of trade clause is likely to be unfair, the ACCC will have regard to the length of the restraint, the restraint area, and the breadth of conduct the franchisee cannot engage in.

The ACCC raised concerns with franchisors about clauses that contained cascading values for the restraint period and restraint area. For example, a clause may specify multiple distances (in descending order) from a site that an ex-franchisee cannot operate within after exiting the franchise system. If the largest distance was struck out from the contract, the next largest distance would apply to the restraint area.

One franchisor agreed to remove the largest values for the restraint period and area from its contract. The ACCC encourages all franchisors to review their restraint of trade clauses to ensure they are only as broad as reasonably necessary to protect their legitimate interests.

Termination

Franchising often requires a considerable investment. In light of the significant harm that can flow to a franchisee if their agreement is terminated, the ACCC is concerned about terms that grant the franchisor an unreasonable power to terminate a franchise agreement.

After engagement with the ACCC, a number of franchisors made important changes to termination clauses in their agreements.

Example: Removal of a concerning termination clause

One franchisor's agreement provided that it could terminate a franchisee if the franchisee committed any four breaches of the agreement within a 90 day period, regardless of the severity of the breaches or whether the franchisee had remedied them. This term raised concerns, and the franchisor agreed to remove the term from its agreement.

Example: refining the circumstances in which a franchisor can terminate

A franchise agreement reviewed by the ACCC provided that, if the franchisor determined that the franchisee or its nominated manager were unable to operate the franchise due to an incapacity that continues (or is likely to continue) for 90 days, the franchisor could terminate the agreement.

Following engagement with the ACCC, the franchisor amended the agreement to provide that it can only terminate if the franchisee and the nominated manager are incapacitated, and it has provided the franchisee with the opportunity to replace the nominated manager. The franchisor also clarified that a period of capacity will only be deemed likely to continue for 90 days if there is objective evidence to support this view. In the ACCC's view the amendments to this term make it likely to be fair.



6. Waste management

After commencing its engagement with businesses in the preceding five industries initially selected for review, concerns were raised with the ACCC regarding the prevalence of unfair contract terms in the waste management industry.

The ACCC subsequently contacted two of the largest providers of waste management services in Australia to participate in the review.

Automatic renewal

As previously mentioned in chapter 1, terms that allow a contract provider to automatically renew a contract without the small business' consent are not necessarily unfair. Automatic renewal may even be practical and efficient for both parties in the circumstances of an ongoing agreement.

Whether or not an automatic renewal clause is likely to be considered unfair will depend on the specifics of the clause and the extent to which it creates an imbalance between the parties. For example, an automatic renewal clause is less likely to raise concerns where a customer is provided with:

- reasonable notice that the contract is about to renew
- a reasonable period in which to give a notice stopping the renewal and
- the ability to exit the renewed contract without penalty.

Both waste management agreements reviewed by the ACCC contain clauses that provide for the contract to automatically renew if the customer does not opt out in a prescribed period.

Both companies submitted that these clauses were necessary and in their legitimate business interests (e.g. automatic renewal is necessary to keep transaction costs low). Both worked with the ACCC however to refine the circumstances in which the terms would operate.

Example: Amendment of problematic automatic renewal term

Up until recently, one business' original contract provided that it would automatically renew for an additional three year term unless the customer opted out of the renewal at least 60 days before the end of the initial term. The agreement also provided that if the customer terminated the renewed agreement before the end of the renewed term, the customer would be liable to pay liquidated damages of 50 per cent of the value remaining under the contract.

The ACCC considered that this term was likely to raise concerns under the law. Prior to the ACCC contacting the business, it independently opted to amend its agreement to remove the automatic renewal term, and replace it with a clause that allowed the customer to terminate the agreement at the expiry of the initial term by giving notice at any time during the initial term. It also provided that if the contract was not terminated it would not automatically renew, but would simply remain on foot. The customer could cancel the agreement with 90 days' notice and would not be required to pay damages or additional fees to exit. The business also reduced the liquidated damages from 50 per cent to 30 per cent of the value remaining in the contract.

Following consultation with the ACCC, the business has amended its agreement further to provide that a customer can terminate the agreement after the initial period with only 60 days' notice.

The amended clause is an example of an automatic renewal term that is now unlikely to raise concerns under the law.

Example: Improving the transparency of the renewal process

The other business's contract contained a term that provided that, unless a customer opted out before the end of the initial term, their agreement would be renewed on the same terms and for the same duration as the original agreement. It further provided that, if a customer wishes to terminate its agreement following the renewal, it will be charged 30 per cent of the fees that it would have paid over the life of the renewed agreement.

The ACCC raised concerns about this term with the business, and the business made some amendments to the term. For example, it increased the period of time that a customer has to opt out of the automatic renewal of the agreement. This change by itself would be unlikely to alleviate the ACCC's concerns about the term.

The business also indicated that it would include a clear statement about automatic renewal on the front page of the agreement, and a tick box to allow the customer to either accept or not accept automatic renewal.

The addition of a tick box in the agreement that allows the small business to opt into automatic renewal at the end of their contract term alleviates the ACCC's initial concerns.

As discussed in Chapter 2, the ACCC is of the view that early termination charges (ETCs) or liquidated damages charged to a customer for exiting a contract early should reflect a trader's genuine estimate of its losses.

When reviewed by the ACCC, both companies' agreements provided that if a customer terminated the agreement, they would be liable to pay 30 per cent of the value remaining under the contract. Both companies declined to amend this amount.

The ACCC recommends that all waste management service providers review their ETCs/liquidated damages for termination clauses to ensure that the amount customers are required to pay out is a genuine estimate of losses that may result from the early termination.

Unilateral variation

As discussed throughout this report, the ACCC has identified unilateral variation clauses as potentially problematic. Unilateral variation clauses may be considered more acceptable if the variation power is clearly expressed, only goes as far as is necessary to allow the business to achieve its legitimate business interest, and provide a balancing right such as an ability for the customer to exit the contract without penalty where the change could be materially detrimental.

Both agreements reviewed contained unilateral variation clauses that raised potential concerns.

One business made positive amendments to its unilateral variation clauses. The other company proposed amendments that had positive aspects but overall did not address the ACCC's initial concerns.

Example: Making a unilateral variation power fairer

One contract contained a clause that allowed the business to change its fees at any time.

The ACCC considered that this was likely to be broader than what was necessary to protect the business' legitimate interests, and could have been used to detriment the customer.

After engaging with the ACCC the company agreed to limit its ability to adjust fees to circumstances where it was passing on increases to disposal costs, fuel costs or any increased costs associated with a change in the law.

The ACCC considered that the amended clause would be more likely to be considered fair as it better balanced the company's commercial interests with a customer's interest in not being subject to unreasonable fee increases.

Limited liability and wide indemnities

Both agreements reviewed contained multiple clauses that the ACCC considered provided the company with potentially broad indemnities and unreasonably limited liability.

Both companies agreed to either remove or amend these clauses to apply more fairly. Positive changes by the businesses included limiting the circumstances in which a customer would be required to indemnify the business for loss and limiting a customer's indemnity to losses that are a result of the customer's act or omission.

Example: removal of a potentially unreasonable limitation of liability

One waste removalist's contract contained a clause stating that it would not be liable for loss or damage suffered by a small business customer in circumstances where the removalist failed to provide services on scheduled times, or cancelled or suspended the supply of those services.

The ACCC considered that this was potentially an unreasonable limitation of liability. After consulting with the ACCC, the business agreed to remove the clause.



7. Agriculture

There are approximately 123 000 agricultural businesses, including farm businesses, in Australia.⁵ The majority of these are small or family owned businesses.⁶

In recognition of the significant power imbalance that can exist between farmers and the businesses that they deal with (e.g. buyers, processors and agents), the ACCC has engaged with agriculture businesses to promote awareness of and compliance with the new unfair contract terms regime. The ACCC continues to discuss the new law with agriculture stakeholders and this report provides an update on the work undertaken to date.

The ACCC has reviewed standard form contracts from 17 traders across the horticulture, beef and cattle, viticulture, honey, cotton, poultry, grain and sugar industries. Standard form contracts in the dairy industry will be considered as part of the ACCC's inquiry into the dairy industry. Clauses identified as potentially problematic under the new law include terms that:

- provide businesses broad rights to reject or downgrade produce
- limit liability
- significantly restrict a supplier's ability to sell produce in excess of the amount committed under the contract
- allow for late indicative or variable pricing of produce.

The ACCC is currently discussing these clauses with traders.

Although engagement with the agriculture sector continues, the ACCC has already secured positive changes to two kinds of terms.

Unilateral variation

As discussed throughout this report, the ACCC has identified a number of unilateral variation clauses that could raise concerns under the new regime.

Three of the contracts reviewed contained clauses that provide the trader with a broad discretion to change quality of produce requirements and pricing terms. Each trader submitted that such clauses are necessary to allow them to respond flexibly to changes in regulatory requirements that are beyond their control.

⁵ Australian Bureau of Statistics, '4627.0 - Land Management and Farming in Australia, 2014-15', released 25 May 2016, available at www.abs.gov.au/ausstats/abs@.nsf/mf/4627.0.

⁶ Australian Productivity Commission, '[Regulation of Australian agriculture](#)', draft report, July 2016.

After discussing these clauses with the ACCC, two traders amended their contracts to make it clear that changes can only be made in the event of regulatory change outside of the business's control. The other trader has committed to reviewing the language of the term of concern.

Terms allowing unrestricted access to property

Many contracts in the agriculture sector provide that suppliers must allow businesses the right to enter and inspect the property where produce is grown at any time.

The ACCC accepts that it may be necessary, from time to time, for a business to inspect the operations of a supplier to ensure compliance with the contract. However, the ACCC is concerned about clauses that provide a supplier must allow the other business unrestricted rights to enter and inspect their property. Such terms may be unduly burdensome if they do not provide notice requirements or some restrictions on when and how inspections can occur.

The ACCC raised concerns regarding these types of terms with three traders. One trader subsequently amended its contract to only allow inspections to occur following a two-week notice period, or at a time agreed to by the parties. One trader did not amend its contract. Consultation with the third trader continues.

8. Next steps

The small business unfair contract terms law will come into effect on 12 November 2016. Going forward, the ACCC will assess alleged unfair contract terms in accordance with our Compliance and Enforcement Policy. The small business unfair contract terms law will be a priority for the ACCC.

While the ACCC can act in cases of widespread small business detriment or where the business involved is acting in blatant disregard of the law, there are a number of ways small businesses can seek to resolve their own particular concerns about a potentially unfair term. For example, a small business operator who believes they have found an unfair term in their contract should talk to the contract provider to see if they can resolve the issue e.g. by amending or removing the term. Speaking to the other party first could save the small business both time and money – and lead to a better outcome.

Businesses can contact the ACCC or their relevant state or territory fair trading agency if this process is unsuccessful.

Small businesses who find their contract provider unwilling to address their concerns should also consider seeking legal advice. Under the ACL, small businesses have the right to take their own court action or go to a tribunal where they consider a term to be unfair. Disputes over the fairness of a particular term may also be resolved through alternative dispute resolution schemes, industry ombudsmen, or (if applicable) the relevant state small business commissioner's office.

Ultimately, only a court or tribunal (not the ACCC) can decide that a term is unfair. If a term is found to be unfair, it will be void – this means it will not be binding on the parties. The rest of the contract will continue to bind the parties to the extent it is capable of operating without the unfair term.

If a court makes a declaration that a term is unfair and a party subsequently seeks to apply or rely upon the unfair term, it is a contravention of the ACL (or the ASIC Act), and the court may grant one of the following remedies:

- an injunction preventing the party from acting upon the term
- an order to provide redress to non-party small businesses
- any other orders the court thinks appropriate.