Circle Green Community Legal

Unfair contract terms for contractors

A Circle Green Community Legal claim guide

Introduction

This claim guide is for contractors who are covered by the *Fair Work Act 2009* (Cth) in Western Australia who wish to make an unfair contract terms claim.

The information below has been written to assist you with the practical process of making an unfair contract terms claim. If you are not yet ready to make a claim and you are seeking more general information, you may wish to view our Q&A publications on our workplace resources page first. If you need legal advice before making a claim, you can submit an application for advice to us here or see our private solicitors list here.

Circle Green can only provide information or advice on the application of the *Fair Work Act 2009* (Cth) and a limited number of other workplace laws. If you are a contractor, there may be additional laws that apply to you or that affect the information provided below. This claim guide is provided as general information only and is not intended to be a substitute for legal advice. By using the information on this page, you agree to our full disclaimer.

Key terms

This information resource uses a number of key terms. You can click on our glossary in a new window and read what the key term means. See our glossary here: https://circlegreen.org.au/resource/glossary-workplace-law/

We encourage you to read this claim guide from start to finish. If you are looking for a specific piece of information, you can click on any heading below to skip to that section.

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Overview

Certain contractors are covered by the *Fair Work Act 2009* (Cth). These contractors can apply to the Fair Work Commission to change or set aside unfair contract terms if they earn less than the contractor high income threshold. The Fair Work Commission can only hear applications regarding contracts that were entered into on or after 26 August 2024.

An unfair contract terms application involves lodging an application form, usually having a conciliation conference, and then a formal hearing if no outcome can be agreed in conciliation.

If the FWC determines that one or more contractual terms are unfair, then they can order that the terms of the contract be changed or set aside but they cannot order compensation.

In deciding whether a term is unfair the FWC has a list of matters it may consider but it can also consider any other matter it thinks is relevant.

If you are raising unfairness in how the other party is acting towards you, then you should link it to terms that you think are unfair.

This claim guide explains who can make a claim, when a term will be considered unfair, and the procedure of making a claim. If you have received legal advice and you are very confident that you are able to make a claim and your term was unfair, you may wish to skip to the procedural information.

Eligibility

Only certain contractors can make unfair contract terms claims. To be able to make a claim you need to fit certain circumstances. If you fit these circumstances, then you are “eligible” to make a claim.

To be eligible to make an unfair contract terms claim, you must meet the following criteria:

- you are a contractor;
- your contract for services was entered into on or after 26 August 2024;
- your contract for services has a “constitutional connection” (see FWO definition here and seek advice if you are unsure); and
- you earn less than the contractor high income threshold (this is adjusted annually on 1 July – see FWC website for current limit).

You will also need to specifically identify one or more terms in your contract that you think are unfair. If you are raising unfairness in how the other party is acting towards you, then you should link it to terms that you think are unfair.

If you entered into your contract before 26 August 2024 or you earn more than the contractor high income threshold, you can’t make this type of claim, however you may be able to make a similar type of claim under the *Independent Contractors Act 2006* (Cth).

Time limits for making a claim

There is no time limit to lodge an unfair contract terms claim. As long as you meet the eligibility criteria, you can lodge the claim.

It may be that there is no practical benefit to lodging a claim if the contract has ended, because the claim process is aimed at improving conditions going forward. If your contract has ended, the FWC

may or may not accept your claim. However, as this is an emerging area of law the position is not completely settled.

What makes a term unfair?

In deciding whether a term is unfair the FWC has a list of matters it may consider. However, it is not required to consider every one of these matters and it can also consider any other matter it thinks is relevant.

When determining whether a term is unfair the FWC may consider the following:

The parties' relative bargaining power

- An inequality in bargaining power may support a term being found unfair.
- Generally, individual workers have less bargaining power than the party they are engaged by, but it can depend on the circumstances.
- For example, sometimes you may realistically have no choice but to accept the terms as given to you by the other party.
- In other situations, the inequality in bargaining power may not be as extreme. Sometimes you may have a limited ability to negotiate the terms of your contract. However, you still may be able to make arguments about the limits of your ability to negotiate and how this suggests a difference in your relative bargaining power.

Whether there is a significant imbalance in the parties' rights and obligations under the services contract

- A significant imbalance in the parties' rights and obligations under the services contract may support the term being found unfair.
- For example, terms requiring a worker to be available 24/7 and allowing the other party to cancel the worker's shifts at a minute's notice may be imbalanced. In this example, it may be that the rights and obligations in the contract are significantly one-sided or imbalanced such that the term is unfair.

Whether the contract term is reasonably necessary to protect the legitimate interests of a party to the contract

- A legitimate interest might be something like protecting the other party's client base. For example, contracts often protect this legitimate interest by including a "non-solicitation clause" that prevents one party from luring clients away.
    - As an example, a physiotherapist might be contracted by a health clinic to see clients, with the clinic and the physiotherapist sharing the profits. If the physiotherapist asked the clients to continue treatment separately, to avoid having to share profits with the clinic, this would be taking advantage of the cost and effort put in by the clinic to obtain clients, which the clinic is entitled to protect.
- However, if the term does more than what is reasonably necessary to protect the legitimate interest then this may support the term being found unfair.
- So a non-solicitation clause which prevents deliberate poaching of clients might be reasonable, but a restraint of trade clause which prevents one party from working in the industry generally might be unreasonable.
    - Following the example above, consider if a health clinic had a term in a contract with a physiotherapist that said the physiotherapist can't treat any

clients within the Perth area for 12 months after the end of the contract. This would likely be considered to go beyond the clinic's interest in their own client base, and may be considered an unfair restriction on the physiotherapist.

Whether the contract term imposes a harsh, unjust or unreasonable requirement on a party to the contract

- A term that places harsh, unjust, or unreasonable requirements on a party to the contract may support the term being found unfair.
- For example, a term that requires a contractor to work 10 hours on a particular day and then commence at 4AM the next day may be harsh, unjust, or unreasonable.

Whether the services contract provides for total remuneration that is less than what regulated workers performing the same or similar work would receive under a minimum standards order or minimum standards guidelines

- The FWC can set minimum standards orders or guidelines for contractors who are "regulated workers".
- A services contract providing for less than what the contractor would receive under a minimum standards order/guideline may support a term being found unfair.
- You can call the FWO if you are unsure whether or what minimum standards order or guidelines apply to you and what remuneration they provide for.
- For more information on regulated workers and minimum standards orders and guidelines, please see our publications: "Q&A: Rideshare, digital platform and gig economy workers" and "Q&A: Road Transport Workers".

Whether the services contract provides for total remuneration that is less than what employees performing the same or similar work would receive

- A services contract providing for less than what the contractor would have received if they were an employee may support a term being found unfair.
- All employees have minimum entitlements, such as minimum pay rates or other minimum conditions of work.
- For example, specific industries or types of work are often covered by an "award" which sets out minimum rates of pay and other minimum conditions for employees. Another example is sometimes employees of specific enterprises are covered by an "enterprise agreement" or "industrial agreement".
- For example, you may be a contract cleaner working for an agency. If the agency is paying you less than what an employee would be entitled to under the *Cleaning Services Award [MA000022],* then it might be an unfair contractual term.
- If you are unsure what your pay or other minimum entitlements would be if you were working as an employee, you can contact the FWO.

Any other matter the FWC thinks is relevant

- The FWC can consider any other factors that they consider are relevant.
- This could be anything, as long as it is relevant in the context of the contract.
- If you think the FWC should something else relevant to unfair terms then you can make arguments about why the FWC should consider this in your application.

Outcomes

If you don't settle your matter at conciliation and your matter proceeds to a final hearing, the FWC will make a decision. The FWC will either find that the contract was fair and dismiss the application, or they will find that it was unfair and then consider whether to order a remedy.

A remedy means something that is done or given to you at the end of a legal process that is meant to repair the wrong done to you or compensate you for it. In unfair contract terms claims the only remedy the FWC can order is that the terms of the contract be varied or set aside.

While this is an emerging area of law, the general position is that the FWC does not have the power to award compensation or backpay in unfair contract terms claims.

The power to award a remedy is discretionary – this means that you do not automatically get a remedy if the contract is unfair. The FWC has to be convinced that they should provide a remedy.

The FWC can only change or set aside terms that would relate to a "workplace relations matter". For example, rates of pay are ordinarily considered a workplace relations matter for employees. However, this means the FWC cannot change or set aside terms if they relate to things that are not considered workplace relations matters such as superannuation.

This means if an unfair term would involve a workplace relations matter if you were an employee then the FWC may be able to change or set aside the unfair term. See the table below for a non-exhaustive list of the types of terms that are workplace relations matters and are not workplace relations matters.

Examples of workplace relations matters	Examples of matters that are NOT workplace relations matters
remuneration, allowances or other amounts payable to employees	preventing discrimination or promoting equal employment opportunity (unless contained in a state or territory industrial law)
employees' leave entitlements	superannuation
employees' hours of work	workers' compensation
enforcing/terminating employment contracts	occupational health and safety
making, enforcing or terminating other agreements determining terms and conditions of employment	child labour
industrial action by employees and employers (unless it affects essential services)	public holidays (except public holiday rates)

disputes between employees and employers	deductions from wages or salaries
other matters that are substantially the same as matters that relate to employees or employers dealt with by or under the *Fair Work Act 2009* (Cth) or state or territory industrial laws.	industrial action affecting essential services
	jury service
	professional or trade regulation
	consumer protection
	taxation

Costs

In court proceedings, the losing party usually pays the legal costs of the winning party. This is not the case in the FWC. In the FWC, each party is responsible for paying the costs of any representation or advice they receive to help them in the claim.

There are some exceptions. One exception is when the claim is made, or responded to, frivolously or vexatiously. A case is made frivolously where there the application is so faulty or baseless that it doesn't deserve an answer. This is more than being a weak or tenuous claim, or a claim where the facts are in dispute or poorly recollected. It should be apparent on reading the application that there is no chance for it to win.

A case is vexatious when its main purpose is to harass, annoy, or embarrass the other party. If a claim is made or defended with this purpose, then it may be vexatious even if there is a reasonable basis for it.

Another exception is where a party unreasonably does something, or fails to do something, and as a result the other party incurs costs. An example might be where a party unreasonably refuses a reasonable settlement offer or fails to discontinue an application. Whether it is unreasonable depends on the circumstances, but the key thing is that there is clear evidence of unreasonable conduct.

Representation

Conciliations and hearings at the FWC are designed with the intention that they can be navigated by an ordinary person without representation. However, a person can be represented by a lawyer or an agent if a member of the FWC grants permission.

Being represented by a lawyer or agents means that they speak and act on your behalf at the proceedings. A party must notify and seek permission from the FWC before they can be represented at conciliations or hearings.

Permission is only granted if:

1. the complexity of the matter means that a representative would help it to be dealt with more efficiently;

2. the party is unable to represent themselves so it would be unfair to refuse permission for them to be represented by someone else; or

3. it would be unfair not to allow the person to be represented, considering fairness between the party and other parties in the same matter.

Making an application

You start a claim by filing a Form F91 – Application for an unfair contract term remedy with the FWC. The form can be downloaded from the FWC website. You file the claim by email to lodge@fwc.gov.au or by posting or delivering the application to the Perth commission office. In some circumstances it is possible to make an application over the phone.

If you have a written contract then you must lodge a copy of your contract with your application. However, contracts can be written, verbal, by conduct (or a mixture of these things) so if you do not have a written contract you are not prevented from making a claim.

Information about fees can be found here: https://www.fwc.gov.au/apply-or-lodge/fees-and-costs

Once the application is accepted, the FWC will provide the application to the other party and then invite them to respond within 7 days. The response will usually set out any objections the other party has to the things said in your application, their arguments why the terms are not unfair, and their arguments why the FWC should not make the contractual changes you seeking.

Dismissing applications before hearing

The FWC can dismiss applications if asked to or when it decides that there is a reason to. The power to dismiss an application is used cautiously by the FWC, but it will be used when necessary.

Generally, the FWC will dismiss an application if it is not made correctly, including if the worker does not pay the proper filing fee. It may also dismiss the application if it has no prospects of success, or if it is frivolous or vexatious. Frivolous or vexatious has the same meaning here as it does above – a claim that is either baseless or intended to harass or annoy.

Generally speaking, if you are eligible to make a claim, you have an arguable case that your contract was unfair, you follow the FWC processes correctly and you respond to their communications with you, your case should not be dismissed before it gets to conciliation or hearing.

Conciliation

If your claim is accepted, the first step is usually to hold a conciliation conference to see if the claim can be settled by a negotiated outcome.

Most claims are resolved in conciliation rather than proceeding to a formal hearing. Hearings are time and resource intensive, and can be challenging to navigate for ordinary, unrepresented people, even though the FWC is a more relaxed jurisdiction than a court of law. It is in everyone's interests for a claim to be conciliated rather than determined by a hearing, including yours. Regardless of how strong your claim might be, success at hearing is never guaranteed, so you are generally better off saving the time and expense of a hearing and avoiding the gamble of losing.

A conciliation conference is usually held by telephone between a conciliator or commissioner, the other party and/or their representative, and you and/or your representative. In conciliation, both parties will get an opportunity to present their case and respond to things the other party has said. The conciliator may ask questions of the parties and may speak to each of the parties separately

about their case and what they might be willing to accept as a negotiated outcome. The parties may then come to together to discuss settlement.

Settlement

Settlement means an agreement between the parties that will end the dispute that has led to the claim. Because settlement is an agreement between the parties, anything can be a part of settlement, as long as the parties are willing to agree to it.

While you are not legally prevented from asking for compensation (money), it's unlikely that the other party would agree, as the FWC is unlikely to have the power to award compensation at a hearing. For this reason, it may be seen to be unreasonable to negotiate for monetary compensation. One exception may be if you are negotiating a "global settlement", meaning that you are settling a number of claims, or all claims. This is something you may wish to clarify at the start of the conciliation.

Settlements are usually finalised in writing. They could be settled by a deed, which is a written document describing the actions each party agrees to take in order to bring the matter to a close. A deed will usually include a timeline of events relevant to the dispute, some definitions of terms, the terms that the parties agreed to in conciliation, and potentially some standard or "boilerplate" terms that are generally included in deeds to make them work properly. Once agreed to, a deed is legally binding and can be enforced by making an application to a court. You should only agree to terms of settlement that you are willing to be legally bound by.

Settlement of a matter can be reached any time before the final decision is made. It is always worth reaching out and seeing if the other party is willing to settle, because it allows you to have some control over the outcome of the matter. Leaving it up to the FWC means that the outcome is out of your hands.

Hearing

If the matter is not settled at conciliation, you can discontinue the matter or proceed to a hearing.

The FWC has some discretion over the process for a hearing, however a standard process is described below.

The FWC will first hold a "programming" or "directions" conference or hearing, where the parties will be given dates by which they have to do certain things.

You will be asked to provide documentary evidence to the FWC, such as your contract and written statements by the parties or other witnesses providing factual information to the FWC. You may be asked to collate all your documents into a "book", or a compilation of all your documents.

You and the other party may be asked to submit a statement of agreed facts and some agreed documents. Submitting these will require you to talk to the other party and see what parts of your claim they agree with, and what parts of their defence you agree with. This is known as "conferral", and the purpose is to focus the hearing on matters that are not agreed, so that the parties don't give evidence on things that are already agreed.

You will also be asked to provide an outline of "submissions" to the FWC. Submissions are legal arguments in a written form about why the facts support your case. You will normally be expected to give an outline of the submissions you intend to make, in enough detail for the other party to prepare a response.

You will then give your submissions in full orally (spoken) during the hearing. You will usually give an opening statement where you state your overall case, including your version of events and your reasons why those facts mean your contract is unfair. If any oral evidence is being provided, the witnesses will do that after the opening statement, with you asking them questions and the other party asking cross examination questions. Once all your witnesses have given evidence, you will give a closing statement where you make your submissions about why the FWC should give more weight to your evidence and prefer your evidence over the other party's evidence, and why your contract is unfair. You may be questioned about parts of your case by the Commissioner hearing your case.

Once your case is provided in full, the other party will give their case. You will have an opportunity to ask questions of any witnesses who give evidence. Once both cases have been provided, the next step will be for the FWC to make its decision. The decision will usually not be made on the spot, instead it will be “reserved”, meaning that the FWC will take some time to decide whether the contract is unfair and then deliver the decision in writing at a later date.

Enforcing an outcome

If you win the case and the FWC exercises its discretion to award a remedy, there will be an order made by the FWC to change or set aside some or all of the contract. It is likely that the FWC cannot order compensation in an unfair contract terms claim.

An order will usually set a date by which the other party has to comply with the order. If they do not, you can seek enforcement of the order by making an application to the Fair Work Divisions of the Federal Circuit and Family Court or the Federal Court, or an eligible WA court.

You may also be able to dispute non-compliance with the order by making a breach of contract claim in the Magistrates Court. For example, if an order is made that your pay be increased but your pay doesn’t change, it’s likely that the contract (as amended by the order) is being breached.

It may be that the Magistrates Court expects you to enforce the order within the Fair Work jurisdiction first, however, this is an emerging area of procedure and law. If you are in this situation, you may wish to seek legal advice.

Appealing an outcome

If you lose your case, you can make an application to the Full Bench of the FWC to hear the appeal by lodging a form F7 with the FWC within 21 days of the original decision. The FWC will first decide whether to grant permission to appeal, and then whether there has been an error in the original decision.

In deciding whether to grant permission to appeal, the FWC will consider whether there is public interest in doing so. The public interest may include:

- whether the matter raises issues of importance and general application;
- whether the type of matter has been decided differently in the past and it would be beneficial for the Full Bench to provide guidance;
- whether the original decision creates an injustice or has led to an unlikely or unexpected result; and
- whether the Commissioner in the original decision applied the wrong principles.

Because the FWC considers each factor, simply finding an error in the decision won’t itself lead to permission to appeal being granted.

Further information and assistance

Circle Green Community Legal

WA employees can request free and confidential legal assistance with employment and workplace discrimination issues from Circle Green Community Legal.

Complete an online request: circlegreen.org.au/get-help

Telephone enquiries: 08 6148 3636 (Please note that we do not provide on demand legal advice)

For further information on our Workplace law services, please visit: circlegreen.org.au/workplace

Commissions	Government departments & other supports
Fair Work Commission Email: perth@fwc.gov.au (enquiries only) Email: melbourne@fwc.gov.au (to lodge a claim form) Telephone: 1300 799 675 Web: www.fwc.gov.au	**Fair Work Ombudsman infoline** Telephone: 13 13 94 Web: https://www.fairwork.gov.au/ **Wageline** Phone: 1300 655 266 Web: https://www.dmirs.wa.gov.au/contactwageline

If permission is granted, you will go through another hearing where you will have to make submissions on why the original decision was wrong.

Appeals are legally complex and time consuming. If you don't have a strong argument, you may be at risk of a costs order. You may wish to seek legal advice before appealing a decision.

Related resources

- Q&A: Conciliation conferences for WA employees
- Q&A: Unfair contract terms for WA workers

Disclaimer:

This factsheet only contains general information. This factsheet is not legal advice and should not be relied on as a substitute for legal advice. You may wish to seek advice from a lawyer regarding your own particular circumstances. We are not responsible for any consequences arising from your use of, or reliance on, the information contained in this factsheet.

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