



Update

Corporate & Commercial

April 2010

New National Unfair Contracts Laws Passed

After much speculation, the legislation has now been passed to put in place a new national law prohibiting unfair terms in consumer contracts. The key operative provisions of the *Trade Practices Amendment (Australian Consumer Law) Act (No. 1) 2010* (Cth) are to take effect from a date to be fixed by proclamation (not to be before 1 July 2010). The reforms are likely to have significant implications for most Australian businesses dealing with consumers, and will particularly impact businesses such as airlines, gyms, mobile phone suppliers, banks and other financial institutions and rental businesses.

What is the scope of the new unfair contracts regime?

The new regime will apply to “standard form consumer contracts” entered into by corporations and to contracts which are financial products or are for the supply (or possible supply) of financial services. It is also envisaged that the States and Territories will pass complementary legislation later in the year to expand the application of the legislation beyond corporations and financial services to, for example, sole traders and partnerships. Certain types of contracts are excluded (such as shipping contracts, company constitutions and insurance contracts governed by the *Insurance Contracts Act 1984*). The new laws are not intended to apply to business-to-business contracts and will only apply to contracts entered into by individual consumers and not companies.

The new Act provides that any term of a standard form consumer contract which is deemed to be “unfair” may be found to be void and treated as if it never existed. If the unfair clause cannot be severed, the entire contract could potentially be void. A consumer could either seek to challenge an unfair term themselves or make a complaint about a term to the relevant regulator. The remedies which might be sought by a regulator or the affected consumer include injunctions, declarations, and other orders a Court thinks appropriate (including orders to refund money).

It is currently envisaged that the ACCC will jointly administer the new unfair contracts regime along with the various State Offices of Fair Trading (or equivalent) and ASIC (ASIC will administer unfair terms in consumer contracts involving financial products or financial services). The ACCC has released a draft guide to the new unfair contracts laws for public comment, which gives some indication how the new legislation might be interpreted.

What are standard form consumer contracts?

A “consumer contract” is basically a contract for:

- the supply of goods or services; or
- the sale or grant of interests in land,

to an individual whose acquisition of the goods, services or interest in land is wholly or predominantly for personal, domestic or household use or consumption.

Although the term “standard form contract” is not defined in the Act, there will be a statutory presumption that a consumer contract is a standard form contract unless proven otherwise. The ACCC has said that a standard form contract will typically be one that has been prepared by one party to the contract and is not subject to negotiation between the parties - effectively a contract offered on a “take it or leave it” basis.

When will a term be unfair?

The unfair contracts provisions will not apply to the following terms of a standard form consumer contract:

- terms that define the main subject matter of the consumer contract;
- terms that set the “upfront price” payable under the contract; or
- terms that are required, or expressly permitted, by a law of the Commonwealth or a State or Territory.

In order for a contract term to be deemed “unfair” it must:

- cause a significant imbalance in the parties’ rights and obligations under the contract; and
- not be reasonably necessary to protect the legitimate interests of the party seeking to rely on the term; and
- are likely to cause detriment (financial or otherwise) to a party if it were to be applied or relied upon (it is not necessary to show actual detriment suffered).

A Court must consider the following when deciding if a term is unfair:

- the extent to which the term was transparent; and
- the contract as a whole.



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Examples of potentially unfair terms

The Act provides examples as to what may constitute an “unfair” contract term. Those examples include terms which allow one party but not the other to:

- terminate the contract;
- penalise the other party for a breach or termination of the contract;
- vary the terms of the contract;
- renew or not renew the contract;
- vary the upfront price payable under the contract or unilaterally vary the characteristics of the goods or services to be supplied;
- limit the right of the other party to sue;
- avoid or limit performance of the contract or limit vicarious liability for agents;
- unilaterally determine whether the contract has been breached or interpret its meaning;
- limit the evidence the other party can adduce in proceedings relating to the contract or impose the evidential burden on the other party in proceedings relating to the contract; and
- assign the contract to the detriment of the other party without consent.

However, these terms are examples of potentially unfair terms only and are not prohibited from use per se.

What can your business do to minimise your risk under the unfair contracts regime?

Given that the legislation will have the effect of rendering specific terms (and potentially contracts as a whole) void, it is recommended that businesses carefully review their existing consumer contracts. The unfair contract laws will apply to contracts entered on or after their commencement date or contracts renewed or varied after that date.

To prepare for the implementation of the unfair contract terms legislation, businesses using standard form consumer contracts should:

- review the form of existing consumer contracts (including standard terms and conditions of sale) for terms that might be contrary to the new unfair terms laws;
- seek advice on standard form consumer contracts to better understand which aspects of the contracts are potentially open to challenge under the new legislation and to determine how to better manage the relevant risk; and
- amend standard form consumer contracts where necessary, ensuring to:
 - avoid using provisions which could potentially be deemed unfair under the new laws (or at least employ such provisions only when genuinely necessary to protect their legitimate commercial interests); and
 - make potentially unfair terms as transparent to the consumer as possible.

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