

Commercial

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Unfair Contracts Regime

The first stage of the new Australian Consumer Law, which includes a new regime regulating unfair contracts, has now passed the Federal Parliament. The bill which will implement this is the *Trade Practices Amendment (Australian Consumer Law) Bill 2009*. The changes are likely to commence as early as 1 July 2010. A further bill is currently before Federal Parliament, which if passed, will implement the remainder of the proposed Australian Consumer Law.

The new Unfair Contracts Regime will significantly affect many businesses who supply goods and services and property to consumers. Its aim is to ensure that consumers are not forced or hoodwinked into contracts that are unfair. Where a trader uses its standard contract to supply goods, for example whitegoods, or services such as mobile phone services, and a term of the contract is found by a court to be unfair, the term will be void and the rest of the contract will apply without that term.

As the new regime is likely to commence on 1 July 2010, businesses should review their supply contracts as soon as possible to determine if and how they will be affected.



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Contracts affected

The Unfair Contract Regime will not apply to business to business contracts. It will apply to consumer contracts which are also standard form contracts. Broadly, a consumer contract is 'a contract for the supply of goods or services or a sale or grant of an interest in land, to an individual whose acquisition of the goods, services or interest is wholly or predominantly for personal, domestic or household use or consumption.' Most business to consumer contracts will fall within this definition.

The Unfair Contracts Regime does not indicate what constitutes a standard form contract, but the court may take into account any matters the court thinks are relevant to determine this, and must take into account the factors set out in the legislation. They may include:

- the relative bargaining power of the parties;
- whether the contract was pre-prepared;
- whether a party was required to (in effect) accept or reject the contract terms; and
- whether a party was given an effective opportunity to negotiate the terms.

A consumer contract is presumed to be a standard form contract. The onus is on the trader to rebut this presumption.

There are some types of contracts that are specifically excluded from the regime.

Terms affected

Even if a contract falls within the regime, not all terms may be affected. For instance, the regime does not apply to a term of a consumer contract to the extent that the term:

- defines the main subject matter of the contract;
- sets the upfront price payable under the contract; or
- is a term required, or expressly permitted, by law.

An *upfront price* is the consideration that is provided, or is to be provided, for the supply, sale or grant under the contract, and is disclosed at or before the time the contract is entered into, but does not include any other consideration that is contingent on the occurrence or non-occurrence of a particular event.

Unfair terms

A term which is not excluded from the Unfair Contracts Regime may be challenged as unfair if:

- it would cause a significant imbalance in the parties' rights and obligations arising under the contract;
- it is not reasonably necessary in order to protect the 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.

In determining this, a court may take into account matters it thinks relevant, but must take into account the extent to which the term is transparent, and the contract as a whole. A term is transparent if it is expressed in reasonably plain language, is legible, is presented clearly and is readily available to any party affected by the term. The changes will not apply to contracts entered into before the changes commence. However, if after the changes commence a contract is renewed, or a term of an existing contract is varied, the changes will apply to the renewed contract or the varied term.

Onus on traders

Importantly, if a claim is made against a trader, a term will be presumed to not be reasonably necessary to protect the trader's legitimate interests, and the onus is on the trader to prove that it is. For this reason, when preparing standard form contracts and signing them, a trader should retain information which will help to prove that a challenged term is reasonably necessary to protect its legitimate interests. This can be done in a number of ways, and it will be important to incorporate those strategies into internal policies for creating, negotiating and signing standard form contracts.

Multiplier effect

A significant risk for traders is the multiplier effect. If a term is found by a court to be unfair, and the trader endeavours to rely on the term, a court has a number of remedies including orders to provide redress to non-party consumers (for example to other purchasers under the same or similar contracts made with the trader).

Examples of unfair terms

The legislation provides a number of examples of the kinds of terms which *may* be unfair. Those examples broadly include terms which give unilateral powers under a contract, terms regarding assignment of a contract to the detriment of a consumer, and terms limiting rights to sue. Excessive charges for changing providers and "lock-in" provisions are given as examples of terms that may be unfair. The examples are provided for guidance and are indicative only.

Next steps

The changes are likely to commence on 1 July 2010, which is a very short space of time to work through the issues.

We strongly suggest that clients review their contracts now. Please contact one of our commercial team members for assistance.

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