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Consumer Law Changes – Summary

Will standard form contracts continue to be enforceable? - Overview

Proposed legislation could have the effect that all standard form contracts used by businesses containing certain terms will no longer be enforceable. Also, companies (and their officers) seeking to enforce terms which are prohibited could be subject to fines.

Recommendation- All standard form contracts may be affected and should be reviewed.

A Bill released last week for public comment by the Federal Minister for Consumer Affairs, Chris Bowen would, if it becomes law, render unenforceable, and prohibit the inclusion of, “*unfair terms*” or “*prohibited terms*” in standard form contracts.

All standard form contracts entered into for the supply of goods or services, including transfers of land or the supply of financial services, will be covered by the Bill. This includes ‘business-to-business’ contracts.

We would recommend that all businesses review their printed standard terms and conditions to ensure they remain enforceable.

What types of contracts will the legislation apply to?

The Bill does not limit the application of the provisions to consumer contracts. Indeed the Bill proposes wholesale changes to the law relating to the use of unfair terms in standard form contracts. There is no definition of a standard form contract; however the Bill provides that any contract that:

- is presented on ‘take-it-or-leave-it’ basis; or
- is non-negotiable; or
- does not take into account any individual circumstances;

will be a ‘standard form contract’.

What will be the effect of the Bill?

Certain terms of standard form contracts will be rendered void, and therefore unenforceable. For a term to be rendered void by the Bill, it must fall into one of the following categories:

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- an unfair term; or
- a prohibited term.

Unfair Terms

A term is unfair if:

- it causes a significant imbalance in the parties rights and obligations under the contract; and
- it is not reasonably necessary to protect the legitimate rights of the party who has the benefit of the term.

The Bill provides a list of guidelines to be used in considering whether a term is unfair. They include any term that:

- allows one party but not the other to terminate the contract;
- penalises one party but not the other for breach or termination of contract;
- limits one party's vicarious liability for its agents;
- limits one party's right to sue another party;
- permits one party to assign the contract to the detriment of another party without that other party's consent.

Other guidelines are set out in the Bill, while guidance will also be set out in the Regulations.

In the consultation paper, examples were given of those terms likely to be considered unfair. These included terms which allowed one party to vary unilaterally terms of a contract or to impose a cancellation fee. However, those terms will not be unfair unless they meet both of the criteria set out above.

In practice, some of these terms may be considered to be so unreasonable that they fall within the category of a "prohibited term" (see below).

Excluded from the scope of unfair terms are terms which set out an upfront price for the goods or services being supplied.

In order to minimise the risk that a term would be classified as an 'unfair term', businesses will need to ensure that the term is:

- written in plain English; and
- presented clearly to the other party.

Prohibited Terms

In addition to these guidelines, the Bill also provides for a certain terms to automatically be deemed to be unfair. These will be set out in the Regulations.



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Any business using a ‘prohibited term’ in a standard form contract will be subject to fines.

What Does This Mean For You?

This means that any standard form contract may be subject to proceedings on the basis that they contain unfair or prohibited terms.

What Happens Next?

The legislation will be introduced in two stages. The first Bill will involve unfair contracts amendments, while the second Bill will involve changes to product safety laws and enforcement provisions.

The unfair contracts legislation will be introduced in the Winter Sittings of Parliament (June 2009). It is expected that the new national consumer law will be fully implemented by the end of 2010.

Submissions in relation to the Bill are due by 22 May 2009.

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