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Commercial Law e-alert

Fairness in contracting – national unfair contract terms provision released for public comment

Who will this affect?

- all businesses that use standard form, non-negotiated contracts
- all businesses that transact with consumers, including those in the financial services industry

Key changes

- unfair contract terms to be void from 1 January 2010
- increased enforcement powers for state-based consumer regulators and the ACCC
- a consistent national approach to consumer protection law

As reported in our commercial law e-alert on 23 February 2009, a major aim of the Rudd Government's proposed new Australian Consumer Law is to "crack down" on unfair contracts.

On 11 May 2009, the Assistant Treasurer Chris Bowen released the draft national unfair contract terms provision for public comment. The provision is proposed to be enacted as Schedule 2 to the *Trade Practices Act 1974* (entitled The Australian Consumer Law), and as new sections 12BA-12BK to the *Australian Securities and Investments Commission Act 2001* (to bring financial services contracts into the net). The consultation paper on the proposed legislation is available at the treasury website:

<http://www.treasury.gov.au/contentitem.asp?NavId=037&ContentID=1537>

Submissions on the draft legislation close on **22 May 2009**.

This "important first part of the first tranche of the Australian Consumer Law" as it is described by the Assistant Treasurer, is intended to be introduced to Parliament in the Winter sittings (June 2009), for commencement on **1 January 2010**. The Assistant Treasurer has said the final legislation will also include new enforcement powers for the ACCC, but these are not included in the exposure draft attached to the consultation paper. Common national guidance on enforcement is to be issued by the relevant enforcement agencies prior to commencement of the legislation.

The draft legislation reflects the model agreed by the Ministerial Council on Consumer Affairs (MCCA) in August 2008, and by the Council of Australian Governments (COAG) in October 2008.

In summary, so far as unfair contract terms are concerned, the exposure draft of the legislation provides that:

- an unfair term of a standard form contract is **void** but the rest of the contract will continue to bind the parties if it is capable of operating without the unfair term;
- a term of a standard form contract is **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.
- In deciding whether a term of a contract is unfair a court can take into account matters it considers relevant but **must** take into account the following:
 - (a) the potential for the term to cause financial or other detriment to a party if it was applied or relied on;
 - (b) the extent to which the term is expressed in plain language, is legible, is presented clearly, and is readily available to any party affected by it; and
 - (c) the contract as a whole.

The draft legislation also contains a (non-exhaustive) list of 14 examples of the kinds of terms of a standard form contract that may be considered unfair; 9 of these relate to terms that have a unilateral effect – these are terms that allow only one of the parties to do the following:

- avoid or limit performance
- terminate the contract
- penalise the other party for breach or termination
- vary the contract
- renew or not renew the contract
- vary the upfront price with no right for the other party to terminate
- vary characteristics of the subject matter of the contract
- determine whether the contract has been breached or interpret its meaning or
- assign the contract to the detriment of another party without that party's consent.

Terms that limit one party's: vicarious liability for its agents, right to sue another party, or evidence in legal proceedings are also in the list, as is any term that imposes the evidential burden in legal proceedings on just one party. Other examples of unfair terms may be prescribed in the regulations.

It is important to note that particular circumstances may justify the use of such terms.

The regulations may also prescribe terms that are prohibited. It is not proposed to prohibit any terms at this time, but if there are such terms prescribed in the future, including them in contracts or applying or relying on them will be a contravention of the relevant Acts and will attract a pecuniary penalty.

Contract terms that define the main subject matter, set the upfront price payable, or are required or expressly permitted by law, are excluded from the legislation.

If the legislation comes into force, existing contracts will not be affected, but contracts entered into after 1 January 2010 will be affected, as will those that are renewed or varied after that date.

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