

Unfair Contract Terms Checklist

Does my credit documentation include unfair terms?

Section 24 of the Australian Consumer Law identifies three elements as to whether a contractual term is unfair.

Those key elements are that the term:

1. causes significant imbalance in the parties' rights and obligations under the contract (section 24(1)(a));
2. is not reasonably necessary in order to protect the legitimate interest of the party who would be advantaged by the term (section 24(1)(b)); and
3. would cause detriment (financial or otherwise) to a party if it were to be applied or relied upon (section 24(1)(c)).

Understanding what an 'unfair term' is

Section 25 of the Australian Consumer Law provides guidance as to what kind of terms may be unfair.

Such terms include:

1. a term that permits, or has the effect of permitting, one party (but not another party) to avoid or limit performance of the contract;
2. a term that permits, or has the effect of permitting, one party (but not another party) to terminate the contract;
3. a term that penalises, or has the effect of penalising, one party (but not another party) for a breach or termination of the contract;
4. a term that permits, or has the effect of permitting, one party (but not another party) to vary the terms of the contract;
5. a term that permits, or has the effect of permitting, one party (but not another party) to renew or not renew the contract;
6. a term that permits, or has the effect of permitting, one party to vary the upfront price payable under the contract without the right of another party to terminate the contract;
7. a term that permits, or has the effect of permitting, one party unilaterally to vary the characteristics of the goods or services to be supplied, or the interest in land to be sold or granted, under the contract;
8. a term that permits, or has the effect of permitting, one party unilaterally to determine whether the contract has been breached or to interpret its meaning;
9. a term that limits, or has the effect of limiting, one party's vicarious liability for its agents;
10. a term that permits, or has the effect of permitting, one party to assign the contract to the detriment of another party without that other party's consent;
11. a term that limits, or has the effect of limiting, one party's right to sue another party;
12. a term that limits, or has the effect of limiting, the evidence one party can adduce in proceedings relating to the contract;
13. a term that imposes, or has the effect of imposing, the evidential burden on one party in proceedings relating to the contract; and
14. a term of a kind, or a term that has an effect of a kind, prescribed by the regulations.

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Common Clauses and Examples

We provide a summary table of common terms which have been held to be unfair, along with examples clauses. Please consider reviewing your current credit documentation to ensure it does not contain any of the following terms, which have all held to be unfair. If you are in doubt as to whether or not a term is unfair, we would be happy to advise you.

| Type of clause | Example clause |
|---|---|
| Charging clause | <p>In consideration of [Lobux] agreeing to supply the Goods, the Customer charges all of its rights, title and interest (whether joint or several) in any land, realty or other assets capable of being charged, owned by the Customer either now or in the future, to secure the performance by the Customer of its obligations under these terms and conditions (including, but not limited to, the payment of any money.</p> <p><i>Lobux Pty Ltd v Willshaun Pty Ltd [2022] FCA 204 29</i></p> |
| Indemnity clause | <p>To the maximum extent permitted by law, the customer shall be responsible for and indemnify JJR from and in respect of all liabilities, claims, damages, actions, costs and expenses which may be incurred by JJR on a full indemnity basis (whether successful or not) as a result of or arising out of or otherwise in connection with this agreement, including any breach by the customer of any of the warranties, covenants and conditions herein.</p> <p><i>Australian Competition and Consumer Commission v JJ Richards & Sons Pty Ltd [2017] FCA 1224</i></p> |
| Price variation clause (where only one party can amend the price without affording the other party the ability to terminate the contract) | <p>JJR may adjust its prices during the term of the agreement for reasons such as but not limited to increased operation costs, changes in disposal fees, site profitability, changes to disposal facility locations or increased government charges and levies by giving customers 30 days notice of such increase.</p> <p><i>Australian Competition and Consumer Commission v JJ Richards & Sons Pty Ltd [2017] FCA 1224</i></p> |
| Automatic renewal / 'evergreen' clause | <p>The term shall be automatically renewed for further periods of [initial term] years thereafter unless terminated by either party giving written notice within 30 days prior to the end of the initial term or any renewed term.</p> <p><i>Australian Competition and Consumer Commission v JJ Richards & Sons Pty Ltd [2017] FCA 1224</i></p> |

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| Type of clause | Example clause |
|---|---|
| Indemnity costs clause | <p>Customer must pay FXA all costs and expenses, including legal costs and collection agency costs, which FXA incurs in exercising any of its rights under the Agreement (on a full indemnity basis), including any amounts which FXA pays to remedy any breach of Customer's obligations under the Agreement.</p> <p><i>Australian Competition and Consumer Commission v Fujifilm Business Innovation Australia Pty Ltd [2022] FCA 928</i></p> |
| Assignment clause (where only one party can exercise a right to assign its rights under the contract) | <p>Customer must not assign or transfer the Agreement or any benefit or right under it without prior written consent from FXA. FXA may without notice assign the Agreement or any benefit or right under it.</p> <p><i>Australian Competition and Consumer Commission v Fujifilm Business Innovation Australia Pty Ltd [2022] FCA 928</i></p> |
| Limitation / exclusion of liability | <p>The total liability of FXA for any and all Claims is limited in the aggregate as follows: (i) for Claims in relation to Non Excludable Rights to: (1) in the case of goods, any one or more of the following: the replacement of goods or supply of equivalent goods; the repair of the goods; the payment of the cost of replacing the goods or of acquiring equivalent goods; or the payment of the cost of having the goods repaired; and (2) in the case of services, any one or more of the following: supplying the services again; or payment of the cost of having the services supplied again; and (ii) for all other Claims, to an amount equivalent to the Charges paid by Customer under the Agreement during the first 12 months of the Minimum Term (or during such shorter period in the event the Claim arises in the first 12 months of the Minimum Term).</p> <p><i>Australian Competition and Consumer Commission v Fujifilm Business Innovation Australia Pty Ltd [2022] FCA 928</i></p> |
| Force majeure clause (where only one part has the benefit of the clause) | <p>FXA will not be liable to Customer for any delay or non-performance of its obligations, to the extent such delay or non-performance arises from a Force Majeure Event.</p> <p><i>Australian Competition and Consumer Commission v Fujifilm Business Innovation Australia Pty Ltd [2022] FCA 928</i></p> |

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| Type of clause | Example clause |
|--|---|
| <p>Termination clause (where only one part has a right to terminate)</p> | <p>Express termination rights: Subject to any Non Excludable Rights, the Agreement cannot be cancelled or terminated except as expressly provided for in the Agreement. (b) Suspension: If Customer is in breach of the Agreement or another agreement with FXA which FXA reasonably considers is related to this Agreement, or if FXA considers there may be a risk to the health or safety of its personnel, FXA may suspend the provision of Services. Any suspension of the Services in such circumstances is without prejudice to Customer’s obligations to comply with the Agreement, including the continued payment of all Charges. (c) Termination by FXA: FXA may immediately terminate any or every Agreement in whole or in part for cause by notice to Customer if: (i) Customer breaches any term, provision, warranty or condition of the Agreement (including an Essential Term) which Customer fails to remedy within a period of 7 days of being given notice, specifying the breach and the intention by FXA to terminate the Agreement if the breach is not remedied; (ii) Customer becomes subject to an Insolvency Event; (iii) a form of guarantee or security arranged by Customer and given to FXA in relation to performance of Customer’s obligations or potential liability under the Agreement lapses, becomes unenforceable or the guarantor or security provider dies or becomes subject to an Insolvency Event; or (iv) any Equipment is lost, stolen, destroyed or damaged to an extent FXA considers unrepairable.</p> <p><i>Australian Competition and Consumer Commission v Fujifilm Business Innovation Australia Pty Ltd [2022] FCA 928</i></p> |
| <p>Exclusion of pre-contractual representations</p> | <p>The Agreement contains the entire understanding between the parties as to the subject matter of the Agreement. Subject to Non Excludable Rights, all previous negotiations, understandings, representations, warranties, memoranda or commitments concerning the subject matter of the Agreement are superseded by the Agreement and are of no effect. Customer agrees that it has not relied on any representation by FXA or any of its personnel not expressly set out in the Agreement.</p> <p><i>Australian Competition and Consumer Commission v Fujifilm Business Innovation Australia Pty Ltd [2022] FCA 928</i></p> |

No cost review of your credit documentation

We are offering a no cost review of your credit documentation. To take advantage of this offer, or to speak to us generally about the expanded UCT Laws, please contact the Results Legal team on **1300 757 534** or via email at info@resultslegal.com.au