

# Unfair Terms and Unjust Terms in Business-to-Business Contracts

## Role of the Victorian Small Business Commissioner

Under the *Small Business Commissioner Act 2003*, the Office of the Victorian Small Business Commissioner (VSBC) seeks to resolve business disputes about unfair market practices and commercial dealings. This includes disputes about terms in business-to-business contracts.

The VSBC will determine the most appropriate form of alternative dispute resolution (ADR) to resolve such a dispute. If a party refuses to engage in ADR, the VSBC can issue an 'unreasonable refusal to engage in ADR' certificate. This certificate can be used in proceedings before a court or the Victorian Civil and Administrative Tribunal (VCAT). The VSBC can also identify such a party in its Annual Report.

## Certain protections exist under Victorian and Commonwealth law

In Victoria, Section 185 (see over) of the *Australian Consumer Law and Fair Trading Act 2012* (Vic) provides VCAT with the power to make any order it considers fair, including declaring any unjust term void or otherwise varying a contract to avoid injustice for certain business contracts. VCAT must consider a range of factors before making such a determination.

These 'unjust term' protections apply to trader-to-trader disputes for amounts up to \$10,000.

The Australian Consumer Law (ACL) (Cth) provides protections for both consumers and businesses against unconscionable conduct, misleading and deceptive conduct and misrepresentation.

The ACL also provides protections for consumers entering into 'standard form' (i.e. 'take it or leave it') business contracts. The ACL specifies criteria which must be satisfied for a term to be considered 'unfair' and void in the contract. These protections do not currently exist for business-to-business contracts, although the Commonwealth Government is considering extending such protections to 'small business'. For more information about these proposed reforms, refer to [www.treasury.gov.au](http://www.treasury.gov.au)

For more information about the ACL, refer to [www.consumerlaw.gov.au](http://www.consumerlaw.gov.au)

**For more information contact the VSBC:**

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## **AUSTRALIAN CONSUMER LAW AND FAIR TRADING ACT 2012 (Vic)**

### **SECTION 185 – Additional powers of VCAT**

(1) In addition to its powers under section 184, VCAT, in determining a consumer dispute or a trader-trader dispute, may make any order it considers fair including declaring void any unjust term of a contract or otherwise varying a contract to avoid injustice.

(2) In determining whether a term of a contract is unjust under subsection (1), VCAT may have regard to—

- (a) the intelligibility of the contract generally, and of the term in particular;
- (b) the extent to which the term, and its legal and practical effect, were accurately explained to the relevant party before the term was agreed to and the extent to which the relevant party understood the term and its effect;
- (c) the relative bargaining power of the parties to the contract;
- (d) the consequences to the parties to the contract if the term is complied with or not complied with and the relative hardship of those consequences to each party;
- (e) whether or not it was reasonably practicable for the relevant party to reject, or negotiate for a change in, the term before it was agreed to;
- (f) the relationship of the term to the other terms of the contract;
- (g) whether the relevant party obtained independent legal or other expert advice before agreeing to the term;
- (h) whether unfair pressure, undue influence or unfair tactics were used to obtain the relevant party's consent to the contract or the term;
- (i) whether at the time the term was agreed to the relevant party knew, or could probably have found out by asking, that the term would cause any other relevant party hardship;
- (j) the conduct of the parties to the contract after the term was agreed to;
- (k) whether the term is usually found in contracts of that kind;
- (l) the justification for the term;
- (m) whether the term is unconscionable, harsh or oppressive;
- (n) any other factor VCAT thinks is relevant.

(3) Despite anything to the contrary in this section, in determining whether a term of a contract is unjust, VCAT must not have regard to any injustice arising from circumstances that were not reasonably foreseeable when the term was agreed to.

(4) In this section—

**trader-trader dispute** means a dispute between a purchaser or possible purchaser and a supplier or possible supplier in relation to the supply or possible supply of goods or services in trade or commerce which involves—

- (a) a claim for payment of money in an amount not exceeding \$10,000; or
- (b) a claim for performance of work of a value not exceeding \$10,000.