



## The new Australian Consumer Law – A look at the National Unfair Terms Regime

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The Trade Practices Amendment (Australian Consumer Law) Bill 2009 was passed by Parliament on 17 March 2010. The new consumer protection regime harmonises the various Commonwealth, state and territory laws, provides new enforcement powers to the ACCC and ASIC, and introduces stronger penalties for misconduct.

### Unfair contract terms

The commencement date for the unfair contract terms provisions is expected to be 1 July 2010. These new rules do not apply to contracts that were entered into before the commencement of the unfair contract provisions, unless:

- the contract is renewed after that date, in which case the rules apply to the entire contract as renewed in relation to conduct from the date of renewal, or
- a term of the contract is varied after that date, in which case the rules apply to the varied term only.

The new Australian Consumer Law provides that a term is void and cannot be enforced if:

- it is a term of a consumer contract
- the contract is a standard form contract, and
- the term is unfair.

### What is a consumer contract?

A consumer contract is a contract for supply of goods or services or a sale or grant of interest in land to an individual whose acquisition is wholly or predominantly for personal, domestic or household use or consumption. While the existing definition looks at the nature and value of the goods or services, this new definition looks at the circumstances of the individual purchaser.

### What contracts are standard form contracts?

There is no definition for a standard form contract. All contracts will be presumed to be standard form contracts unless otherwise established. The onus will be on the party seeking to rely on the benefit of the term to establish that the contract was not in standard form.

The factors which the Court may consider in determining whether a contract is a standard form contract include:

- whether one party has all or most of the bargaining power
- whether the contract was prepared by one party before any discussion relating to the transaction occurred
- whether the other party is required to either accept or reject the terms of the contract in the form in which the terms were presented
- whether the other party was given an effective opportunity to negotiate the terms of the contract, and
- whether the terms of the contract take into account the specific circumstances of the parties.

### What terms are unfair?

A term will be unfair if it:

- would cause a significant imbalance in the parties' rights and obligations under the contract
- is not reasonably necessary to protect the legitimate interests of the party who would be advantaged, and
- would cause detriment (financial or non-financial) to a party if it was applied or relied on.

A term will be presumed to be not reasonably necessary to protect the supplier unless the supplier proves otherwise.

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In determining whether a term is unfair, the Court will consider:

- the contract as a whole, and
- whether the term is transparent – that is whether or not it is expressed in reasonably plain language, legible, presented clearly and readily available to any party affected by the term.

Generally, in determining whether a term is unfair, the Court may take into account such matters as it thinks is relevant. However, examples of terms which may be unfair include terms that permit one party (but not the other) to:

- limit or avoid performance
- be penalised for breach or termination
- vary the price without allowing the other party to terminate the contract
- limit a party's vicarious liability for its agents
- unilaterally determine if the contract has been breached or to interpret the contract
- limit the evidence that can be adduced in proceedings regarding the contract
- terminate or vary the contract
- renew or not renew the contract
- unilaterally vary the goods or services supplied under the contract
- sue the other party
- assign the contract to the other party's detriment without consent, and/or
- impose an evidential burden on one party in proceedings regarding the contract.

## Exceptions

These unfair contracts terms provisions do not apply to terms that:

- define the main subject matter of the contract
- set the upfront price payable under the contract, or
- are expressly permitted by law.

## What happens if a term is unfair?

A term in a consumer contract which is found to be unfair will be void. However, the contract will continue if it is capable of operating without the unfair term. The regulator or any other party (including affected consumers) may apply to the Court to have a term declared an unfair term. Where the Court declares a term to be unfair:

- a regulator will be able to apply for injunctive relief to prevent a party to the contract from applying or relying (or purporting to apply or rely) on a declared unfair term, and
- the Court may make remedial orders where a party to the contract applies or relies on (or purports to apply or rely on) a declared unfair term.

## Non-party consumer redress

The regulators have the power to apply to the Court to seek certain orders for the benefit of persons that are not parties to proceedings where:

- the respondent is a party to a consumer contract and advantaged by a term of the contract in relation to which the Court has made a declaration is an unfair term
- the declared term has caused or is likely to cause a class of people to suffer loss or damage, and
- the class includes people who have not been a party to enforcement action in relation to the declared term.

The orders that the Court can make to redress the loss or damage suffered by non-party consumers include all or any of the following:

- an order declaring all or part of a contract to be void
- an order varying a contract or arrangement as the Court sees fit
- an order refusing to enforce any or all of the terms of a contract or arrangement



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- an order directing the respondent to refund money or return property to a non-party consumer
- an order directing the respondent to repair or provide parts for a product provided under a contract, at their expense
- an order directing the respondent to provide services to the non-party consumer at their expense, and/or
- an order directing the respondent to terminate or vary an interest in land that was created or transferred by the contract.

## Implications for businesses who deal with consumers

1. Businesses will need to review their standard form contracts, since the onus is on businesses to justify all of the terms and to ensure that their contracts do not contain any unfair terms.
2. Because transparency is a factor taken into account when determining whether a term is unfair, businesses need to ensure that consumer contracts are well drafted and use plain English.
3. Businesses should also consider introducing procedures to deal with complaints by consumers that a term is unfair.

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