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Commercial Law e-alert

Fairness In Contracting – the first part of the new Australian Consumer Law has been passed by the Senate

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 2011
- increased enforcement powers for state-based consumer regulators and the ACCC
- a consistent national approach to consumer protection law

A major aim of the Rudd Government's proposed new Australian Consumer Law is to "crack down" on unfair contracts. It is therefore the unfair contracts provisions that have been first cab off the rank in the introduction of the major law reform that will be the Australian Consumer Law.

On 17 March 2010 the Senate passed the Trade Practices Amendment (Consumer Law) Bill 2009 in which a new Australian Consumer Law is enacted as Schedule 2 to the Trade Practices Act 1974 and the Australian Securities and Investments Commission Act 2001 is also amended (to bring financial services contracts into the net).

Once the Senate passes the second tranche of the new law and all the States and Territories adopt The Australian Consumer Law as their own law, all state and territory consumer protection legislation on door-to-door sales and rights to refunds, repairs under warranties and product safety rules will be reformed and unified. The whole new law is expected to commence on 1 January 2011. On 17 March 2010 the Senate passed that part of the reform to do with unfair contracts. The final form of the legislation on unfair contract terms differs from the original draft in the following important respects:

- a requirement has been included that a contract can only be unfair if it would cause detriment (whether financial or non-financial) to a party;
- business to business contracts have been excluded. The unfair contracts provisions apply only to consumer contracts, (which are contracts for the supply of goods and services or sale or grant of an interest in land to an individual wholly or predominantly for personal, domestic or household use or consumption); and
- the power to prohibit terms (to "black list" certain terms) in the regulations has been scrapped – similar Victorian legislation in place for several years contains such a provision, but it has never been used.

In summary, so far as unfair contract terms are concerned, the new 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;
 - (b) it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term;and
 - (c) it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.

- 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 extent to which the term is transparent (i.e. is expressed in reasonably plain language, is legible, is presented clearly, and is readily available to any party affected by it); and
 - (b) the contract as a whole.

There is also a non-exhaustive list of 14 examples of the kinds of terms of a standard form contract that may be considered unfair (this has been referred to as a “grey list”). 9 of these relate to terms that have a unilateral effect – these are terms that allow one only 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.

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.

Existing contracts will not be affected, but contracts entered into after 1 January 2011 will be affected, as will those that are renewed or varied after that date.

Specified maritime contracts and corporate constitutions are exempt from the unfair contracts terms provisions. They also have very limited application to insurance contracts because of section 15 of the Insurance Contracts Act 1984. The government has issued an options paper asking for submissions as to how this might be addressed in the upcoming reform of that act.

Businesses whose standard contracts are affected by these reforms should begin reviewing them to ensure compliance by 1 January 2011.

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