



# Unfair Contract Terms in B2B Contracts – One Year On.

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# What we'll cover

- A basic refresher
- The challenges of the review process
- Guidance and case law in New Zealand
- Lessons from other jurisdictions
- Potential future reform
- Tips for approaching a terms review

# A refresher

- Unfair Contract Terms legislation first applied to consumer contracts under the Fair Trading Act Amendment Act 2013 from 17 March 2015
- Regime extended to B2B contracts under the Fair Trading Amendment Act 2021 from 16 August 2022
- In basic terms, the regime now covers:
  - standard form trade contracts with annual value of \$250k including GST or less
  - Terms that (a) would cause significant imbalance (b) not reasonably necessary to protect legitimate interests and (c) would cause detriment



# Process



**Commerce Commission applies for declaration**

**Only Commerce Commission can currently apply**



**Court declares term to be unfair**



**Term cannot be applied, enforced, or relied upon, or included in a standard form contract**



**Penalties only apply if term subsequently used, relied upon etc**

# The challenges of the review process

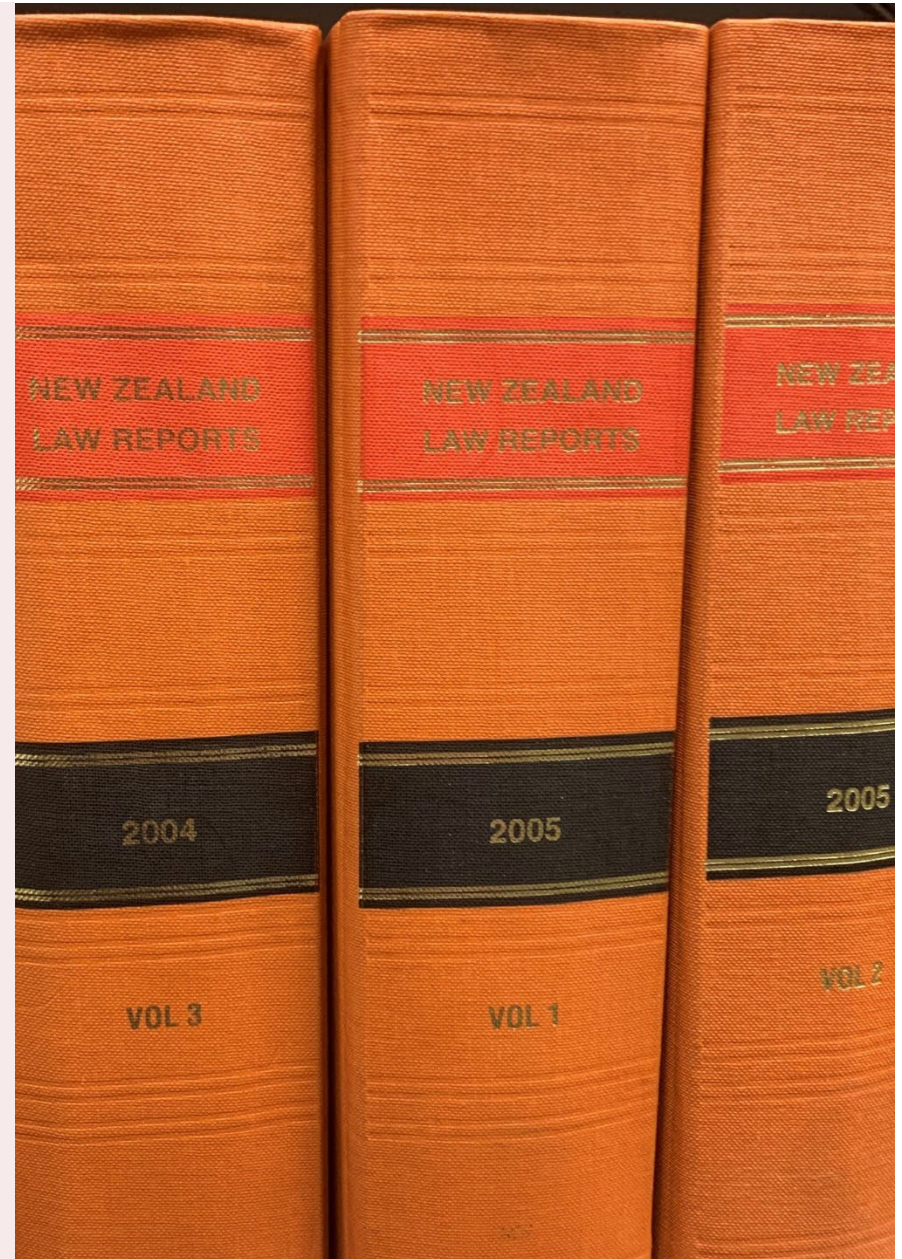
- Is this contract captured by the regime?
- Is the term unfair?





# New Zealand guidance and case law

- Commerce Commission *Unfair Contract Terms Guidelines*
- Limited case law
- Industry reviews provide some insights (though in B2C context)
  - telco
  - gyms
  - electricity



# Other jurisdictions

## **ACCC**

*Unfair terms in small business contracts:  
A review of selected industries*  
(November 2016)

## **ASIC**

*Unfair contract term protections for small  
businesses* (2016)  
  
*See also Unfair contract terms and small  
business loans report* (2018)

## **UK CMA**

*Unfair contract terms guidance* (2015)



# Common issues



Unilateral  
variation



Broad liability  
limits /  
indemnities



Automatic  
renewal



Early  
termination  
fees



Imbalanced  
termination  
rights



# Examples - Australian small business cases

Case	Examples of terms	
<b>JJ Richards 2017</b>	<ul style="list-style-type: none"> <li>• Binding to subsequent contracts</li> <li>• Unilateral price increases</li> <li>• Liability limitation</li> <li>• Charges for services not rendered.</li> </ul>	<ul style="list-style-type: none"> <li>• Exclusive rights</li> <li>• Suspension of services</li> <li>• Unlimited indemnity</li> <li>• Preventing termination where payments outstanding.</li> </ul>
<b>Servcorp 2018</b>	<ul style="list-style-type: none"> <li>• Automatic renewal with unilateral price increase</li> <li>• Unilateral termination.</li> </ul>	<ul style="list-style-type: none"> <li>• Unreasonable liability clauses</li> <li>• Keep security deposit if return not requested.</li> </ul>
<b>Fujifilm 2022</b>	<ul style="list-style-type: none"> <li>• Automatic renewal</li> <li>• Disproportionate termination</li> <li>• Liability limitation.</li> </ul>	<ul style="list-style-type: none"> <li>• Termination payment terms</li> <li>• Unfair payment terms</li> <li>• Unilateral variation.</li> </ul>

“Now “legitimate interests” may be of a business or a financial nature... The meaning of “legitimate interest” will depend on the particular business of the supplier, including the circumstances of the business and the context of the contract as a whole.

Further, what is “reasonably necessary” involves an analysis of the proportionality of the term against the potential loss sufferable, and other options that might be available to the respondent in terms of protecting its business and which are less restrictive to the other party to the contract.”

*Dialogue Consulting Pty Ltd v Instagram, Inc* [2020] FCA 1846

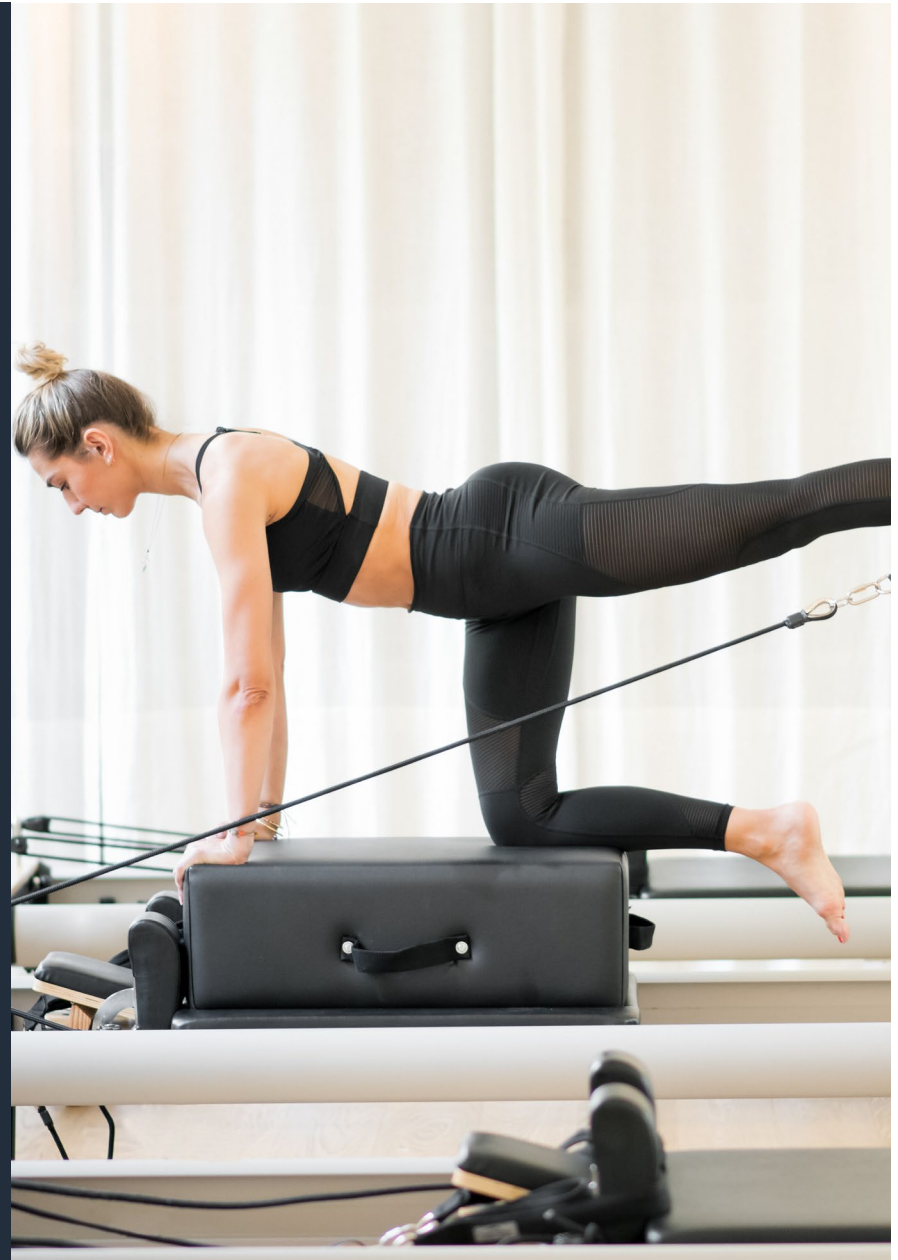
# Future reform?

Private enforcement

Penalties (removal of 'two-step' process)

Clarifying meaning of 'standard form' contract?

Threshold change (general or industry-specific)?



# Summary

## Identify standard form contracts

Does the contract fall within definitions of consumer contract, small trade contract, or grocery supply contract?

## Consider terms that are detrimental and likely to create significant imbalance

- Consider grey list and other guidance
- Is the term likely to cause detriment?
- Take a holistic, “in the round” approach to the question of balance

## Are those terms reasonably necessary to protect legitimate interests?

- A two-step inquiry
- Consider alternative ways to protect interests
- Does the clause overreach?
- Don't forget about transparency

## Make a risk assessment

If you decide a clause is not unfair, make a record



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