

# The Fair Trading Act

## Unfair contract terms & unsubstantiated representations

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COMPETITION · REGULATION · POLICY · STRATEGY

### Introduction

1. The Fair Trading Act (FTA) prohibits **unfair conduct in trade**. Its purpose is to contribute to a trading environment in which the interests of consumers are protected, businesses compete effectively, and consumers and businesses participate confidently.
2. While the FTA is clearly an effective (and important) piece of legislation from a consumer protection perspective, it is also **relatively easy to breach**, and traders can often find themselves getting into trouble inadvertently. The Commerce Commission (CC) has extensive information gathering powers under section 47G of the FTA, which can include the CC requiring people to attend compulsory interviews.
3. The FTA also provides for **significant maximum fines**:
  - For companies – up to **\$600,000** per offence.
  - For individuals – up to **\$200,000** per offence.
4. To put this in context, recent fines imposed on medium-large corporate defendants in the last 2 years for offences under the FTA have ranged from **\$165,000** (Vodafone – *Red Essentials*) near the lower end, to **\$1,080,000** (Reckitt Benckiser – *Nurofen*) at the upper end. Other significant fines in the same period include Harmony (\$292,000), Youi (\$320,000), Trustpower (\$390,000) and Bike Barn (\$800,000). Costs of dealing with the CC investigations and defending charges are significant.
5. This all reinforces the fact that the FTA should form part of any good compliance programme. It is important to ensure that all sales and marketing teams have a good understanding of the law in this area, especially with the rise of digital interaction between businesses and their customers – including on social media!
6. While the FTA may be well-known as prohibiting **misleading and deceptive conduct** in trade, **false representations** and **unfair practices** (for example, bait advertising, pyramid selling schemes), this paper focuses on two of the more recent additions to the FTA – the prohibitions on:
  - **unfair contract terms** in standard form consumer contracts; and
  - **unsubstantiated representations** (when a person making a representation in trade does not have reasonable grounds for doing so, at the time the representation is made).
7. The FTA also provides for rules around **consumer information standards**, **product safety**, and **consumer transactions & auctions** (including layby sales, uninvited direct sales, extended warranties, and auctions – all of which were brought within the scope of the FTA by virtue of the Consumer Law Reform Bill).
8. The CC has published several excellent FTA fact sheets and guidelines on its website. See [www.comcom.govt.nz/fair-trading/fair-trading-act-fact-sheets/](http://www.comcom.govt.nz/fair-trading/fair-trading-act-fact-sheets/) and [www.comcom.govt.nz/fair-trading/guidelines/](http://www.comcom.govt.nz/fair-trading/guidelines/) for more information.

With thanks to our colleague Elsie Stone in preparing this paper.

# I. Unfair contract terms

9. The unfair contract terms (**UCT**) provisions are set out in sections 26A, and 46H-M of the FTA. In a nutshell, they provide that:
  - the CC may apply to the courts (the High Court or a District Court) for a declaration that a term in a “standard form consumer contract” (**SFCC**) is a UCT; and
  - if a court has declared that a term in a SFCC is a UCT, it is an offence for a person to include that term in a SFCC, or to apply, enforce, or rely on that term.
10. Only the CC can apply to the court for a declaration that a term in a SFCC is a UCT.
11. A flow-chart setting out the requirements for a court to declare a term a UCT is attached as **Appendix A**.
12. The remainder of this section is structured under the following headings:
  - *What is a consumer contract?*
  - *What is a SFCC?*
  - *What is (and is not) a UCT?*
  - *How is transparency likely to be viewed?*
  - *How is the contract as a whole likely to be viewed?*
  - *What are some examples of UCTs?*
  - *In what circumstances can a court declare a term unfair?*
  - *What happens if a term is declared unfair?*
  - *Are there any exceptions?*
  - *What action has the CC taken to date?*

## What is a consumer contract?

13. Consumer contracts are contracts for the supply of goods and services that are ordinarily acquired for domestic, personal or household use (ie consumer goods and services as opposed to commercial goods or services). However, contracts for the supply of goods and services acquired for resupply in trade, for the use in a production or manufacturing process or in the case of goods, repairing or treating, in trade, other goods or fixtures on land are excluded (ie they are not consumer contracts).
14. A business can be considered a consumer for the purposes of the FTA in limited circumstances where the goods/services are of a kind that are “ordinarily acquired for personal, domestic, or household use or consumption” and the business does not acquire the goods/services for the purpose of resupplying them in trade, consuming them in the course of a process of production or manufacture, or (for goods only) repairing or retreating them in trade. For example, if a business purchases a fridge for its staffroom, the business would likely be considered a “consumer”, and the sale contract between the business and the whiteware supplied would likely be considered a “consumer contract”, for the purposes of the FTA.

## What is a SFCC?

15. Section 46J of the FTA allows the court to determine that any consumer contract is a SFCC if the terms (other than exempted terms referred to in section 46K) have not been subject to effective negotiation between the parties.
16. In determining whether there has been effective negotiation, the court must (without limitation) take into account the following:
  - whether one of the parties has all or most of the bargaining power relating to the transaction (ie is there material imbalance in respect to bargaining power);

- whether the contract was prepared by one or more parties before any discussion relating to the transaction occurred with the other party or parties (ie the contract is pre-prepared);
  - whether one or more of the parties was, in effect, required either to accept or reject the terms of the contract (other than terms referred to in section 46K) in the form in which they were presented (ie the contract is presented on a “take-it or leave- it” basis);
  - the extent to which the parties had an effective opportunity to negotiate the terms (other than terms referred to in section 46K) of the contract (ie the contract was presented on a non-negotiable basis); and
  - the extent to which the terms of the contract take into account the specific characteristics of any party to the contract (ie no consideration was given to the relevant party’s circumstances).
17. Examples of industries where SFCCs are commonplace include telecommunications, utilities, carparking, gym memberships, daily deals, pay TV, residential construction, airfares, car rental contracts, and retirement villages.
18. If, in proceedings, the CC alleges that a contract is a SFCC, the contract is presumed to be a SFCC unless the party relying on the term proves otherwise.

## What is (and is not) a UCT?

19. A term in a consumer contract is unfair if the court is satisfied that the term:
- would cause a **significant imbalance** in the parties’ rights and obligations arising under the contract;
  - is **not reasonably necessary** to protect the legitimate interests of the party who would be advantaged by it; and
  - would cause **detriment** (whether financial or otherwise) to a party if it were applied, enforced or relied on.
20. The court, in making that determination, may consider any matter it thinks relevant, but must take into account:
- the extent to which the term is **transparent**; and
  - the contract as a **whole**.
21. However, to the extent that a term of a SFCC:
- defines the main subject-matter of the contract; or
  - sets the up-front price payable under the contract (to extent that the price term is transparent); or
  - is required or expressly permitted by any enactment,
- a court **may not** declare that term to be a UCT.
22. The CC’s Unfair Contract Terms Guidelines, February 2015 (published 25 February 2015) (**Guidelines**) state that:<sup>1</sup>
- whether a term *“creates a significant imbalance between the parties’ rights and obligations will depend on the facts of each case”*<sup>2</sup>;
  - the CC *“expect[s] that the court is likely to make an overall assessment on the interests involved, rather than apply the test mechanistically”*<sup>3</sup>; and
  - the “significant imbalance” requirement is likely to be met where a term (i) gives rights to the business that it would not usually have or be able to obtain if the parties had equal bargaining power; or (ii) protects the business in a way that puts the consumer at a significant disadvantage; or (iii) shifts risks to the consumer that the business is better placed to manage.<sup>4</sup>

<sup>1</sup> See: <http://www.comcom.govt.nz/fair-trading/guidelines/unfair-contract-term-guidelines/>.

<sup>2</sup> Guidelines, page 11.

<sup>3</sup> Guidelines, page 11.

<sup>4</sup> Guidelines, page 12.

23. In any proceedings a term in a SFCC is presumed not to be reasonably necessary to protect the legitimate interests of the party who would be advantaged by it unless that party proves otherwise. Note, however, there are certain terms in contracts of insurance that are presumed to be reasonably necessary to protect the legitimate interests of the insurer.
24. According to the Guidelines, businesses would likely need to demonstrate that there is a legitimate interest that needs protection and it *“cannot reasonably be protected by fairer means”*.<sup>5</sup> The Guidelines suggest that businesses advantaged by a penalty term will need to provide sufficient evidence to a court to satisfy the court that a penalty is reasonably necessary to protect a legitimate interest by recovering the costs stemming from a breach of contract.
25. In respect to causing detriment to a consumer if the term were applied, enforced or relied on, the Guidelines emphasise that the FTA does not limit the detriment to financial detriment and suggest other forms of detriment including delay or distress suffered stemming from the UCT.<sup>6</sup>

## How is transparency likely to be viewed?

26. As noted, when determining whether the three elements (ie significant imbalance, reasonably necessary, and detriment) are met, the court must, in addition to taking into account any matter it considers relevant, consider the contract as a whole and the extent to which the term is transparent. We consider it likely that, in determining whether a term is transparent, the courts will adopt an “average reasonable consumer” standard. However, we would expect that where the supply is aimed at a particular class of persons, for example in retirement village arrangements, the court is likely to adopt an “average reasonable consumer” in respect of the relevant class of persons.
27. Section 2(1) of the FTA defines transparent, in relation to a term in a contract, as a term that:
  - is expressed in reasonably plain language; and
  - is legible; and
  - is clearly presented; and
  - is readily available to a party affected by the term.

### Example: CC’s Gym Contracts Review

In its gym contracts review (see below), the CC criticised contracts that *“contained complex language or legal jargon and were in small font with dense and closely formatted text”* because *“this will make it difficult for consumers from a range of educational backgrounds and ages to easily understand the content of the terms.”*

## How is the contract as a whole likely to be viewed?

28. The court must also consider the contract as a whole when determining whether a term is unfair. Accordingly, a court cannot consider a term in isolation – it must consider the whole contract and its operation.
29. As the Guidelines note *“[t]his means that a term that might appear unfair on its face may not be unfair when read in the context of the other terms of a contract. For example, a potentially unfair term may be counterbalanced by additional benefits such as a lower price. Similarly, an apparently fair term may be unfair when the other contract terms are taken into account”*.<sup>7</sup> Potentially unfair terms being counterbalanced by lower prices is likely to be relevant to industries where promotional pricing is common to attract volume/market share and suppliers are assuming additional risk that need protection.

## What are some examples of UCTs?

30. Section 46M of the FTA provides a non-exhaustive list of examples of the kind of terms that, if in a consumer contract, may be unfair contract terms (colloquially known as the **“grey list”**). These include terms permitting one party to *unilaterally*:

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<sup>5</sup> Guidelines, page 13.

<sup>6</sup> Guidelines, page 14.

<sup>7</sup> Guidelines, page 15.

- avoid or limit performance of the contract;
- terminate the contract;
- vary the terms of the contract;
- renew or not renew the contract;
- penalise a party for a breach or termination of the contract; or
- vary the upfront price (as defined in section 46K(2)) payable under the contract without the right of another party to terminate the contract.

31. A full copy of the “grey list” is attached as **Appendix B**.

32. While the “grey list” terms are not *per se* UCTs, the CC’s view is that it “*will pay particular attention to [SFCCs] that contain any of the types of listed terms*”.<sup>8</sup>

#### **Example: CC’s Telecommunications Contracts Review<sup>9</sup>**

In its telecommunications contracts review (see below), the CC found that all the companies reviewed relied on imbalanced liability clauses that sought to limit and/or exclude the companies’ liability, while providing consumers with no corresponding limitation to their liability. For example, one contract attempted to limit loss to the lesser of \$1000 or the total amount paid to it for services in the six months immediately prior to the consumer’s claim.

The CC found that this kind of limitation of liability clause can lead to a significant imbalance in the rights and obligations of the parties under the SFCC. The companies said the clauses were reasonably necessary because it was highly unlikely a claim would exceed capped amounts and the consumer still had recourse to consumer protection legislation (eg the Consumer Guarantees Act). However, the CC stated that these justifications were not sufficient in comparison to the significant disadvantages caused by the clauses.

## **In what circumstances can a court declare a term unfair?**

33. A court may declare a term to be a UCT if it is satisfied that:

- the term is in a SFCC; and
- the declaration is not prohibited (because the term defines the main subject matter of the contract, sets the upfront price payable under the contract, or is a term required or expressly permitted by any enactment); and
- the term is “unfair”.

34. A declaration must identify the SFCC to which it applies by reference to at least one of the parties to the contract and may describe the context or conditions in which the term's inclusion in a SFCC means that the term is a UCT.

## **What happens if a term is declared unfair?**

35. If a term in a SFCC is declared unfair by a court a party must not:

- apply, enforce or rely on that UCT; or
- include the UCT in a SFCC (unless the term is included in a way that complies with the terms (if any) of the decision of the court).

36. If a party continued to include/enforce the UCT (or include it in a way that is viewed as contrary to the decision of the court), it may be convicted and fined under the FTA and ordered to pay damages or to refund money. As noted, the maximum fine for a company under the FTA is \$600,000 *per offence*.

<sup>8</sup> Guidelines, page 16.

<sup>9</sup> See: <https://www.comcom.govt.nz/dmsdocument/14024>

## Are there any exceptions?

37. The new prohibition does not apply to:

- contracts of insurance (as defined in section 7 of the Insurance (Prudential Supervision) Act 2010); or
- any variation of a contract of insurance; or
- any new contract of insurance contract that has the effect of operating as a renewal of the contract, and any subsequent renewal;

if the relevant contract for insurance was entered into before 17 March 2015.

38. In respect to contracts of insurance entered into after 17 March 2015, section 46L(4) & (5) of the FTA sets out a list of terms that are deemed to be necessary to protect the legitimate interest of the insurer and are therefore cannot be declared UCTs.

### Impacts on practitioners – what should you consider?

Practitioners drafting or reviewing terms that may be viewed as unfair should consider strategies and factors including the following:

- Is there scope to retain the term if transparency was increased by making the term more prominent (ie position, font etc) and educating staff to bring it to the attention of consumers before the agreement is entered into?
- Does the term still raise concerns when considered in the context of the contract as a whole?
- Is the term in respect to a “penalty” or is it a component of the up-front price?
- Could the term be made reciprocal so that the right applies to all parties?
- Could the term be amended to make it more reasonable and balanced as between the parties?
- Could the term be redrafted more narrowly so that it is better aligned with the business’ legitimate interest that needs protecting?
- Does the clause require greater explanation of the term including why the term is included and the particular circumstances in which the term might apply?
- Always draft a provision with severability in mind.

## What action has the CC taken to date?

39. The CC has conducted three industry-wide UCT reviews – covering telecommunications, retail electricity, and gym contracts – and has published a series of reports with useful insights into the CC’s views. Summaries of those reports are below. We are not aware of the CC having sought a declaration from the courts that a term in a SFCC is a UCT, however as time goes on (and businesses are on notice), applications for such declarations may become more common.

### CC’s Telecommunications Contracts Review<sup>10</sup>

In its telecommunications contracts review, the CC reviewed 19 SFCCs from 7 different telecommunications providers. In total, the CC identified 66 terms that it considered to be potentially unfair, including:

- Terms relating to limitation of liability.
- Terms granting unilateral variation of services.
- Terms providing for termination without reason.
- Terms providing for a unilateral right to restrict or suspend services.
- Terms making the customer responsible for unauthorised charges.

<sup>10</sup> See: <https://www.comcom.govt.nz/dmsdocument/15688>

### CC's Energy Retail Contracts Review<sup>11</sup>

In its energy retail contracts review, the CC identified a wide range of potentially unfair terms across the contracts. In total the CC identified 59 terms that it considered to be potentially unfair, including terms allowing the energy retailer to:

- Automatically renew fixed term contracts for a further term unless the customer opts out of the renewal.
- Limit its liability to its customers for breach of contract or negligence without providing a corresponding limitation to the customer's liability.
- Avoid liability for consequential loss.
- Vary the price of services without providing a corresponding right to terminate the contract without penalty.
- Vary the terms of the contract without providing a corresponding right for the customer to terminate the contract without penalty.
- Limit the liability of electricity distribution businesses.

### CC's Gym Contracts Review<sup>12</sup>

In its gym contracts review, the CC identified a wide range of potentially unfair terms across the contracts, including terms relating to:

- **Duration** of the contract, specifically terms relating to the minimum membership period and of any automatic renewal.
- **Cancellation** of the contract, specifically (a) terms that required the gym to accept or acknowledge a members' request to cancel the contract before it is treated as effective; (b) the length of notice periods for cancellation (30 days); (c) termination fees; and (d) terms that allowed gyms to unilaterally exclude members.
- **Variation** of the contract, specifically terms that allowed gyms to unilaterally change the upfront price, characteristics of services, or terms of the contract, without notice or without a right to terminate without cost.
- **Liability** under the contract, specifically (a) terms that limited the gym's liability for breach of contract and civil wrongs (such as negligence and deliberate damage causing loss to a member's property); (b) terms that appeared to contract out of the Consumer Guarantees Act or the Fair Trading Act or that potentially misled members about their rights under these laws; and (d) 'Entire Agreement' clauses.

The CC found that 8/10 gyms reviewed had 30-day notice periods for cancellation. The gyms' justification for this length was that it was "reasonably necessary to protect legitimate interests" for reasons such as that they allowed the gyms time to process the cancellations and permitted budgeting/planning for classes or fitness programmes.

The CC concluded that what is "reasonably necessary" would be decided on a case-by-case basis, but as some gyms operate with shorter notice periods, it was difficult to see how 30 days would be reasonably necessary, especially because in special circumstances a termination can be processed in 48 hours.

## II. Unsubstantiated representations

40. Section 12A of the FTA provides that businesses that make claims about goods or services (whether express or implied) must have "reasonable grounds" for making those claims, at the time they are making the claim.
41. Even if a business makes an unsubstantiated claim that later turns out to be true, this will still breach the prohibition if the business did not have reasonable grounds for making that claim at the time they made the claim. The CC's fact sheet on unsubstantiated representations<sup>13</sup> notes that "reasonable grounds" can come from information provided by reputable suppliers/manufacturers, information the business making the claim holds, or any other reasonable source (eg scientific or medical journals).

<sup>11</sup> See: <https://www.comcom.govt.nz/dmsdocument/14648>

<sup>12</sup> See: <https://www.comcom.govt.nz/dmsdocument/15688>

<sup>13</sup> See: <http://www.comcom.govt.nz/dmsdocument/11785>

42. The prohibition is effectively designed to stop businesses “jumping the gun”, deliberately or otherwise, and making claims before those claims have been sufficiently validated. That validation may come in the form of rigorous and/or scientific testing carried out by a necessarily qualified and reputable party. Prohibiting businesses from making unsubstantiated claims promotes competitive markets. It prevents rogue businesses from gaining an unfair competitive advantage by making claims they do not have reasonable grounds to support, to the detriment of the competitive process.
43. Proceedings for unsubstantiated representations may only be brought by the CC – no other parties may initiate proceedings for alleged breaches. It was considered that if other parties could bring proceedings the process may be open to abuse by competitors bringing proceedings against each other for the purposes of accessing confidential information during the discovery process.
44. If the CC issues proceedings the onus is on the defendant to prove on the balance of probabilities that they had “reasonable grounds” for making the claim (at the time the claim was made).
45. Where a court is required to assess whether a person had “reasonable grounds” for a representation, it must have regard to “all of the circumstances”, including:
  - the **nature of the goods, services**, or interest in land in respect of which the representation was made;
  - the **nature of the representation** (for example, whether it was a representation about quality or quantity);
  - any **research or other steps taken** by or on behalf of the person before the person made the representation;
  - the **nature and source of any information** that the person relied on to make the representation;
  - the extent to which the person making the representation **complied with the requirements of any standards, codes, or practices** relating to the grounds on which such a representation may be made, and the nature of those requirements; and
  - the actual or potential **effects of the representation on any person**.
46. The CC has published a useful fact sheet and video to educate businesses on the law relating to unsubstantiated representations. These resources can be accessed at: <http://www.comcom.govt.nz/fair-trading/fair-trading-act-fact-sheets/unsubstantiated-representations/>.

## Examples

47. Since the unsubstantiated representations provision came into effect in June 2014, the CC has issued several warning letters to various businesses.
48. In September 2017, Fujitsu became the first business convicted under section 12A, for unsubstantiated claims made about energy efficiency.

### **WARNING - Baby bead claims “lack independent and credible scientific evidence”<sup>14</sup>**

The CC investigated Baa Baa Beads following complaints about its Baltic amber necklaces for babies. The Commission sought evidence from Baa Baa to substantiate its website claims regarding the therapeutic benefits, composition, and popularity of its products. This included Baa Baa’s products that were targeted at treating teething babies. The Commission concluded that in its view Baa Baa failed to substantiate its claims. In the Commission’s view “there was a lack of independent and credible scientific evidence to substantiate the claims made about the health benefits of Baltic amber products.”

### **WARNING – Organic sunscreen claims “UVA/UVB protection”<sup>15</sup>**

The CC investigated The Green People Company over claims regarding its organic sunscreen, including that it provides “broad spectrum UVA/UVB protection.” Green People said it relied on test results from 2008 when making the representation. However, a test carried out by the company in 2013 indicated that the sunscreen did not comply with the broad spectrum test. The CC found that the 2013 test results were unlikely to constitute reasonable grounds for the representation. The CC also found Green People was likely to have breached section 12A as it was unlikely to

<sup>14</sup> Media release: <https://www.comcom.govt.nz/the-commission/media-centre/media-releases/2015/baa-baa-beads-warned-over-health-claims/>

<sup>15</sup> Warning letter: <https://www.comcom.govt.nz/dmsdocument/14649>



have had reasonable grounds for representing that the sunscreen was “water repellent” as the testing process for this was insufficient.

### **WARNING – Solar panel retailer claims increase in property value “by 3 to 4%”<sup>16</sup>**

The CC issued a warning to a solar panel systems retailer over claims made about the financial benefits of solar panel installation, including “installing a solar system increases the average property value by 3 to 4% and houses that have a solar system installed usually sell twice as fast as other properties on the market” and “in many ways, your solar power system is a financial product – one that is capable of generating annual returns ranging anywhere from 10% to more than 30%.” The CC considered that the information provided to it by the company to substantiate these claims “were of varying degrees of reliability” and as such, the representations were likely to breach section 12A.

### **CC v Fujitsu General New Zealand**

Fujitsu was charged with 7 representative charges under the FTA – 5 of these related to s 12A of the Act for making unsubstantiated representations about the efficiency of Fujitsu’s heat pumps. The representations were made on the company’s website over a period of more than two years and included statements such as “New Zealand’s most energy efficient solutions” and “New Zealand’s most energy efficient heat pump range.” Fujitsu also made a range of representations regarding the e3 range, including that it was a most efficient system ever and that it offered delivery of almost five times the heat of the amount of energy used.

The District Court held that the conduct was careless, approaching wilful, stating that it was “a case of exaggeration... likely perhaps to influence buyers.”<sup>17</sup> Fujitsu was fined \$125,000 in relation to section 12A ie \$25K per charge.

### **Practical tips for practitioners and their clients**

- It is not good enough to “create” supporting evidence after the event (eg once the CC has commenced an investigation). Businesses must have reasonable grounds for making the claim at the time they make the claim.
- In-house and external legal advisers should “test” all claims with marketing and sales teams, to ensure that there is sufficient evidence to support the claim.
- The extent of the evidence required will depend on the nature of the claim.
- Questions to ask include (1) whether the evidence is from an independent and reputable source (although this may not be strictly necessary in all circumstances), (2) whether there is better or additional evidence that can be obtained; and (3) whether the claim could be interpreted in another unhelpful way (such that the evidence no longer supports the claim).
- Legal advisors and/or marketing and sales teams should maintain records of all relevant evidence for a reasonable period of time during and after the claims are made.
- Businesses should record their view as to why they consider the relevant evidence constitutes “reasonable grounds”, at the time the claims are made.



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<sup>16</sup> Media release: <https://www.comcom.govt.nz/the-commission/media-centre/media-releases/2017/solar-panel-retailer-warned-over-financial-benefit-claims/>

<sup>17</sup> *CC v Fujitsu General New Zealand Limited* [2017] NZDC 21512 at [63].

The term is in a **consumer contract**



The term is in a **standard form contract**



The term doesn't come under one of the **exceptions**



The term is **unfair**



The Court may declare that the term is an unfair contract term (**UCT**).

Have the terms of the consumer contract been subject to "effective negotiation" between the parties? If **no** = standard form consumer contract (**SFCC**).

- a. Is the contract between a supplier of goods/services in trade and a consumer?
- b. Is the contract between someone disposing of an interest in land and a consumer?  
 If **yes** to a. or b. = consumer contract.

"Supplier" = a person or business that sells goods/services. Includes supply (of goods) by gift, exchange, hire, lease, hire or hire purchase and supply (of services) by providing, granting or conferring.

"Goods/services in trade" = must undertake any trade, business, industry, profession, occupation, activity of commerce or undertaking relation to the supply of goods/services.

"Consumer" = a person who:  
 a. Acquires goods/services of a kind ordinarily acquired for personal, domestic or household use; and  
 b. Does not acquire the goods/services for trade purposes.

- a. Does the term define the main subject matter of the contract?
- b. Does the term set the upfront price payable under the contract?
- c. Is the term required or permitted by any enactment?  
 If **yes** to any of the above = not a UCT.

A term is "unfair" if:  
 a. it would cause a **significant imbalance** in the parties' rights/obligations; and  
 b. it is **not reasonably necessary** to protect the legitimate interests of the party who would be advantaged by it; and  
 c. it would **cause detriment** to a party if it were applied/enforced/relied on.

"Significant imbalance" = fact specific.  
 • Onus is on the Commission.  
 • Must be a causal connection between the term and the imbalance.  
 • The imbalance must be significant.  
 • Imbalance must relate to the parties' rights/obligations under the SFCC as a whole, not just the specific term.  
 Eg the term shifts risk to consumer where the supplier is better placed to manage such risk, term penalises one party for breach of contract but not another or term advantages supplier while putting consumer at a disadvantage.

"Not reasonably necessary to protect legitimate interests" =  
 • Onus on relying party.  
 • Likely will have to show that the interest is a legitimate interest requiring protection and that the interest cannot reasonably be protected by fairer means.  
 • Will likely need to provide evidence demonstrating the above, eg in relation to the business' costs, operations, business structure, regulatory or contractual obligations, risks and methods of mitigating risks.

"Cause detriment" =  
 • Onus is on the Commission.  
 • Detriment not limited to financial detriment – could be detriment such as delay in receiving goods/services or distress suffered as the result of an unfair term.

*When considering the above, the court must consider the extent to which the term is transparent AND the contract as a whole.*

## Appendix B

### The “Grey List”

#### Section 46M Examples of Unfair Contract Terms

Without limiting the ability of the court to declare a that a term in a standard form consumer contract is an unfair contract term (under section 46I of the FTA), the following are examples of the kind of terms that, if in a consumer contract, may be unfair contract terms:

- a term that permits, or has the effect of permitting, one party (but not another party) to **avoid or limit performance of the contract**:
- a term that permits, or has the effect of permitting, one party (but not another party) to **terminate the contract**:
- a term that **penalises**, or has the effect of penalising, one party (but not another party) for a **breach or termination of the contract**:
- a term that permits, or has the effect of permitting, one party (but not another party) to **vary the terms** of the contract:
- a term that permits, or has the effect of permitting, one party (but not another party) to **renew or not renew** the contract:
- a term that permits, or has the effect of permitting, one party to **vary the upfront price** (as defined in section 46K(2)) payable under the contract **without the right of another party to terminate** the contract:
- 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:
- a term that permits, or has the effect of permitting, one party unilaterally to **determine whether a contract has been breached** or to **interpret its meaning**:
- a term that limits, or has the effect of **limiting, one party’s vicarious liability for its agents**:
- 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:
- a term that limits, or has the effect of **limiting, one party’s right to sue** another party:
- a term that limits, or has the effect of limiting, the **evidence one party can adduce in proceedings** relating to the contract:
- a term that imposes, or has the effect of imposing, the **evidential burden on one party** in proceedings relating to the contract.