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UNFAIR CONTRACT TERMS

A term of a **consumer contract** OR **small business contract** is void if; the term is **unfair** and the contract is a **standard form contract** (s 23(1) ACL). However, the contract will continue to bind the parties if it is capable of operating without the unfair term (s 23(2) ACL).

CONSUMER CONTRACT

23(3)	<p>A contract for the;</p> <ul style="list-style-type: none"> ▪ supply of goods or services OR ▪ sale or grant of an interest in land <p>to an individual whose acquisition of those goods, services, or interest is wholly or predominantly for personal, domestic or household use or consumption.</p>
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SMALL BUSINESS CONTRACT

23(4)	<p>A contract for the;</p> <ul style="list-style-type: none"> ▪ supply of goods or services OR ▪ sale or grant of an interest in land <p>And at the time the contract is entered;</p> <ul style="list-style-type: none"> ▪ one party is a business that employs less than 20 people AND ▪ the upfront price payable does not exceed \$300,000 OR ▪ the contract has a duration of more than 12 months and the upfront price payable does not exceed \$1,000,000
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UNFAIR

24(1)	<p>A term of a consumer contract is unfair if;</p> <p>(a) it would cause a significant imbalance in parties' rights and obligations</p> <p>(b) Not reasonably necessary in order to protect legitimate interests of party advantaged by term</p> <p>(c) Would cause detriment to a party if it were to be applied or relied on</p>
24(4)	<p>A term is presumed to be not reasonably necessary, unless the party proves otherwise.</p>
24(2)	<p>In determining whether a term is unfair or not, a court must take into account;</p> <p>(a) Extent to which the term is transparent</p> <p>(b) Contract as a whole</p>
23(3)	<p>A term is transparent if the term is (a) expressed in reasonably plain language; (b) legible; (c) presented clearly; (d) readily available to any party affected by the term</p>
25	<ul style="list-style-type: none"> ▪ Terms penalising one party for breach/termination ▪ Terms permitting one party to vary cost without other being able to terminate ▪ Terms limiting the right to sue ▪ Terms allowing one party (but not the other) to vary contract

STANDARD FORM CONTRACT

27(1)	<p>Not defined, but commonly known as one that has been prepared by one party & is not subject to negotiation – it is offered on a 'take it or leave it' basis.</p> <p>There is a presumption that a contract is a standard form contract.</p>
27(2)	<p>Matters to take into account when determining whether it is a standard form contract;</p> <ul style="list-style-type: none"> ▪ Bargaining power between parties, who prepared the contract, whether required to accept or reject as presented, negotiation opportunity, do the terms reflect special characteristics of a party.

Does not apply to (s 28); 1) contract for the carriage of goods by ship, 3) contract that is the constitution of a company, 4) small business contract to which statute applies.

Does the PPSA apply?

The PPSA applies to **security interests in personal property**, subject to some **exceptions**.

Personal property	10	<p>All property other than land or a statutory entitlement that is declared by the statute not to be personal property for the purposes of the PPSA.</p> <ul style="list-style-type: none">▪ Goods; tangible property, incl. crops, livestock, wool, extracted minerals, satellites/space objects▪ Financial Property; chattel paper, currency, documents of title, investment instruments, negotiable instruments▪ Intermediated Securities;▪ Intangible property; any personal property that does not fit under any of the other three categories. E.g. accounts, intellectual property, licenses.	<p>_____ would be considered personal property under s 10 of the PPSA, which defines personal property expansively, only excluding land and certain statutory entitlements.</p>												
	'In substance' security interest	<p>12(1) An interest in personal property provided for by a transaction that, in substance, secures payment or performance of an obligation (without regard to form or title).</p> <ul style="list-style-type: none">▪ 'provided for by a transaction' denotes that the interest taken in personal property must be consensual.													
	12(2)	<p>For example;</p> <table><tr><td>a) fixed charge;</td><td>g) trust receipt;</td></tr><tr><td>b) floating charge;</td><td>h) consignment;</td></tr><tr><td>c) chattel mortgage;</td><td>i) lease of goods</td></tr><tr><td>d) conditional sale agreement (including retention of title);</td><td>j) an assignment;</td></tr><tr><td>e) hire-purchase agreement;</td><td>k) transfer of title;</td></tr><tr><td>f) pledge;</td><td>l) flawed asset arrangement</td></tr></table> <p>Where the transaction, in substance, secures payment or performance of an obligation.</p>	a) fixed charge;	g) trust receipt;	b) floating charge;	h) consignment;	c) chattel mortgage;	i) lease of goods	d) conditional sale agreement (including retention of title);	j) an assignment;	e) hire-purchase agreement;	k) transfer of title;	f) pledge;	l) flawed asset arrangement	<p>A security interest is (s 12(1) PPSA). Therefore, _____ is an 'in substance' security interest as it is a _____ (s 12(2) PPSA), and (give details of the payment/ performance of obligation).</p>
a) fixed charge;	g) trust receipt;														
b) floating charge;	h) consignment;														
c) chattel mortgage;	i) lease of goods														
d) conditional sale agreement (including retention of title);	j) an assignment;														
e) hire-purchase agreement;	k) transfer of title;														
f) pledge;	l) flawed asset arrangement														

Are there any competing security interests over the same collateral?

Where there are competing interests over the same collateral, the priority rules set out at Part 2.6 will determine which party has priority over the assets.

PMSI

- 14(1) A PMSI is a security interest given to facilitate the grantors purchase of the collateral to which the security interest relates.
- A security interest taken in collateral, that secures all or part of its purchase price
 - Interest of a lessor/bailor of goods under a PPS lease
 - Interest of a consignor under a commercial consignment
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- 62 A PMSI must be perfected by registration before the end of 15 business days after;
- *For goods*; the day the grantor obtains possession of the property
 - *For other property*; the day the interest attaches to the property

_____ is a PMSI as per s 14(1) of the PPSA, and the secured party has met the timing requirement of registering within 15 business days of;

1. obtaining possession
2. attachment

Priority Rules

- 57 1. A security interest perfected by control has priority over a security interest in the same collateral, perfected by another means
- 75 2. A perfected security interest held by an ADI has priority over any other perfected security interests in the collateral

Party 1	VS.	Party 2	Outcome	S
Earlier Perfected	v	Later Unperfected	Perfected prevails	55(3)
Earlier Perfected	v	Later Perfected	First to register prevails	55(4)-(5)
Earlier Unperfected	v	Later Unperfected	First to attach prevails	55(2)
Earlier Unperfected	v	Later Perfected	Perfected prevails	55(3)
Earlier Perfected PMSI	v	Later Perfected	PMSI prevails **	62
Earlier Perfected	v	Later Perfected PMSI	PMSI prevails **	62

** subject to timing rules (s 62)