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## Commercial Law e-alert

# An end to unfair contracts? – The new Australian Consumer Law

### Who will this affect?

- All businesses that use standard form contracts
- All businesses which are involved in transactions with consumers, including those in the financial services industry.

### Key changes

- a proposed ban on unfair contract terms
- increased enforcement powers for state-based consumer regulators and the ACCC
- a consistent national approach to consumer protection law.

On 17 February 2009, the Federal Government released a consultation paper in relation to the proposed new Australian Consumer Law. It follows an earlier Productivity Commission report which recommended sweeping changes to consumer laws in Australia.

Currently, each state and territory has its own consumer protection legislation. This legislation is consistent with the generic consumer protection provisions in the *Commonwealth Trade Practices Act*. However, specific consumer protection laws vary widely between the states and territories. This can create difficulties for businesses, particularly those which operate across several states or which use “standard form” contracts.

The proposed Australian Consumer Law is intended to establish a uniform national consumer protection system. The national approach has been agreed upon by all Australian governments. According to the Federal Government, it will be modelled on the “best practice” consumer protection provisions in each state. It remains to be seen whether this aim will be achieved by the legislation, which is yet to be finalised.

The reforms are limited to standard form, non-negotiated consumer contracts. They will not apply to contracts between businesses or which are negotiated between the parties.

### Unfair contracts

One of the key aims of the Australian Consumer Law is to “crack down” on unfair contracts.

Unfair contracts are contracts which contain terms which “*cause a significant imbalance in the parties’ rights and obligations ... and are not reasonably necessary to protect the legitimate interests of the supplier*”, according to the consultation paper.

Examples of the types of terms which may be considered “unfair” include:

- where the supplier can vary the terms of the contract without reference to the customer;
- where the supplier can assign the contract to the customer’s detriment, without the customer’s consent; and
- where the customer is prevented from cancelling the contract.

It may also include the following types of terms, where they cause a significant imbalance to the customer’s detriment:

- an acknowledgement that the customer has read or understood the contract;
- “entire agreement” clauses that deny the existence of oral representations; and
- clauses which require early termination fees to be paid, where such fees are not genuine pre-estimates of the supplier’s costs.

Unfair terms would be banned under the proposed Australian Consumer Law, and additional enforcement powers given to the regulators to ensure compliance by businesses.

The proposed powers include:

- civil pecuniary penalties, which may be up to \$1.1 million for corporations and \$220,000 for individuals depending on the final form of the legislation;
- substantiation notices, which would require businesses to provide evidence to support their claims regarding their goods or services;
- disqualification orders, banning individuals from managing corporations and also specific forms of conduct; and
- an expanded “public warning” (naming and shaming) power.

### Other changes

There are also a number of other changes proposed as part of the Australian Consumer Law.

These include:

- changing the name of the *Trade Practices Act* to the “*Competition and Consumer Act*”;
- introducing a consistent definition of a “consumer”;
- specific changes in relation to door to door marketing, lay-by sales, telemarketing, and minimum standards for the appearance of documents (eg font size and disclaimers).

### When will it come into effect?

Submissions on the proposed Australian Consumer Law are due by **17 March 2009**.

It is expected that the form of legislation will be finalised by July 2010 and passed by the Commonwealth and all states and territories by the end of 2010.

If you would like to make a submission, or have questions about the impact of the proposed changes on your business, please contact:

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