

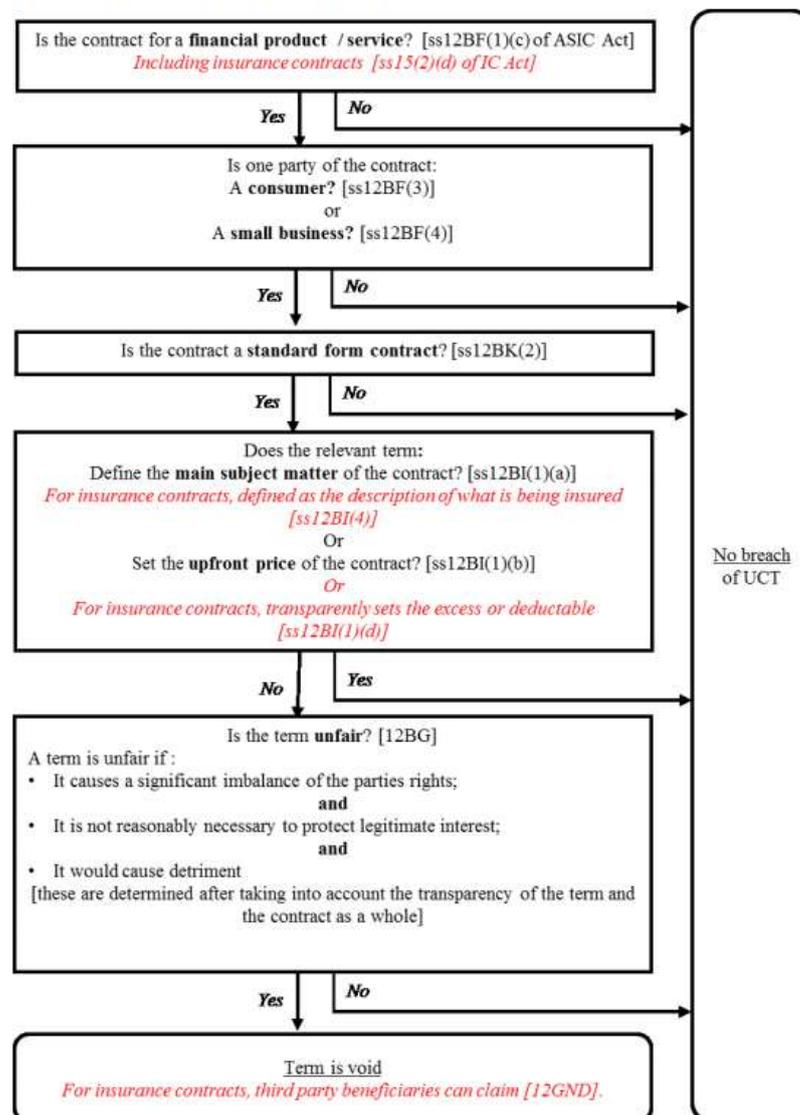
Unfair Contracts Regulation in respect of financial products

Introduction

1. Part 2 Division 2 Subdivision BA of the ASIC Act 2001 sets out the Unfair Contract Terms Regime in respect of a contract for a financial product or the supply or possible supply of financial services.¹
2. Financial Product is defined at section 763A of the Corporations Act.
3. Financial Services are defined at section 766A of the Corporations Act.'
4. Section 24 of the Australian Consumer Law Act operates to all intents and purposes identically to sub-div BA of the ASIC Act.
5. Page 7 of [Treasury's explanatory memorandum](#) on the insurance changes conveniently sets out the flowchart for a general UCT assessment:

Extending the Unfair Contract Terms Regime to Insurance Contracts

Diagram 1.1 Summary of the operation of the UCT regime for financial products and services¹⁰



¹ ASIC

The items in red relate specifically to insurance but the flow chart is helpful.

Consumer Contract

6. A "consumer contract" is a contract with (at least one) individual whose supply under said contract is wholly or predominately an acquisition for personal, domestic or household use or consumption (s 12BF(3) *ASIC Act*, s 23(3) *ACL*).
7. A consumer contract is defined subjectively, done so by reference to the purpose for which the goods or services were acquired rather than the substantive character of the goods themselves. A distinction has been made between products which might be regarded as of a kind acquired for personal, domestic or household use "as a matter of common sense" (see *Crago v Multiquip Pty Ltd* (1998) ATPR 41-620).
8. Two requirements must be satisfied for a contract to be deemed a 'consumer contract'; the first is that it is supplied to an individual, and secondly, the individual acquired the good or service for personal, domestic or household use.
 - (a) Firstly, the term "individual" is defined in the *Acts Interpretation Act 1901* (Cth) to mean a natural person.²
 - (b) Secondly, although the words "domestic or household" have a similar connotation, "personal" use is clearly intended to cover a wider field, but the primary contrast intended to be drawn is commercial or business use (*Minchillo v Ford Motor Co of Australia* [1995] 2 VR 594).
9. When an item can be used in a domestic setting, it does not lose its domestic description when used commercially [*Carpet Call v Chan* (1987) ATPR 46-065 at 53]. Therefore, the use of heavy duty carpet in a club was classified as 'goods of a kind ordinarily acquired for person, domestic or household use or consumption'. Similarly, a prime mover, farming equipment or services to erect a multi-storey office building have been considered not of a kind that is for personal, domestic or household use.
10. The Court in *Bunnings Group Ltd v Laminex Group Ltd* (2006) 230 ALR 269 provided some hints on determining whether a good or service is of personal, domestic or household use:
 - (c) The phrase 'good of a kind ordinarily acquired for personal, domestic or household use or consumption', should be given a broad by uniform meaning;
 - (d) The word 'ordinarily' means 'commonly' or 'regularly', but not 'principally' or 'exclusively';
 - (e) Look towards how the goods in question are used, rather than how goods within that category are ordinarily used;
 - (f) The character of the goods is relevant in consideration, but it's not a determinative aspect for the courts.
11. "Wholly or predominately" is not defined. Under the National Credit Code definition this is quantitative rather than qualitative: s5(4).
12. Paterson suggests at 5.110 that a business purpose declaration may not be determinative and may itself be an unfair contract term (*Corones' Australian Consumer Law*, 2019).

² *Acts Interpretation Act 1901* (Cth) sect 2C.

Small Business Contract

13. Under s 12BF(4) of the *ASIC Act*, a contract is a small business contract if:
- (a) at the time the contract is entered into, at least one party to the contract is a business that employs fewer than 20³ persons; and
 - (b) Either of the following applies:
 - (i) The upfront price payable under the contract does not exceed \$300,000;
 - (ii) The contract has a duration of more than 12 months and the upfront price payable under the contract does not exceed \$1,000,000.
 - (c) For the purpose of counting the persons employed by a business, a casual employee is not to be counted unless he or she is employed by the business on a regular and systematic basis [s 12BF(5)].

Standard Form Contracts

14. Section 12BK sets out the test for whether a contract is standard form.
15. 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 subsection 12BI(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 subsection 12BI(1);
 - (e) Whether the terms of the contract (other than the terms referred to in subsection 12BI(1)) take into account the specific characteristics of another party or the particular transaction.

³ This is likely to increase to 100 employees.

Section 12BG (1)(a)-(c) ASIC Act 2001 (Cth)

16. Section 12BG deals with when a term will be 'unfair' and provides that:

- (1) A term of a contract referred to in subsection 12BF(1) 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 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:
 - (b) the extent to which the term is transparent;
 - (c) 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 paragraph (1)(b), a term of a 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.

- (a) *Chrisco* [43]: In terms of s 24 of the ACL, a clause can only be unfair if all requirements are met.⁴
- (b) *Ashley & Martin* [17]: The underlying policy of unfair contract terms legislation gives regard to true freedom of contract, and seeks to prevent the abuse of standard form consumer contracts, which by definition, aren't individually negotiated.⁵
- (c) *Ashley & Martin* [19]: Unfairness can be seen by a number of terms operating in conjunction to create an overall effect.

The alleged unfairness of the Contract is not created by a single term but rather is created by a number of terms operating in conjunction to create an overall effect. In any event, no such assessment is required and is not determinative. So much is apparent from s 23(2) of the ACL which contemplates that a contract may not be capable of operating without the unfair term. If it cannot operate, a comparison cannot usefully be undertaken.

⁴ *Australian Competition and Consumer Commission (ACCC) v Chrisco Hampers Australia Ltd* (2015) 334 ALR 309 ('*Chrisco*').

⁵ *Australian Competition and Consumer Commission (ACCC) v Ashley & Martin Pty Ltd* (2019) FCA 1436 ('*Ashley & Martin*').

17. Section 12BH lists examples of unfair terms.

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION ACT 2001 - SECT 12BH

Examples of unfair terms

- (1) Without limiting section 12BG, the following are examples of the kinds of terms of a contract referred to in subsection 12BF(1) 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;
 - (g) a term that permits, or has the effect of permitting, one party unilaterally to vary financial services to be supplied 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.

- (a) *Chrisco* [40]: In the context of s 25 of the ACL, it provides statutory guidance on the types of terms which may be regarded as being of concern, it doesn't prohibit use of such terms, nor does it create a presumption that those terms are unfair.
- (b) *Bendigo* [18]: Affirming the above, no presumption that the terms listed in s 12BH are unfair. Relies upon a contextual approach to statutory interpretation that can't ignore the matters contained within 12BH which are provided specifically as examples of unfair terms.⁶
- (c) *Paciocco* [363]: The assessment of 'unfairness' is to be carried out with a close attendance to the statutory provisions, and is of lower moral or ethical standard than unconscionability.⁷

Section 12BG(1)(a) (Significant Imbalance)

18. There are a number of considerations determining what constitutes a significant imbalance.

- (a) *CLA Trading* [54(c)]: It is useful to assess the impact of an impugned term on the parties rights and obligations, through a comparison to the effect of the contract with, and without the term. (This isn't appropriate should the alleged unfairness arise from multiple terms).⁸
- (b) *First National Bank* [37]: The requirement of a 'significant imbalance' directs attention to the substantive unfairness of the contract.⁹

⁶ *Australian Securities and Investments Commission v Bendigo and Adelaide Bank Limited* [2020] FCA 716.

⁷ *Paciocco v Australia and New Zealand Banking Group Ltd* (2016) 258 CLR 525.

⁸ *Australian Competition and Consumer Commission (ACCC) v CLA Trading Pty Ltd* (2016) FCA 377.

⁹ *Director-General of Fair Trading v First National Bank plc* [2002] 1 AC 481.

- (c) *Ibid* [54]: The mere lack of individual negotiation between an entity and customers isn't relevant to whether a term causes significant imbalance in the rights and obligations arising under contract. Rather, *consideration of the relevant terms together with the parties' other rights and obligations arising from the contract* is of prominence.
- (d) *Jetstar* [104]-[105]: Significant in this context means "significant in magnitude", or "sufficiently large to be important", "being a meaning not too distant from substantial".¹⁰
- (e) *Jetstar* [112]: The underlying policy of unfair contract terms legislation respects true freedom of contract and seeks to prevent the abuse of standard form consumer contracts which, by definition, will not have been individually negotiated, also as iterated in *Ashley & Martin* [17]
- (f) *Jetstar* [40]: The element of significant imbalance would appear to overlap substantially with that of the absence of good faith.

Mitigating/Aggravating factors

- (a) *Chrisco* [53]: The contract gives one party a right without imposing on that party a duty as well, or giving a corresponding right to the counterparty.
- (b) *JJ Richards* [56(c)]:¹¹ Where one party is in a better position to manage or mitigate the risk of the prevention or hindrance occurring, yet imposes the obligation upon the other party.

Case law: clauses occasioning a significant imbalance

- (a) *CLA Trading* [69]: it was found that the clause below which imposed unlimited liability upon the customer for any case of a breach, however trivial, and considering that there's no comparable term offering any imposition onto Europcar as to mitigate unfairness, it constitutes a significant imbalance in the parties' rights and obligations.

4.9(a) to 4.9(c): If you breach the rental contract there is no cover and you are liable for:

- (1) Damage
 - (2) loss of the vehicle as a result of theft
 - (3) third party loss.
- (b) *Chrisco* [53]: A clause within the contract gave Chrisco a right to withdraw money from a customer's account, after the conclusion of the consumer's order, without any substantial corresponding right to the customer. A right is the correlative of a duty, but what duty is imposed upon Chrisco which corresponds to the consumer's duty to permit Chrisco to withdraw money from his or her account.
 - (c) *JJ Richards* [56(b)]: A price variation clause allowed the supplier to unilaterally increase the price of services for any reason. Such a clause creates significant imbalance without any corresponding rights to the customer to terminate the contract or obtain a change in the scope or sale of services.

Circumstances leading to a decline in revenue, increased overheads, relocation costs and/or an increase in government levies/charges would allow

¹⁰ *Jetstar Airways Pty Ltd v Free* [2008] VSC 539.

¹¹ *Australian Competition and Consumer Commission (ACCC) v JJ Richards & Sons Pty Ltd* (2017) FCA 1224.

JJ Richards to invoke the price variation clause. With the caveat that all customers would be given 30 days' notice of such a change.

- (d) *JJ Richards* [56(c)]: An agreed times clause removes any liability for *JJ Richards* where performance of service has been prevented or hindered, even though the Customer is not in any way at fault.

"JJR will use all reasonable endeavours to perform the collection at the times agreed but accepts no liability where such performance is prevented or hindered in any way."

- (e) *JJ Richards* [56(h)]: A termination clause prevents *JJR Customers* from terminating their contract with *JJ Richards* if they have payments outstanding and entitles *JJ Richards* to continue charging *JJR customers* equipment rental after the termination of the contract, despite the fact that no services are provided.

"No termination without final payment. Payment in full of all monies outstanding must be made before this agreement can be terminated. The equipment will not be removed until such payment is made and rental for the equipment may be charged if delays in payment of the final account occur."

- (f) *Bendigo* [67]: Terms contained within the Delphi and Rural conditions, as unilateral variation or termination clauses, permitted the Bank to vary the upfront price of the contract, the financial services to be supplied and other terms as well could all be varied.
- (g) Significant imbalance as the clause allowed the Bank to vary these services or reduce funds available, limited only by a 14 day notice requirement that may not give enough time for a customer to refinance. Also issues with a lack of corresponding rights.

Section 12BG(1)(b) (Legitimate Interests)

19. Pursuant to 12BG(4), it is for the party advantaged by an impugned term to rebut the presumption and prove that said term is reasonably necessary to protect its legitimate interests. *Bendigo* [25].

- (a) *Ashley & Martin* [48]: What is a 'legitimate interest' and what is 'reasonably necessary' will depend on the particular business of the supplier, including the particular circumstances of the business and the context of the contract as a whole:
- (b) *Paciocco* [29], [161], [266]: "Legitimate interests" may be of a business or a financial nature and are not necessarily monetary. A party may have interests in contractual performance that are intangible and unquantifiable.
- (c) *Ashley & Martin* [54]-[59]: An analysis of what alternatives are available to the party protected by the impugned term and proportionality may be relevant to the question of what is "reasonably necessary" to protect a parties' legitimate interests
- (d) *JJ Richards* [58(b)]: price variation clause: Although *JJ Richards*' costs may increase for reasons beyond its control, the price variation clause goes beyond what is reasonably necessary in order to protect *JJ Richards*' legitimate interests. For example, on one view, the price variation clause would allow *JJ Richards* to increase its prices simply because it wished to increase its revenue or profitability. While increasing prices in order to increase its revenue or profitability would be in *JJ Richards*' interests, those are not legitimate interests in this context.
- (e) *JJ Richards* [58(c)]: The agreed times clause: The agreed times clause goes beyond what is reasonably necessary to protect *JJ Richards*' legitimate interests by absolving *JJ Richards* of its performance obligations and requiring *JJR Customers* to assume the risk of non-performance under circumstances that they do not control.

- (f) *JJ Richards* [58(h): The termination clause: Where monies remain outstanding from a JJR Customer, JJ Richards could recover those funds through ordinary legal recovery processes. JJ Richards could also charge interest for outstanding fees. By enabling JJ Richards to continue to charge JJR Customers for equipment they no longer require or enjoy, in circumstances where JJ Richards could recoup outstanding fees through other means, this clause goes beyond what is reasonably necessary to protect JJ Richards' legitimate interests in recovering outstanding monies.
- (g) *Discovery Cruises* [72]: Two legitimate interests identified by the Court, respondent's reputation in the market, and the good will of its business in all firms. These are interests they're entitled to protect. Was argued that evacuation and cancellation fees should be retained to ensure financial standing in ensuring emergency procedures and events can be paid for. However, the cancellation clause as seen below is not necessary to protect such interests, as retaining an entire fare is perhaps just as likely to cause a loss of good will and reputation.¹²

More than 30 days prior to departure - 30% of the relevant fare (This can be used on another cruise this season or next but not refunded) 21-30 days prior to departure - 50% of the relevant fare (This can be used on another cruise this season or next but not refunded) 20 days or less prior to departure or no-show - 100% of the relevant fare

- (h) *Bransgrove* [63]: Here, the Court found that certain terms within an insurance contract were reasonably necessary to protect a legitimate interest. The clause in question as seen below, was necessary as Sebring cannot obtain insurance cover for overhead damage. If the trader did manage this risk, then customers would have to pay higher rental fees. The approach taken in fining customers for overhead fees was fairer in this circumstance otherwise customers who didn't cause overhead damage would be paying for it through higher fees.¹³

4.7 'for Overhead Damage or any Other Damage caused by contact between the vehicle and objects overhanging or obstructing the path of the Vehicle'

- (i) *Tiger Airlines* [8]: Established that alternative arrangement clauses for carriage was reasonably necessary to protect an airlines legitimate interest as were it not for such a condition the airline industry would be unlikely to be able to operate efficiently in the circumstances which gave rise to this application; such a situation would expose Tigerair to unknown, unavoidable and unquantifiable risks and consequences and claims and ultimately might act against the consumer's interests.¹⁴

"At any time after a booking has been made we may change our schedule, cancel, terminate, divert, postpone, reschedule or delay any flight. Subject to the consumer guarantees referred to in Article 2.4, the options outlined here are the sole and exclusive remedies available to you and we shall have no further liability in this respect."

Section 12BG(1)(c) (Detriment)

- (a) *Ashley & Martin* [60]: More than a mere possibility of detriment is required.
- (b) *NRM Corporation* [200]: The question of detriment may be considered together with the question of whether the term would cause a significant imbalance in the parties rights and obligations under the contract:¹⁵

¹² *Ferme v Kimberley Discovery Cruises Pty Ltd* [2015] FCCA 2384/

¹³ *Bransgrove v Sebring Pty Ltd* [2012] VCAT 1189.

¹⁴ *Wells v Tiger Airways Australia Pty Ltd* (2016) VCAT 84.

¹⁵ *NRM Corporation Pty Ltd v Australian Competition and Consumer Commission* [2016] FCAFC 98.

- (c) *CLA Trading* [80]: Terms that would allow the supplier to charge the customer for damage because the customer has committed a breach of the contract that did not cause or contribute to the damage.'
- (d) *Bendigo* [77]: Terms requiring the customer to disprove matters which the entity itself would be in the best position to provide primary evidence could cause detriment.
- (e) *Advanced Medical Institute* [951]: fees imposed on termination of a contract for medical services, comprising a 15% administration fee, a pro-rata fee for the expired portion of the treatment, a pro-rata fee for the 30 day notice period and the cost of medication supplied or prepared for the patient, whether the reason for termination was a change of mind very soon after a phone consultation, a severe adverse side effect or where the relevant medication proved ineffective.¹⁶
- (f) *Bendigo* [60]: Each of the impugned event of default clauses would cause detriment to the customer if relied upon because of the relevant default consequences. They fall within the list of example terms pursuant to 12BH. Furthermore, there's nothing that mitigates from the contract as a whole the unfairness of these terms.

60 Default consequences under the Delphi Conditions include:

- (1) the customer has no entitlement to use the facility or draw down any funds: cl 2(f);
 - (2) the customer indemnifies the Bank and is liable for all costs incurred in relation to the event of default, including an unspecified amount of break costs: cll 11.3 and 14;
 - (3) there is no right of set-off for the customer but there is for the Bank: cl 6.3 and cl 17.1; and
 - (4) the customer does not have any right to prevent any of the above by demonstrating that it has remedied (or will remedy) any default that can be remedied or that there is no credit risk to the Bank.
- (g) *CLA Trading* [70]: Terms that permit Europcar to charge money to a consumer who would not otherwise be liable to Europcar (because he or she is not at fault), and terms that would allow Europcar to charge the customer for damage because the customer has committed a breach of the contract that did not cause or contribute to the damage, would cause detriment to the consumer. The parties agree, as do I, that each of the terms referred to above would advantage Europcar and cause detriment to a Consumer if it were to be applied or relied on.
 - (h) *JJ Richards* [61]: The terms interacted in a way that is even more detrimental to customers. For example, he agreed times clause and the no credit without notification clause have the combined effect (at least on one view) that JJ Richards can attend to make a collection outside of agreed hours, fail to collect and still charge the customer. To give another example, where a customer is not aware of the automatic renewal of the contract, and has not monitored the term of the agreement, the agreement may be automatically renewed. Where the customer then seeks to terminate the contract, but has not paid for the first week's service under the renewed contract, JJ Richards is, on one view, entitled to leave unwanted equipment on the JJR Customer's property and to continue to charge the customer for that equipment.

¹⁶ Advanced Medical Institute Pty Limited [2015] FCA 368.

Section 12BG(2) (b) & (c) ASIC Act (Transparency & Whole Contract)

(b) (Transparency)

- (a) *Chrisco* [43]: Transparency is to be considered in relation to the particular term that is said to be unfair and only in relation to the matters concerning that term at s 12BG(1)(a)-(c)

If a term is not transparent it does not mean that it is unfair, and vice versa.

Consideration of the elements 12BG(3).

- (a) Must satisfy all.
 - (ii) Plain: Obvious explanation to the customer of what is expected.
 - (iii) Legible: Font is not overly small, diluted or otherwise obscured.
 - (iv) Presented clearly: Page has sufficient spacing, isn't spread out or referenced to other clauses that's not immediately obvious.
 - (v) Readily available to any part affected by the term.

Consideration

- (a) *Chrisco* [81]: Terms that did not clearly identify amounts that the customer will be charged or the means by which those amounts would be, were not to be plain within the meaning of 12BG(3)(a). (Should draw the customers attention to important clauses).
- (b) [91]: If the terms interact with each other but do not refer to each other, that is an aggravating factor against transparency
- (c) [90]: Can't be a 'densely packed page of small print terms and conditions'.
- (d) *Bendigo* [54]: Obligation must be expressed in plain terms, cant set out multiplicity of examples 'without limitation'.
- (e) *Bendigo*: The phrase 'determination of any amount' is conclusive in the absence of manifest error' lacks transparency, as this would be sufficient in constituting legal language.

Case law (Non-transparent):

- (a) *JJ Richards* [60]: that terms were not transparent where they were drafted in legal language and not in plain English; they were presented in a very small font size, and not in a way that would be apparent to a customer reviewing them, when they could have been presented in a manner that was clearer and more readily accessible to a small business customer.
- (b) *Advanced Medical Institute* [953]: that a term lacked transparency "to a significant extent" where the basis of calculation of an administration fee imposed by the term was not disclosed; the method of calculation of the cost of medication was not disclosed; the term itself was disclosed in a recorded message and the patient was not provided with a written copy of the term until after the contract was entered into, except in the case of patients who attended clinics
- (c) *Bendigo* [54]: Indemnity terms were not transparent, as some of the terms it was necessary to read 35 definitions. Definition inception, required to read definitions about other definitions to refer to other definitions.

Section 12BG(2)(c) (Contract as a whole)

Interpretive tools

- (a) *CLA Trading* [54(g)]: In considering the contract as a whole, not each and every term of the contract is equally relevant (or relevant at all). Main requirement is to consider terms that might reasonably be seen as tending to counterbalance the term in question.
- (b) *JJ Richards* [61]: Important to consider how the impugned terms interact, and how the non-impugned terms might ameliorate the impact of impugned terms.
- (c) *CLA Trading* [128]: an inquiry into whether the term in question causes an “imbalance” in the parties’ “rights” (plural) and “obligations” (plural) “arising under the contract”. It is confirmed by the statutory injunction to consider “all the circumstances”. This does not mean that each and every term of the contract is equally relevant, or necessarily relevant at all. The main requirement is to consider terms that might reasonably be seen as tending to counterbalance the term in question. The task involves an exercise of judgment against a statutory standard, rather than an exercise of discretion. *In discussion about s 32 of the Fair Trading Act.*
- (d) *Jetstar* [40]: Terms must be reasonably transparent and should not operate to defeat the reasonable expectation of the customer... should be able to make an informed choice.

Case Law

- (a) *Chrisco* [82]: Unfair contract terms in this example, such as the 'opt out' clauses weren't considered to be lacking in any transparency. The term itself was not hidden, and the option to opt out was put where it might be noticed. *However*, there are matters that concern these terms (HeadStart terms) that reduce its transparency. Ultimately these terms can be considered unfair.
 - (i) HeadStart term did not clearly identify the amounts that would be debited by Chrisco, or the means in which those amounts would be determined.
 - (ii) Payments would 'continue accordingly', what are the payments? No information was evident.
 - (iii) 'We will write to you to confirm your HeadStart Plan payments prior to commencing direct debits, It would not be plain to a consumer whether this was an indication that Chrisco would write to confirm whether the consumer intended to proceed with a scheme of having his or her account debited before an order was placed or whether it was an indication that Chrisco would write to confirm the amount of the payments that it would take.

Lessons from *Bendigo Bank v ASIC*

- 20. Apparent stronger enforcement stance, pre-emptive caution as to terms even when customers have not suffered loss or damage.
- 21. ASIC Commissioner Sean Hughes commented on the outcome of this case, stating that Insurance firms should take note of this outcome.

22. A stark reminder of the more hard-line stance mounted by ASIC in response to the use of unfair contract terms.¹⁷ The Courts decision in this case further aggravates the risk of such terms by potentially seeing lenders face sanction regardless of any damage or loss being suffered.¹⁸ Although such an action has yet to become a legal reality.
23. The plaintiff sought declarations and other orders in regard to certain contracts used by the defendant through two divisions, Delphi Bank and Rural Bank. ASIC alleged and the Bank accepts that the contracts contained terms that are unfair within the meaning of s 12BG(1) of the *ASIC Act 2001* (Cth) and are therefore void pursuant to s 12BF(1) of the Act [1].
24. The terms were contained within Delphi's General Conditions (Delphi Conditions), as well as the Rural Bank Facility Terms (Rural Conditions). The Bank in response to this, has given an undertaking to ASIC and to the Court, vowing that said terms shan't be used or relied upon.
25. The matter itself is concerned with ss 12BF, 12BG, 12BH and 12BK in sub-div BA of Div 2 'Unfair contract terms'.
26. The Bank is a publicly listed entity and holder of an AFSL, Delphi and Rural are divisions. Used the Delphi conditions since 2016, and Rural Conditions since 2017.
27. ASIC highlighted six relevant facilities, two contracts incorporate Delphi, four incorporate Rural.
28. The contracts were generally business loans.

Unfair Terms

29. Indemnification clauses
 - (a) Essentially made customer liable for loss or costs incurred by the bank that either; they had not caused, or could have been caused by the Bank etc.
30. Event of default clauses
 - (a) Disproportionately severe default consequences.
 - (b) None permit the customer to remedy a default which may be capable of remedy.
 - (c) Clauses create a default based on events that may not involve any credit risk to the bank.
 - (d) Untrue or misleading statements that are insignificant. Any part of the contract becoming void etc.
31. Unilateral variation or termination clauses
 - (a) Permit the bank to vary the upfront price of the contract, and subsequent financial services.
 - (b) Creates a significant imbalance in the parties rights and obligations because:
 - (i) Allows the bank to reduce the amount of funds that the customer would otherwise have to utilise. Entitlement only limited by notice, which isn't long enough for adequate opportunity to refinance.
 - (ii) Allows for unilateral variance by one party.

¹⁷ Australian Securities & Investment Commission, *Unfair contract terms and business loans* (Report No 565, March 2018)

(iii) Customer has no corresponding rights.

32. Conclusive evidence clauses:

- (a) Have the effect of imposing the evidential burden on the customer in proceedings related to the contract. Allow the Bank but not the customer to terminate the contract if the customer does not pay x amount.
- (b) Terms create significant imbalance because;
 - (i) Allows imposition of an evidential burden by issuing a certificate.
 - (ii) Bank has no additional duty, customer has no corresponding rights.
 - (iii) In terms of Delphi conditions, customer can only contest the amount stated if a manifest error can be demonstrated.

Indemnity Clauses

33. The ACCC guidance regarding the limitations of liability and indemnities have (generally) stated that clauses having one or more of the following characteristics would be viewed as unfair within the relevant framework;

- (a) Require a customer or small business to indemnify a counterparty for losses that are not within the reasonable control of the consumer or small business, or may have been caused by a counter party.
- (b) Consumer or small business that isn't bestowed a corresponding right or benefit
- (c) Constrained exceptions to the indemnity (ie gross negligence or wilful misconduct)
- (d) Circumstances are unclear.

34. Furthermore, indemnity clauses with the above characteristics will not find safe harbour in transparent waters, it doesn't matter if the customer understands and agrees to such terms, they can still be found unfair within the framework.

35. The above considerations also go against the tenets of s 12BH(1) ss (l)(i)(k).

- (a) *Servcorp* [53]: In reference to the below clauses, they attempt to limit Servcorp's liability except in cases of gross negligence or misconduct. The clauses create a significant imbalance in the parties' rights and obligations given that there is no corresponding clause which limits ASCI's liability to Servcorp Parramatta in this way. ASCI would clearly suffer detriment if the clauses were relied on or applied by Servcorp Parramatta. This occurs even where the loss or damage is caused by either Servcorp Parramatta or Servcorp Melbourne. There is no corresponding benefit in favour of the counterparty. The indemnity provided for in these clauses causes a significant imbalance in the parties' rights and obligations and the counterparties would suffer detriment if they were relied on by Servcorp Parramatta or Servcorp Melbourne. Notable is the finding that even though the indemnity only applies to losses that were attributable to the client, the Court found that the indemnity could apply even if Servcorp caused the loss and was thus unfair.¹⁹

¹⁹ Australian Competition and Consumer Commission (ACCC) v Servcorp Ltd (2018) FCA 1044.

17. Indemnity Clause

- a. With the exception of gross negligence or wilful misconduct, the Client shall expressly indemnify Servcorp, its employees, caretakers, cleaners, agents or invitees, against any theft or loss from the Office(s) or damage to the Office(s) and its contents attributable to the Client, howsoever occurring.
- b. The Client shall expressly indemnify Servcorp against any loss, damage, corruption of data or any loss of information whether from hardware, software, internet, voice or communication system failure that may occur to the Client during the term of this service Agreement.

Event of default clauses

36. In the context of *Bendigo*, issues with default clauses mainly stemmed from:
- (a) Allowing an entity to unilaterally determine whether a default had occurred
 - (b) Did not permit a customer to remedy the default
 - (c) Created defaults for events which may not have caused any material change in credit risk.

Bendigo [62]: Whether or not the unfairness had been mitigated via operation of other provisions.

37. [ASIC Report 565](#): offers a number of considerations regarding default clauses radiating unfairness.²⁰
- (a) Material adverse change events of default: clauses that allow lenders to treat a loan as being in default because of any unspecified 'material adverse change'.
 - (b) Specific events of non-monetary default: clauses allowing a bank to call a default (other than for a non-payment) and terminate a loan contract.

Unilateral variation clauses

38. Clauses that give lenders a broad ability to vary contracts without agreement have a high risk of being considered unfair, as they cause a significance imbalance in rights and are unlikely to be reasonably necessary to protect the legitimate interests of the lender if they can be used in a broad range of circumstances.²¹
39. Variation clauses that allow for a change of terms that don't offer the other entity termination/change in scope are generally considered unfair.
40. Other such considerations include:
- (a) ASIC Report 565: Giving adequate time for borrowers to exit the contract via repayment or refinancing (generally provisions of 30 and 90 calendar days for the borrower to do so before the variation takes effect).
 - (b) *Bendigo* [72]: Terms such as 'periodic review' with no period defined, or unclear limitations on a Banks power through terms such as 'by notice to the borrower' fail the transparency test generally and are seen as unfair.
 - (c) *Bendigo* [67]: deemed unfair in circumstances where the Bank could unilaterally change a clause such as amount of funds available to a customer on notice that

²⁰ Australian Securities & Investment Commission, *Unfair contract terms and business loans* (Report No 565, March 2018) 11.

²¹ *Ibid* 6.

wouldn't give customer adequate opportunity to refinance. OR if the terms permit the bank to terminate if the customer doesn't accept new terms. Regards corresponding rights (imbalance).

- (d) *Mitolo* [27(b)]: The unilateral variation of terms clause permitted the respondents to alter at wish the terms described as 'standard terms and conditions'. There was no corresponding right given, nor could they terminate the contract or obtain a change in scope.²²

Conclusive evidence clauses

- 41. From *Bendigo* [77], unfair clauses can be seen in circumstances such as:
 - (a) An entity to impose, by the issuing of a certificate, an evidential burden on the customer regarding matters in which the entity itself is best placed to answer
 - (i) The entity holds no additional duty. The customer, no corresponding right.
 - (ii) Customer cannot contest the amount stated unless the customer can demonstrate a 'manifest' error.
 - (iii) Or it would cause detriment (the certificate) if relied upon in circumstances where it's incorrect yet the customer could not, or did not, seek to disprove it

Remedies

- 42. The current framework does not allow for damages to be awarded for the mere existence of an unfair term.
- 43. However, a business that asserts that a term is legitimate or seeks to enforce or rely on it when it has been declared unfair by a court may be misrepresenting the true position to the consumer. This could be false or misleading conduct, in breach of the relevant *ASIC Act/ACL* prohibition. If so, the usual remedies, which include pecuniary penalties, would apply.
- 44. If a court finds that a term in a standard form contract is unfair, the term is void. The contract is rendered operable once more, and continues to bind (if operability is possible).
- 45. There are a range of orders a court can make including:
 - (a) Declaration that all or part of the contract is void
 - (b) Vary the contract
 - (c) Refuse to enforce some or all of the terms of the contract
 - (d) Direct the entity to refund money or return property
 - (e) Direct the entity to provide services to the customer. at the entities expense.
- 46. Section 12GND(2), when read with s 12GND(3) empowers the court to declare a term as unfair, on application by ASIC.
- 47. Section 12GND(5) provides that s 12GND(2) does not limit the power of the Court to make declarations.
 - (a) *Bendigo* [85]: Although, prior to a declaration being made, three requirements must be met.

²² *Australian Competition and Consumer Commission v Mitolo Group Pty Ltd* (2019) 138 ACSR 143, 3.

- (i) Question must be real and not hypothetical or theoretical
 - (ii) Applicant must have a real interest in raising it
 - (iii) Must be a proper contradictor.
- (b) *Bendigo* [104]: The Court must not make an order unless satisfied that the order will prevent or reduce the loss or damage suffered, or likely to be suffered, by the non-party consumers in relation to the declared term.
- (c) *Bendigo* [83]-[107]: A number of orders were made in reference to both the Delphi and Rural conditions. Including terms being varied and rendered void.

AFCA Precedents

Case Number [782534](#)

48. Complainant held a life and total and permanent disability policy (TPD) policy. Complained about the change in policy to a level premium structure, alleged that the insurer misled him about how premiums are applied for the increased cover he received under the 'Automatic Increase Benefit'. He says the policy wording led him to believe premiums charged for the automatic increase benefit would be based on his age.
49. Decided that, no, the policy wording is clear and not misleading. It confirms for level premium policies, premiums for any increase to the sum insured is based on the complainant's age at the time of the increase. Therefore, the insurer is not required to refund any premiums. Highlighting that the clause in question must be read with *the whole document*, and once done so, is not unclear or misleading.

Toby Blyth and Oska Purcell

March 2022

Appendix: UCT in Insurance

Introduction

1. The Unfair Contract Terms (UCT) regime will start applying to standard form consumer contracts entered into on or after 5 April 2021.²³ Contracts entered into beforehand will be exempt, however, if they are renewed or if a term is varied after the commencement date then UCT laws will apply.
2. The UCT laws will only apply to 'consumer contracts' or 'small business contracts'

Standard Form Contracts

3. A contract that is open to negotiation by a broker/insured may not be a standard form contract (depending on the precise facts).
4. A contract that is negotiated by a broker or the insured is not standard form and UCT will not apply.
5. Having said that, unless there is some foolproof mechanism to avoid the provision of certain material that is suitable for large corporations being given to a small businesses, or distinguishing between negotiated and non-negotiated contracts, it is generally safer to have a uniform set of documents.
6. Broadly, the UCT regime applies to "a contract that is a financial product" or "a contract for the supply, or possible supply, of financial services" (each a "financial or credit contract").
7. Insurance policies are financial products but have to date been excluded from the operation of all other legislation by section 15 of the ICA. Insurance policies will shortly be subjected to the UCT regime for financial products.
8. In brief, the UCT regime is as follows:
 - (a) if a term of a financial or credit contract is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term, then
 - (b) the party relying on that term must prove it is otherwise fair in the circumstance

Main subject matter of the policy (UK Context)

9. Certain terms are excluded from the operation of the UCT regime. These are terms that define the main subject matter, up front price payable or that are required by Commonwealth, state or territory law.
10. Naturally, there is much debate on what these terms are. For insurance policies, a further exclusion is provided for transparent excess terms, discussed further below.
11. The policy basis for the exclusion of terms that define the main subject matter of a standard form contract is to ensure that a party cannot challenge a term concerning the basis for the existence of the contract.
12. The "main subject matter" for insurance policies is defined as the description of what is being insured. The replacement explanatory memorandum provides further explanation for this and states that relatively few terms in insurance contracts will qualify for this exemption [main subject matter exemption], this will be determined on a case-by-case basis. The replacement

²³ The new laws are introduced by way of the *Financial Sector Reform (Hayne Royal Commission Response—Protecting Consumers (2019 Measures)) Act 2020*, which effectively amends both the *ASIC Act 2001*(Cth) and *Insurance Contracts Act 1984* (Cth).

explanatory memorandum provides examples for home, car, income and life insurance as follows:²⁴

- (a) Isla purchases home insurance for a house at 17 Drayton Street. The contract describes the house as a four bedroom, brick veneer freestanding house. This description (a four bedroom, brick veneer freestanding house at 17 Drayton St) is the main subject matter of the contract and therefore outside of the unfair contract terms regime.
 - (b) Jess purchases car insurance. The contract describes the car as a 2018 Kia Carnival S 2.2-litre four-cylinder turbo-diesel with a modification to take wheelchairs. This description (a 2018 Kia Carnival S 2.2-litre four cylinder turbo-diesel with a modification to take wheelchairs) is the main subject matter of the contract and therefore outside of the unfair contract terms regime.
 - (c) Tom is a 46-year-old marine biologist who earns an income of \$100,000 a year. He purchases income protection insurance for the value of \$6,250 a month and discloses no significant ill health. The contract describes Tom as a 46-year old man with no significant ill health and also states the sum insured is \$6,250 a month. Both the description of Tom and the statement of the sum insured are the main subject matter of the contract and therefore outside of the unfair contract terms regime.
 - (d) Yvonne buys life insurance cover for herself and her husband Bob, for the value of \$100,000 for each life insured. The description of Yvonne, Bob and statement of the sum insured is the main subject matter of the contract and therefore outside of the unfair contract terms regime.
13. The narrow definition of the subject matter means that conditions and (importantly) coverage exclusions will be subject to the UCT regime.

Methodological framework and section 54

14. UCT as it applies to insurance is new (although some assistance can be gleaned from the [UK](#)). It assists to develop an initial intellectual framework for the review.
- (a) Unlike the law on UCT as it applies to lending and credit (usefully summarised in the *ASIC v Bendigo Bank* decision), in terms of consumer insurance policies we consider that the UCT will have most impact on exclusions and conditions.
 - (b) This is because much of the rest of the policy is either mechanical (and neutral) or the subject matter of the contract (and therefore exempt).
 - (c) As to the main subject matter issue, we will assume that the ASIC view prevails, namely that exclusions etc are not the main subject matter and therefore exclusions are subject to UCT.
15. We disagree with ASIC's view on this, and suspect that this will be litigated, as clearly exclusions negatively delineate what is insured and so form part of the main subject matter of the contract (which is excluded from the UCT).
16. In any event, in our opinion section 54 as it currently is interpreted by the High Court in cases like *Maxwell v Highway Hauliers Pty Ltd* [2014] HCA 33 is a good start. The new way of interpreting section 54 as it relates to exclusion clauses is that the courts consider that a loss must be causally related to the exclusion, otherwise section 54 will cure the insured's breach with no prejudice provable by the insurer (for example, an exclusion when the driver did not have a particular class of licence, which had nothing to do with the accident, was excused by

²⁴ Financial Sector Reform (Hayne Royal Commission Response - Protecting Consumers (2019 Measures)) Bill 2019 (Cth).

the High Court in Maxwell; and see the Federal Court excusing the failure to check in at Fremantle when the yacht in *Pantaenius*²⁵ was damaged in Australian waters).

17. In short, if an insurer's response to a complaint would be "it wasn't intended to work that way" or "that is something that s54 can cure", then we consider the court might conclude that the term is unfair (because it should not have to rely on the insurer conceding that it shouldn't be read at face value or on the court reading it down under section 54). This may be the right test to bear in mind when terms are not obviously unfair on their face.
18. There are often a number of issues where the insurer may be required to approve steps by an insured. While this is not an unfair contract term per se, the insurer must act reasonably, and we note s54 will apply.

Indirect Causation

19. An important issue generally in the industry is "indirect" causation in exclusions (eg an exclusion for any loss caused directly or indirectly by a specified peril).
20. A court would understand the "direct" result exclusions. For example, a loss caused by the direct result of criminal conduct may constitute the subject matter of the contract because in a hazard policy, it describes the hazards that the insurer is not prepared to insure.
21. Even if that is incorrect, the court could relatively easily be satisfied that an exclusion for loss the direct result of the criminal conduct is justified to protect the insurer's legitimate interests (but the insurer might need actuarial evidence).
 - (a) However, indirect result exclusions are harder to justify - for example I am at the pub drinking and a beam falls on me. My injury is indirectly the result of drinking intoxicating liquor (which might be excluded as a cause) but in section 54 terms we think a court would not uphold the exclusion. The insurer would say "of course the exclusion is not meant to pick that up" but that reinforces the potential unfairness.
 - (b) Many things are unlawful but may not have any real influence on an insured hazard. For example, a quarantine detainee sneaks out to a shop to buy cigarettes and is hit by a car. The death indirectly results from the criminal breach of quarantine regulations, but a court would likely use section 54 to remedy that.
22. The solution could be to prepare relevant evidence to demonstrate the actuarial justification for the exclusion or delete the "indirectly" exclusion (actuarial evidence does not need to come directly from an actuary - an underwriter can provide this review).

Claim Conditions

23. ASIC is concerned as to the requirement that insureds comply strictly with claim conditions.
24. The court would ask what reason justifies this condition (or strictly what legitimate interest of the insurer does this protect?).
25. The real issue is prejudice (and this arises more for injury than death, as death is relatively easily provable). However, we think the better way is to add words expressing exactly what the insurer's rights are (using section 54 terminology), as the legislature via section 54 has expressly stated that an insurer can reduce its liability to reflect prejudice, so we consider that that is a legitimate interest of an insurer in UCT terms.
26. In essence, broad discretions are generally to be avoided under UCT.

²⁵ *Watkins Syndicate 0457 v Pantaenius Australia Pty Ltd* [2016] FCAFC 150.

Remedies - Impact upon pricing and reinsurance

27. The only remedy at this stage is a declaration that a term is void. That in itself, being a retrospective declaration, will likely play havoc with a prospectively priced and calibrated product.
28. Assuming that announced amendments are passed, there will soon be three types of remedies under the new framework:
 - (a) Declaration that term is void - it is likely that a reinsurer will be bound to pay. This could have a particularly adverse impact where an exclusion is declared void, with flow-on effects to the portfolio risk profile.
 - (b) Order to pay civil penalty - to the extent the penalty merely equates to an indemnity payout, a treaty may bind the reinsurer to pay. However, where the penalty is properly characterised as "punitive" or the judgment and an order to pay a penalty is evidence of bad faith, then a treaty may not oblige a reinsurer to pay.²⁶
 - (c) The Court fashions an appropriate remedy rather than declaring the term void:
 - (i) The outcome here will depend on the remedy:
 - (A) Corrective advertising - will likely fall outside the scope of a treaty;
 - (B) An order that the policy be amended: conceptually the same as a void term;
 - (C) An order for return of premiums: the reinsurer will likely be obliged to refund ceded premiums; and
 - (D) Compensatory damages: equivalent to a policy payout payable by reinsurer; or equivalent to a civil penalty and reinsurer not bound to pay.

²⁶ Generally see *American Marine Insurance Group v Neptunia Insurance Co* 775 F. Supp 703,708 (NDNY, 1991); and *Insurance Co of Africa v Scor Reinsurance* [1985] 1 Lloyd's Rep 312, 330