

Charter of Contractual Fairness July 2010

1. The Charter's Goal

Contractual fairness is about achieving balance in contracts.

The terms that make contracts unfair for consumers are the same as those that make contracts unfair for businesses—particularly self-employed people—when they deal with large organizations, whether they are companies or government instrumentalities.

Unfair contract terms are those that disadvantage one party to a contract, but that are not reasonably necessary for the protection of the legitimate interests of the other.

The elements of this *Charter of Contractual Fairness* seek to create protections from unfair contracts for self-employed people. In March 2010, the *Trade Practices Act* was amended with support from all political parties to create protections from unfair contracts for consumers. The goal of this charter is to achieve the same protections for small business people, the self-employed and independent contractors.

Government instrumentalities and corporations should aspire to having fairness in their contracts.

2. Definition of 'Unfairness'

A term of a contract is unfair if it:

- would cause a significant imbalance in the parties' rights and obligations arising under the contract;
- is not necessary in order to protect the legitimate interests of the party who would be advantaged by the term;
- would cause financial or other detriment to one party if it were applied or relied on.

3. 'Transparency'

In determining whether a term of a contract is unfair, a court should take into account:

- the contract as a whole;
- the extent to which a term is transparent;
- any other relevant matters.

For terms to be transparent, they must be expressed in plain language, and be clearly and readily presented to the contracting parties.

4. 'Unfair Terms'

A contract term is unfair if it gives one party but not the other, the ability to:

- a. avoid or limit the performance of the contract;
- b. terminate the contract;
- c. apply penalties against the other party for a breach or termination of the contract;

- d. vary the terms of the contract;
- e. renew or not renew the contract;
- f. vary the price payable under the contract without the right of the other party to terminate the contract;
- g. unilaterally vary the characteristics of the goods or services to be supplied under the contract;
- h. unilaterally determine whether the contract has been breached or to interpret its meaning;
- i. limit one party's vicarious liability for its agents;
- j. permit one party to assign the contract to the other party's detriment without their consent;
- k. limit one party's right to sue the other party;
- l. limit the evidence one party can adduce in legal proceedings in respect to the contract;
- m. impose the evidential burden on one party in legal proceedings in respect to the contract.

5. ICA's Policy Position

There is a sound rationale for proscribing unfair contract terms that cause detriment to small business people, the self-employed and independent contractors. Fairness in contracts is a valued ethical principle, recognised in long-standing common law and in broad statutes against unconscionable conduct.

'Unfair' terms appear to be widespread in contracts and there is growing evidence of the exploitation of self-employed people.

Self-employed people can be exposed to avoidable risk if they do not carefully read the contracts that are put in front of them by large companies or government instrumentalities. What are often long and complex contracts may use particular terms that are against the self-employed person's interests.

Existing national laws for dealing with unfair contract terms are slow, costly and uncertain in their application. Various industry codes and some State laws bar unfair or unjust contract terms, and there is a risk that more fragmented and inconsistent approaches to the problem are impending. A clear, nationally consistent approach is needed and would provide significant benefits.

In the many countries that have enacted laws against unfair contract terms, there is little evidence of significant business compliance costs or adverse unintended commercial consequences. Some businesses have supported such regulation.

The proper design of any policy should include clear definitions of unfair terms, guidelines about their use, and a focus on dealing with terms that cause detriment.

ICA is committed to working with government instrumentalities and corporations to ensure that their contracts are fair.

For further information, please visit our website: www.contractworld.com.au