

UNFAIR CONTRACT TERM LAWS OF AUSTRALIA

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FOREWORD

The justice of every legal system depends upon fairness in procedure and fairness in outcome. The fairness of outcome by distributive justice across society is a concern of political philosophy. The fairness in outcome by corrective justice between persons is a concern of legal philosophy. Amartya Sen gives an example of three children, Anne, Bob and Carla who wish to play with a flute. Anne is the only one who knows how to play the flute. Bob is the only one who is poor and has no toys. And Carla is the child who made the flute using her own materials and labour. The ownership of the flute as a matter of distributive justice is a question of political philosophy. Different answers might be given by the utilitarian, the economic egalitarian, and the libertarian. But as a matter of corrective justice, between the three children only, the outcome that Carla is entitled to the flute is both natural and clear. So too, the procedural fairness of the process by which Carla's entitlement is to be positively determined and declared, with Anne and Bob having a right to be heard, is a matter of natural justice. Corrective justice requires fairness in procedure and outcome as a matter of natural right, not fashion. In many areas of law, the open-textured principles of natural justice for a fair procedure and a fair outcome have crystallised into common law rules which are the product of continuous refinement and development. Over centuries, the rules have developed slowly and incrementally at common law.

Sometimes gaps have arisen. One gap which was sometimes perceived in the common law was the inability of the common law to rewrite or avoid terms in the agreements of parties which are perceived to be unfair, even grossly unfair, provided that the terms were agreed in a procedurally fair way. Unlike Roman law, which had concepts such as *laesio enormis* to protect parties against substantive abuse, the common law generally respected the liberty of a party to choose any substantive term that was consistent with the public policy of the realm. On 1 July 2010, this perceived gap in the landscape of contract law was partly filled in Australia. In legislative provisions now existing in every State and Territory of Australia many contracts were subjected to legislative requirements of fairness by Pt 2-3 of Ch 2 of the Australian Consumer Law and Pt 2, Div 2, SubDiv BA of the Australian Securities and Investments Commission Act 2001 (Cth). The highly open-textured nature of unfairness was crystallised around three cumulative factors of significant imbalance in rights and obligations, reasonable necessity to protect the legitimate interests of the party who would be advantaged, and detriment if the term were applied or relied on. In the following 16 years a substantial body of case law has developed rules around those three factors, as well as anterior and posterior legislative issues: to which contracts do the unfair term provisions apply? What is the relationship between unfair terms and "unconscionable" terms?

Unfair Contract Term Laws of Australia

What are the consequences of a conclusion of unfairness? Who is liable as an accessory for contraventions?

In *Unfair Contract Term Laws of Australia*, Peter Sise addresses all of these questions and many more and provides practical guidance in a comprehensive survey of the legislative schemes and case law in the present Australian schemes concerning unfair contract terms. The depth of the book demonstrates Mr Sise's many years of experience, expertise and insight in this rapidly developing area of law. The history of legislative development in this area up to 2010 shows the ratchet effect of the concern of Parliaments with unfair terms. Rarely will a Parliament cut back the scope of protection for contracting parties against unfairness. Instead, as the legislation expands to apply to new circumstances to address new forms of abuse and potential for abuse, and as the broad principles are refined into clearer rules in the case law, it is to be hoped that *Unfair Contract Terms in Australia* will be a book that develops new editions that further address the expanding case law and legislation. But, for the present, and for the development and understanding of this important area of private law, *Unfair Contract Terms in Australia* will stand as a learned and illuminating guide for scholars, practitioners and judges, and as a foundational contribution to the understanding of the constraints upon the liberty of parties to agree unfair contract terms in Australia.

James Edelman
High Court of Australia
6 June 2026
Birthday of Isaiah Berlin