

UNFAIR CONTRACT TERMS, THE AUSTRALIAN CONSUMER LAW AND ENHANCED ACCC AND ASIC PENALTY AND ENFORCEMENT POWERS

Recent legislative changes to the *Trade Practices Act 1974* came into effect on 1 July 2010 in relation to unfair contract terms through the application of the Australian Consumer Law.

Further substantive changes have been enacted by Australian Consumer Law 2 however will only apply from 1 January 2011. We will be writing to you about those changes before they become operative.

The legislative changes which took effect on 1 July 2010 provide that “unfair terms” in “standard form” consumer contracts will be void and such contracts will continue to bind the parties to the contract to the extent that the contract is capable of operating without the unfair term.

In addition, effective 15 April 2010, each of the ACCC and ASIC has additional powers in relation to the imposition of penalties and enforcement proceedings. Importantly, the courts have been provided with the power to grant orders to redress non-party consumers.

These legislative initiatives may affect your business.

Unfair contract terms and the Australian Consumer Law

1. The legislative changes with respect to unfair contract terms apply to businesses that contract for the supply of goods or services or the sale or grant of an interest in land to any individual who is acquiring such things wholly or predominantly for personal, domestic or household use or consumption, and use a “standard form” contract for such dealings.
2. A contract may be deemed to be a “standard form” contract if it takes the form of a consumer contract which:
 - 2.1 gives your business all or most of the bargaining powers;
 - 2.2 has already been prepared by or for your business before the consumer agreed to purchase from you;
 - 2.3 in effect requires the consumer to either accept or reject the terms in the form in which your business presented them;
 - 2.4 does not give the consumer an effective opportunity to negotiate the terms; or
 - 2.5 does not contain terms which take into account the specific characteristics of the purchaser or the particular transaction.

Further, if someone challenges your business on the terms in your contract and alleges that it is a “standard form” contract, then the new law provides that it will indeed be presumed to be a “standard form” contract unless you prove otherwise. If the contract which you use for dealings with consumers is deemed to be a “standard form” contract, it will be subject to the *Trade Practices Act 1974* amendments effective 1 July 2010.

3. A “standard form” contract will be deemed to contain unfair terms if such terms:
 - 3.1 would cause significant imbalance in the parties’ rights and obligations arising under the contract;

- 3.2 are not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by those terms; and
 - 3.3 would cause detriment (whether financial or otherwise) to a party if they were applied or relied upon.
4. In addition, the courts are provided with the power to make determinations based upon examples of the kinds of terms which *may* be unfair including terms which provide for the right for one party to:
- 4.1 void or limit performance;
 - 4.2 terminate the contract;
 - 4.3 penalise one party but not the other for breach or termination of a contract;
 - 4.4 vary the terms of the contract;
 - 4.5 renew or not renew the contract;
 - 4.6 vary the upfront price payable,

as well as various other terms which provide one party with rights which are biased in that party's favour.

The implications of these changes are quite apparent and if you have any contracts that are, or you suspect may be, standard form consumer contracts, then we recommend you seek our advice as soon as practicable to review the terms of such contracts.

Enhanced penalty and enforcement powers

Each of the *Trade Practices Act* and the *ASIC Act* have been revised as a result of the recent changes to the Australian Consumer Law to add a number of enhanced penalty and enforcement provisions for both the ACCC and ASIC.

These new provisions address disqualification orders, substantiation notices, orders to redress loss or damage suffered by non-party consumers, infringement notices and public warning notices. A number of consequential amendments to each of the relevant Acts have been made to provide these new powers.

We will provide a more detailed update on request and suggest that this may be a particularly good time to consider your overall corporate governance processes and procedures and the dissemination of information through to your directors and officers.

Please contact one of the Cowell Clarke competition law specialists if you would like further information on T +61 8 8228 1111.

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