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Health and Aged Care Bulletin

This Issue • New Unfair Contracts Regime — Don't Panic!

The New Regime

Introduction

On 14 April 2010 the *Trade Practices Amendment (Australian Consumer Law) Act (No. 1) 2010* ("Act") was given Royal Assent. This Act is the first arm of the new Australian Consumer Law ("ACL"). The main feature of the Act is the unfair contract terms provisions which will commence on 1 July 2010.

The second arm, the *Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010*, is expected to be passed by Parliament by mid-2010 and take effect from 1 January 2011. The purpose of this Bill is to amend the *Trade Practices Act 1974* and the *Australian Securities and Investments Act 2001* to establish and apply the ACL.

Summary of Proposed Amendments

The ACL will operate to protect individuals from being disadvantaged by consumer contracts favouring the supplier and will introduce new penalties, enforcement powers and consumer redress options.

For a contract to fall within the scope of the Act, the contract needs to be deemed a **consumer contract**. A term in a consumer contract will be **void** if it is considered **unfair** and the contract is in a **standard form**.

What is a consumer contract?

A consumer contract is a business-to-consumer contract for the supply of goods or services or a sale grant of an interest in land to an individual whose acquisition is wholly or predominantly for personal, domestic or household use or consumption.



What is a standard form contract?

The Act does not define what will be considered as a "standard form contract".

There will be a presumption that a contract is a standard form contract, unless a party to any proceedings proves otherwise.



In determining whether a contract is a standard form contract the court will consider, among other things, whether:

- one party has all or most of the bargaining power;
- if the contract has been prepared by one party before any discussion relating to the transaction;
- another party is required to accept or reject the terms of the contract;



- another party was given effective opportunity to negotiate the terms of the contract; or
- the terms of the contract take into account the specific characteristics of another party.

It appears then, as though Residents Agreements made under the *Retirement Villages Act 1987* (SA) and Residential Care Service Agreements made under the *Aged Care Act 1997* (Cth) will be standard form contracts.

When is a term unfair?

A term of a consumer contract is unfair if:

- it causes a significant imbalance in the parties' rights and obligations arising under the contract;
- it is not reasonably necessary to protect the supplier's legitimate interests of the party who would be advantaged by the term; and
- it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.

Section 4 of the Act contains a non-exhaustive list of the types of terms that may in some circumstances be considered unfair.

For example, if a term permits or has the effect of permitting one party but not the other to (among other things):

- terminate the contract;
- penalise the other party for breach or termination;
- vary the terms of the contract;
- vary upfront price;
- unilaterally determine whether the contract has been breached or to interpret its meaning; or
- assign the contract to the detriment of the other party without that party's consent.

It is important to keep in mind that these are examples of terms which **may** cause a significant imbalance in the parties' rights and obligations arising under the contract. A court will not deem a term void without having regard to the necessity of the term to protect the legitimate interests of the party.

Exemptions

Terms that will remain unaffected by the Acts are the main subject matter of the contract, the upfront price payable under the contract and terms required or expressly permitted as a matter of law.

Enforcement and Remedies

A term of consumer contract will be void if that term is found to be unfair by the court. However, a contract continues to bind the parties if it is capable of operating without the unfair term.

The legislation is enforceable by a party to a consumer contract or the Australian Competition and Consumer Commission or the Australian Securities and Investment Commission.

The ACL introduces new civil pecuniary penalties for particular consumer protection provisions of the *Trade Practices Act 1974*. The penalty for contravention of these provisions can be up to \$1.1 million for bodies corporate and up to \$220,000 for persons other than bodies corporate.

Impact on Residents Agreements and Residential Care Service Agreements

The Acts are "new law" and, as such, the impact of the unfair contract term provisions may not be felt until the legislation has been tested by the courts.

In our view, it is unlikely that the "basic" provisions of most independent living Residents Agreements or Residential Care Service Agreements will be considered to be "unfair".

For example, a term will not be considered to be unfair and void if it is a term required, or expressly permitted, by a law of the Commonwealth or State or Territory. In relation to both types of Agreement, they are usually drafted to follow the requirements of the *Retirement Villages Act 1987* (SA) and the *Aged Care Act 1997* (Cth) and, in particular, include matters required by the relevant Act.

Suggested Action

While we consider it unlikely that the "basic" terms of Residents Agreements or Residential Care Service Agreements prepared by us for clients will be considered to be "unfair" under the new laws, we recommend that administering authorities and approved providers review:

- their contracts and, in particular, any clauses that have been added by them to accommodate particular issues (which may, on review, seem "heavy handed"); and
- the rules applying to their village or care facility

in order to satisfy themselves that neither include any terms that could be considered to be "unfair".

We would be happy to assist with any review, or to answer any further queries.

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