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update

Property

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Unfair Contracts Regime

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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 a vast array of industries, including the property development sector.

Key Points

- The Unfair Contracts Regime is likely to affect terms in property developer/purchaser land sale contracts, house and land package contracts and agency agreements, as well as other contracts between a property development business and a consumer.
- If a term of a contract is found to be unfair, it will be void and the rest of the contract will continue to apply without the term. If a developer relies on or enforces a term declared unfair by a court, there are a number of remedies which a court may grant, not only to the party claiming in the action, but also other non-party consumers, such as other purchasers within the subdivision with similar contracts.
- As the new regime is likely to commence on 1 July 2010, property developers and land agents should review their standard form contracts as soon as possible to determine if and how the Unfair Contracts Regime will affect those contracts.

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.

Therefore, a contract for the sale of the land in a subdivision by a property developer to a consumer, is likely to be a standard form contract.

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

Terms affected

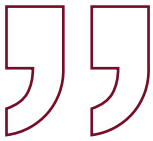
Even if a contract falls within the regime, not all terms may be affected. For instance, the regime does not apply to a term of a consumer contract to the extent that the term:

- 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.

You should assess which standard form contract terms are likely to require consideration under the Unfair Contracts Regime. Importantly, you should consider which terms regarding fees and payments will set the upfront price (and therefore will be 'carved out' from the regime's application), and which terms will not have that status.

Think of the ramifications if a clause is declared an unfair term, and you have used that clause in several hundred contracts.



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.

Importantly a term will be presumed to **not** be reasonably necessary to protect your legitimate interests, and the onus will be on you to prove that it is. For this reason, when preparing standard form contracts and signing them, you should retain information which will help to prove that a challenged term is reasonably necessary to protect your 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.

A significant risk for you is the multiplier effect. If a term is found by a court to be unfair, and you endeavour to rely on the term, a court has a number of remedies including orders to provide redress to non-party consumers (which could potentially include other purchasers of land in your subdivision who entered into the same or similar contracts after the changes commenced). Think of the ramifications if a clause is declared an unfair term, and you have used that clause in several hundred contracts.

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. The examples are provided for guidance and are indicative only.

However, the examples are not exclusive. For example, a clause in a sale of land contract which enables a developer to vary the size of the allotment by plus or minus 5% to cope with the Lands Titles Office's requisitions is likely to be unfair. Ways of making it fair are to have a pro rata adjustment of the purchase price, or the ability for the purchaser to cancel the contract.

You can therefore see that your contract needs to be critically analysed against the criteria set out by the law.

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.

To help us provide an efficient service to you, Lynch Meyer has developed a detailed checklist to assess unfair contract terms.

We strongly suggest that you start to review your contracts now. We would love to hear from you. Please contact one of our Property team members for assistance.

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