



# Unfair Contract Terms in the automotive industry

Everything you need to know



## Preamble

This guide has been prepared by the Motor Trades Association of Australia (MTAA) with the assistance of HWL Ebsworth Lawyers (HWLE). HWLE has a dedicated Automotive Industry Group comprised of lawyers with a passion and understanding of the automotive industry and a depth of expertise, including in relation to unfair contract terms legislation within Australian Consumer Law. We would like to thank Evan Stents, Teresa Torcasio and Zoe Vise for their assistance in the development of this guide. If you require any further assistance in relation to the matters in this guide, please contact the team at HWLE using the details below.

[Evan Stents](mailto:estents@hwle.com.au) | [estents@hwle.com.au](mailto:estents@hwle.com.au) | 03 8644 3509 | 0437 108 300

[Teresa Torcasio](mailto:tortcasio@hwle.com.au) | [tortcasio@hwle.com.au](mailto:tortcasio@hwle.com.au) | 03 8644 3623 | 0427 321 317

[Zoe Vise](mailto:zvise@hwle.com.au) | [zvise@hwle.com.au](mailto:zvise@hwle.com.au) | 03 8644 3777 | 0448 055 771

## Copyright

This work is copyright. Apart from any use permitted under the Copyright Act 1968, no part may be reproduced by a process, nor may any other exclusive right be exercised, without the permission of:

[Motor Trades Association of Australia](http://www.mtaa.com.au) | 650 Victoria Street, North Melbourne VIC, 3051 | [ggwilym@vacc.com.au](mailto:ggwilym@vacc.com.au)

[HWL Ebsworth Lawyers \(HWLE\)](http://www.hwle.com.au) | PO Box 3, Collins St West VIC, 8007 | [tortcasio@hwle.com.au](mailto:tortcasio@hwle.com.au)

## About MTAA

The Motor Trades Association of Australia (MTAA) is Australia's peak national automotive association. MTAA's membership includes the Motor Traders' Association of New South Wales, the Victorian and Tasmanian Automotive Chamber of Commerce, the Motor Trade Association of South Australia and Northern Territory, the Motor Trade Association of Western Australia, and the Motor Trades Association of Queensland.

MTAA represents new and used vehicle dealers (passenger, truck, commercial, motorcycles, recreational and farm machinery), repairers (mechanical, electrical, body and repair specialists, i.e. radiators and engines), vehicle servicing (service stations, vehicle washing, rental, windscreens),

parts and component wholesale/retail and distribution and aftermarket manufacture (i.e. specialist vehicle, parts or component modification and/or manufacture), tyre dealers and automotive dismantlers and recyclers.

The automotive industry is a vital contributor to Australia's economy, employing approximately 385,000 people across 13 sectors and 52 trades, and contributing 2.1 per cent of Australia's Gross Domestic Product (GDP).

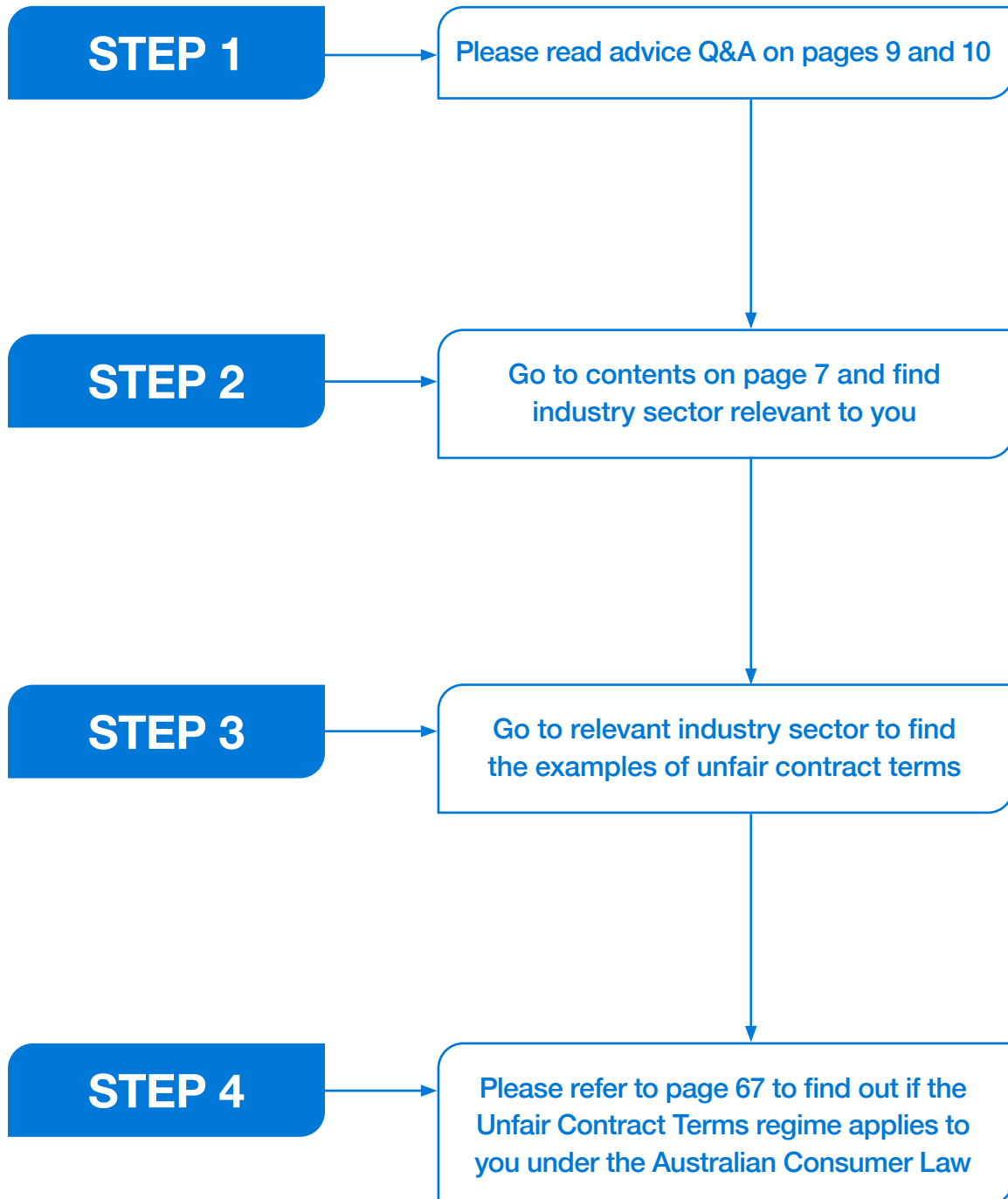
The automotive industry is also one of the largest employers of apprentices and trainees nationally, and the majority of automotive businesses (96 per cent) are small and family-owned enterprises.



# How to use guide



Before you start, please read this...



# Contents



About MTAA	3
How to use guide	4
Advice Q&A	8
Service and repair	12
Automotive dismantler and recyclers	16
Franchised and used automotive dealers	20
Towing (trade towing)	24
Rental vehicles	28
Franchised and used farm and industrial machinery	32
Commercial vehicles	36
Franchised and new motorcycles and used motorcycle dealers	40
Franchised and independent service stations	42
Engine reconditioners	46
Retail tyre industry, suspension	50
Caravans	54
Boats	58
Buses	62
General	64
UCT	66

# Advice Q&A





### What is the Australian Consumer Law?

The Australian Consumer Law (or 'ACL') is a federal law which promotes fair business practices and gives consumers certain rights whenever they acquire goods or services. The ACL also aims to protect consumers and small businesses from unfair contract terms in standard form contracts. This is known as the unfair contract terms regime, or 'UCT' for short.

### What is the unfair contract terms (UCT) regime?

The unfair contract terms (UCT) regime aims to protect consumers and small businesses in their dealings with other businesses (such as larger businesses with more bargaining power), by prohibiting the use of unfair contract terms in standard form contracts. The UCT regime only applies to certain types of contracts, as its function is to provide relief where there is some imbalance in the bargaining power of two parties, and not, for example, in relation to heavily negotiated contracts or contracts between two large companies on equal footing.

### Why are we talking about the UCT regime?

The UCT regime is not new. In fact, it has been around for nearly eight years. What is new, however, is the major reform that took place late in 2022 to strengthen the protections offered to consumers and small businesses under the regime. The key effect of this reform is that, from 9 November 2023, any business that proposes, applies or relies on an unfair contract term in a standard form consumer or small business contract will have contravened the UCT regime and may face significant financial penalties. The reform has also increased the maximum penalty that can be imposed and expanded the definition of a 'small business contract' to bring a much broader group of businesses within the scope of the regime.

While the new regime will only apply to contracts made on and from 9 November 2023, it will also apply to any contracts made before this time that are renewed or varied once the new regime has come into effect. The changes may therefore be relevant to any historical contracts that are up for renewal or subject to variation.

### When does the UCT regime apply?

There are two criteria for the UCT regime to apply to a contract. These are:

1. The contract must be a standard form contract; and
2. The contract must be a consumer contract or a small business contract.

### When is a contract a standard form contract?

A standard form contract is generally understood as the type of contract rolled out on a repetitive basis to multiple people, for example, a set of standard supply or service terms and conditions used by a business. However, there is no blanket rule under the ACL, only indicators that are to be taken into account.

A contract is more likely to be considered standard form if it is provided on a 'take it or leave it' basis, leaving little room for negotiation. Where each party has a meaningful opportunity to consider the contract and negotiate its terms, it is less likely to be standard form.

### What is a consumer or small business contract?

A consumer contract is a contract for the supply of goods or services (or a sale or grant of an interest in land) to a person who is acquiring the goods, services or interest 'wholly or predominantly' for personal, domestic or household use or consumption. This might include, for example, the terms and conditions of a gym membership, or the sale terms of an online retail business.

A small business contract is a contract for the supply of goods or services (or a sale or grant of an interest in land) where at least one party has less than 100 employees or has a turnover of less than \$10 million in its last income year before the contract is made.

### What happens if the UCT regime applies?

If the UCT regime applies to a contract, a term under that contract may be unfair where it creates a significant imbalance in the rights and obligations of the parties under the contract and would cause detriment to the party disadvantaged by the term if it were applied or relied on. The term will not, however, be unfair if it is reasonably necessary to protect the legitimate interests of the party that would be advantaged by the term. This is known as the UCT Test.

There are a few other matters that will be taken into account when determining whether a term is unfair according to the UCT Test. Firstly, it will be considered how transparent the term is – in other words, how clear and legible it is, and whether or not it is expressed in plain language. Secondly, the contract as a whole will be considered, to determine whether there are any practical realities of the arrangement between the parties that would impact on whether the term is unfair.

### Let's look at an example of a contract term that is likely unfair.

Zoe enrolls into a six-month automotive sales training course offered by the Learning Institute. She signs the enrolment form, which includes terms and conditions that allow the Learning Institute to raise the monthly course fees at any time during the six-month period, for any reason. Halfway through the course, the CEO of the Learning Institute decides that she wants to increase the profits of the business and raises all fees by 50 per cent. Zoe tries to get out of the course, but the Learning Institute tells Zoe she has no rights to terminate, as she is locked in for the six-month term. There is a significant imbalance here – the Learning Institute has a unilateral right to raise the fees, but Zoe has no right to exit the arrangement. Zoe will suffer financial detriment, and the fee increase is not linked to any external event which might have made it legitimate for the Learning Institute, for example an increase in CPI or government charges. In this scenario, the term is likely to be unfair.

It is important to be aware, however, that even if the UCT regime applies to a contract, not every onerous or one-sided clause within that contract will automatically be unfair. The UCT regime does not necessarily provide a “get out of jail free card” for a bad deal. Additionally, there are certain contract terms that the ACL specifically excludes from the application of the UCT Test, including terms that define the subject matter of the contract or set the upfront price payable under the contract.

### Let's look at an example of some contract terms that are likely not unfair.

Teresa has a large strawberry farm in Shepparton. Teresa is making a killing supplying strawberries to small businesses and schools. Teresa decides it's time to grow her business. She purchases 10 new harvesters from Sweetas Harvesting, the manufacturer of specialised strawberry harvesting equipment. The harvesters use innovative robotics technology, developed by a company in Germany, that will allow Teresa to pick double the strawberries in half the time. Sweetas Harvesting accepts Teresa's order, with an estimated delivery date in two months' time. The harvesters cost a mint, but Teresa will be able to recoup her investment in no time if business continues the way it has been going.

A few weeks later, widespread panic erupts as needles begin to appear in strawberries being sold on supermarket shelves. Unfortunately for Teresa, this seems to have spooked her customers. They

stop placing orders for strawberries overnight. Teresa tries to cancel her order with Sweetas Harvesting, but they refuse, advising Teresa that the agreement does not allow a purchaser to cancel an order for change of mind or change in circumstances. Sweetas Harvesting tells Teresa that while they are sympathetic to her plight, they cannot agree to cancel the order because they have already begun manufacturing the harvesters and have now financially committed to purchasing the required technology components from their supplier in Germany. The contract term prohibiting Teresa from cancelling her order because of a change of mind or change in circumstance, is not likely to be unfair, given it is does not go beyond what is reasonably necessary for Sweetas Harvesting to protect its legitimate interests.

### What happens if a term is unfair?

A contract term that is unfair is deemed void, meaning it cannot be enforced by the parties. In addition, the person who proposed, applied or relied on the term (or who tried to apply or rely on the term) will have contravened the ACL, and may be subject to significant financial penalties. Each time that a person engages in this conduct, a ‘fresh’ contravention will occur, meaning that there could be multiple contraventions in one contract, or across multiple standard form contracts, each with their own eye-watering maximum financial penalty.

The maximum financial penalty that can be imposed for a contravention of the UCT regime is:

- For companies, the greater of \$50 million, three x the value of the benefit obtained from the contravention, or if the value of the benefit cannot be determined, 30 per cent of the ‘adjusted turnover’ of the company during a 12-month period, which is a formula that would consider the turnover of all related companies in the case of a corporate group.
- For individuals, \$2.5 million per contravention.

The ACL also gives certain powers to the courts and the ACCC in response to any contravention of the UCT regime. This includes, for example, the court's ability to make orders restraining a business from using an unfair contract term in its other contracts, and the ACCC's right to issue public warning notices to warn the public about the conduct of a contravening business. These broad rights, in addition to any financial penalties, have the potential to cause significant damage to a business, not just financially, but reputationally as well.



# Service and repair



# Examples of unfair contract terms

Automotive Repairer's Division (VACC/TACC, MTA/WA), Australian Heavy Vehicle Repairer's Association (MTA/NSW), Body Repair Division (VACC/TACC, MTA/WA, MTA/NSW), Automotive Transmission and Rebuilders Division (MTA/NSW), Automotive Engineers Division (MTAQ), Exhaust Systems Specialist Division (MTA/NSW), Automotive Mechanical Repair Division (MTA/NSW), Brake Repair Specialist Division (MTA/NSW), Motor Vehicle Assessor and Inspection Division (MTA/NSW), Rustproofing Specialists Division (MTA/NSW), Steering and Suspension Specialists Division (MTA/NSW), Body Repair Specialists (MTA/SA), Automotive Repair and Engineering Specialists (MTA/SA), National Auto Collision Alliance (MTAQ), Radiator Repair Specialists Division (MTA/NSW), Automotive Electrical Division (VACC/TACC) and Automotive Electrical Specialists Division (MTA/NSW).

The following examples have been written to relate to specific industry divisions, however may also apply to other industries within the automotive sector.

## Scenario 1 – Auto-renewal clause s 23 ACL

Bob's Car Studio is a small business repairer of motor vehicles. Smooth Drive is a manufacturer of motor vehicles. Smooth Drive wants to engage Bob's Car Studio to be one of its authorised repairers for customers claiming under the Smooth Drive manufacturer's warranty. The proposal is that Bob's Car Studio will repair Smooth Drive motor vehicles for customers claiming under Smooth Drive's manufacturer's warranty, and Bob's Car Studio will then charge back to Smooth Drive for its labour and parts. Smooth Drive sends through its standard authorised repairer agreement which Bob's Car Studio signs. The agreement has an initial term of three years, which automatically renews for rolling three-year periods unless Bob's Car Studio terminates the agreement at least 120 days before the end of the initial term or any renewal period.

After nearly three years under the agreement, Bob's Car Studio is approached by another manufacturer of motor vehicles called Fonda. Fonda offers Bob's Car Studio more work and a better rate for labour. Bob's Car Studio jumps at the opportunity and gives

notice to Smooth Drive that it will be terminating its agreement with Smooth Drive. Bob's Car Studio is unaware of the automatic renewal clause, and aside from a signed copy of the agreement, has never received any notice about renewal dates. Bob's Car Studio gives Smooth Drive notice 20 days before the three-year initial term ends. Smooth Drive responds to Bob's Car Studio, advising that the notice is invalid, and that the agreement will rollover after the third year for another three years. After some back and forth, Smooth Drive explains that it doesn't have another repairer lined up and that is why 120 days' notice is required. Smooth Drive threatens to sue Bob's Car Studio if it pulls out of the contract.

In these circumstances, the automatic renewal clause is likely to be an unfair contract term. The factors which support this are the length of the renewal term (same as the initial term), the fact that Smooth Drive has not been required to notify Bob's Car Studio about upcoming renewals and the length of the notice period required (being one-third of the renewal term itself).

## Scenario 2 – Unilateral price variation clause ss 23 and 25(f) ACL

Quik Repairs is a national automotive chain offering motor vehicles servicing and repairs. Each time a customer of Quik Repairs agrees to a quote, they sign up to the Quik Repairs standard terms and conditions, which were rolled out many years ago. The terms and conditions allow Quik Repairs to adjust their prices on 1 July each year, which is Quik Repairs' standard operational practice to account for the rising costs of business. The terms and conditions provide for the price adjustment on 1 July to apply to all invoices issued by Quik Repairs after that date, whether or not those invoices are issued under new or existing quotes and orders. Until recently, Quik Repairs had not ever had any issues with enforcing its standard terms and conditions. However, on 5 July, a customer named Ally calls Quik Repairs to query why the invoice she has received is higher than the price she was quoted for. Ally dropped off her Nexus with Quik Repairs at the end of June for required

repairs to the transmission. Quik Repairs advises Ally of their recent price adjustment, which will apply given the works to Ally's Nexus (requiring many replacement parts) took place after 1 July.

Ally, an experienced consumer lawyer, advises Quik Repairs that they cannot rely on this clause as it is an unfair contract term, and asks Quik Repairs to reissue the invoice based on the quoted price.

In these circumstances, the clause allowing Quik Repairs to increase its prices is likely to be an unfair contract term. This is because the term applies to alter the price payable under a contract that is already on foot, rather than one that is formed after the imposition of the new prices. The term may not be unfair if it merely stated that Quik Repairs could adjust its pricing from time to time and that pricing would be reflected in all quotes issued and contracts formed from that date (not in relation to any quotes issued or contracts formed before that date).

### Scenario 3 – One-sided indemnity clause s 23 ACL

Repairs R Us is a small business motor vehicle repairer that wins a big job with Eastfield Shopping Centre to roll out a motor vehicle servicing offering at the Eastfield Shopping Centre car park. The idea is that customers can park their car at the Repairs R Us designated car park and have their car serviced while they shop. Repairs R Us are stoked to get the gig, and don't think twice about signing the standard services agreement presented to them by Eastfield Shopping Centres' lawyers, Lowe & Ball.

Business is going swimmingly for Repairs R Us until one day when the business receives a letter from Lowe & Ball. The letter states that Eastfield Shopping Centre has been sued by a customer over damage to their brand new Cherrari sustained during a routine service at Repairs R Us. Teresa, the owner of the Cherrari, is claiming \$10,000 in property damage and consequential loss. Teresa is a social media influencer, and is claiming the additional consequential loss for loss of profits, as she was going to be using the car in a sponsored post the day after the routine service, which she had to cancel once she noticed a huge dint, scratches and scuff marks near the back of her Cherrari. The letter from Lowe & Ball goes on to state that Eastfield Shopping Centre is claiming the entire \$10,000 from Repairs R Us pursuant to the indemnity in the standard services agreement. The clause in question requires Repairs R Us to indemnify Eastfield Shopping Centre for any loss or damage caused to Eastfield Shopping Centre arising in connection with the agreement, whether or not due to any reckless or negligent act or omission of Eastfield Shopping

Centre or its personnel. There is no similar indemnity clause that applies in favour of Repairs R Us.

Repairs R Us is perplexed at how such significant property damage could have been caused during their routine servicing, and pulls up the tapes from the day in question. It becomes clear that the damage was not caused by the service provided by Repairs R Us, but by an Eastfield Shopping Centre trolley attendant who loses control of a long string of trolleys near to where Teresa's Cherrari is parked after the service and ready for collection. The trolleys crash into Teresa's Cherrari and the trolley attendant quickly regains control and runs away.

Repairs R Us present the footage to Lowe & Ball, but are referred back to the wording of the indemnity which refers to any loss arising 'in connection with' the agreement, whether or not caused by any negligence or reckless conduct on the part of Eastfield Shopping Centre or its personnel. Lowe & Ball hold firm and demand immediate payment of the \$10,000 under the indemnity.

It is likely that the indemnity clause is an unfair contract term. This is because the indemnity clause is one-sided, extremely broad, and does not account for any contribution from Eastfield Shopping Centre as the party being indemnified, and there is no corresponding right for Repairs R Us under the agreement. This position may be different if the indemnity clause was confined to certain events (e.g. breach of agreement by Repairs R Us) and was 'carved out' by any loss or damage caused by Eastfield Shopping Centre.

### Scenario 4 – Set-off clause s 23 ACL

HP Smash Repairs and Mechanical is a small business motor vehicle repairer that has recently signed up to provide smash repair works under a standard agreement with an insurer called OAP. HP Smash Repairs and Mechanical is acutely aware that the standard agreement is drafted heavily in favour of OAP, but historically hasn't had any issues with getting paid. The standard agreement requires HP Smash Repairs and Mechanical to rectify any jobs that OAP considers are defective, but again, HP Smash Repairs and Mechanical has only been called out for rectification works a couple of times and is always happy to stand behind its work.

One day, HP Smash Repairs and Mechanical receive a call from OAP requesting rectification on a repair job completed by HP Smash Repairs and Mechanical. The insured, Zoe, is claiming that the repairs to her 1994 Volvo were defective, as the engine is backfiring and making strange noises when in operation. OAP direct HP Smash Repairs and Mechanical to take in Zoe's car and replace the engine at HP Smash Repairs and Mechanical's

cost, as required under the standard agreement.

HP Smash Repairs and Mechanical disputes that their repair work was involved in the repairs to Zoe's engine, as the engine issue was due to the age of the car. At the time of repair, HP Smash Repairs and Mechanical informed Zoe that she may be required to replace her engine at some point given its age and signs of wear. Zoe had understood and declined to proceed with any repairs related to the aged engine. HP Smash Repairs and Mechanical did not get any of their advice to Zoe in writing, but flatly refuse to OAP to cover the cost of the rectification job.

A few weeks later, HP Smash Repairs and Mechanical receive payment for their latest monthly invoice, save for a reduction of \$850 with the description 'rectification work completed by alternative provider'. HP Smash Repairs and Mechanical call OAP and are furious to hear that OAP has engaged another repairer to undertake the works to Zoe's Volvo and has charged this back to HP Smash Repairs and Mechanical by setting it off against HP Smash Repairs and Mechanical's invoice.

HP Smash Repairs and Mechanical look back through the standard services agreement and can see that indeed, OAP has the right to set off amounts that they believe are owing to them by HP Smash Repairs and Mechanical against amounts owing to HP Smash Repairs and Mechanical, and that there is no dispute resolution process relating to rectification requests or in the standard agreement generally.

In these circumstances, the set-off clause is likely to be unfair. This is because it creates a significant imbalance in the rights of HP Smash Repairs and Mechanical and OAP (giving OAP the

right to determine amounts owing to it and set off those amounts without any corresponding right or benefit to HP Smash Repairs and Mechanical, e.g. a right to dispute requests or other matters under the agreement). Although a set-off clause may not be unfair in cases where the amounts are undisputed or proven, the broadness of this set off clause and the one-sided nature of the agreement, means it is unlikely that OAP will be able to show that this clause is reasonably necessary to protect their legitimate business interests.

## Scenario 5 – Unilateral variation clause ss23 and 25(g)

Steve is the owner of BodyWorx, a small business body repairer in Adelaide. Steve requires a range of equipment and products to run his business, including auto paint products. While Steve usually purchases his auto paint from a range of different suppliers, he is looking to develop a more ongoing arrangement with a reputable supplier, so that he can use the supplier's name and the brand name of the paint products in his advertising to attract clients. After doing some research, Steve lands on DaVinci's, a leading supplier of 'Dali' brand auto paints, which are universally recognised as being the best auto paints in the business. DaVinci's tell Steve that they can offer a competitive unit price if BodyWorx signs up for a three-year agreement with minimum volume requirements based on Steve's forecasted needs. Steve is pleased with the commercial deal, and signs on the dotted line without reading through the terms and conditions set out in DaVinci's standard supply agreement.

12 months later, and BodyWorx is doing better than ever as a result of the new relationship with DaVinci's. The supply arrangement has been smooth sailing and mutually beneficial. That is until one day, when Steve opens up the latest order from DaVinci's to see tins of 'Monet' brand paints, instead of the usual Dali brand paints. Steve instinctively turns up his nose at the Monet brand paints, which are known in the industry as being inferior quality and especially prone to chipping. Steve is surprised that a supplier like DaVinci's would stock the Monet brand paints but shrugs it off and calls up DaVinci's to report the issue, which he assumes is a shipping mistake.

Unfortunately, Steve is advised that DaVinci's is no longer stocking Dali brand paints, and as of last week, all Dali paint orders will be substituted with Monet brand paints. Steve protests, noting the horrible reputation Monet paints have within the industry, but is simply directed to the agreement, which allows DaVinci's to substitute the ordered paint for any other brand of paint at any time during the agreement at their discretion and without notice. Steve starts to sweat as he realises that he is locked in for a further two years, with minimum volume requirements, to purchase these second-rate paints. While BodyWorx is able to terminate for DaVinci's breach, there are no other termination rights available to BodyWorx (e.g. in response to any variation of the agreement terms or for convenience).

In these circumstances, the clause allowing DaVinci's to substitute the paints is likely to be an unfair contract term, as it allows DaVinci's to vary the characteristics of the paint to be supplied under the agreement, without giving BodyWorx any corresponding right or benefit in return (e.g. the right to receive notice of the substitution and to terminate the agreement if it is dissatisfied with the variation). While BodyWorx will still get the quantity of paint it orders, it will likely suffer reputational detriment as a result of selling low quality paint, leading to a loss of business and financial detriment. BodyWorx will also have to remove the brand name of the paint from its advertising, which was being used as a selling point, inevitably leading to a loss of business and further financial detriment.

# Automotive dismantler and recyclers





# Examples of unfair contract terms

Automotive Dismantler and Recyclers (VACC/TACC), Auto Dismantlers Division (MTA/NSW), Parts and Accessories Division (MTA/NSW), Automotive Parts Recyclers Division (MTAQ), Auto Parts Recyclers Association WA (MTA/WA) and Automotive Dismantlers (MTA/SA).

The following examples have been written to relate to specific industry divisions, however may also apply to other industries within the automotive sector.

## Scenario 6 – Unilateral price variation clause ss 23 and 25(f) ACL

King Wrecker is a small business that specialises in dismantling vintage cars and selling the salvaged parts to its customer base, which is mainly composed of vintage car collectors. The owner of King Wrecker, Kevin, has operated the business out of his facility in Melbourne for years. However, the ongoing success of the business has meant that he is very close to running out of room, with vintage cars parked all over his facility and up and down the street. He decides that it is time to find a storage location that he can use to store all the vintage cars he acquires before it's time to bring them back to his facility to dismantle them. Kevin finds a storage provider called StoreMore and signs up to the StoreMore standard storage agreement for a two-year term, after a quick read through the important terms like price and inclusions. While Kevin was slightly put off by the significant monthly storage fee, he was ultimately swayed by StoreMore's incredible customer service and meticulous security measures, which helped him to justify a fee slightly out of budget.

A few months have passed since, and things are going well for King Wrecker. Kevin has much more space to work, and peace of mind that his valuable cars are safely stored away. However, things change when Kevin reads through the King Wrecker's bank account statement and sees that StoreMore

have charged a monthly storage fee that is two per cent higher than what was agreed and charged in previous months. Disgruntled, he calls up StoreMore and is advised that the business has recently increased their standard storage fees, as is the case on 1 July of each year. Kevin is disappointed, and says that unfortunately he cannot possibly continue at these rates, as the existing fee was already stretching the budget. To Kevin's horror, he is advised by StoreMore that unfortunately King Wrecker are already locked in for a two-year term, and the only termination right available for King Wrecker is in response to StoreMore's breach of contract. The StoreMore representative makes it clear that a breach has not occurred in this case, pointing to a clause in the agreement which allows StoreMore to update their standard storage fees from time to time, which updates will be applied to all future invoices from the date they take effect.

In these circumstances, the unilateral price increase clause is likely to be an unfair contract term. This is because it allows StoreMore to unilaterally adjust the storage fee payable under the contract, but does not afford King Wrecker any corresponding right or benefit in return, such as the right to consent to any price adjustment or terminate the contract if it is unsatisfied with the price adjustment.

## Scenario 7 – Auto-renewal clause and one-sided termination clause ss 23 and 25(b) ACL

Mandy runs a small business dismantling motor vehicles and cleaning up the salvageable parts for resale. She is big on protecting the environment and sustainability. Big Bins is a waste management company that provides waste management solutions for motor vehicles and parts. Mandy engages Big Bins under a waste management agreement to collect and dispose of all non-salvageable parts of the motor vehicles she works on. While Mandy was hoping to negotiate some of the terms and conditions of the Big Bins standard waste management agreement, she was advised by Big Bins that no alterations would be accepted, and that the waste management agreement was essentially a 'take it or leave it' contract. Mandy is slightly put out by this, but is attracted by Big Bins' competitive pricing and promises of 'eco-friendly' recycling, so signs the agreement anyway. Mandy skims the

agreement and doesn't see anything untoward but fails to notice the text hidden in small font at the bottom of the agreement which says "This agreement commences on the date it is signed for a period of one year, and will continue to renew for further one-year periods unless the customer gives at least 30 days' notice in writing to Big Bins before the start of the next renewal period. It is the customer's responsibility to monitor their renewal periods and give the required notice". Almost three years down the line, Mandy sits down to watch the evening news and is shocked when she sees a report that Big Bins have been found to have been dumping all the waste they collect into landfill, despite their 'eco-friendly' claims. Mandy immediately emails Big Bins to advise that she cannot continue to support Big Bins and will be immediately terminating the agreement. When Big Bins gets back to Mandy,

they point her to the auto-renewal clause in the agreement. Big Bins advises that Mandy cannot legally terminate the agreement, as the next renewal period is in eight days and the required notice was not received. Additionally, while Big Bins have a range of termination options, there are no other termination rights for Mandy under the Agreement. Mandy calls to complain and is told by Big Bins that there is nothing they can do. They remind her that it was her responsibility to keep on top of the renewal dates and unfortunately their hands are tied.

In these circumstances, the automatic renewal clause is likely to be an unfair contract term. The factors which support this are the length of the renewal term (same as the initial term), the fact that Big Bins is not required to notify Mandy about upcoming

renewals, and the lack of transparency of the auto-renewal clause in the agreement (given that it is in small, hard to read font). Big Bins may not be able to show that the clause was reasonably necessary to protect its legitimate business interests, given that it is a large corporate group with a contract management department, and therefore is likely in a better position to stay up to date with when its contracts are up for renewal, compared with its small business customers who may not have such effective systems in place. Additionally, the termination clause is likely to be an unfair contract term. This is because it allows Big Bins to terminate in a range of scenarios but does not afford Mandy any similar right or corresponding benefit.



# Franchised and used automotive dealers



# Examples of unfair contract terms

Used Car Traders Division (VACC/TACC), Victorian Automobile Dealers Association (VACC/TACC), Australian Automobile Dealers Association Metropolitan Division (MTA/NSW), Australian Automobile Dealers Association North and North West Division (MTA/NSW), Australian Automobile Dealers Association South and South West Division (MTA/NSW), Licensed Used Car Dealers Division (MTA/NSW), Australian Automotive Dealer Association Qld (MTAQ), Automotive Remarketing Division (MTAQ), Australian Automobile Dealers Association (MTA/WA), Four Wheel Drive Industry Association (MTA/WA), Imported Vehicle Division (MTA/WA), Licensed Motor Vehicle Dealers (MTA/WA), Automotive Dealers Association (MTA/SA) and Licensed Vehicle Dealers (MTA/SA).

The following examples have been written to relate to specific industry divisions, however may also apply to other industries within the automotive sector.

## Scenario 8 – Auto-renewal clause s 23 ACL

Rick owns Rick’s Auto Group, a small business motor vehicle dealer. Business is booming, and Rick identifies the need to get some IT solutions in place so that he can spend less time on the books and more time developing the business. After typing “auto dealer accounting software” into Google, Rick is pleased to find Ezi Software Solutions, an accounting software provider that claims to specialise in the automotive industry. Ezi Software Solutions tells Rick that for a monthly subscription fee they can provide an IT platform for Rick’s Auto Group that covers accounting, human resources and other web-based services.

Rick enters into ‘negotiations’ with Ezi Software Solutions based on their standard software terms and conditions. While Rick is overwhelmed by the length of the agreement and the technical IT jargon used, he is pleased to see that he is able to select some of the legal terms from a few different options presented by Ezi Software Solutions, making him feel involved in the negotiation process. The agreement will run for an initial term of three years, after which time it will automatically renew for successive one-year periods unless Rick gives notice within the 14-day period before the start of a new renewal period. The agreement does not require Ezi Software Solutions to provide any advance notice of an upcoming renewal period.

The next few years are challenging, with the parties working through what Ezi Software Solutions describes as ‘teething issues’ with the software. Rick begins to strongly suspect that Ezi Software Solutions does not have any experience in the motor vehicle industry like he was led to believe. The final straw comes after Rick loses his biggest client over ongoing invoicing discrepancies caused by the software. Frustrated, and aware that the initial three years are nearly up, Rick emails Ezi Software

Solutions to advise that he will not be renewing the agreement, and promptly checks himself into a three-week yoga retreat to clear his head. Upon returning to work after the yoga retreat, Rick catches up on his emails. He sees a response from Ezi Software Solutions on the same day that he sent his email to them. Ezi Software Solutions advise that as Rick sent his email 16 days before the start of the new renewal period, it is invalid, and that in order to give effective notice he would need to do so within the agreed 14-day window. Rick grows concerned as he realises that the 14-day window in question has now passed, meaning he is locked in for another year. Ezi Software Solutions confirm this in a follow-up email, and also point out that Rick has no right to terminate for convenience under the agreement. Rick consults the contract and can see this is the case, and that in contrast, Ezi Software Solutions have a number of termination rights at their disposal.

In these circumstances, the automatic renewal clause is likely to be an unfair contract term. The factors which support this are the narrow window in which Rick must give notice to terminate, comparative to the overall length of the initial term and renewal term, the one-sided termination rights, and potentially a lack of transparency of the term given the lengthy and technical nature of the agreement. It is unlikely that Ezi Software Solutions will be able to show that such a constrained notice period was reasonably necessary to protect its legitimate business interests. Additionally, while Rick has been given the opportunity to ‘negotiate’ some of the terms of the agreement by selecting from a few options here and there, which Ezi Software Solutions might point to in order to show that the agreement was not ‘standard form’, this is unlikely to be considered meaningful negotiation for the purposes of the unfair contract term regime.

## Scenario 9 – Unilateral price variation clause ss 23 and 25(f) ACL

Car Town is one of the largest used car dealers operating throughout NSW. When customers purchase a used car, they agree to the Car Town standard terms and conditions which are attached to the sale contract.

Tim has recently saved up enough money to buy his first car and sets off to Car Town hoping to find a good deal. Tim is flabbergasted when he sees his dream car – a used Ground Rover – in mint condition and within his price range (okay, maybe just a bit over...). After going through the details with Bob, a Car Town salesperson, Tim pays the deposit, signs the sale contract, and heads to the pub to celebrate his new purchase. Car Town tells Tim that he can pick up the car and pay the final instalment in a couple of weeks once all the paperwork has been sorted.

When Tim arrives to pick up his Ground Rover a couple weeks later, he is confused to see that the remaining balance payable has increased by \$500. Bob tells Tim that this is a two per cent administration surcharge charged by Car Town, and points Tim to the clause in the standard terms and conditions which states that: “Car Town may increase the price

payable for the vehicle between the date of purchase and the date of delivery for any reason, including to pass through any costs incurred by Car Town and to apply any applicable surcharges that Car Town may determine from time to time”. Tim is crushed and starts considering whether he even wants to proceed with the sale. Sensing some hesitation, Bob reminds Tim that the cooling-off period has now ended and there is no way for Tim to get out of buying the car.

This broad price increase clause is likely to be an unfair contract term. This is because it gives Car Town the one-sided right to increase the agreed contract price, without giving the customer any corresponding right or benefit (e.g. the right to avoid the sale). While in some cases a price increase can be drafted in a way that is fair (e.g. when a business needs to pass through specific pre-defined costs it may incur between the time of contract formation and delivery), the price increase clause here is incredibly broad and essentially locks the customer in to a new price at Car Town’s discretion without any way to exit the arrangement.

## Scenario 10 – Unilateral assignment clause ss 23 and 25(j) ACL

Happy Motors is a small business motor vehicle dealer in Hobart that has been engaged by one of Tasmania’s leading fleet management companies, Fleetly, to supply new vehicles to Fleetly’s customers under the Fleetly standard supplier agreement. Happy Motors has recently terminated its arrangement with Tasmania’s other leading fleet management company, FleetMax, due to a breakdown in the relationship caused by FleetMax’s persistent failure to pay Happy Motors on time. As things ended bitterly between Happy Motors and FleetMax, Happy Motors is looking forward to a fresh start with Fleetly.

After many months of success and a developing professional relationship between Happy Motors and Fleetly, the owner of Happy Motors, George, is shocked to receive notice from Fleetly that Fleetly has been bought out by FleetMax and, accordingly, Fleetly will be exercising its right under the standard supplier agreement to assign the agreement to FleetMax upon completion of the sale. George looks through the standard supplier agreement and can see that Fleetly does indeed have a right to assign the agreement without Happy Motors’ consent. Additionally, Happy Motors is locked in

for a three-year term and can only terminate for breach during this time. George begins to panic as he realises that he is now locked into a contract with a previous supplier that he left on bad terms and who potentially has the ability to damage George’s business by reducing the amount of orders placed with Happy Motors. George is also concerned that FleetMax will revert to a failure to pay Happy Motors on time, which was a major cause for the breakdown in their relationship.

In these circumstances, the unilateral assignment right is likely to be an unfair contract term. The factors that support this are the one-sided ability for one party (Fleetly) to assign the agreement to the detriment of another party (Happy Motors) without that other party’s consent. While it may not be considered unfair for Fleetly to assign the agreement, Happy Motors has no corresponding right to withhold consent or to terminate the agreement in response to an assignment. Happy Motors may suffer detriment by finding itself in an agreement with a former (disgruntled) supplier, and it is unlikely that Fleetly will be able to show that it requires such a broad right of assignment to protect its legitimate interests.



# Towing (trade towing)





# Examples of unfair contract terms

Towing Operators Division (VACC/TACC), Towing Services (MTA/SA), Tow-Truck Operators Division (MTA/NSW).

The following examples have been written to relate to specific industry divisions, however may also apply to other industries within the automotive sector.

## Scenario 11 – Auto-renewal clause s23 ACL

Cindy is the owner of Cindy's Speedy Tows, which specialises in trade towing in the Greater Western Sydney region. A key element in Cindy's towing business is the utilisation of real-time software, which requires a stable internet connection to function. Cindy recently engaged a new internet provider called iWeb. Cindy was drawn to iWeb as they had a special offer for fast 5G internet speeds that were not subject to off-peak and on-peak times.

After a year of lightning speed internet, Cindy realised that iWeb had been slowing down during the on-peak times. Cindy queried this with an iWeb representative, who stated that the special offer was only for 12 months from signing up and would be subject to off-peak and on-peak download speed restrictions after the initial 12 months. Cindy was very frustrated that this was not communicated to her when signing up and requested to end the agreement to find a new internet provider. However, the iWeb representative rejected this request as

Cindy was required to give three months' notice to terminate the agreement before the next renewal period and the required notice was not received. As Cindy did not give notice to terminate in that period the agreement would continue for a further 12 months. Additionally, there are no other termination rights for Cindy under the Agreement. The iWeb representative apologises to Cindy but reminds her that it was her responsibility to keep on top of the renewal dates and there is nothing they can do.

In these circumstances, the automatic renewal clause is likely to be an unfair contract term. The factors which support this are the one-sided termination rights, and potentially a lack of transparency of the term given the provisions on internet speed were not clear and the fact that iWeb were not required to remind Cindy of the renewal periods. It is unlikely that iWeb will be able to show that this clause was reasonably necessary to protect its legitimate business interests.

## Scenario 12 – Auto-renewal clause s23 ACL

Reliable Insurance sells a motor vehicle insurance product to consumers which covers loss or damage to a vehicle sustained during a breakdown. This includes incidental costs like roadside assistance and towing. Reliable Insurance has a panel of towing operators in various locations that it engages to provide required towing services. Tow To The Rescue (or "3TR" for short) is an up-and-coming small business towing operator trying to establish a presence in the market.

3TR initiates discussions with the Reliable Insurance team, and after weeks of back-and-forth correspondence, Reliable Insurance decides to appoint 3TR to its panel for the Melbourne Metropolitan area. Reliable Insurance presents 3TR with its standard towing operator agreement, and encourages 3TR to sign it as soon as possible, noting the influx of towing work that 3TR could take on once the agreement is signed. 3TR have a brief read over the agreement and are satisfied with the gist of the key terms, so eagerly sign the agreement without giving it too much thought.

After several busy months, 3TR begins to notice some changes to the relationship with Reliable Insurance. While it was appointed for the Melbourne Metropolitan area, 3TR seems to only be getting towing jobs in the outer suburbs, many of which

are inconveniently located some 25 kilometres from any designated holding yard. Reliable Insurance has also in some instances only been paying a portion of the amounts invoiced to it by 3TR without explanation. After raising its concerns to Reliable Insurance, 3TR is advised that after entering into the agreement, Reliable Insurance made the decision to vary 3TR's designated service area, and to impose a set of performance criteria which, if not met, allow Reliable Insurance to deduct certain amounts from the fees owed to 3TR. 3TR is shocked by this news, and refer back to the agreement to see whether Reliable Insurance has committed a breach. Unfortunately, 3TR quickly identifies a clause which allows Reliable Insurance to vary any term of the agreement without notifying 3TR, with no similar right given to 3TR in return.

In these circumstances, the clause allowing Reliable Insurance to unilaterally vary the contract is likely to be an unfair contract term. The factors which support this are the broad application of the variation right (i.e. not limited to certain trigger events), the fact that 3TR has no mutual or similar corresponding right, and the lack of notice requirement (which may show that the term is not 'transparent'). It is unlikely that Reliable Insurance will be able to show that the clause is reasonably necessary to protect its legitimate

business interests. While a variation clause might be reasonably necessary to protect the legitimate interests of a business in some situations (e.g. needing the right to vary terms to reflect a change in

law), there is probably no sufficient basis to show that such a broad unilateral variation right (exercisable without notice) is reasonably necessary here.

### Scenario 13 – One-sided termination clause ss 23, 25(b) and 25(c) ACL

Adam owns Trusty Towing, a small towing business located in Darwin. Adam's childhood friend, Petey, has recently taken up a job at the local council and reveals to Adam one evening at their weekly pub trivia that the local council are not too happy with their current towing operator. Adam uses this intel and his relationship with Petey to set up a meeting with the local council, where he successfully pitches Trusty Towing as the council's new towing operator.

When Adam receives a copy of the council's standard contractor agreement, he is pleased to see that the council are proposing a five-year term, and quickly signs and returns the contract to lock in the deal. The job volume that the council is forecasting is so high that Adam makes the difficult decision to part ways with a few of his other loyal customers.

The next few months are very busy for Trusty Towing, with towing jobs from the local council coming in left, right and centre. Adam is finally getting into a rhythm when, all of a sudden, he receives a termination notice from the local council, effective immediately. The notice states that the council are exercising their right to terminate for breach of the agreement, given Trusty Towing's failure to comply with clause 12.4.2(3)(ii)(A) of the council's contractor guidelines requiring contractors

to wear a council-issued name tag at all times.

Adam is bewildered, and takes a good read through the agreement to see what is going on. He can see that the council do indeed have a right to immediately terminate for breach of any term of the agreement, which incorporates numerous council policies including the contractor guidelines. In contrast, there are no termination rights for Trusty Towing, and no right for Trusty Towing to be paid any amounts outstanding under the agreement where the agreement is terminated.

In these circumstances, the termination clause is likely to be an unfair contract term. This is because the council has the one-sided right to terminate for breach of agreement, which is exercisable for any breach of Trusty Towing's numerous obligations under the agreement and contractor guidelines (i.e., not just for 'material' or significant breaches). The termination right is also exercisable immediately and does not expressly permit Trusty Towing to be paid for amounts incurred up to the date of termination. It is unlikely that the council will be able to show that such a broad and onerous termination right is 'reasonably necessary' to protect its 'legitimate interests'.



# Rental vehicles



# Examples of unfair contract terms

Hire Car and Chauffeur Driven Limousines Division (MTA/NSW), Rental Vehicle Division (MTA/NSW), Rental Vehicle Industry Division (MTAQ) and Rental Vehicle Industry Association (MTA/WA).

The following examples have been written to relate to specific industry divisions, however may also apply to other industries within the automotive sector.

## Scenario 14 – Auto-renewal clause s 23 ACL

Quartz is a small rental car business located in Adelaide. Bill, the owner of Quartz, has always been sceptical of new technology, and has built his business on the basis of a ‘paper trail’ booking system. However, as Bill’s daughter Brenda grows into adulthood and starts to take a more active role in the family business, Brenda identifies an opportunity to improve Quartz’s financial performance and overall efficiency by implementing an automated booking system for rental cars.

Brenda looks into potential software providers and finds a business called Honey, which specialises in implementing user-friendly booking systems for businesses. Impressed by Honey’s offering, Brenda quickly subscribes for the one-year ‘premium’ Honey package, ticking the box to agree to the Honey standard terms in the process.

Almost a year later, Quartz have experienced a significant increase in customer satisfaction and profit since implementing the Honey software. However, all that time has given Brenda the chance to do some further market research, and she now has her sights set on an alternative software provider that can offer a far better solution for Quartz customers at a cheaper price. Aware that Quartz’s one-year arrangement with Honey is coming to an end, Brenda signs up with the new provider so that they can begin transitioning Quartz’s system before Honey’s services stop.

To finalise things with Honey, she logs on to her

Honey account and tries to click the ‘cancel subscription’ box, but it is greyed out. She calls Honey and is advised that, per the Honey standard terms, the subscription has already rolled over for another year and there is no option to cancel. The Honey representative tells Brenda that if Quartz had wanted to cancel, they would have had to do so at least 90 days before the end of the one-year term. Brenda looks through the 40-page Honey standard terms and finally locates the auto-renewal clause buried in the legal jargon. She can’t believe that Honey would be able to include this clause, without even so much as a requirement to notify customers about upcoming renewal periods. She doesn’t remember seeing one mention of the auto-renewal clause when she signed up on the website.

In these circumstances, the automatic renewal clause is likely to be an unfair contract term. The factors which support this are the lack of the transparency of the clause (given the length of the agreement and failure of Honey to call out the term on its website), the fact that Honey has not been required to notify Quartz about upcoming renewals, and the length of the notice period required (being a quarter of the renewal term). It is unlikely that Honey will be able to show that this term is reasonably necessary to protect its legitimate interests, given that it clearly has an automated process for communicating with customers and thus the ability to issue reminders for renewal periods.

## Scenario 15 – Unilateral variation clause ss 23 and 25(d) ACL

Lola owns a small business called Modern Carriage, which stocks a dozen limousines for hire. Lola’s limos are usually fully booked over the weekends, meaning cleaning and maintenance of the limos generally takes place during the week, ahead of the following weekend. Demand for the limos is highest in the spring and summer months due to the increase in weddings. With spring only a few weeks away, Lola recalls the struggle of staying on top of limo maintenance and cleaning during the previous wedding season, and decides to engage an external car cleaning business called Royal Wash. Lola prides herself on having a very high standard of cleanliness for her limos, which is part of the reason why she has continued to personally clean her own limos for many years. Prior to engaging Royal

Wash, Lola made sure to inform Royal Wash about her expectations and specific requirements when cleaning the limos, including the scent of cleaning products to be used. Royal Wash was quick to assure Lola that under their standard terms and conditions, their policy is to use the cleaning products and scents requested by the customer, and that customers may request to inspect a clean or rectification of a clean if they are for any reason unsatisfied with Royal Wash’s services. Lola has a quick flick through the standard terms and conditions and quickly spots the clauses that Royal Wash referred to. Satisfied with her due diligence, Lola signs up to a weekly cleaning service and signs the Royal Wash standard terms and conditions on behalf of Modern Carriage. The wedding season is coming to the halfway point

when Lola begins receiving booking cancellations and negative Google reviews on the Modern Carriage page, particularly regarding the smell and cleanliness of her limos. Lola is distraught that this is becoming a serious problem for her business and contacts Royal Wash, requesting that she inspect the cleaning process in-person and investigate what the issue may be. Royal Wash declines Lola's request and tell her that she should trust that they know what they are doing. Lola is annoyed that Royal Wash would so blatantly reject a request that is permitted under Modern Carriage's agreement with Royal Wash, and calls a Royal Wash representative to demand answers. Royal Wash informs Lola that the standard terms and conditions she signed up to were recently updated, and that under the new terms and conditions, there is no right for the customer to request the use of certain cleaning products and scents, or to request an inspection or rectification of a clean. Royal Wash points out the clause in the agreement with Modern Carriage that allows Royal Wash to update the terms

and conditions applying to the agreement from time to time without notice. Furious, Lola asks Royal Wash to immediately terminate the agreement, but is told that there is no right to terminate for the first 12 months of the term except for Royal Wash's breach of contract. Lola would have to see out the next nine months before she could terminate for convenience. In these circumstances, the variation clause is likely to be an unfair contract term. The factors which support this are the broad application of the variation right (i.e. not limited to certain trigger events), the fact that Lola has no mutual right of variation or any right to terminate in response to a variation, and the lack of notice requirement (which may show that the term is not 'transparent'). While a variation clause might be reasonably necessary to protect the legitimate interests of a business in some situations (e.g. needing the right to vary terms to reflect a change in law), it is unlikely that Royal Wash will be able to show that such a broad unilateral variation right (exercisable without notice) is reasonably necessary to protect its legitimate business interests.

### Scenario 16 – One-sided termination clause ss 23 and 25(b) ACL

Three Seasons is a boutique luxury hotel in Perth. Recently, Three Seasons has noticed that there is an increasing number of hotel guests requesting to rent a car in order to discover the many beautiful beaches Western Australia has on offer. The hotel manager of Three Seasons, Gloria, is tasked with engaging a suitable car rental agency that can provide rental vehicles in a timely manner. After some researching, Gloria lands on Ausmotors, a rental car provider specialising in European car rentals, which Gloria believes will align with the luxury image of Three Seasons. Three Seasons enters into a standard agreement with Ausmotors, under which Ausmotors will make five LMW cars in differing sizes for hire by guests of Three Seasons. While the cars will be kept at Three Seasons, Ausmotors is responsible for cleaning the LMWs each time a guest uses the car, and for performing a general maintenance clean each week to ensure the cars are suitable for hire. After a few months, Gloria notices that the LMWs are looking worse for wear. She does some investigating and realises that Ausmotors has only been doing a quick rinse off of the car's exterior each week and only some minimal interior cleaning each time a guest returns the keys. Gloria is fearful that this might impact the Three Seasons' luxury reputation and contacts Ausmotors to request that they perform proper cleans moving

forward. To her dismay, Ausmotors refuse to change their cleaning procedures and reference the agreement which does not require them to meet any particular threshold of cleanliness.

A frustrated Gloria decides to email the owner of Ausmotors threatening to terminate the agreement. The owner of Ausmotors responds to Gloria's email immediately stating that she has no power to terminate the agreement without cause, and that cleanliness to the car does not constitute a breach of the agreement. Gloria looks through the agreement and can see that while both parties have a mutual right to terminate for breach, the vast majority of the obligations are placed on Three Seasons, with virtually none placed on Ausmotors. Additionally, while Three Seasons only have a single termination right for breach, Ausmotors can terminate in a range of scenarios, including immediately for convenience at any time. In these circumstances, the one-sided termination clause is likely to be an unfair contract term. While Three Seasons have a right to terminate for breach, the lack of obligations placed on Ausmotors under the agreement mean that the termination right is effectively useless. In contrast, Ausmotors can terminate in a wide range of situations, including for convenience.



# Franchised and used farm and industrial machinery





# Examples of unfair contract terms

Farm and Industrial Machinery Dealers Association of Victoria (VACC/TACC), Farm Machinery Dealers Association Division (MTA/NSW), Farm Machinery Dealers Association (MTA/WA), Farm and Industrial Machinery Dealers Association (MTA/SA) and Qld Farm and Industrial Machinery Dealers Division (MTAQ).

The following examples have been written to relate to specific industry divisions, however may also apply to other industries within the automotive sector.

## Scenario 17 – Auto-renewal clause s 23 ACL

Elliot and his wife have recently started a new landscaping business called Elite Landscapers, which specialises in tending to the landscaping and grounds care of beachside golf courses. Elite Landscapers was initially established from Elliot's close affiliation with the Seaside Golf Club and has grown to include another three beachside golf courses as part of its client base. With the increased amount of landscaping work involved, Elliot decides it's time to upgrade his commercial mowers, and purchases a fleet of fairway mowers and riding greens mowers. Stoked with his new equipment, Elliot sets out to find someone he can hire for routine servicing of the mowers to ensure they maintain optimal mowing performance.

After discussions with a number of providers, Elliot settles on Peter Duggen, a leading farm and industrial machinery supplier who can provide ongoing servicing for a fair price.

Elliot is sent through a quote to sign with a long and boring-looking set of standard terms and conditions attached to the back, which naturally, he ignores. However, he reads and accepts the quote, which is stated as applying for the one-year term.

After almost a year with Peter Duggen, Elliot decides he isn't totally happy with the service he's receiving, and is referred to a new provider, Tim's Mowing, that can do a better deal with more inclusions. He enters into an agreement with Tim's Mowing to take effect a few days after the date that the agreement with Peter Duggen will come to

an end and sends Peter Duggen an email to see if there are any outstanding invoices he needs to pay before the agreement expires the following week.

To Elliot's surprise, he receives a response from Peter Duggen to advise that the agreement is not due to expire for another year now, given the auto-renewal clause in the standard terms and conditions that has now taken effect. Elliot calls Peter Duggen and is advised that, as they did not receive notice from Elite Landscaping to cancel at least 30 days before the end of the one-year term, the contract has rolled over for a new one-year term. When asked why he wasn't made aware of this, Peter Duggen advise that they are not required under their standard terms and conditions to give notice to customers of upcoming renewal dates. Elliot starts to sweat as he realises, he is now locked in with not one but two providers for the next year.

In these circumstances, the automatic renewal clause is likely to be an unfair contract term. The factors which support this are the length of the renewal term (being the same as the initial term) and the fact that Peter Duggen was not required to notify Elite Landscaping about any upcoming renewals. It is unlikely that Peter Duggen will be able to show that the auto-renewal clause is reasonably necessary to protect its legitimate interests, given that it is the larger entity with a number of customers under auto-renewal contracts, and is therefore in a better position to track upcoming renewal dates than its small business customers.

## Scenario 18 – Unilateral variation clause ss 23 and 25(g) ACL

Prestige Farming are a small rural business specialising in selling and repairing farming equipment. Prestige Farming's contract with its overseas tractor engine supplier is coming to an end, and the business is keen to engage a supplier that is local to the area and supplies Australian-made parts. They identify Helpful Harvesters, a nearby supplier that sells 'OzMade' brand tractor engines and parts. After reaching out to Helpful Harvesters, Prestige Farming are provided with a competitive offer and a copy of Helpful Harvesters' standard terms and conditions to sign. Pleased with the commercial deal, Prestige Farming faithfully signs and returns the terms and conditions to secure the offer.

After several years working with Helpful Harvesters, Prestige Farming starts to notice visual differences in the tractor engines and parts they are receiving from Helpful Harvesters, as well as some issues with performance and efficiency.

After conducting some research, Prestige Farming is shocked to discover that the engines and parts they are receiving are made overseas and are much lower cost than the engines and parts manufactured by OzMade.

Prestige Farming contact Helpful Harvesters to demand answers, and are informed that under the terms and conditions, Helpful Harvesters can vary any aspect of the goods (including brand,

make or model) supplied under the agreement without notice to Prestige Farming. Prestige Farming looks through the agreement and finally locates the term in small font under a description of the agreed OzMade goods to be supplied.

In these circumstances, this unilateral variation clause is likely to be an unfair contract term. This is because of the broad right Helpful Harvesters has to vary the nature of the goods being supplied under the agreement, the lack of corresponding rights available to Prestige Farming (e.g. a right to be notified or consent to the variation), and the

overall lack of transparency of the term. It is unlikely that Helpful Harvesters will be able to show that the term is reasonably necessary to protect their legitimate interests, given the broad application of the term and the other measures that could be taken to agree on changes to the goods (e.g., negotiating variations by agreement or entering into a new agreement). However, this clause may be considered not unfair where the substitution of the goods supplied are with goods that are of equivalent or superior quality because Prestige Farming would have not suffered detriment.



# Commercial vehicles



# Examples of unfair contract terms

Commercial Vehicle Industry Association (VACC/TACC), Commercial Vehicle Industry Association of NSW Division (MTA/NSW), Commercial Vehicle Industry Association (MTA/WA) and Commercial Vehicle Industry Association (MTA/SA).

The following examples have been written to relate to specific industry divisions, however may also apply to other industries within the automotive sector.

## Scenario 19 – Auto-renewal clause s 23 ACL

Fiona is a semi-retired truck driver in Melbourne who takes on jobs from time to time as an independent owner truck driver, mainly for pocket money to spend on her grandkids. Fiona receives a job request from one of her regulars, a supermarket chain called WaySafe. WaySafe want to engage Fiona for 30 hours a week for three months and are offering a nice package for doing so. Conscious that her grandson Billy has been eyeing off the new PS6 for his birthday, Fiona accepts the job. When Fiona gets a copy of the work order, she is surprised to see a huge set of terms and conditions at the back written in legal mumbo jumbo. She calls her contact at WaySafe to ask what the deal is, as she's used to seeing a two-page document. Her contact tells her that WaySafe have recently been acquired by a big corporate, TT Capital, who have rolled out a whole new set of contracts that the business has to use. He tells her not to worry as it's all standard, so she signs and returns the work order and starts to make arrangements for the three-month stint.

After almost three months, Fiona is tired of being on the road and is keen to finish up and spend more time with her family. She checks her phone and is surprised to see an email from WaySafe with next month's delivery roster attached. She emails back advising that there must have been a mistake, as she's finishing up in a week's time. A few hours

later, Fiona receives a stressed call from her contact telling her that the terms and conditions she signed up to actually contained a rollover clause, which TT Capital are now seeking to enforce due to a shortage in transport providers. He explains that while the initial term was only three months, the agreement has now rolled over for another three-month period because Fiona didn't give notice at least 30 days' before the end of the three-month period. Fiona scoffs at the suggestion but is told by her contact that given there are minimum hour requirements under the contract, her failure to see through the next term would be a breach of contract, which TT Capital would seek reimbursement for under their corporate group indemnity in the terms and conditions. There is no requirement for WaySafe to notify Fiona of any upcoming renewal and no other rights for Fiona to terminate the agreement.

In these circumstances, the auto-renewal clause is likely to be an unfair contract term. The factors which support this are the length of the renewal term (being the same as the initial term) and the fact that WaySafe is not required to give notice of the upcoming renewal. Also of relevance will be the fact that the auto-renewal clause essentially locks Fiona in for another term under which she must perform certain obligations or else face repercussions under a one-sided contractual indemnity.

## Scenario 20 – Unbalanced limitation of liability/indemnity clause s 23 ACL

Produce Plate is a small family-run business operating in Gawler, South Australia. Produce Plate prides itself on offering some of South Australia's finest fresh produce on a seasonal basis. However, as Produce Plate's clientele continues to grow, they seek to find new farmers to engage with for the purposes of widening their produce offering for all year-round enjoyment. Produce Plate enter into agreements with several fruit and vegetable growers in Far North Queensland to obtain exotic tropical fruits, such as dragon fruit and rambutan. Due to the remoteness of these farmers and the delicate nature of the produce, they suggest that Produce Plate seek the transport services of an external company to safely deliver the produce.

After conducting some internet research, Product Plate seek the transportation services of Heavy Hauling. Their website advertised that Heavy Hauling is a national heavy commercial vehicle operator that transports

large containers of refrigerated produce. Produce Plate was drawn to engage Heavy Hauling as they had recently begun expanding their transportation services to offer expedited delivery between Far North Queensland and South Australia. Produce Plate are not particularly familiar with transport services agreements and do not understand the liability provisions which contained the following wording, "Heavy Hauling excludes liability for all loss, liability, damage or claims, howsoever incurred under or in connection with this agreement." Heavy Hauling assure Produce Plate that the agreement is standard with all their produce seller clients and that it has never been an issue over their 50 years of experience. Produce Plate accept their reasoning and sign the agreement. After a very successful winter season, Produce Plate receive rave reviews from their clients about the quality of the tropical fruits. However, the freshness

quality takes a turn for the worse in the summer months as the delivery of tropical fruits are rotten and circled by fruit flies. As a result, the quality of the produce is unsellable and further fines have been issued against Produce Plate as a biosecurity threat. Upon investigation by Produce Plate, the cause of the poor-quality tropical fruit was due to a lack of sufficient refrigeration and safety when transporting the produce. Produce Plate decide to cancel all pending orders with Heavy Hauling and issue a claim against them for the damage suffered because of Heavy Hauling's lack of care in transportation.

However, in response to the claim notice, Heavy Hauling refer to the limitation of liability clause in the transport services agreement which explicitly states the exclusion of any liability howsoever incurred.

In these circumstances, the limitation of liability clause is likely to be an unfair contract term. The factors which support this are the significant imbalance in the parties' rights, the broadness of the clause, the lack of carve out for Heavy Hauling's own negligence and that the term would cause detriment to Produce Plate if it were to be applied.



# Franchised and new motorcycles and used motorcycle dealers





## Examples of unfair contract terms

Motorcycle Industry Division (VACC/TACC), Motorcycle Industry Association (MTA/SA), Motor Cycle Industry Association of NSW Division (MTA/NSW), Queensland Motorcycle Industry Division (MTAQ) and Motorcycle Industry Association (MTA/WA).

The following examples have been written to relate to specific industry divisions, however may also apply to other industries within the automotive sector.

### Scenario 21 – Unilateral variation clause ss 23 and 25(g) ACL

MotorHead are a small business luxury motorcycle dealer in Melbourne. The owner of MotorHead, Penny, is always looking for ways to add an extra ‘pop’ of luxury or exclusivity to MotorHead to ensure that her business stands out from the crowd. After a recent visit to her competitor, Penny notices (under her fake glasses and moustache) all of the beautiful furniture placed by her competitor in their showroom, and is inspired to upgrade MotorHead’s fitout with new lounges, tables, and other furnishing accents. She walks into La Mode, one of Melbourne’s high-end furniture stores, and places an order worth over \$10,000. The order form signed by Penny on behalf of MotorHead is subject to the La Mode standard terms of supply, which Penny doesn’t bother to read.

Four weeks later, Penny excitedly stands to the side while La Mode’s delivery drivers unload all her ordered furniture into the MotorHead showroom. Her excitement fades, however, when she realises that some of the items being delivered are not what she ordered. She tries to raise her

concerns with the delivery drivers, but is told that they can’t help her, and she will need to speak to La Mode directly. Penny contacts La Mode to sort out the issue, but is told that La Mode are entitled, under their standard terms of supply, to substitute any ordered items with other similar items without notice to the customer. Penny is outraged, and requests that La Mode immediately come to collect the goods and provide her with a full refund. Penny says that had she known about this term, she would have never entered into the agreement with La Mode. La Mode refuse, noting that there is no contractual right for Penny to avoid the sale now.

In these circumstances, the clause allowing La Mode to vary the goods ordered under the contract is likely to be an unfair contract term. This is because it gives La Mode the unilateral right to vary the terms of the agreement, without giving MotorHead any corresponding right or benefit, such as the right to consent to any such variation or to avoid the contract if it is unsatisfied with the variation.

### Scenario 22 – One-sided limitation of liability clause s 23 ACL

Marley owns Marley’s Motorcycles, a sole trader business that purchases used motorcycles that are repaired and resold. The love of motorcycles has been a family passion since she could remember and makes Marley a self-proclaimed expert on giving a second life to battered motorcycles. As part of her business, Marley requires a wide variety of rare and specialised parts for her used motorcycles.

Since the inception of Marley’s Motorcycles, Marley has benefitted from a wholesale agreement with her Uncle Jimmy’s business, Motor Parts “R” Us. Although the current agreement is about to expire, Marley would like to continue the ongoing arrangement. Uncle Jimmy’s requests for a new agreement to be prepared but drafted on substantially the same terms as the existing standard form agreement, to allow his new son-in-law (who has recently graduated from law school) an opportunity to be a part of the ‘family business’ by preparing the new agreement. Marley agrees to an updated agreement, which is prepared by Jimmy’s son-in-law and subsequently executed by Marley and Uncle Jimmy. Unfortunately for Marley, who did not take the time to review the new changes, a number of additional clauses in Uncle Jimmy’s favour were inserted into the agreement, including a clause excluding Uncle Jimmy’s liability to Marley for “any loss or liability suffered or incurred by Marley in connection with the agreement, however arising”.

In contrast, there is no similar clause (or any other limitation of liability clause) applying in Marley’s favour.

A few years later, Uncle Jimmy and Marley’s relationship turns sour when Marley discovers that Uncle Jimmy has slowly been replacing the reputable, brand name parts he supplies with cheap, imported and low-quality parts to save on cost. A number of disgruntled customers have requested a refund, forcing Marley to fork out thousands in issuing refunds and sourcing the reputable, brand name parts she requires to fix the issues with the motorcycles. After resolving her customer complaints, Marley emails Uncle Jimmy with all the evidence she has collected, demanding that Uncle Jimmy pay her the costs she has incurred in refunds and sourcing alternative parts. Uncle Jimmy denies the claims and refuses to pay anything, directing Marley to the clause excluding his liability under the agreement.

In these circumstances, the limitation of liability clause is likely to be an unfair contract term. This is because Uncle Jimmy’s liability exclusion is extremely broad and one-sided, with no corresponding right or benefit given to Marley. The exclusion also has the effect of making Marley responsible for loss and liability that has been caused by Uncle Jimmy, causing financial detriment to Marley. It is unlikely that Uncle Jimmy will be able to show that such a broad and unfettered exclusion is reasonably necessary to protect his legitimate interests.

# Franchised and independent service stations



# Examples of unfair contract terms

Service Station and Convenience Store Division (VACC/TACC), Service Station Division (MTA/WA), Service Station Division (MTA/NSW), Service Station (MTA/SA) and Service Station and Convenience Store Association Queensland (MTAQ).

The following examples have been written to relate to specific industry divisions, however may also apply to other industries within the automotive sector.

## Scenario 23 – One-sided limitation of liability clause s 23 ACL

Cora's Corner Store is a small convenience store located in rural WA. Cora, the owner of Cora's Corner Store, sells a range of items for customers (mainly travellers) to purchase, including drinks and snacks. Cora has a long-standing agreement with beverage company Sarki, the manufacturer of many popular beverages, including the Blue Cow energy drink.

One day, Cora is contacted by a customer who states that after drinking a Blue Cow energy drink purchased from Cora's Corner Store, the customer became extremely ill and was admitted to hospital for three days. The customer threatens to take the matter to court unless Cora pays all of his out-of-pocket hospital expenses. Alarmed, Cora contacts Sarki and advises them of the claim that is being made, assuming that Sarki will take responsibility for the claim or assist Cora in determining the next steps. To her surprise, Sarki's solicitors write back to advise that, per the standard supply agreement

entered into between Cora's Corner Store and Sarki, Sarki has excluded all liability to Cora's Corner Store for any loss suffered or incurred by Cora's Corner Store arising under the agreement, however caused. Sarki's solicitors therefore inform Cora that their hands are tied. Cora is furious because while Sarki has limited its liability, there is no such limitation for Cora's Corner Store.

In these circumstances, the limitation of liability clause is likely to be an unfair contract term. This is because the clause is extremely broad and one-sided, with no corresponding right or benefit given to Cora's Corner Store. The exclusion also has the effect of making Cora's Corner Store responsible for loss that has been caused by Sarki, causing financial detriment to Cora's Corner Store. It is unlikely that Sarki will be able to show that such a broad and unfettered exclusion is reasonably necessary to protect its legitimate interests.

## Scenario 24 – One-sided termination clause ss 23 and 25(c) ACL

Bert owns a small independent service station and convenience store, Fuel Up & Go, on a main road in Paddington. Fuel Up & Go is one of four service stations located on the main road but is known to consistently get the most traffic due to their low petrol prices. As part of Bert's commercial strategy to increase his profits, Bert ensures that he has the most competitive fuel pricing on the main road, in addition to low prices for his chocolate bars and energy drinks. This strategy has led to many profitable years since Bert first opened Fuel Up & Go.

While business is booming, Bert is adamant that he must continuously think of new ways to stand out as the preferred service station and convenience store in Paddington. Several of Bert's Gen Z customers have begun asking Bert whether he can trace the source of his fuel from sustainable origins. In the hopes of becoming more aligned with the environmentally conscious customer base, Bert seeks to engage a new fuel supplier that can be transparent with their energy sources.

After some lengthy research, Bert engages Big Clean Energy, an energy company that has recently appointed a sustainability department to spearhead their environmental initiatives. Bert was so impressed with Big Clean Energy's bold environmental claims that he signed their

standard supply agreement on the same day he met with a representative of the company.

The shift in fuel suppliers pays dividends for Bert, and he enjoys an increase in business for many months. That is until an expose documentary is released detailing Big Clean Energy's many fraudulent claims. It turns out that Big Clean Energy actually contributes more pollution than Bert's previous supplier and has not done anything to address environmental issues like they claimed. The 'sustainability department' is in fact an overworked intern using a chatbot.

The backlash is swift, and Bert sees a significant decline in business almost immediately. Desperate to rectify the situation, Bert asks his lawyer for advice on how to get out of the five-year agreement. Bert's lawyer tells him that while both parties can terminate 'for convenience', if Bert exercises this right, he will be forced to pay out a termination fee of a further six months of his average monthly fuel supply costs. Bert is dismayed, as he cannot possibly afford to pay out this amount while also paying an alternative fuel supplier.

In addition to many other protections under the Australian Consumer Law, such as Big Clean Energy's misleading information about being 'sustainable', the termination clause is likely to be an unfair contract term. This is because it penalises one party,

but not the other, for terminating the agreement. While Big Clean Energy may argue that the termination fee is reasonably necessary to protect their legitimate interests in finding a new customer,

it is unlikely that this kind of significant fee would be justified in this case, especially given the size of Big Clean Energy's business compared to Bert's.

### Scenario 25 – Set-off clause s 23 ACL

Evelyn owns a service station as a franchisee of a national fuel chain called Paltex. Evelyn wishes to differentiate her Paltex from others in the area and decides to engage BreadBakes, a large well-known multi-national bakery, to supply a daily assortment of freshly baked croissants, donuts and bagels to the service station for Evelyn's customers to purchase. BreadBakes sends Evelyn its standard supply of goods agreement, advising Evelyn that the agreement is 'non-negotiable' and is the same agreement they have in place with all their business customers. Evelyn is shocked by how long and wordy the agreement is but trusts that a large corporation like BreadBakes would have a tip-top contract, and promptly enters into the agreement.

After a few months, it is clear that Evelyn's decision to engage BreadBakes is a success. The service station's profits are up by 20 per cent, and Evelyn's employees tell her that many customers visit the service station purely to purchase the BreadBakes baked goods, rather than just picking them up while re-fuelling. Evelyn is thrilled, until she receives her next monthly invoice from BreadBakes. While Evelyn has maintained the same order of baked goods since the agreement was signed, the latest invoice from BreadBakes has increased by \$300, with the description 'administration cost of re-delivery'. Confused, Evelyn emails her

BreadBakes representative, who advises Evelyn that the additional cost is due to the BreadBakes delivery driver going to the wrong Paltex on multiple occasions and having to re-deliver to Evelyn's Paltex instead. Evelyn is furious that she must bear the cost of the error made by BreadBakes' delivery driver, and demands that the \$300 fee be removed from her invoice. However, the BreadBakes representative points to the agreement, which gives BreadBakes the ability to set-off any amounts that they believe are owing to them by Evelyn, and requires Evelyn to pay all invoices issued by BreadBakes within 15 days. There is no dispute resolution clause under the agreement, including in relation to any disputed invoices.

In these circumstances, the set-off clause is likely to be an unfair contract term. This is because it creates a significant imbalance in the rights of Evelyn and BreadBakes (giving BreadBakes the right to determine amounts owing to it and set off those amounts without any corresponding right or benefit to Paltex, e.g. a right to dispute the determination or avoid liability for any loss that it did not cause). Although a set-off clause may not be unfair in cases where the amounts are undisputed or proven, the broadness of this set-off clause means it is unlikely that BreadBakes will be able to show that this clause is reasonably necessary to protect their legitimate business interests.



# Engine reconditioners



# Examples of unfair contract terms

Engine Reconditioner and Radiator Service Division (VACC/TACC), Engine Reconditioners Association (MTA/WA), Engine Reconditioners Association of NSW Division (MTA/NSW) and Engine Reconditioners Association of Queensland (MTAQ).

The following examples have been written to relate to specific industry divisions, however may also apply to other industries within the automotive sector.

## Scenario 26 – Unilateral variation clause ss 23 and 25(d) ACL

Isaac's Engines is a small business based out of Banbury, WA, that specialises in engine reconditioning work. Isaac's Engines is the preferred contractor for a number of major insurers, including Skipp. Isaac, the owner of Isaac's Engines, signed an agreement with Skipp many years ago under the standard Skipp contractor agreement. While Skipp can be frustrating to work for, given the size of their operations and the fact that Isaac never speaks to the same representative twice, generally Isaac has had a good experience and has been able to make a decent amount of money reconditioning engines for Skipp's customers who make claims under their insurance. Isaac has got his work down to a fine art after many years of trial and error with different parts and tools.

One morning, Isaac is shocked to receive a letter from Skipp advising that Isaac is currently in breach of the Skipp contractor agreement and has 30 days to rectify the breach before Skipp may exercise its right to terminate. The letter says that pursuant to the Skipp Contractor Code of Conduct (a copy of which is attached to the letter), Isaac's Engines is only permitted to use parts from Skipp's range of pre-authorised suppliers and has breached this requirement by using parts from a non-authorised supplier. Isaac looks through the Contractor Code of Conduct and can see that these 'pre-authorised suppliers' are completely unviable. He also can't remember seeing anything like this in the Contractor Code of Conduct when he entered into the agreement, which he diligently read, highlighted and annotated. Isaac goes back to the original agreement he signed and looks through the Contractor Code of Conduct attached to that agreement. He can see that it is a totally

different document - with the new Contractor Code of Conduct almost double the length and containing a range of clauses Isaac simply cannot comply with. Isaac looks back through the agreement and can see that there is a clause requiring Isaac's Engines to comply with all of Skipp's policies and procedures 'as may be updated from time to time and published on the Skipp contractor portal'.

Isaac is incredibly disheartened. Complying with the updated Contractor Code of Conduct would require him to incur significant capital cost, and he simply won't be able to remedy the 'breach' within the 30-day period. Additionally, he would be strongly opposed to purchasing from Skipp's pre-authorised suppliers, as most of these suppliers charge an arm and leg for an inferior product. Had Isaac known about the major updates to the Contractor Code of Conduct, he would have taken active steps to exit the agreement himself without committing a breach, or else adjust his operational practices to comply with the Contractor Code of Conduct.

In these circumstances, the clause allowing Skipp to update their policies and procedures from time to time is likely to be an unfair contract term. This is because it gives Skipp the one-sided right to vary the terms of the agreement but provides no corresponding right or benefit to Isaac's Engines (such as the right to consent to changes or to be notified of updates). Isaac's Engines will suffer detriment either financially (in obtaining new parts to comply with the Contractor Code of Conduct) or otherwise (in committing a breach of the contract or in being forced to use parts from suppliers he finds undesirable).

## Scenario 27 – One-sided termination clause ss 23 and 25(b) ACL

Ronald owns Ronald's Reconditioners, a small business that specialises in engine repairs and reconditioning. Ronald's Reconditioners is party to a standard services agreement with a large national delivery company called Pack n' Go, under which Ronald's Reconditioners performs maintenance and repair work for Pack n' Go's fleet of vehicles. One day, Ronald receives a letter advising him that Pack n' Go is terminating the services agreement with Ronald's Reconditioners with 48 hours' notice. The letter states that Pack n' Go are exercising their right to

terminate as Ronald was in breach of the agreement for a failure to comply with Pack n' Go's social media policy which requires Pack n' Go to approve all of Ronald's Reconditioners social media posts.

Ronald is perplexed that such a policy would amount to a breach of the agreement. Ronald calls his lawyer, who reads through the agreement and informs Ronald that Pack n' Go indeed have a right to terminate for breach of any term of the agreement, which includes numerous Pack n' Go company policies. In contrast, Ronald's Reconditioners do

not have any termination rights, and no right for Ronald's Reconditioners to be paid any amount outstanding where the agreement is terminated.

In these circumstances, the one-sided termination clause is likely to be an unfair contract term. This is because, while Pack n' Go has the right to terminate the agreement for breach, which is exercisable for any breach of Ronald's

Reconditioners' obligations under the agreement and company policies (i.e. not limited to 'material breaches' or 'significant breaches'), Ronald's Reconditioners has no corresponding right or benefit. The termination right is also exercisable with a very short timeframe and does not expressly permit Ronald's Reconditioners to be paid for amounts incurred up to the date of termination.

## Scenario 28 – One-sided indemnity clause s 23 ACL

Fran runs a small business reconditioning engines in large motor vehicles like vans and trucks. Fran's business has recently landed a big job with a large used car dealer, Murray Motor, providing required repairs to vehicles at the dealership to prepare them for sale. To finalise the job, Fran entered into an agreement with Murray Motor which was subject to their standard terms and conditions of purchase, which Fran neglected to read.

All is going well for Fran in her dealings with Murray Motors, until one day when she receives a scary looking letter from the business. She opens the letter and is shocked to find that Murray Motor are requesting \$12,500 from Fran's business to indemnify Murray Motor in relation to a customer claim they have settled. The letter details a claim that was brought against Murray Motor for breach of contract due to the car's poor performance. Murray Motor refers to an indemnity in the agreement with Fran's business, which requires Fran's business to indemnify Murray Motor for any loss or liability arising in connection with the agreement.

Fran checks the agreement and identifies the indemnity clause. She can see that while Murray

Motor have an indemnity clause in their favour, her business does not have any similar right, and there is nothing to limit her liability under the indemnity clause, e.g. to account for any potential contribution or wrongdoing on the part of Murray Motor. Fran believes that the fault with the car actually has nothing to do with her work reconditioning the engine, but rather with other issues that she herself noticed when working on the car and recommended that Murray Motor have fixed by a general auto repairer.

In these circumstances, the one-sided indemnity clause is likely to be an unfair contract term. This is because it requires Fran's business to indemnify Murray Motor for any loss or liability arising in connection with the agreement, even where such loss or liability has not been caused or contributed by Fran's business or could have been avoided or mitigated by Murray Motor. Further, there is no corresponding right or benefit given to Fran's business under the agreement, such as a carve-out to the indemnity to reduce the liability of Fran's business to the extent the loss or liability was caused by Murray Motor.





# Retail tyre industry, suspension



# Examples of unfair contract terms

Victorian Tyre Dealers Association (VACC/TACC), Tyre-Dealers and Retreaders Association of NSW Division (MTA/NSW), Tyre and Undercar Division of Queensland (MTAQ), WA Tyre Dealers Association (MTA/WA) and Tyre Dealers (MTA/SA).

The following examples have been written to relate to specific industry divisions, however may also apply to other industries within the automotive sector.

## Scenario 29 – One-sided termination clause ss 23 and 25(b) ACL

Inspired Tyres is a small business that supplies tyres to a range of wholesale customers throughout Australia. The majority of Inspired Tyres' customer base are large corporates, meaning Inspired Tyres often has the lower hand in business negotiations. However, Inspired Tyres does its best, and has experienced great success over its decades of operation.

Sally is the founder and owner of Inspired Tyres and has been keeping an eye out for new opportunities for the business. She finds herself in discussions with a new major player in the automotive industry, Broom Broom. Broom Broom is looking for a tyre supplier on a large scale – much larger than what Sally is used to. Sally speaks to her own supplier (the manufacturer of the tyres) and decides to take the leap – signing Broom Broom's standard purchase agreement on behalf of Inspired Tyres. The purchase agreement sets out the forecast of Broom Broom's tyre requirements over the two-year initial term, which Sally uses to place orders with her supplier well in advance to ensure she will have sufficient stock.

The relationship between Inspired Tyres and Broom Broom flourishes, and Sally works her way through six exhausting but exciting months. She has figured out that the best approach is to order Broom Broom's forecasted amount three months in advance, giving her some extra buffer stock in case it's needed. A few days after her latest shipment, Sally is horrified to receive a termination notice from Broom Broom,

advising that Broom Broom is giving Sally the required seven days' notice that the agreement is now terminated. She calls Broom Broom to figure out what is going on and is told that these things happen sometimes, and that this decision has come from the Board level. Sally is informed that termination on seven days' notice is permitted under the agreement. She looks through the agreement herself and can see that indeed, Broom Broom may terminate on seven days' notice for any reason at any time during the term, and will not be required in such cases to provide any compensation to Inspired Tyres. In contrast, Sally has a very limited termination right in response to a breach and on 30 days' notice. Sally takes a fearful glance at the huge amount of stock she has ordered in, aware that she is unable to return any stock to her tyre supplier under her own supply agreement with the tyre supplier. She is also stuck with a new lease for a property that she will likely no longer need.

In these circumstances, the termination clause is likely to be an unfair contract term. This is because it creates a significant imbalance in the rights and obligations of the parties under the agreement – giving Broom Broom the right to terminate for convenience on only seven days' notice, but no corresponding right or benefit to Inspired Tyres, such as an equally broad termination right or the right to receive compensation in relation to stock purchased in reliance on Broom Broom's forecast.

## Scenario 30 – One-sided termination clause ss 23 and 25(b) ACL

Tyres Galore is an independent family-run small business operating in rural South Australia. Tyres Galore has recently appointed a new CEO, Larry, who has been working in the family business since he was 15 years old. Larry is excited about his new appointment and is eager to revolutionise the Tyres Galore business, starting with their marketing. Tyres Galore is currently lacking in the marketing department, with a very basic website and no social media accounts. Larry believes that by engaging professional marketing services, Tyres Galore will be able to increase their profits and potential expand to open in other states across Australia.

While attending a wedding in Clare Valley, Larry is introduced to Ken, who owns his own marketing firm, Hype Media. Larry and Ken spend the next few hours at the wedding discussing some preliminary ideas

about how Hype Media can assist Tyres Galore in expanding their online presence. Larry is convinced that Ken is the perfect person to lead his vision, and asks Ken for a formal quote for the proposed scope of services. Ken informs Larry that Hype Media are very selective with their clients and that it is crucial to enter into a subscription service to optimise marketing potential. Ken believes Tyres Galore is a great addition to Hype Media's portfolio, and gives Larry a copy of their standard agreement, that he conveniently had sitting in his car. Larry is utterly convinced that Ken is a man of his word, and signs the agreement just as the wedding is concluding. Before signing the agreement, Larry did not turn his mind to the automatic renewal clause which states that "This agreement commences on the date it is signed by both parties for a term of two years, and will continue

to renew for further successive two year periods unless the client provides written notice to Hype Media at least 40 days before the start of the next renewal period. Hype Media is not required to monitor or remind the client of any upcoming renewal periods.”

Almost four years since entering into the agreement, and Tyres Galore have not seen any dramatic improvement in profits since engaging Hype Media. While Hype Media created an Instagram page for Tyres Galore many years ago, which now has around 100,000 followers, the account receives very few likes on their posts. Larry suspects that Hype Media have purchased fake followers, which would explain the lack of engagement the account receives. Fed up, Larry decides that he no longer wants to pay Hype Media for their services, and emails Ken to advise

that he would like to terminate the agreement. Ken responds to express his disappointment but advises Larry that that Tyres Galore is not able to terminate the agreement, except prior to each auto-renewal period. Ken says that unfortunately, as Larry’s notice has been received outside of the required window to cancel the next auto-renewal period, Tyres Galore is already locked in for a further two years.

In these circumstances, the automatic renewal clause is likely to be an unfair contract term. The factors which support this are the length of the renewal term (being the same as the initial term), the fact that Hype Media has not been required to notify Tyres Galore about upcoming renewals, and the overall one-sided termination clauses under the agreement.

### Scenario 31 – Unilateral price increase clause ss 23 and 25(f) ACL

Ollie has recently purchased a second-hand car from a family friend, and although it is in very good condition, the tyres need to be replaced. Ollie is very money-conscious, and after purchasing a car, is wanting to save on cost wherever possible. With this in mind, Ollie decides that instead of purchasing brand new tyres for his car, he will instead purchase second-hand tyres. After collecting recommendations from friends and family, Ollie decides to engage a local business called Tyre Traders to supply and fit second-hand tyres onto his car. Tyre Traders provides Ollie with a great price for the job, and Ollie happily signs off on the Tyre Traders quote attaching Tyre Traders’ standard terms and conditions. Ollie doesn’t bother reading the terms and conditions, as they are extensive and printed in very small print. In fact, the terms and conditions state that Tyre Traders may increase the price, between the date of the order and the date for payment, to account for any increase in cost incurred by Tyre Traders.

A few days later, Ollie returns to the Tyre Traders warehouse to collect his car with the four new reconditioned tyres. Ollie is shocked, however, by the price on the final bill, which is \$250 more than the

price he was quoted for. Tyre Traders advise that their mechanic was overbooked on Friday, so had to come in on a Saturday to complete the job in time, which cost Tyre Traders in overtime. They tell Ollie that, as is their right under the standard terms and conditions, they have passed through this additional cost as a price increase for the order. Ollie is disappointed to hear that he is somehow responsible for this cost despite not having caused it in any way, particularly considering that he was in no rush to have the job completed by the estimated date set out in the quote.

In these circumstances, the price variation clause is likely to be an unfair contract term. This is because it creates a significant imbalance in the rights of Tyre Traders and Ollie under the agreement, giving Tyre Traders the right to unilaterally increase the price, but no corresponding right or benefit to Ollie, such as the right to provide consent for any such increases or to exit the agreement as an alternative. The lack of transparency of the price variation clause will also be relevant, considering the size of the document and the fact that it was printed in small font.



# Caravans



# Examples of unfair contract terms

Various industry sectors

Caravan Dealers Division (MTA/WA) and Caravan Industry Division (MTA/NSW).

The following examples have been written to relate to specific industry divisions, however may also apply to other industries within the automotive sector.

## Scenario 32 – Auto-renewal clause s 23 ACL

Carla's Caravans is a small business with a strong reputation in the industry for manufacturing state-of-the-art caravans with all the bells and whistles. The business has recently captured the attention of the annual expo run by Captivating Caravans, which invite Carla's Caravans to be a featured guest at the expo under a 12-month exclusive sponsorship agreement with Captivating Caravans. Carla, the head of Carla's Caravans, is thrilled about the opportunity, and, after double-checking that the agreement is only for a 12-month term, happily signs the standard sponsorship agreement provided to her by Captivating Caravans.

The reason that Carla was conscious of the term is because in a year's time, Carla will be entering into an exclusive sponsorship agreement with Charming Caravans, a competitor of Captivating Caravans. Carla and Charming Caravans have been in talks for years, and Charming Caravans have promised Carla the gig once they boot their current exclusive sponsor at the end of that agreement.

Almost 11 months into the sponsorship agreement, Carla has achieved great success from her feature at the Captivating Caravans expo, and has diligently performed her sponsorship duties

under the sponsorship agreement. After receiving the green light from Charming Caravans that her sponsorship agreement is being drawn up, she prepares a heartfelt email to the Captivating Caravans team, thanking them for the opportunity and wishing them all the best. To Carla's surprise, Captivating Caravans respond to advise her that the sponsorship agreement has been automatically renewed for a new 12-month period. Carla calls her lawyer, who reads through the contract and delivers Carla the unfortunate news that there is an automatic renewal clause in the contract, and the contract has indeed rolled over for another year. Carla was unaware of this as the contract did not require Captivating Caravans to notify Carla, and the clause was buried in a different clause to the clause setting out the term of the agreement. Had Carla known about the clause, she could have avoided auto-renewal by giving at least 30 days' notice.

In these circumstances, the automatic renewal clause is likely to be considered an unfair contract term. The factors which support this are the length of the renewal term (same as the initial term) and the fact that Captivating Caravans has not been required to notify Carla about the upcoming renewal.

## Scenario 33 – Unilateral determination clause ss 23 and 23(h) ACL

Roxy is a sole trader caravan dealer that lists caravans for sale on an online marketplace called Vantastic. When Roxy signed up for Vantastic a few years ago, she accepted the Vantastic standard terms and conditions, which she neglected to read. Roxy's earnings for the caravans she sells are kept in her Vantastic 'bank account', which she can withdraw as required. One day, Roxy is contacted by Vantastic and is advised that her account has been suspended indefinitely due to her breach of the Vantastic standard terms and conditions. After requesting further information, Vantastic informs Roxy that their system picked up attempts made by Roxy to circumvent the marketplace and sell direct to customers, in breach of their code of conduct. Roxy is confused as she has never done such a thing, but perhaps recalls giving out her phone number on the odd occasion. She requests further information, noting that she has several

thousands of dollars sitting in her bank account that she needs to withdraw, but Vantastic simply refer to a clause in their standard terms and conditions which states that Vantastic has the sole discretion to determine whether a breach of the standard terms and conditions have occurred, with any such determination made by Vantastic being final.

In these circumstances, this clause is likely to be considered an unfair contract term, as it causes a significant imbalance in the rights of the parties under the agreement – Vantastic has the right to unilaterally determine whether a breach has occurred, but there is no corresponding right or benefit granted to Roxy, such as a right to request information or follow a pre-determined dispute resolution price. Vantastic's determination will also cause financial detriment to Roxy unless she can access the funds in the bank account in some other way.

## Scenario 34 – Unilateral price variation clause ss 23 and 25(f) ACL

Kelly has recently retired from her job as an executive assistant and has always wished to spend her retirement travelling around Australia in a caravan. After receiving her last official payslip, Kelly decides to take the plunge and purchase a caravan to live out her dreams. She has been told by numerous friends that she simply must visit Cruisin' Caravans, as they have the best selection of caravans and offer customisation for the caravan accessories and body paint.

After a few visits to Cruisin' Caravans, Kelly decides on a pop top caravan with a customisation to include her name across the side of the caravan in the shade 'lilac'. Kelly communicates her special customisation request to Carroll, a Cruisin' Caravans salesperson, and is presented with an order form which attaches the Cruisin' Caravans standard terms and conditions of sale. Kelly is overcome by her excitement and signs the order form immediately, putting down a 20 per cent deposit before heading home to begin mapping out her trip. A week later, Cruisin' Caravans send Kelly a text message to advise that her caravan will be ready for pick up by the end of the month.

When Kelly arrives to pick up her new caravan, she

notices that the remaining balance has increased by \$1,000. Carroll tells Kelly that this is an additional 'customisation surcharge' that Cruisin' Caravans have charged in accordance with their standard terms and conditions. Carroll shows Kelly the relevant clause, which states that "Cruisin' Caravans may increase the price payable after the date of purchase and before the date of delivery for any reason, including to pass through any applicable costs or surcharges that Cruisin' Caravans determine from time to time". Kelly is confused as to why this surcharge wasn't included on the original quote, and doesn't want to pay the additional \$1,000, which will eat into her travelling budget. Kelly expresses her concerns with Carroll, however Carroll responds that the cooling-off period has now ended and there is no other option for Kelly to avoid the contract.

In these circumstances, the price increase clause is likely to be an unfair contract term. This is because it gives Cruisin' Caravans the one-sided right to increase the agreed contract price, without giving the customer any corresponding right or benefit (e.g. to allow Kelly to avoid the purchase).





# Boats



# Examples of unfair contract terms

Various industry sectors

Automotive and Marine Trimmers Division (MTA/NSW)

The following examples have been written to relate to specific industry divisions, however may also apply to other industries within the automotive sector.

## Scenario 35 – Unilateral price variation clause ss 23 and 25(f) ACL

Sailaway is a small business in Sydney that provides marine trimming services for boat manufacturers and suppliers. Having earned quite the reputation up and down the NSW coast, Sailaway is approached by one of Australia's leading boat manufacturers, Dolphinfin. Dolphinfin offer to appoint Sailaway as one of their marine trimming contractors in the Sydney area for an attractive rate. Sailaway is chuffed, and immediately begins working with Sailaway to figure out the details of the arrangement. Dolphinfin provide Sailaway with their standard contractor agreement, and advise that while the terms are pretty much "set in stone", they are happy to consider any requested changes to the invoicing clauses to align with Sailaway's operational practice. Sailaway request some minor tweaks, which are accepted by Dolphinfin, and the agreement is signed.

The owner of Sailaway, Penny, is out working on a boat when she receives a frenzied call from her husband, Pat. Pat has just opened a letter from Dolphinfin seeking the immediate payment of costs in relation to a customer claim. Penny reads through and can see that Dolphinfin are requesting \$20,000 to settle a customer claim caused by Sailaway's marine trimming servicing, citing the indemnity clause under the contractor agreement. Penny digs out the agreement and can see that indeed, Sailaway is required to indemnify Dolphinfin for any loss suffered by Dolphinfin arising under or in connection with the agreement, except where the loss is caused by Dolphinfin's negligence. There is no indemnity right for

Sailaway, or any other limitation of liability clause that would apply in Sailaway's favour. After re-reading the letter and doing some further investigation, it appears to Penny that the issue experienced by the customer is not at all caused by Sailaway's services, but rather relates to parts used in the goods supplied by Dolphinfin. While the parts are consistent with Australian Standards, they don't hold up too well when exposed to salt water. Penny wonders whether this constitutes negligence or whether it is just an innocent mistake on Dolphinfin's part.

In these circumstances, the indemnity clause is likely to be an unfair contract term. This is due to the imbalance of rights of the parties – while Dolphinfin has a broad right to be indemnified, Sailaway has no corresponding right or benefit, such as a mutual right to be indemnified or any right to limit its liability under the indemnity.

While the indemnity would not apply where caused by Dolphinfin's negligence, it may still apply in other scenarios such as the by Dolphin's breach of contract, or in the case of an innocent mistake (which doesn't amount to negligence). It is unlikely that Dolphinfin would be able to show that such a broad and unfettered indemnity clause would be reasonably necessary to protect its legitimate interests. While it may be argued that the contract is not standard form, as Sailaway had the opportunity to negotiate the invoicing clauses, this is unlikely to be considered meaningful negotiation and will not prevent the application of the UCT regime.

## Scenario 36 – One-sided termination clause ss 23 and 25(b) ACL

The Royal Charter Yacht Club (commonly known as "RCYC") is going out to tender for a new cleaning company to undertake regular exterior cleaning of their members' boats and yachts when docked at RCYC. A veteran member of RCYC approaches the general manager of RCYC to insist that they appoint his grandson, Seth, who is starting his own business after five years working for a large boat cleaning company in Italy.

RCYC decide to have a trial run with Seth for a few weeks before giving Seth a re-purposed standard form agreement on the same terms and conditions as that used for the previous cleaning company. As Seth has already begun working at RCYC, and doesn't want to rock the boat by requesting any negotiations, he

decides to sign the agreement without giving it too much extra thought. What Seth is not aware of is that the agreement allows RCYC to terminate the contract for any reason, at any time, by giving Seth 24 hours' notice, and does not require RCYC in such cases to compensate Seth in any way. The agreement is also exclusive, meaning that Seth is forced to give up some other jobs he had arranged prior to getting the gig with RCYC, and invest a significant amount of money in getting the right tool kit together for the types of mega-yachts that are docked at RCYC, compared with his other smaller clients. Nine months have passed since Seth entered into the agreement, and he decides to go on a short three-day hike. He clears the trip with the general

manager of RCYC and lets him know that he will not have any cell service for those 72 hours. When Seth returns from the hike, he is shocked to find an email from the general manager of RCYC giving notice to terminate the agreement, and the termination has already taken effect. He calls the general manager and asks how RCYC intend to compensate him for the sudden termination on short notice, given the amount of money he has now invested and the other jobs he has had to turn down. The general manager states that as per the terms and conditions, there is nothing they need to do – it is only Seth that would have been required to cover interim costs if he had exercised his right to terminate.

In these circumstances, the termination clause is likely to be an unfair contract term. This is because it creates a significant imbalance in the rights and obligations of the parties under the agreement – giving RCYC a broad and almost immediate termination right, but no corresponding right or benefit to Seth, such as a right to receive compensation similar to what Seth would have had to provide to RCYC if he had been the terminating party, e.g. compensation to reflect the potential loss suffered by Seth in light of the short-notice termination, the capital expenses he had to incur in order to perform the contract and the other jobs he had to turn down given the exclusive nature of the agreement.

### Scenario 37 – Auto-renewal clause s 23 ACL

Lewis is an avid traveller and loves to be on his boat whenever weather permits. Lewis has recently moved to Point Piper, Sydney, and is looking for a nearby marina to dock his boat close to home. Neighbourhood Marina are a very exclusive marina in Point Piper, and available spots for personal boat docking do not become available very often. After months of phone calls and emails begging to jump the waiting list, Lewis receives an invitation to join Neighbourhood Marina. The invitation allows Lewis to use Neighbourhood Marina's clubhouse facilities and a designated spot to dock his boat all-year round. Lewis is thrilled by this news and rushes to sign and return the standard membership agreement to ensure that he secures his spot. The standard membership agreement runs for an initial term of one year, after which time it will automatically renew for successive one-year periods unless Lewis gives notice at least 30 days before the start of a new renewal period.

After almost 12 months, Lewis decides that he has seen all he needs to see in Point Piper and makes arrangements to move to Perth to explore Australia's west coast beaches. Shortly before he

is due to head off, Lewis emails Neighbourhood Marina to advise that he will no longer require Neighbourhood Marina's services. He receives a swift response to advise that the agreement has already auto renewed for a subsequent year, given Lewis' failure to end his membership within the required timeframe. Lewis is very confused and speaks with a Neighbourhood Marina representative, stating that he was not informed of the timeframe to give notice and due to his move, there is no need for him to dock his boat and it would not make sense to be paying a membership that he cannot use or enjoy. The Neighbourhood Marina representative points to the signed membership agreement which confirms their earlier email and informs Lewis that it is not their responsibility to monitor their members upcoming renewal periods or provide notice of such.

In these circumstances, the automatic renewal clause is likely to be an unfair contract term. The factors which support this are the length of the renewal term (being the same as the initial term) and lack of obligation on Neighbourhood Marinas to provide notice of any upcoming renewal periods.



# Buses



# Examples of unfair contract terms

Various industry sectors

Motor Bus Division (MTA/NSW), Bus & Coach (MTA/WA) and Small Charter Vehicles (MTA/WA).

The following examples have been written to relate to specific industry divisions, however may also apply to other industries within the automotive sector.

## Scenario 38 – One-sided indemnity clauses 23 ACL

Rollerskaters United is a small business that organises and facilitates rollerskating competitions across Victoria. As part of their new initiative to increase promotion of rollerskating, Rollerskaters United have decided to hold an inaugural competition in Canberra. Rollerskaters United have begun to advertise the upcoming Canberra competition and have received an influx of interest from their Melbourne members. To ensure that the Canberra competition receives a good turnout, Rollerskaters United decide to offer bus transportation from Melbourne to Canberra. The founder and CEO of Rollerskaters United, Remy, decides to contact Bluehound Buses, a well-known Australian charter bus service that would be fully equipped to comfortably transport 52 Rollerskaters United organisers and competitors from Melbourne. Bluehound Buses send through their standard form agreement to be signed by Rollerskaters United. Remy, stressed out from all of his planning commitments, hastily signs the agreement on behalf of Rollerskaters United without properly reading it. Remy misses an important detail in the agreement, a clause which would require Rollerskaters United to indemnify Bluehound Buses for any loss incurred by Bluehound Buses arising out of the agreement. There is no similar indemnity clause applying in favour of Rollerskaters United.

The day before the Canberra competition begins, Remy and the other bus-goers meet at the office of Rollerskaters United and eagerly board the bus. Remy is a bit put off by the state of the bus – the seats are

visibly dirty, and some of them are hanging loose from their hinges. Remy grows concerned about the safety of the bus when a Rollerskaters United competitor, Tracey, sits down on her seat and lurches backwards as the seat gives way. Still, nothing can dampen the group's spirits, and once Tracey is safely secured in another seat, the rest of the trip, and the return back, goes off without a hitch (although, Remy notices that the faulty seat is almost completely loose from its hinges by the time they return to Melbourne). The next day, Remy is shocked by an email from Bluehound Buses, claiming an amount of \$600 to cover the cost of a replacement seat that Bluehound Buses allege is necessary due to property damage caused by a Rollerskaters United passenger. Remy calls Bluehound Buses and explains everything he noticed about the seat in question but is dismissed and told that if he does not pay the amount claimed, Bluehound Buses will commence proceedings against Rollerskaters United.

In these circumstances, the indemnity clause is likely to be an unfair contract term. This is because it requires Rollerskaters United to indemnify Bluehound Buses for any loss arising in connection with the agreement, even where such loss has not been caused or contributed to by Rollerskaters United or could have been avoided or mitigated by Bluehound Buses. Further, there is no corresponding right or benefit given to Rollerskaters United under the agreement, such as a carve-out to the indemnity to reduce the liability of Rollerskaters United to the extent the loss was caused by Bluehound Buses.

## Scenario 39 – Unilateral variation clause ss 23 and 25(d) ACL

Yellow School Bus, a small business bus operator, signs on with Ebsworth Grammar School to service the daily bus routes for students of the school. The parties enter into an agreement on Ebsworth Grammar School's standard terms. Ange, the CEO of Yellow School Bus, reads through the agreement and is satisfied with the commercial terms, including the specified routes and performance KPIs. While Ange has a flick through the legal terms, she can't make sense of most of them and assumes they're fairly standard given she is contracting with a school.

A few years later, Ange receives a letter from the school advising that the routes and performance KPIs will be changing. The new routes will require almost double travel time for Ange's staff, and the performance KPIs on timing have tightened, which

Ange believes will be totally unachievable given the updated routes. Ange contacts the school to at least discuss some flexibility on the performance KPIs or an update to the price to reflect the additional work involved, but is met with an unwillingness to negotiate from the school. The school tells Ange to refer to the agreement, which allows them to vary the terms of the agreement from time to time at their sole discretion and reminds Ange that she is locked in for a term of five years with no right to terminate for convenience.

In these circumstances, the unilateral variation clause is likely to be an unfair contract term, given that it allows the school a broad, one-sided right to make changes to the contract, but affords no corresponding right or benefit to Yellow School Bus (such as the right to terminate or consent to any requested variation).

# General





# Examples of unfair contract terms

“Other” industry sector

General Division (VACC/TACC), General Trades Division (MTA/NSW), General (MTA/SA) and Transport Industry Division (MTA/WA).

The following examples have been written to relate to specific industry divisions, however may also apply to other industries within the automotive sector.

## Scenario 40 – Auto-renewal clause s 23 ACL

Trina has recently become an independent taxi driver. She wishes to engage a shared business services company which would provide Trina with back-office support such as account management and scheduling. After speaking with some of her peers that have experience as small business owners, Trina decides to contact Assistant Solutions. Assistant Solutions is a well-known shared business services company that seems very polite and professional. Assistant Solutions agrees to provide the required services and send through the company’s standard agreement for Trina to sign, which Trina promptly signs and returns without reading. Trina fails to notice that the agreement, which will run for a two-year initial term, will automatically renew for successive two-year periods unless Trina gives notice to Assistant Solutions at least six months before the end of the relevant term.

Almost two years later, Trina has enjoyed her stint as a taxi driver, which has been made so much easier by the services of Assistant Solutions. However, she finds herself dreaming of a sea change and, on a whim, makes arrangements to move to Hawaii and start her training as a dolphin trainer. As part of winding down her operations as a taxi driver, Trina reaches out to Assistant Solutions to advise that she is changing

direction and will be leaving the profession. She thanks the business for their time and asks them to reach out in a year or two if they need any dolphin training services. To Trina’s surprise, she receives a response from Assistant Solutions to advise that her request cannot be put through, as the agreement has already renewed for a further two-year period. Trina calls to speak to Assistant Solutions and is told that she would have had to give notice several months earlier if she wanted to avoid the auto-renewal. When Trina asks what her options are, Assistant Solutions tells her that there are none. While both parties have mutual rights to terminate for breach of agreement, there is no right allowing Trina (or Assistant Solutions for that matter) to terminate without a breach. Trina complains that she didn’t receive notice of the renewal requirement but is told that this is not something Assistant Solutions is required to do under the agreement.

In these circumstances, the automatic renewal clause is likely to be an unfair contract term. The factors which support this are the length of the renewal term (same as the initial term), the fact that Assistant Solutions has not been required to notify Trina about upcoming renewals and the length of the notice period required (being one quarter of the renewal term itself).

## Scenario 41 – One-sided termination clause ss 23 and 25(b) ACL

Lucas is the sole trader of Water Post, a small ferry transportation business that specialises in chartering packages around the Port Jackson Bay. Business has been somewhat slow for Water Post, as residents have many other options available for package delivery, including by mail. Lucas decides to approach multiple supermarkets and fresh food grocers that operate around the Port Jackson Bay, in the hopes of enticing executives to employ his services as an alternative mode of transportation. After a few weeks of meetings, Lucas is offered an agreement to provide ferry transportation to W Mart, a large supermarket chain. The W Mart representative advises Lucas that the agreement is their standard form agreement for transportation services, which has been slightly amended to apply to his ferry services. Lucas is overcome with excitement at this amazing business opportunity and quickly skims through the agreement before signing and returning it.

Over the next few months, Lucas starts to question whether he made the right decision. While he has certain hours of availability that he must comply with under the agreement, he has not been getting many

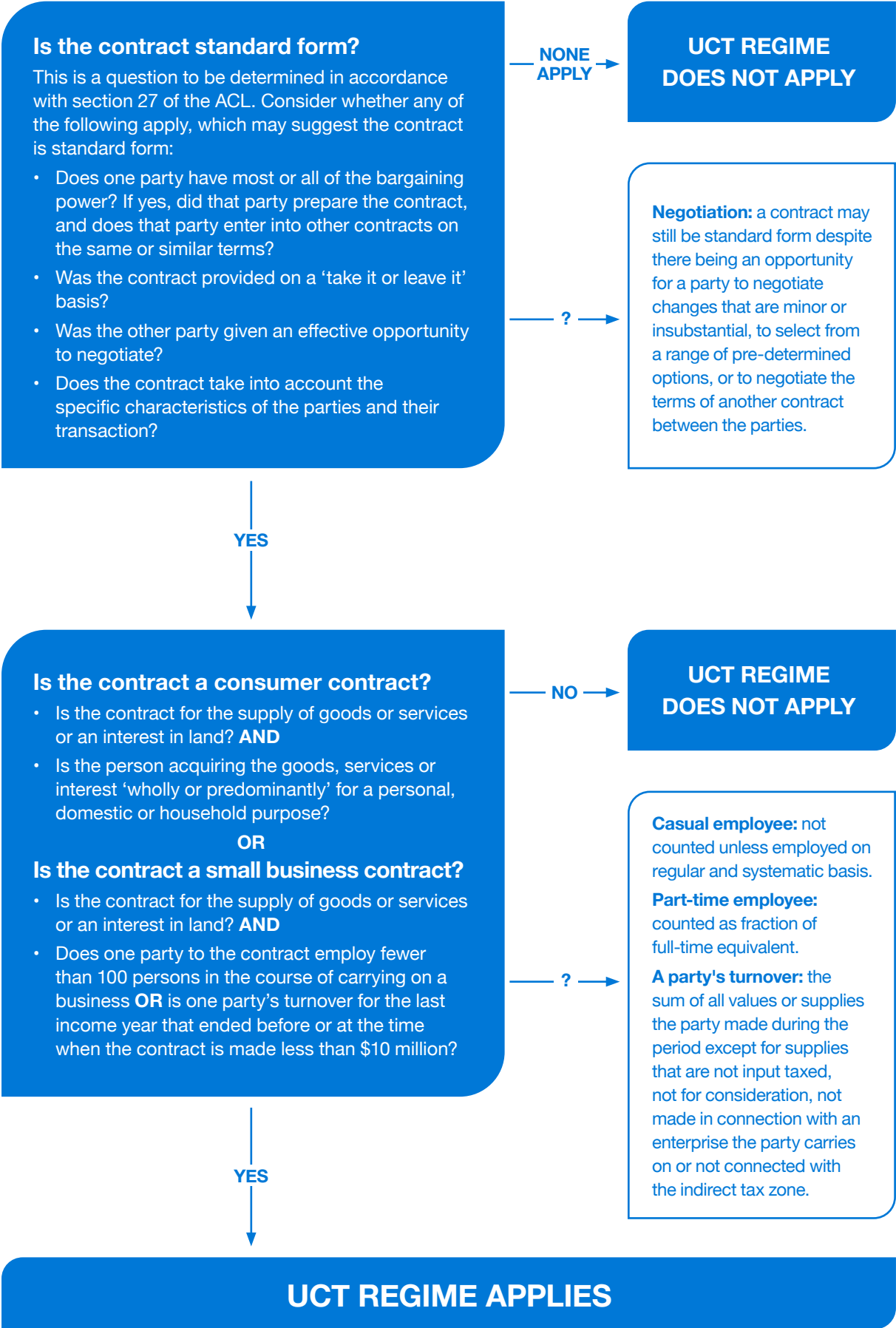
jobs from W Mart, and there has been little to no effort from W Mart’s end to market and advertise the ferry delivery services. Lucas eventually decides that enough is enough, and emails W Mart to pull the pin on the arrangement. W Mart write back to advise that unfortunately, they cannot accept Lucas’ request, given Water Post has no termination rights under the agreement during the three-year term. Shocked, Lucas reads back through the agreement and sees that indeed, there are no termination rights for Water Post, despite W Mart having the right to termination for convenience, for Water Post’s breach of agreement or breach of law, for Water Post’s insolvency or change of control, and for a range of other reasons. All up, W Mart has around 10 termination rights under the agreement, while Water Post has none.

In these circumstances, the termination clauses are likely to be unfair contract terms. This is due to the significant imbalance in termination rights between the parties under the agreement, with W Mart being the only party able to exercise a termination right. It is unlikely that W Mart can justify such a broad right as being reasonably necessary to protect their legitimate interests.

# UCT



# Does the Unfair Contract Terms (UCT) regime under the Australian Consumer Law (ACL) apply?



**MOTOR TRADES  
ASSOCIATION  
OF AUSTRALIA**

