

# Preventing unfairness in event ticketing terms

A guide for legal practitioners and consumer advocates



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# Contents

<b>Introduction</b>	<b>4</b>
<b>1. Understanding Australia’s unfair contract term legislation</b>	<b>5</b>
How does unfair contract term legislation work?	5
What is an unfair term?	5
Examples of unfair terms	5
What is a standard form consumer contract?	6
What is the effect of an unfair term?	6
What is the aim of enforcement action?	6
Will using this guide protect a business from having a term made void?	6
<b>2. Common unfair terms in event ticketing</b>	<b>7</b>
Terms that exclude or limit liability	7
‘No refund’ terms and changes to the event	8
Refund of booking fees	9
Terms allowing the promoter to refuse admission/eject patrons	10
Lost, stolen or damaged tickets	11
Conflicting terms provided by promoters and ticketing agencies	11
<b>3. Australian Consumer Law unfair contract term legislation</b>	<b>12</b>
Section 23 – Unfair terms of consumer contracts	12
Section 24 – Meaning of unfair	12
Section 25 – Examples of unfair terms	12
Section 26 – Terms that define main subject matter of consumer contracts etc. are unaffected	13
Section 27 – Standard form contracts	14
Section 28 – Contracts to which this Part does not apply	14
<b>Contacts</b>	<b>15</b>

# Introduction

This guide will help legal practitioners and consumer advocates recognise unfair contract terms in event ticketing contracts.

It will also help them understand how Australian consumer protection agencies apply unfair contract term legislation to event ticketing terms.

This legislation is part of the Australian Consumer Law (ACL) and reproduced in Chapter 3 of this guide. It gives consumers, and the agencies that protect their interests, a new avenue to address the content of consumer contracts.

This guide is based on a Consumer Affairs Victoria review of ticket terms for a range of high-profile sporting events attracting a large number of spectators. It explains why consumer protection agencies consider some common event ticketing terms unfair, outlines the basis on which they are likely to take enforcement action, and includes examples of types of terms that may be considered unfair. These examples are not a definitive list of what is unfair under the legislation. Ultimately, courts and tribunals decide if a term is unfair.

Consumer protection agencies believe that fair contracts benefit consumers and businesses, by helping to create a fair and open marketplace. Legal practitioners should use this guide to review terms in contracts they prepare for promoters, and change or remove any unfair terms. We will monitor event industry compliance with the unfair contract term legislation.

In this guide, references to:

- > 'unfair contract term legislation' means the legislation in Part 2-3 of Schedule 2 of the *Competition and Consumer Act 2010*.
- > 'consumer guarantees' in relation to defective goods or services means the consumer guarantees set out in Division 1 of Part 3-2 of Schedule 2 of the *Competition and Consumer Act 2010*.

This guide and other publications about unfair consumer contract terms are available at [www.consumerlaw.gov.au](http://www.consumerlaw.gov.au).

# 1. Understanding Australia's unfair contract term legislation

## How does unfair contract term legislation work?

The legislation empowers consumers and consumer protection agencies to seek a court or tribunal:

- > declaration that a term in a consumer contract is unfair
- > injunction against the business using the term in its consumer contracts
- > remedial order for any losses suffered.

Enforcement of unfair contract term legislation is shared by the:

- > Australian Competition and Consumer Commission (ACCC)
- > Australian Securities and Investments Commission (ASIC)
- > state and territory consumer protection agencies.

These agencies work together to ensure a consistent approach to compliance and enforcement.

## What is an unfair term?

A term in a standard form consumer contract is unfair if it:

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

In assessing whether a term is unfair, the legislation requires that:

- > the contract as a whole be taken into account, including any countervailing favourable terms
- > the transparency of the term be taken into account; that is, whether the term is:
  - expressed in reasonably plain language
  - legible
  - presented clearly
  - readily available to any party affected by the term.

A term is not subject to the unfair contract terms legislation if it:

- > defines the main subject matter of the contract
- > sets the up-front price, or
- > is permitted by another law.

A term can be unfair regardless of the business's intention or whether the term has been relied upon.

A significant imbalance in the parties' rights and obligations under the contract is created when a term:

- > gives powers to the business that it would not otherwise or usually have
- > protects the business in a way that puts the consumer at a disadvantage
- > alters their position under the ordinary rules of contract or the general law
- > shifts risks to the consumer that the business is better placed to manage.

## Examples of unfair terms

The legislation sets out some examples of possible unfair terms.

This includes terms that permit the supplier but not the consumer to:

- > avoid or limit performance of the contract
- > terminate the contract
- > vary the terms of the contract
- > renew or not renew the contract.

It also includes terms that permit the supplier to:

- > vary the price without the consumer having the right to terminate the contract
- > unilaterally vary the characteristics of the goods or services to be supplied under the contract
- > unilaterally determine whether the contract has been breached or to interpret its meaning
- > assign the contract to the consumer's detriment without the consumer's consent.

## 1 Understanding Australia's unfair term legislation

Other examples of possible unfair terms given in the legislation include those that:

- > penalise the consumer but not the supplier for a breach or termination of the contract
- > limit the supplier's vicarious liability for its agents
- > limit the consumer's right to sue the supplier
- > limit the evidence the consumer can produce in legal proceedings relating to the contract
- > impose the evidential burden on the consumer in such legal proceedings.

### What is a standard form consumer contract?

A 'consumer contract' is a contract for the supply of goods or services to an individual consumer (that is, not to a company) who buys them wholly or predominantly for personal, domestic or household use or consumption.

The legislation does not explain what constitutes a 'standard form' consumer contract. However, it is essentially a pre-prepared contract that a business uses for its customers that is not open to negotiation by the consumer.

When assessing whether a contract is 'standard form', the following factors are considered:

- > whether the supplier has all or most of the bargaining power
- > whether the contract was prepared by the supplier before any discussion relating to the transaction occurred with the consumer
- > whether the consumer was, in effect, required either to accept or reject the terms of the contract in the form in which they were presented
- > whether the consumer was given an effective opportunity to negotiate the terms of the contract
- > whether the terms of the contract take into account the specific characteristics of the consumer or the particular transaction.

### What is the effect of an unfair term?

If a term in a standard form contract is declared unfair, it is void. However, the contract continues to bind the parties unless it cannot operate without the unfair term.

### What is the aim of enforcement action?

By taking enforcement action, consumer protection agencies aim to change behaviour to promote compliance and stop offending behaviour. Successful enforcement outcomes will be publicised, to raise consumer and supplier awareness of the law.

### Will using this guide protect a business from having a term made void?

Using the guide cannot protect a promoter from having a ticketing term declared unfair by a court or tribunal; it is not to be relied upon as legal advice. If you are unsure whether a term is unfair, obtain independent legal advice.

## 2. Common unfair terms in event ticketing

The main areas of unfairness in event ticketing terms reviewed by Consumer Affairs Victoria are terms that:

- > exclude liability for death, personal injury, or loss or damage to consumers' property; or that mislead consumers about their statutory rights
- > deny refunds in any circumstances or deny refunds of booking fees
- > give unlimited discretion for the promoter to change the event
- > allow the promoter to refuse admission or to eject patrons without giving reasons
- > deny any obligation to replace lost, stolen or damaged tickets.

### Terms that exclude or limit liability

The statutory consumer guarantees under the ACL require that services, which include the rights, benefits, privileges or facilities provided to consumers by event promoters, be rendered with due care and skill<sup>1</sup>.

It is an offence for a supplier to attempt to exclude, restrict or modify these rights or its liability for a breach – including by placing time limits on claims shorter than those allowed under the legislation. Such terms are void. Broad exclusions or limitations of liability are also void because, whether intentional or not, they purport to encompass the consumer guarantees.

For example:

- > You are responsible for your own property and [promoter], its venues and [promoter's agent] will not be liable for loss or damage to any property brought to any of the venues.

The problem with such terms is that, legally, promoters are liable for their and their employees' and agents' negligence or lack of due care and skill.

Consumer protection agencies also consider such terms unfair as they:

- > permit or have the effect of permitting the promoter to avoid or limit performance of the contract
- > limit or have the effect of limiting the consumer's right to sue the promoter
- > limit or have the effect of limiting the promoter's vicarious liability for its employees or agents
- > alter the legal position that would otherwise have applied.

Examples of impermissible limitations or modifications of the consumer's statutory rights are terms that:

- > put a monetary limit on compensation
- > place a time limit on claims shorter than provided for under the legislation
- > exclude pure economic loss.

For example:

- > The [promoter] will not be liable for any indirect or consequential loss suffered by you or caused by any acts or omissions of the [promoter], their directors, employees, agents and contractors arising out of or in relation to the event.

Many terms that exclude or limit a promoter's liability for loss or damage indirectly attempt to cater for the consumer's statutory rights.

For example:

- > You agree and acknowledge that, to the extent permitted by law, [promoter] will not be liable for any loss or damage suffered by you or caused by any acts or omissions of [promoter] or employees, agents or contractors of [promoter] or any other persons present at the course.
- > Nothing in these conditions of entry affects your rights under the *Trade Practices Act 1974* (Cth), the *Fair Trading Act 1999* (Vic) or similar legislation regarding implied conditions or warranties.

<sup>1</sup> The duty to render services with due care and skill is analogous to the common law duty not to render services negligently.

## 2. Common unfair terms in event ticketing

These are likely to be considered unfair terms that limit or have the effect of limiting the consumer's right to sue the promoter for a breach of a statutory right, because most consumers will not know what that 'law' is.

Such terms tend to mislead consumers about their rights under the consumer guarantees. These terms give the appearance of complying with the law, but signify nothing to consumers who are ignorant of their rights and who will only understand the exclusionary nature of the term.

It is the lack of transparency of such terms that makes them unfair – they are not presented clearly and are misleading.

Liability exclusions must clearly signpost consumers' statutory rights, or consumer protection agencies will consider such terms unfair.

For example:

- > For consumers, our services come with non-excludable guarantees under the ACL, including that they will be provided with due care and skill. You are entitled, at your option, to a refund or the re-supply of the services for a breach, and to compensation for any other loss.

### Recreational service providers

Legislation in some jurisdictions enables 'recreational services' providers to exclude or limit their statutory obligations under the ACL, within carefully defined limits. Correctly applied by a recreational service provider, these exclusions will also fall within the exception in unfair contract term legislation for terms permitted by law.

In the review, many event conditions for sporting activities had liability waivers in terms that went beyond the limits of relevant legislation.

These terms are ineffective under the relevant legislation and do not come within the exception in unfair contract term legislation for terms permitted by law. Like other liability exclusion terms, consumer protection agencies regard these as unfair because the terms seek to avoid or limit performance of the contract or the consumer's right to sue the supplier.

### 'No refund' terms and changes to the event

Terms that deny consumers refunds in all circumstances are considered unfair, as they can be used to deny the consumer a refund when the supplier is in fundamental breach of contract – for example, if the event is cancelled, relocated or rescheduled.

For example:

- > Tickets will not be refunded under any circumstances, including but not limited to, the possible non-appearance of any particular person, group or personality expected by the Ticket holder, whether expected to enter an event or not and whether advertised or not, or in the event of any variation to the programs, seating arrangements, other conveniences and attractions, or any adverse weather conditions or any circumstances beyond the reasonable control of [promoter].
- > [Promoter] is not liable to you for any loss or damage you suffer as a result of cancellation, withdrawal, postponement, relocation or rescheduling of an event where the circumstances giving rise to cancellation, withdrawal, postponement, relocation or rescheduling are beyond [promoter's] reasonable control. You also agree that you have no right to claim a refund or exchange ticket in such circumstances and no obligation is assumed by [promoter] to schedule a substitute event.

In such circumstances, consumers should be entitled to a full refund.

Terms are also considered unfair that give the promoter unfettered discretion to change the event, or deny refunds for material changes after the ticket has been sold. Material changes include changes to what the consumer has contracted to see or hear, even if caused by events beyond the promoter's control.



## 2. Common unfair terms in event ticketing

For example:

- > You cannot exchange your ticket or obtain a refund if:
  - after a session has started, it is cancelled for any reason beyond the corporation's reasonable control;
  - the time of a session changes, or there is a substantial change to the events included in a session, after the date you purchased your ticket;
  - the participants competing in an event or session change at any time without notice, whether through unavailability, injury, illness or for any other reason.

A change to the headline act, main star or feature part of an event after the ticket was sold is likely to be a 'material' change. For multi-star or multi-feature events, a fair outcome will balance factors such as how the event was promoted and the relative prominence given to various artists or features.

For theatre, ballet and opera shows that have a 'run', consumers generally accept the use of understudies for incapacitated performers. A 'no refund' term for understudies would not be considered unfair.

It is not unfair for a supplier to exclude liability for loss or damage suffered by the consumer due to causes outside the supplier's control. However, the supplier cannot deny a refund in such circumstances. When the supplier cannot provide what it has contracted for – including the event time or place – it is a fundamental breach of the contract. The consumer is entitled to a full refund, even if the reason for the change is outside the supplier's control.

If the event is rescheduled or relocated, the supplier cannot require the consumer to accept a ticket to the changed event in lieu of a refund.

If only part of an event is cancelled, the supplier should provide a pro-rata refund for the proportionate value of that part of the event cancelled. The supplier should provide a full refund where the essential or central part of the event is cancelled.

The following term from the *Code of Practice for the Ticketing of Live Entertainment Events in Australia* issued by Live Performance Australia is considered consistent with this position:

- > If an event is cancelled or rescheduled:
  - a) Prior to the event, the presenter or venue manager should make reasonable endeavours to ensure that where an event is cancelled, a consumer is entitled to seating in a similar location at a re-scheduled event. If the Consumer is unable to attend the re-scheduled event, or if the event is not rescheduled, the presenter should ensure that the consumer receives a full refund of the ticket price and other industry imposed ticket charges.

### Refund of booking fees

When consumers buy tickets to an event through a ticketing agent linked to the event promoter, the total cost comprises the promoter's fee and the ticketing agent's booking fee.

When a promoter must provide a refund, a term denying refund of any booking fee is considered unfair.

For example:

- > if all events scheduled for a particular day... are cancelled prior to the advertised time for the opening of gates for admission...[promoter] will procure that the ticket seller refunds...to the holder of that admission ticket its full face value (excluding any third party administrative charges).

For an example of a consistent term, see the above term from the *Code of Practice for the Ticketing of Live Entertainment Events in Australia*.

## 2. Common unfair terms in event ticketing

### Terms allowing the promoter to refuse admission/eject patrons

A broadly-stated right for the promoter to refuse admission or to eject a patron without giving a reason or a refund is likely to be considered unfair. Such terms effectively permit the supplier but not the consumer to terminate the contract.

For example:

- > [Promoter] reserves the right, with reasonable cause, to refuse entry to any person or remove any person from the event.

Such terms are usually designed to enable the promoter to maintain order and safety at the event. However, expressed in a broad way, they enable the promoter to prevent entry or eject people who have not breached the terms of entry, or unfairly to deny a refund.

Asserting that admission will only be refused 'with reasonable cause' does not remove the potential for unfairness, since such terms remain open to abuse. The term should clearly explain the circumstances under which a patron will be refused admission or ejected, or should indicate that there are restrictions and include a link to the full details.

When a ticket-holder is refused entry due to failure to meet a ticketing term, a refund should be provided because they have not received what they paid for. However, it would not be considered unfair if the ticketing terms denied a refund when it would have been very clear to the consumer that he or she did not or could not meet an entry condition; for example, an under-age purchaser of a ticket to an event clearly designated as over-age.

Although not an unfair contract term issue, if the circumstances were not brought to the patron's attention before entry, it is considered unconscionable conduct under the ACL to refuse entry or to eject them by relying on 'deeming' terms, such as:

- > It is your responsibility to inform yourself of the conditions. By purchasing a ticket, you are deemed to have accepted and understood as binding on you all conditions and any accompanying risks, obligations and responsibilities.

The review found that some ticketing terms gave the promoter the power to refuse entry or to eject patrons because of their appearance.

For example:

- > [Promoter] also reserves the right to refuse entry and to remove any person whose appearance and/or behaviour is considered to be offensive. A person found breaching the conditions of entry is not entitled to a refund of any money paid for ticket cost.

Such clauses are considered unfair, particularly when there is no refund, unless what constitutes 'offensive appearance' is made sufficiently clear before entry.

A person admitted to an event should not be ejected because their appearance is considered offensive, at least not without a refund, unless they deliberately changed their appearance after entry.

## 2. Common unfair terms in event ticketing

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### Lost, stolen or damaged tickets

For individual events, a term that denies replacement or refund for a lost, stolen or damaged ticket is generally not unfair, provided it is brought to consumers' attention before purchase. However, the damage must render the ticket unrecognisable as a valid ticket. If the damaged ticket is unusable but recognisably valid, a replacement or refund should be provided.

Therefore, broadly stated denials of a refund or replacement are considered unfair.

For example:

- > The [promoter] is not obliged to replace tickets under any circumstances, including, but not limited to loss or theft. The [promoter] reserves the right, in its sole discretion, to replace a ticket which has been lost or stolen and charge you the cost of organising such replacement.

If a consumer bought an 'on-going' or multiple use ticket – for example, a season ticket for the football or theatre – the promoter should replace the ticket if it is lost, stolen or damaged, because the consumer's claim can be verified. The promoter can require reasonable proof from the consumer, such as a statutory declaration, and charge a reasonable administration fee.

### Conflicting terms provided by promoters and ticketing agencies

Consumer Affairs Victoria's review found that terms posted on event promoters' websites were sometimes inconsistent with those on tickets issued by the promoters' ticketing agents.

This can confuse consumers and is usually not alleviated by a statement in the ticketing agent's terms that the promoter's terms prevail in the event of inconsistency.

In assessing whether a term of a consumer contract is unfair, its transparency (including whether it has been presented clearly and is readily available to the consumer) must be taken into account.

# 3. Australian Consumer Law unfair contract term legislation

## Section 23 – Unfair terms of consumer contracts

- (1) A term of a consumer contract is void if:
  - (a) the term is unfair; and
  - (b) the contract is a standard form contract.
- (2) The contract continues to bind the parties if it is capable of operating without the unfair term.
- (3) A consumer contract is a contract for:
  - (a) a supply of goods or services; or
  - (b) a sale or grant of an interest in land;to an individual whose acquisition of the goods, services or interest is wholly or predominantly for personal, domestic or household use or consumption.

## Section 24 – Meaning of unfair

- (1) A term of a consumer contract is unfair if:
  - (a) it would cause a significant imbalance in the parties' rights and obligations arising under the contract; and
  - (b) it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and
  - (c) it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.
- (2) In determining whether a term of a consumer contract is unfair under subsection (1), a court may take into account such matters as it thinks relevant, but must take into account the following:
  - (a) the extent to which the term is transparent;
  - (b) the contract as a whole.

- (3) A term is transparent if the term is:
  - (a) expressed in reasonably plain language; and
  - (b) legible; and
  - (c) presented clearly; and
  - (d) readily available to any party affected by the term.
- (4) For the purposes of subsection (1)(b), a term of a consumer contract is presumed not to be reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term, unless that party proves otherwise.

## Section 25 – Examples of unfair terms

- (1) Without limiting section 24, the following are examples of the kinds of terms of a consumer contract that may be unfair:
  - (a) a term that permits, or has the effect of permitting, one party (but not another party) to avoid or limit performance of the contract;
  - (b) a term that permits, or has the effect of permitting, one party (but not another party) to terminate the contract;
  - (c) a term that penalises, or has the effect of penalising, one party (but not another party) for a breach or termination of the contract;
  - (d) a term that permits, or has the effect of permitting, one party (but not another party) to vary the terms of the contract;
  - (e) a term that permits, or has the effect of permitting, one party (but not another party) to renew or not renew the contract;
  - (f) 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;

### 3. Australian Consumer Law unfair contract term legislation

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- (g) 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;
  - (h) 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;
  - (i) a term that limits, or has the effect of limiting, one party's vicarious liability for its agents;
  - (j) 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;
  - (k) a term that limits, or has the effect of limiting, one party's right to sue another party;
  - (l) a term that limits, or has the effect of limiting, the evidence one party can adduce in proceedings relating to the contract;
  - (m) a term that imposes, or has the effect of imposing, the evidential burden on one party in proceedings relating to the contract;
  - (n) a term of a kind, or a term that has an effect of a kind, prescribed by the regulations.
- (2) Before the Governor-General makes a regulation for the purposes of subsection (1)(n) prescribing a kind of term, or a kind of effect that a term has, the minister must take into consideration:
- (a) the detriment that a term of that kind would cause to consumers; and
  - (b) the impact on business generally of prescribing that kind of term or effect; and
  - (c) the public interest.

#### **Section 26 – Terms that define main subject matter of consumer contracts etc. are unaffected**

- (1) Section 23 does not apply to a term of a consumer contract to the extent, but only to the extent, that the term:
- (a) defines the main subject matter of the contract; or
  - (b) sets the upfront price payable under the contract; or
  - (c) is a term required, or expressly permitted, by a law of the Commonwealth, a State or a Territory.
- (2) The upfront price payable under a consumer contract is the consideration that:
- (a) is provided, or is to be provided, for the supply, sale or grant under the contract; and
  - (b) is disclosed at or before the time the contract is entered into;
- but does not include any other consideration that is contingent on the occurrence or non-occurrence of a particular event.

### 3. Australian Consumer Law unfair contract term legislation

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#### Section 27 – Standard form contracts

- (1) If a party to a proceeding alleges that a contract is a standard form contract, it is presumed to be a standard form contract unless another party to the proceeding proves otherwise.
- (2) In determining whether a contract is a standard form contract, a court may take into account such matters as it thinks relevant, but must take into account the following:
  - (a) whether one of the parties has all or most of the bargaining power relating to the transaction;
  - (b) whether the contract was prepared by one party before any discussion relating to the transaction occurred between the parties;
  - (c) whether another party was, in effect, required either to accept or reject the terms of the contract (other than the terms referred to in section 26(1)) in the form in which they were presented;
  - (d) whether another party was given an effective opportunity to negotiate the terms of the contract that were not the terms referred to in section 26(1);
  - (e) whether the terms of the contract (other than the terms referred to in section 26(1)) take into account the specific characteristics of another party or the particular transaction;
  - (f) any other matter prescribed by the regulations.

#### Section 28 – Contracts to which this Part does not apply

- (1) This Part does not apply to:
  - (a) a contract of marine salvage or towage; or
  - (b) a charter party of a ship; or
  - (c) a contract for the carriage of goods by ship.
- (2) Without limiting subsection (1)(c), the reference in that subsection to a contract for the carriage of goods by ship includes a reference to any contract covered by a sea carriage document within the meaning of the amended Hague Rules referred to in section 7(1) of the *Carriage of Goods by Sea Act 1991*.
- (3) This Part does not apply to a contract that is the constitution (within the meaning of section 9 of the *Corporations Act 2001*) of a company, managed investment scheme or other kind of body.

# Contacts

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Commonwealth

**Australian Competition and Consumer Commission**

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Canberra ACT 2601  
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[acc.gov.au](http://acc.gov.au)

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