Australian Consumer Law Reform – The introduction of unfair contract terms legislation

Important Amendments to the Trade Practices Act and the ASIC Act

Consumer protection provisions will be significantly expanded under a proposal to amend Australia’s trade practices law. The amendments, which are expected to come into effect this year, will provide that unfair terms in contracts may be declared void and unenforceable. Many businesses that contract with consumers using standard form contracts are likely to be affected by the new laws and may need to reassess the terms of their contracts as well as their risk management practices.

Unfair contract terms

On 24 June 2009, the Trade Practices Amendment (Australian Consumer Law) Bill 2009 (Cth) (Bill) was introduced into Parliament. The Bill proposes to insert a new schedule 2 into the Trade Practices Act 1974 (Cth) (TPA) entitled “The Australian Consumer Law” which will set out a national consumer law regime, expanding the existing consumer protection provisions in the TPA. The new regime is based on the existing unfair contracts law adopted in Victoria.

The key element of the changes will be that contract terms deemed to be “unfair” will be unenforceable. However, these unfair contract provisions will only apply to contracts that are consumer contracts.

A consumer contract is defined as a contract for:

(a) a supply of goods or services; or
(b) a sale or grant of an interest in land,

to an individual whose acquisition of the goods, services or interest is wholly or predominantly for personal, domestic or household use or consumption. There is no minimum or maximum value of contract “cut-off” points when determining whether or not a contract is a consumer contract.

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1 e.g. a residential lease
2 section 2(3) of Schedule 1 of the Bill
A term of a consumer contract will be deemed void if the term is unfair and the contract is a standard form contract. If the contract is capable of operating without the unfair term, then the contract will continue to bind the parties, with the exception of the unfair term.3

**When will a term be unfair?**

A term of a consumer contract will be unfair if:

(a) it would cause a significant imbalance in the parties’ rights and obligations arising under the contract; and

(b) it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term.4

In determining whether a term of a consumer contract is unfair, a court may take into account any matters it thinks are relevant, but must take into account each of the following:5

- the extent to which the term would cause, or there is a substantial likelihood that it would cause, detriment (whether financial otherwise) to a party if it were to be applied or relied on;

- the extent to which the term is transparent (i.e. presented clearly in plain language); and

- the contract as a whole.

A term (as opposed to the remainder of the consumer contract) that:

(a) defines the main subject matter of the contract;

(b) sets the “upfront price” payable under the contract; or

(c) is required, or expressly permitted, by law,

will be exempt from the new laws.6 The “upfront price” payable under a consumer contract is the consideration that:

- is provided, or is to be provided, for the supply, sale or grant under the contract; and

- is disclosed at or before the time the contract is entered into,

but does not include any other consideration that is contingent on the occurrence or non-occurrence of a particular event.

The Bill sets out, without limitation, fourteen examples of the kinds of terms of a consumer contract that may be unfair, such as:

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3 section 6(5) of Schedule 1 of the Bill
4 section 3 of Schedule 1 of the Bill
5 section 3(2) of Schedule 1 of the Bill
6 section 5(1) of Schedule 1 of the Bill
• a term that permits one party (but not the other) to terminate the contract;
• a term that penalises one party (but not the other) for a breach or termination of the contract;
• a term that permits one party (but not the other) to renew or not renew the contract;
• a term that limits one party’s right to sue another party.\textsuperscript{7}

The regulations may also provide for further examples of unfair terms.

A party will also be restricted from including or relying on a \textit{prohibited term} in a consumer contract that is a standard form contract. A prohibited term is any term that may be prescribed by the regulations. Currently, no such terms have been prescribed.

\textbf{Standard Form Contracts}

As noted above, the unfair terms provisions only apply to \textit{standard form contracts} – which is not defined in the Bill. However, where a party to a proceeding claims that a contract is a standard form contract, the contract is automatically presumed to be a standard form contract, unless another party proves otherwise.\textsuperscript{8} This will place the onus on businesses to defend the validity of any alleged unfair terms in their contracts. As there is no statutory definition of standard form contracts, the courts will be responsible for deciding what constitutes the same.

The Bill provides that in determining whether a contract is a standard form contract, a court must take into account the following, in addition to any other factors it considers relevant:\textsuperscript{9}

• whether one of the parties has all or most of the bargaining power relating to the transaction;
• whether the contract was prepared by one party before any discussion relating to the transaction occurred between the parties;
• whether another party was, in effect, required either to accept or reject the terms of the contract in the form in which they were presented;
• whether another party was given an effective opportunity to negotiate the terms of the contract;
• whether the terms of the contract take into account the specific characteristics of another party or the particular transaction;
• any other matter prescribed by the regulations.

Having regard to the above, the term “standard form contract”, as used in the Bill, is likely to capture most non-negotiable, general “terms and conditions” agreements given to consumers to sign before a company provides its goods or services, such as:

\textsuperscript{7} section 4 of Schedule 1 of the Bill
\textsuperscript{8} section 7(1) of Schedule 1 of the Bill
\textsuperscript{9} section 7(2) of Schedule 1 of the Bill
banking documents, including mortgages and credit card terms and conditions;

- terms and conditions attaching to airline, train, bus and taxi travel;

- terms and conditions attaching to the transport of produce or possessions for personal, domestic or household use;

- contracts for utilities, including telephone, internet, electricity and gas contracts;

- residential leases; and

- contracts for recreational services such as tickets to concerts or sporting events.

The new laws will not apply to the following contracts:

(a) certain marine contracts and contracts for the carriage of goods by ship; or

(b) the constitution of a company, managed investment scheme or other kind of body.

It is also important to note that the Bill does not extend to “business to business” contracts.

The Bill also proposes to amend the Australian Securities and Investments Commission Act 2001 (Cth) (ASIC Act) to insert corresponding provisions that will apply to consumer contracts for a financial product or for the supply, or possible supply, of financial services. For instance, this could include agreements customers enter into with financial advisers and brokers and potentially contracts for investment products such as managed funds and superannuation and terms and conditions attaching to options to acquire securities.

Remedies

If a consumer contract term is found to be unfair, the Federal Court has the power to make any orders it sees fit. In practice, if a term is found to be unfair, then the party attempting to enforce it will no longer be permitted to do so. If the term is or was already enforced, the court may grant remedies to return the party, against whom the term was enforced, to that party’s original position (e.g. by awarding damages or making an order for specific performance). Including a term in a contract that is found to be unfair will not, in itself, be a breach of the TPA. However, enforcing such a term will be a contravention of the TPA.

The Australian Competition and Consumer Commission (ACCC) and the Australian Securities & Investments Commission (ASIC) will also be able to seek a declaration from the court that a consumer contract term is unfair.

Expansion of enforcement and penalty provisions

The Bill will expand the enforcement and penalty provisions under the TPA. Some of the important amendments are as follows:

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10 section 8(1) of Schedule 1 of the Bill
11 section 8(3) of Schedule 1 of the Bill
12 Schedule 3 of the Bill
New civil pecuniary penalties for certain contraventions of the consumer protection provisions of the TPA which do not warrant criminal penalties.\(^\text{13}\)

On an application by the ACCC or ASIC, the court will be able to make disqualification orders, banning an individual from managing a corporation for a period of time, for breaches of the consumer protection provisions of the TPA.\(^\text{14}\) This will be in addition to the current director disqualification orders that can made pursuant to the Corporations Act 2001 (Cth).

The ACCC and ASIC will be given the power to issue a substantiation notice to require a person to substantiate claims or representations that the person has made or to provide information in relation to the ability of the person to supply goods and services or employment that is to be or may be offered by a corporation.\(^\text{15}\) Substantiation notices will assist the regulators in deciding whether to take action for a suspected breach of the consumer protection provisions of the TPA or the ASIC Act.

The Court will be given the power to grant remedies to non-parties to proceedings who have suffered loss or damage arising out of a contravention of certain consumer protection provisions of the TPA or the ASIC Act or who are disadvantaged by a term in a consumer contract which has been declared to be an unfair term or a prohibited term.\(^\text{16}\) A non-party consumer will only be bound by such an order if that non-party consumer decides to accept the order.

The ACCC and ASIC will be able to issue a person with an infringement notice containing a financial penalty for suspected contraventions of certain consumer protection provisions.\(^\text{17}\) The financial penalties are intended to be relatively small (up to a maximum of $6,600 for a body corporate).

A person who receives an infringement notice will not be required to pay the penalty. However, if a person decides not to pay the financial penalty required by an infringement notice issued for an alleged contravention, then ACCC or ASIC may bring civil or criminal proceedings against the person in relation to that alleged contravention.

If a person pays the financial penalty set out in the infringement notice, then the person will not be subject to criminal or civil proceedings brought by the ACCC or ASIC in respect of the alleged breach.\(^\text{18}\) Payment of an infringement notice will not be considered an admission of liability.\(^\text{19}\)

The Bill will create a single set of uniform laws in relation to the issuing of public warning notices to replace the current State based models. The ACCC and ASIC will

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\(^{13}\) section 1 of Schedule 2 of the Bill (new section 76E of the TPA)

\(^{14}\) section 7 of Schedule 2 of the Bill (new section 86E of the TPA)

\(^{15}\) section 12 of Schedule 2 of the Bill (new section 87ZL of the TPA)

\(^{16}\) Part 4 of Schedule 2 of the Bill

\(^{17}\) section 24 of Schedule 2 of the Bill (new section 87ZE of the TPA)

\(^{18}\) section 24 of Schedule 2 of the Bill (new section 87ZH(3) of the TPA)

\(^{19}\) section 24 of Schedule 2 of the Bill (new section 87ZH(2) of the TPA)
be able to release a written warning notice to the public about the conduct of a corporation where:

- the regulator has reasonable grounds to believe a corporation’s conduct may have breached certain provisions of the TPA or the ASIC Act; or

- a person refuses or fails to respond to a substantiation notice,

and the regulator is satisfied that one or more persons has suffered, or is/are likely to suffer detriment, as a result of that conduct and that it is in the public interest to issue a public warning notice.\(^{20}\)

Businesses should be aware that due to the increased risks they pose, the proposed laws have the potential of increasing insurance premiums as well as compliance costs generally. As such costs are often passed on to consumers, the Bill may have the unintended effect of increasing the “upfront prices” payable by consumers under standard form contracts – being a term that is exempt from being declared unfair. The new laws may encourage consumers and regulators to challenge and more closely scrutinise standard form contracts making it harder for businesses to enforce their terms of trade. Given that what constitutes a standard form contract and an unfair term will generally have to be determined on a case-by-case basis and according to the relevant circumstances, there is also likely to be continued uncertainty as to when the laws apply. Hopefully, expected guidance to be issued by the ACCC and ASIC will help reduce this uncertainty.

The Bill is still currently before the Senate and, as such, further amendments may be made to the Bill before it becomes law. A commencement date has not yet been established, but is expected to be 1 July 2010. In the meantime, businesses that deal with consumers should consider reviewing their standard form contracts and take into account the increased remedies available to consumers, the further penalties for non-compliance with the consumer protection provisions and the new powers of the ACCC and ASIC.

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\(^{20}\) section 26 of Schedule 2 of the Bill