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Are You Ready for New Unfair Contracts Legislation?

The Commonwealth Government proposes to introduce new law from 1 July 2010 which will make unfair terms in certain contracts void.

What is an Unfair Term?

A contract term will be **unfair** when it:

1. causes significant imbalance in the parties' rights and obligations arising under the contract; and
2. is not reasonably necessary to protect the legitimate interests of the party who would be advantaged by the term.

In deciding whether a term is unfair, the court will have to take the following matters into account (as well as such other matters as it considers relevant):

1. the extent to which the term would or is likely to cause detriment (financial or otherwise) to a party if the term were relied on;
2. the transparency of the term. A term will be transparent if it is expressed in reasonably plain language, legible, presented clearly and readily available to any party affected by it; and
3. the contract as a whole.

Which Contracts are Affected?

The legislation will apply to **unfair terms in standard form consumer contracts**. A **consumer contract** is a contract for the supply of goods, services or an interest in land to an individual who acquires it wholly or predominantly for personal, domestic or household use or consumption. If a customer alleges that a contract is a standard form contract then the onus will be on the supplier to establish that the contract is not a standard form contract. The standard of proof required will be the civil standard, namely "on the balance of probabilities" rather than "beyond a reasonable doubt". As a result, a contract will be presumed to be a standard form contract unless the supplier seeking to rely on it, proves otherwise.

In determining whether or not a contract is a standard form contract, the court will be obliged to take various factors into account including whether:

1. one of the parties has all or most of the bargaining power relating to the transaction;
2. the contract was prepared by one party before any discussion relating to the transaction took place;
3. the contract was effectively presented on a "take it or leave it" basis;
4. the other party was given an effective opportunity to negotiate the terms of the contract; and
5. the terms of the contract as offered by one party take into account the specific characteristics of the other party to the particular transaction.

Simply negotiating just some of the provisions of a contract will most likely not be effective to prevent it from being a standard form contract.

When Do the New Provisions Apply?

The legislation will apply to standard form contracts entered into on or after **1 July 2010**. It will also apply to standard form contracts entered into before that date if they are renewed on or after that date. In addition, if a standard form contract was entered into before 1 July 2010 and it is varied on or after that date, the legislation will apply to the contract as from the date on which the variation takes effect.

It should also be noted that the new provision will apply in addition to and not in place of the existing legal restrictions on certain types of unfair terms, such as the restrictions applying to consumer credit transactions.

Examples of Unfair Contract Terms

The legislation provides examples of the types of terms that **may be unfair**. The list is not conclusive or exhaustive. A term may be unfair:

- permits one party but not the other to terminate the contract;
- permits one party but not the other to avoid or limit performance;
- penalises one party but not the other for a breach or termination of the contract;
- permits one party but not the other to vary the terms;
- permits one party but not the other to renew or not to renew;
- permits one party to vary the upfront price payable without the other party having a right to terminate;
- permits one party to unilaterally vary services to be supplied;
- permits one party to unilaterally decide whether the contract has been breached or to interpret its meaning;
- limits one party's vicarious liability for its agents;
- permits one party to assign the contract to the detriment of the other party without the other party's consent;
- limits one party's right to sue the other party;
- limits the evidence one party can present to the court in proceedings relating to the contract; and
- imposes the evidentiary burden on one party but not the other in proceedings related to the contract.

Who Can Claim that a Term is Unfair?

Not only consumers will be able to claim that contract terms are unfair. The new regime will also apply to natural persons and corporations; even business-to-business transactions if the relevant supply is wholly or predominantly for personal, domestic or household use or consumption. A short list of contracts which may be affected include:

- banks and financial institutions;
- e-commerce contracts;
- software licences;
- car rental agreements;
- residential lease agreements;
- land sale agreements;
- gym contracts;
- insurance contracts; and
- building contracts.

How Will the Scheme be Enforced?

The enforcement and remedy provisions include:

1. the ACCC will have power to approach suppliers and seek to negotiate changes;
2. the ACCC will also have power to issue infringement notices if it has "reasonable grounds to believe" that there has been a breach of the legislation;
3. the ACCC will be able to seek orders to re-dress the loss or damage suffered by third parties and consumers. A redress order may require, for example, the variation or cancellation of contracts, the refund of money, the repair or provision of goods and the re-supply of services.
4. the ACCC will have power to issue a notice requiring a party to provide information and/or documents to substantiate claims in relation to the supply of goods and services. Failure to respond or responding with misleading information will be an offence;

5. civil penalties will apply in certain cases. These will be up to \$1.2 million for corporations and \$220,000.00 for individuals; and

6. the court may make a disqualification order.

Some other likely consequences are:

- customers or their insolvency representatives will challenge the validity of clauses such as charges, fees and interest in order to avoid payment; and
- class actions will also be likely.

Unusual Aspects of the Legislation

The legislation will fundamentally change Australian contract law. Among other things:

1. the onus of proof about the nature of the contract will be reversed. A court will have to assume that:

1.1. the contract is a standard form contract; and

1.2. the provision complained of is unfair,

unless the supplier can prove otherwise;

2. the courts will not be able to write down or minimise the relevant provision but will have to declare it void; and

3. a clause may be found to be unfair even if it has not actually been applied in an unfair way.

If you require further information about the new consumer laws, please contact Norbert Schweizer.



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