

### Unfair Contract Terms part 1: Placing an emphasis on fairness

#### Exploring how the law protects small businesses from unfair terms in contracts for financial products and services.

##### Background

The Victorian Automotive Chamber of Commerce (VACC) strongly supports the reforms to extend unfair contract term (UCT) provisions in the *Australian Securities and Investments Commission Act 2001* (ASIC Act) to insurance contracts governed by the *Insurance Contracts Act 1984* (IC Act).

The insurance sector has systematically lost the trust and confidence of many consumers and small businesses through decades of behaviour that has failed to meet community standards of fairness in contract law. Existing law and industry codes offer limited protection from unfair contract terms. For example, the duty of utmost good faith in the IC Act has rarely been used to prevent reliance on an unfair contract term.

The duty of utmost good faith alone, is not achieving its stated aims and the new UCT laws are welcomed because the duty of utmost good faith by itself:

- does not hold the insurer to account for policy terms which are harsh, oppressive, unconscionable, unjust, unfair, or inequitable for the consumer or a small business like a repairer
- it does not require an insurer to draft policy clauses 'fairly'
- it does not prevent an insurer from selling an insurance policy which is unsuitable, or which the customer does not understand and
- people are overwhelmingly unaware of it and, if they are aware of it, it is very unlikely to assist them in common disputes.

Since 1 July 2010, ASIC has administered the law dealing with unfair terms in **standard form consumer contracts** for financial products and services. The UCT law was extended to cover:

- a) standard form small business contracts from **12 November 2016** and
- b) insurance contracts for consumers and small businesses from **5 April 2021**.

##### Unfair contract term protections for small businesses

The law now gives courts a power to find that a term is 'unfair'. If a term is found to be unfair, it will be void – which means it is not binding. The rest of the contract will continue to bind the parties if it is capable of operating without the unfair term. The unfair contract term law helps in promoting consumer trust and confidence, and ensuring fair, orderly, and transparent markets and business operations.

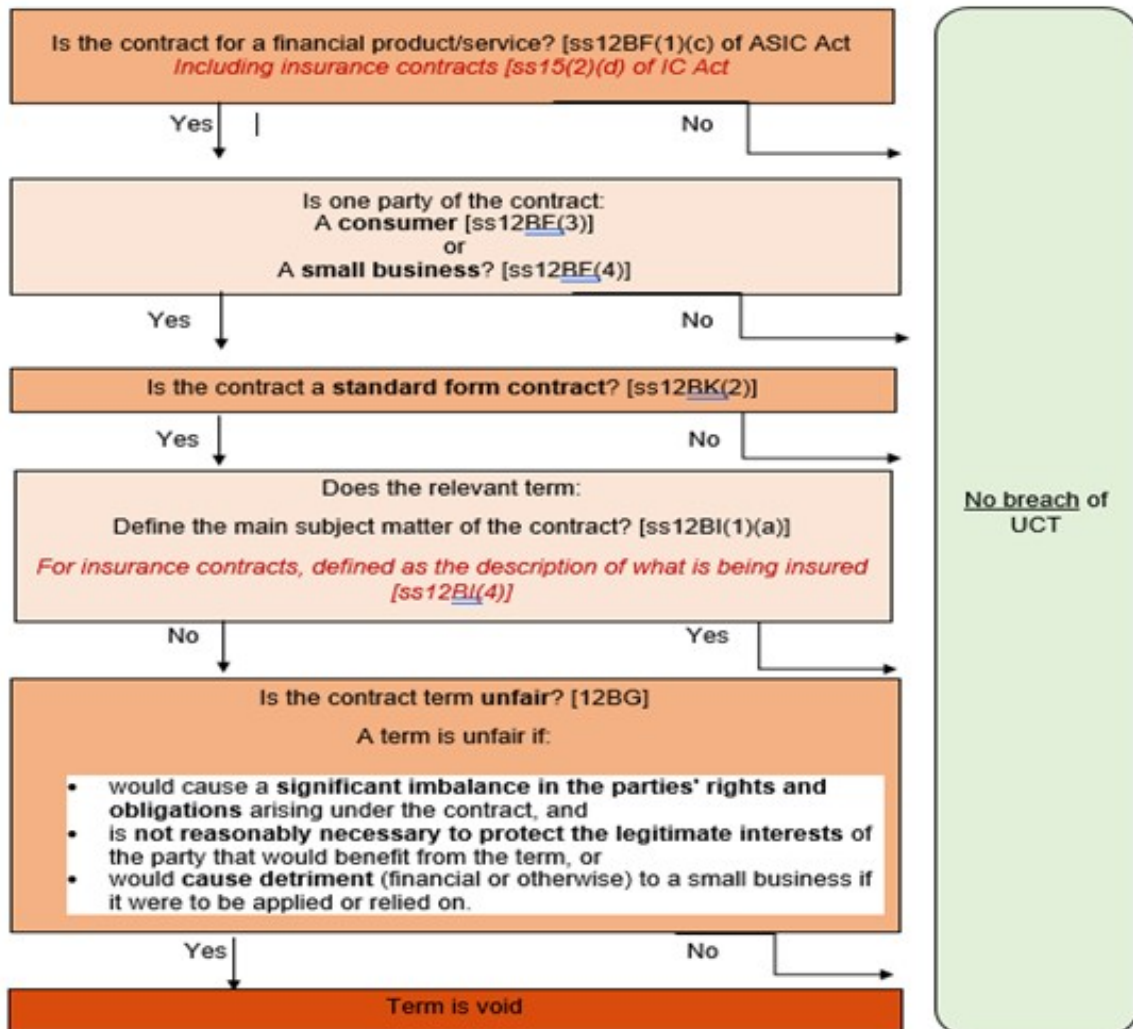
In common law, a basic principle underlying the law of contract is **freedom of contract**. One of the major functions of the law of contract is to preserve the integrity of the bargaining process but otherwise to allow contracting parties the **freedom to negotiate** the substantive terms of their agreements as they see fit.<sup>[1]</sup>

Principles allow a court to set aside an otherwise validly formed contract on the grounds that the consent of one party was impaired or weakened. These vitiating circumstances include such doctrines as fraud, misrepresentation, mistake, undue influence, and unconscionable conduct and its legislative equivalents, including the prohibition of misleading and deceptive conduct. Under general contract law based on the concept of **substantive unfairness**, there is no general jurisdiction for courts to intervene in an otherwise validly formed contract if the conditions for voluntary decisions by contracting parties have been met, until recently.

The UCT laws are both found in the **Australian Consumer Law (ACL)** and the **Australian Securities and Investments Commission Act 2001 (ASIC Act)**. The provisions in the ACL and ASIC Act are largely the same. The main difference is the ASIC Act applies to contracts which are "**financial products**" or contracts for the supply of "**financial services**" while the ACL does not.

A flowchart of the UCT regime for financial products and services. Note, a separate UCT regime operates under the National Consumer Law for non-financial products.

- **Australian Securities and Investments Commission Act 2001 (ASIC Act).**
- **Insurance Contracts Act 1984 (IC Act).**



### Do insurers still have a duty to act in good faith?

Yes, insurers still have a duty to act with the utmost good faith (see section 13, of the IC Act). This duty, to act with the utmost good faith, is separate and independent of the protections against unfair terms.

### Transparency and Fairness

When a court decides whether a term is unfair, it must consider the extent to which the term is **transparent**. A term is 'transparent' if it is legible, expressed in reasonably plain language, presented clearly, and readily available to any party affected by the term.

A term may not be transparent if, for example, it is hidden in the fine print or written in legal or complex language. Transparency is, however, just one of a number of factors a court will consider. A term that is transparent could still be unfair. The court must assess the fairness of a term in the context of the contract as a whole.

A potentially unfair term may be counterbalanced by additional benefits being offered to the small business. This means that a term could be unfair in one contract but not unfair in another. The court may also consider any other matters it thinks relevant and will determine whether unfairness arises in a particular contract on a case-by-case basis.

## More information

In March 2021, ASIC published the article [Are you ready? Laws on unfair contract terms apply to insurance from 5 April 2021](#), outlining its expectations of insurers. For all small business repairers, the VACC recommends you read this article to gain insight on what insurers are/should be doing, especially if the majority of your work is via an insurer.

In October 2020, ASIC also released [Information sheet 211 Unfair contract term protections for small businesses](#). It describes how small businesses can challenge a term under the unfair contract terms law in the Australian Securities and Investments Commission Act 2001, what happens if a term is unfair, and what ASIC can do. ASIC also updated [Information sheet 210 Unfair contract term protection for consumers](#).

The [Australian Competition and Consumer Commission \(ACCC\)'s website](#) also has useful information on unfair contract terms and small business rights protections.

## Next week, Unfair Contract Terms Part 2: Strengthening the unfair term laws by making several key changes – what do those changes mean for you and your small business?

### Important Notice

Please note that the information is a summary giving you basic information about a particular topic. It does not cover the whole of the relevant law regarding that topic, and it is not a substitute for professional advice.

You should also note that because this information sheet avoids legal language wherever possible, it might include some generalisations about the application of the law. Some provisions of the law referred to have exceptions or important qualifications. In most cases, your particular circumstances must be considered when determining how the law applies to you.

If you need further information, please contact me on 03 9829 1142.

Kind regards

**Kathy Zdravevski LLM (JD)**  
**Industry Policy Advisor – Industry Divisions**  
BRD, TOD  
VACC  
Level 7 | 464 St Kilda Road | Melbourne Vic 3004  
P: 03 9829 1142 | M: 0418 329 527 | W: [vacc.com.au](http://vacc.com.au)

<sup>[1]</sup> Subject to requirements such as legality and certainty.