

Preventing unfair terms in furniture removal agreements

A guide for legal practitioners and consumer advocates



Copyright

© Commonwealth of Australia 2012

This work is copyright. You may download, display, print and reproduce this material in unaltered form only (retaining this notice) for your personal, non-commercial use or use within your organisation. Apart from any use as permitted under the *Copyright Act 1968*, all other rights are reserved.

Requests and inquiries concerning reproduction and rights should be posted at the Commonwealth Copyright Administration website at ag.gov.au/cca or addressed to:

Commonwealth Copyright Administration
Attorney-General's Department
3-5 National Circuit
Barton ACT 2600
ISBN 1 921079 44 4

Contents

Introduction	4
1. Understanding Australia’s unfair contract term legislation	5
How does unfair contract term legislation work?	5
What is an unfair term?	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
2. Unfair terms in furniture removal contracts	7
Requiring disputes to be heard in another jurisdiction	7
Penalising the consumer for errors or for varying the contract	7
Assigning the removalist’s rights to unidentified non-parties	8
Liens on consumers’ goods	8
Penalty charges	9
Discretions as to delivery	10
Limitations of liability	11
Indemnities	12
3. Australian Consumer Law unfair contract term legislation	13
Section 23 – Unfair terms of consumer contracts	13
Section 24 – Meaning of unfair	13
Section 25 – Examples of unfair terms	13
Section 26 – Terms that define main subject matter of consumer contracts etc. are unaffected	14
Section 27 – Standard form contracts	15
Section 28 – Contracts to which this Part does not apply	15
Contacts	16

Introduction

This guide will help legal practitioners and consumer advocates recognise unfair terms in contracts between furniture removalists and consumers¹.

It will also help them understand how Australian consumer protection agencies apply unfair contract term legislation to such contracts.

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 Consumer Affairs Victoria's legal action against a furniture removalist in the Victorian Civil and Administrative Tribunal in 2007 (the *Backloads* case)². The tribunal found a number of the contract terms unfair.

The guide explains why consumer protection agencies consider some common 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, and change or remove any unfair terms, in agreements they prepare for this industry. We will monitor industry compliance with the unfair contract term legislation.

In this guide:

- > '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.

¹ The words 'contract' and 'agreement' have the same meaning, and both are used in this document.

² Director of CAV v Backloads.com Pty Ltd [2009] VCAT 754.

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.

They 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 to the consumer.

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 any party affected by the term.

Unfair contract terms legislation does not apply to a contract term that:

- > 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.

1 Understanding Australia's unfair term legislation

The legislation sets out some examples of possible unfair terms.

These include terms that permit the supplier but not the consumer to:

- > avoid or limit performance of the contract
- > terminate the contract
- > change 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.

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 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.

Assessing whether a contract is a 'standard form' contract takes into account whether the:

- > supplier has all or most of the bargaining power
- > contract was prepared by the supplier before any discussion relating to the transaction occurred with the consumer
- > consumer was, in effect, required either to accept or reject the terms of the contract in the form in which they were presented
- > consumer was given an effective opportunity to negotiate the terms of the contract
- > contract terms 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 this guide cannot protect a business from having a term in its agreement 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, you should obtain independent legal advice.

2. Unfair terms in furniture removal contracts

Requiring disputes to be heard in another jurisdiction

Removalists that operate across several states and territories often include contract terms that require consumers to take disputes to courts in the removalist's home jurisdiction – regardless of where the consumer lives.

Such terms cannot prevent consumers from taking legal action in their home jurisdiction. Consumers can always initiate legal action in the courts where they live. It is a matter for the court or tribunal to decide if it has jurisdiction to hear the case.

Consumer protection agencies also consider these terms unfair as they could deter consumers from asserting their rights.

The tribunal considered a similar term in the *Backloads* case – a term that said the law of the Australian Capital Territory applied to the contract. The term deemed the contract to have been entered into in the ACT. The tribunal said:

“...the term has the object or effect of limiting the relevant consumer's right to sue the [removalist] or, alternatively, deterring the non-Australian Capital Territory consumers from enforcing the contract – thereby creating a significant imbalance in the parties' rights and obligations arising under the contract to the detriment of the consumer.”

Penalising the consumer for errors or for varying the contract

Consumers sometimes make errors in the number and nature of the items given to removalists and sometimes need to make last minute changes to 'packing inventories'. This is a normal and unavoidable part of the transaction.

Removalists often charge consumers extra for such errors or last minute adjustments, or refuse to accept any such changes, then insist on going ahead with the contract.

In the *Backloads* case, the tribunal found the following term unfair:

- > 8(b) If the information supplied is incorrect, inadequate, inaccurate or varied after a quotation has been given, the company may at its discretion perform the work strictly as per its quotation or vary its charges in accordance with a pro-rata adjustment based on the variation in the specified quantity, volume or weight of the goods plus any variation of estimated loading and unloading times charged at the time rate.

The tribunal said this was unfair because the term:

- > penalised the consumer by permitting the removalist, in its discretion, to perform the contract as originally agreed without regard to the consumer's desire or need to vary the contract
- > permitted the removalist to determine and/or vary the price without the right of the consumer to terminate the contract
- > permitted the removalist unilaterally to vary the characteristics of the services to be supplied under the contract
- > permitted the removalist unilaterally to determine whether the contract has been breached or to interpret its meaning.

Best practice is to discuss the error or misunderstanding with the consumer and together agree to contract change and put these in writing or, if that proves impossible, to allow the consumer to cancel the contract, without penalty.

2. Unfair terms in furniture removal contracts

Assigning the removalist's rights to unidentified non-parties

In the *Backloads* case, the tribunal found this term unfair:

- > 9(b) The company hereby assigns its rights and the rights of any persons on behalf of whom it is acting, to collect all charges and payments from clients to the contractor. The contractor agrees to issue invoices and to collect all such charges and payments directly from clients.

The tribunal said that the term was unfair because it:

- > assigned rights to someone who was not part of the contract and was not identified (an unidentified non-party)
- > claimed to permit the unidentified non-party to issue invoices and collect all charges and payments payable by the consumer
- > created uncertainty for the consumer because the 'contractor' was not a party to the contract
- > permitted the removalist to assign the contract to the consumer's detriment without the consumer's consent.

Liens on consumers' goods

Consumer protection agencies do not regard terms that give the supplier the right to hold the consumer's goods for unpaid charges (a 'lien') as unfair. But such terms should:

- > only operate from the time the consumer has failed to pay
- > clearly state how they will be applied; that is, the amount payable by the consumer and the time for payment should be certain at the outset. For instance, the supplier should not be able to change the amount and time for payment without consent from the consumer
- > only secure the unpaid charges under the removalist contract.

In the *Backloads* case, the tribunal found the following terms unfair:

- > 10(a) All goods of the client, or carried on behalf of the client, that are received by the company shall be subject to a general lien for any monies owed by the client or the owner of the goods to the company or the contractor as a result of this agreement or any previous agreement between the company and the client or the owner of the goods.
- > 10(b) In order to exercise its rights under the aforementioned lien, the company shall have the right to seize or retain or to defer or refuse delivery of any goods that are the subject of this lien should circumstances arise that make it reasonable to conclude that the client is unwilling or unable to pay any due charges in the required form or at the required place or time.
- > 10(c) Where the charges of the company remain unpaid for a minimum period of 28 days, the company may give 28 days written notice by certified or registered mail to the last known address of the client of intention to sell. If the amount owing is not paid within that further period the company may open any packages, dispose of the goods or sell all or any of the goods by auction or by private treaty at its absolute discretion. Out of any monies arising the company may retain its charges and all charges and expenses of the detention and sale. It shall credit the surplus, if any, to the person entitled to it. Any such sale shall not prejudice or affect any other rights that the company may have to recover any outstanding charges due or payable in respect of such service or the said detention or sale.

2. Unfair terms in furniture removal contracts

The tribunal said that these terms were unfair because they:

- > imposed a lien for monies owed by a non-party to the contract and in respect of other contracts
- > imposed a lien even though the contract required payment on or before pick up, which was unreasonably excessive to protect the removalist's legitimate interests
- > claimed to extend the lien to the benefit of an unidentified non-party to the contract
- > imposed an unreasonable burden on consumers, given the unfettered powers of the removalist to vary the price and to decide the method, route and time of the carriage and the uncertainty which this created about the extent of the application of the lien.

Penalty charges

Removalists can insert powers in their contracts to allow them to impose extra charges in unforeseen circumstances. But these powers must not be too broad – for instance, applying when the removalist caused the unforeseen problem.

Generally, any such power should only operate for problems caused by the consumer. Any penalty should bear a reasonable relationship to the actual loss suffered by the removalist.

In the *Backloads* case, the tribunal found the following term unfair:

- > 11(a) Movement of incorrect goods. The client shall provide an authorised representative who will be responsible for ensuring that the correct goods are loaded. Whether or not such a representative is provided, and whether or not the client provided the company with a list of items to be moved, the client shall pay all reasonable additional charges whatsoever resulting from the movement of incorrect goods or non-movement of goods that the client intended to have moved.

The tribunal said that the term did not make it clear that the additional charges applied only if the problem was caused by the consumer. It gave the removalist the right to make additional charges resulting from the movement of incorrect goods, or the non-movement of goods, even when the removalist may have caused the problem.

On the other hand, the tribunal did not find the following term unfair:

- > 8(c) Delays and cancellations after arrival. When the loading or unloading process is delayed by over 30 minutes due to any factors outside the company's control, an additional charge at the time rate shall apply. Where a job is cancelled or postponed by the client on or after the day before pick up is due, the client agrees to pay half the quoted job charge plus any time spent at pick up, charged at the time rate, subject to a minimum charge of two hours.

The tribunal based its reasoning on the fact that the:

- > penalty for delay only operated on circumstances beyond the removalist's control
- > cancellation penalty only operated when the job was cancelled by the consumer on or after the pick-up date
- > term did not prevent the consumer from challenging any delay penalty that was not proportionate to the actual loss suffered by the removalist
- > amount of the cancellation penalty was not obviously disproportionate to the removalist's actual loss.

2. Unfair terms in furniture removal contracts

While consumer protection agencies generally consider it unfair for the consumer to bear all the loss caused by matters outside the parties' control, they note that the 30-minute limitation for the delay penalty may have also influenced the tribunal's decision.

The agencies acknowledge that removalists may organise their business such that cancellations at the stage described cannot easily be filled. However, any penalty must bear a reasonable relationship to the removalist's actual loss.

Consumer protection agencies also consider it unfair if cancellation penalties apply when the consumer:

- > has given reasonable time for the removalist to find an alternative booking, or
- > is required to pay out the entire contract charge (because this does not account for the costs saved by the removalist or the possibility of an alternative booking).

Discretions as to delivery

Terms that give the removalist absolute discretion on when it delivers the goods are unfair.

In the *Backloads* case, the tribunal found the following term unfair:

- > The time by which carriage of goods or provision of services under this contract are performed shall be at the discretion of the company.

Consumer protection agencies consider that, by allowing the removalist to determine the time for delivery, the term is inconsistent with the basic general law position (as restated in the consumer guarantees under the ACL) that, unless a time is specified, a contract must be performed within a reasonable time.

Removalists must be careful when drafting contract terms that enable them to leave goods unattended at the place of delivery.

In the *Backloads* case, the tribunal found the following term unfair:

- > If there is no-one in attendance at the place of delivery of the goods the company shall be entitled at its discretion to leave the goods at that place or to return at a later time until delivery is completed, storing the goods at any convenient place in the meantime, and the client agrees to pay any reasonable additional charges incurred thereby to the company.

The tribunal said that in the context of other terms that gave the removalist absolute discretion as to the time of delivery, this term could lead to a penalty out of proportion to the problem. The consumer is not being able to insist on any particular time for delivery and risks their goods being left unattended if delivered at a time when there is no one to receive them.

The tribunal said that these terms together caused uncertainty in a critical aspect of the contract such that the consumer might not get what they bargained for. The terms also permitted the removalist:

- > unilaterally to vary the characteristics of the services to be supplied under the contract
- > to limit performance of the contract
- > unilaterally to vary the contract.

Consumer protection agencies note that the tribunal did not find unfair terms that allowed the removalist discretion as to the method and route of the carriage.

2. Unfair terms in furniture removal contracts

Limitations of liability

The ACL's statutory consumer guarantees require that services, such as those provided by a removalist to an ordinary consumer, be:

- > rendered with due care and skill
- > completed by a reasonable time (if no time is specified in the contract).

If the consumer specifies a particular purpose for the services when the contract is made, the services must be reasonably fit for that purpose. If the consumer specifies any result that the services would achieve when the contract is made, the services must be of a nature, quality, state or condition that would reasonably be expected to achieve that result.

It is an offence for a removalist to attempt to exclude, restrict or modify these rights or its liability for a breach – including 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, intentionally or not, they claim to apply to the consumer guarantees.

Unfair terms also include those that exclude or limit the normal liability of a removalist, its employees or agents for a breach of the contract, for a breach of a consumer guarantee or for another default, such as common law negligence.

In the *Backloads* case, the tribunal found the following term unfair:

- > The client recognises that there are always risks involved in the movement of any goods or the provision of services under this contract, many of which are outside the company's or the client's control. All basic quoted prices are for the provision of carriage and other services whereby the client understands and accepts that there are such risks, accepts any financial detriment or other losses that may result from the performance or non-performance of such work and agrees that the company shall not be responsible or liable for such losses.

The tribunal said that not only did the term unreasonably exempt the removalist from liability for its breaches of the contract, it also:

- > exempted it from liability for matters clearly within its control
- > claimed to exempt it from liability for failing to perform the very work that it contracted to do.

Similarly, the tribunal found the following term unfair:

- > Save as expressly provided in these conditions the company shall not be liable to the client for any loss or damage suffered by the client directly or indirectly caused by –
 - any damage, loss or destruction to goods whilst in the possession of the company, whether in transit (which includes, amongst other things, any packing, handling, installation, removal, assembly or erection) or in storage or after they have been delivered or misdelivered
 - a misdelivery, delay in pick-up or delivery, or non-delivery of goods
 - the carriage of goods by a route other than the shortest or usual route
 - any failure to collect cash on delivery (COD) on behalf of the client; and this clause shall apply whether or not any such occurrence was due to any wilful, fraudulent, negligent or other act or omission of the company.

The tribunal said this term was unfair as it attempted to prevent any claim by the consumer when the removalist was negligent, wilful or fraudulent.

Some contract terms that exclude or limit liability for loss or damage indirectly attempt to cater for the statutory consumer guarantees by adding words that only indirectly refer to those rights, such as 'to the extent permitted by law'.

2. Unfair terms in furniture removal contracts

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

These terms also tend to mislead consumers about their rights under the consumer guarantees. While they give the appearance of complying with the law, they do not help consumers who are ignorant of their rights and who will think the term prevents them from making a claim.

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

Liability exclusions must clearly direct consumers to their 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 resupply of the services for a breach, and to compensation for any other loss.

Indemnities

Removalists should not transfer inappropriate risks to the consumer – that is, risks that the removalist is better able to bear. Terms that make the consumer bear a risk that the removalist could remove, or at least reduce, by taking reasonable care are likely to be considered unfair. This includes terms dealing with indemnity. In other words, the removalist should not make the consumer its insurer.

In the *Backloads* case, the tribunal found the following term unfair:

- > 14(f) The client shall indemnify the company against any action, claim, suit, fine or demand brought by any third party, the client or the contractor against the company as a result of or in connection with any breach by the client of any term of this contract or the occurrence of any of the events listed in this clause or clauses 10, 12 or 14 and this indemnity shall extend to the reasonable solicitor client costs of the company in defending any action and in enforcing this indemnity.

The tribunal said the term unreasonably required the consumer to indemnify the removalist for:

- > loss or damage arising from the exercise of a lien over goods not owned by the consumer
- > charges or payments arising other than under the removalist services contract
- > loss or damage occasioned by the removalist's wilful, fraudulent, negligent, or other act or omission.

It conferred an unreasonable benefit on the removalist by claiming to make the consumer liable for the consequences of any legal action they might take against the removalist, the removalist's contractors or any third party arising out of any breach of the contract by the removalist – even those involving its negligence or fraud.

This term also imposed an unreasonable requirement to pay legal costs on a solicitor-client basis, instead of on the normal (and lower) party-party basis. It generally had the object or effect of limiting the consumer's right to sue the removalist.

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

- (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

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

Australian Capital Territory

Office of Regulatory Services

GPO Box 158
Canberra ACT 2601
T. (02) 6207 0400
ors.act.gov.au

Commonwealth

Australian Competition and Consumer Commission

GPO Box 3131
Canberra ACT 2601
T. 1300 302 502
acc.gov.au

Australian Securities and Investments Commission

PO Box 9827
(in your capital city)
T. 1300 300 630
asic.gov.au

New South Wales

NSW Fair Trading

PO Box 972
Parramatta NSW 2124
T. 13 32 20
fairtrading.nsw.gov.au

Northern Territory

ACCC Darwin Office

GPO Box 3056
Darwin NT 0801
T. (08) 8946 9666
acc.gov.au

Queensland

Office of Fair Trading

GPO Box 3111
Brisbane QLD 4001
T. 13 QGOV (13 74 68)
fairtrading.qld.gov.au

South Australia

Consumer and Business Services

GPO Box 1719
Adelaide SA 5001
T. 13 18 82
cbs.sa.gov.au

Tasmania

Consumer Affairs and Fair Trading

GPO Box 1244
Hobart TAS 7001
T. 1300 654 499
consumer.tas.gov.au

Victoria

Consumer Affairs Victoria

GPO Box 123
Melbourne 3001
T. 1300 55 81 81
consumer.vic.gov.au

Western Australia

Department of Commerce

Locked Bag 14
Cloisters Square WA 6850
T. 1300 30 40 54
commerce.wa.gov.au