

Commercial Law Update

Standard form contracts - major reform in Australian consumer law

Does your business use non-negotiable, standard form "business to consumer" contracts?

If the answer is "yes", then it is timely to have them reviewed to ensure that they will comply with new legislation scheduled to commence on 1 January 2010. We can assist you with this task.

On 24 June 2009, the Federal Government introduced the *Trade Practices Amendment (Australian Consumer Law) Bill 2009* ("Bill"). In an initiative which will see the enactment of the first stage of a single, unified Australian consumer law ("Australian Consumer Law"), the Bill's objective is to eventually reduce the number of differing regulatory regimes governing consumer transactions in Australia so that businesses will face a consistent environment wherever they operate. In this case, the law will be legislated by the Federal Parliament and each State and Territory will apply the nationally agreed law.

In addition to the *Trade Practices Act 1974* (C'th), the Bill will also amend the *Australian Securities and Investments Commission Act 2001* (C'th) to introduce corresponding provisions that will apply to financial services and products.

New civil penalties will be introduced which will arm the Australian Competition and Consumer Commission and the Australian Securities and Investments Commission with significant new enforcement powers including the ability to issue infringement notices, substantiation notices and public warnings and also to impose pecuniary penalties.

The Senate Economics Legislation Committee has recommended that the Bill be passed and that guidelines be issued by the regulating agencies to assist parties understand the operation of the Bill's provisions.



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When is a term unfair?

Essentially, the Bill provides that an unfair term of a standard form consumer contract is void. However, the contract will continue to be binding on the parties if it can still operate without the unfair term.

A term of a standard form consumer contract will be unfair if:

- it would cause a significant imbalance in the parties' rights and obligations arising under the contract; and
- it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term.

All of the circumstances of the contract must be considered including whether the term is expressed clearly and in plain language.

The Bill lists contractual terms which may be unfair. These include terms permitting one party to unilaterally:

- avoid or limit performance of the contract
- terminate the contract
- vary the terms of the contract
- renew or not renew the contract
- vary the characteristics of the goods or services to be supplied, or the interest in land to be sold, under the contract; and
- determine whether the contract has been breached or to interpret its meaning.

Other unfair terms include permitting the assignment of a contract to the detriment of another party without their consent, and limiting one party's right to sue another party.

What terms are exempt?

Terms that define the main subject matter or the upfront price of the goods or services supplied under the contract, or terms that are permitted under existing law are exempt from the application of the proposed new law.

However, contractual terms that require further payments such as exit, default or penalty fees are not exempt and, in the event of complaint, will be subjected to scrutiny.

What is a consumer contract?

A "consumer" contract is a contract for

- the supply of goods or services; or
- a sale or grant of an interest in land

to which at least one of the parties is an individual and where that individual's acquisition of what is supplied under the contract is wholly or predominantly for personal, domestic or household use or consumption.

The types of contracts with consumers which fall into this category are broad-ranging and would include contracts for credit and other financial services, utility services, residential tenancies and telecommunications services.

Business-to-business contracts are not covered by the Bill. However, if the one standard form contract is used for both business-to-consumer and business-to-business transactions then it must be compliant with the new law.

What is a standard form contract?

A contract will be presumed to be a standard form contract unless the respondent to the proceedings proves otherwise. The Bill

identifies a number of factors which the court must take into account in determining whether a contract is a standard form contract, including bargaining power and the extent to which the terms of the contract were able to be negotiated.

An adverse outcome relating to the inclusion of particular terms in a standard form contract under the new legislation could have a "ripple effect" for a business owner because the monetary and reputational repercussions could extend beyond the case of the aggrieved individual who brought the initial complaint to other consumers who entered into the same contract.

Second stage to come

A second Bill (not yet introduced) will implement the bulk of the remaining reforms as agreed by the Council of Australian Governments (COAG) as part of the Australian Consumer Law.

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