

4 JUNE 2010

## New Australian Consumer Laws Affecting Unfair Contractual Terms in Standard-form Contracts

The Federal Government's plans to establish uniform, national consumer laws have been implemented through the recent enactment of the *Trade Practices Amendment (Australian Consumer Law) Act (No 1) 2010 (Act)*.

### 1 BACKGROUND

The Act came into effect on 14 April 2010, amending such acts as the *Trade Practices Act 1974*, the *Australian Securities and Investments Commission Act 2001* and the *Corporations Act 2001*. These provisions relating to unfair contract terms (in standard-form contracts) will come into effect on 1 July 2010. Broadly, the Act creates the national unfair contract terms regime and introduces new penalties, enforcement powers and consumer redress provisions.

The Act forms part of a national consumer law regime (the Australian Consumer Law), with further amendments currently being proposed under the *Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010 (Bill)*. The Bill aims to address

general and specific consumer protections, misleading and deceptive conduct, unconscionable conduct, unfair practices, consumer transactions, statutory consumer guarantees and a standard consumer product-safety law for consumer goods and product-related services (as well as a proposed change of title of the *Trade Practices Act 1974* to the *Competition and Consumer Act 2010*). If passed, the Bill may come into effect in January 2011.

In Victoria, the Australian Consumer Law will replace the existing unfair contract terms provisions in the *Fair Trading Act* that have been in effect since 2003 (including the test for what constitutes a 'consumer contract' in that legislation).

### 2 WHAT WILL THE NEW SCHEME LOOK LIKE?

The scheme, as it applies to unfair contracts for consumer goods and services and for the sale or grant of interests in land, amends the *Trade Practices Act*. Such changes mirror amendments to the *Australian Securities and Investments Commission Act*, which



introduces the unfair contract terms regime in relation to financial services.

### 3 HOW WILL THE NEW LAW AFFECT CONSUMER CONTRACTS?

The unfair contract terms provisions will apply to all consumer contracts in a standard form for the supply of goods and/or services that are entered into or varied after 1 July 2010.

It is recommended that all suppliers of goods and/or services, or financial products and/or financial services that are acquired wholly or predominantly for the consumer's personal, domestic or household use, review carefully their standard-form contracts to ensure that terms within those contracts do not fall within the definition of 'unfair' terms in the Act. This review will assist in guarding against exposure to new penalties which the ACCC (in relation to goods and services) and ASIC

(in relation to financial products and services) have been empowered to issue under the new Act.

### 4 HOW WILL THE NEW LAW APPLY?

#### 4.1 Threshold questions: contracts affected by the new consumer laws

##### 4.1.1 What is a consumer contract?

Under the Australian Consumer Law, a 'consumer contract' is a contract for the supply of goods and/or services for an individual's wholly or predominantly personal, domestic, or household use or consumption. Therefore, contracts between businesses are excluded from the scope of the new provisions, except in relation to 'sole traders'.

##### 4.1.2 What is a standard-form contract?

The Act does not define the term 'standard-form contract'. However, it is generally understood that such a contract will be one that has been prepared by one party to the contract and is not subject to negotiation between the parties. Importantly, a consumer contract will be presumed to be in standard form unless another party to the proceeding proves otherwise.

##### 4.1.3 Exempt contractual terms unaffected by the new law

The new regime does not apply to terms in a standard-form contract that: (i) define the main subject matter of a consumer contract; (ii) set the 'upfront price' payable under the contract; and (iii) constitute terms required, or expressly permitted, by law.

#### 4.2 Unfair terms

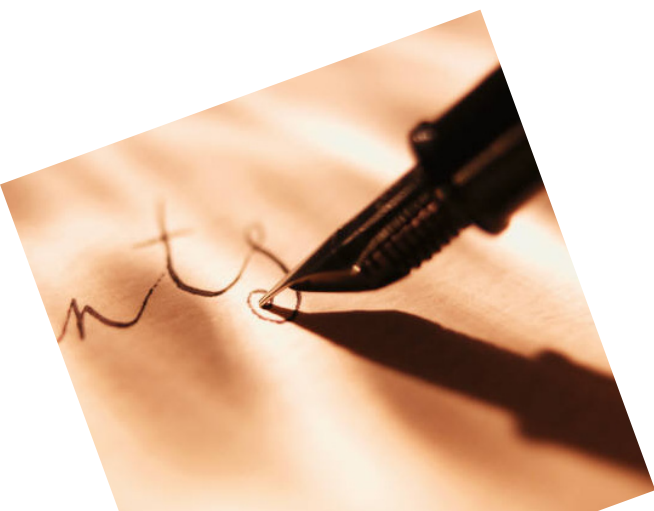
##### 4.2.1 The three-step test for 'unfairness'

A term of a contract is 'unfair' if it: (i) would cause a significant imbalance in the parties' rights and obligations arising under the contract; (ii) is not reasonably necessary to protect the legitimate interests of the party who would be advantaged by that term; and (iii) would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied upon.

##### 4.2.2 Examples of terms that may be considered unfair

The Act includes a non-exhaustive list of the types of terms in a consumer contract that may be regarded as unfair. The list serves as a guide only and does not create a presumption that specific types of terms will be void under the new consumer laws. Any assessment of a term, including a term on the list, is still subject to the unfairness test set out above. Examples include:

- (a) A term that permits, or has the effect of permitting, one party (but not another) to avoid or limit performance of the contract.
- (b) A term that permits, or has the effect of permitting, one party (but not another) to terminate the contract.
- (c) A term that permits, or has the effect of permitting, one party (but not another) to vary the terms of the contract.
- (d) A term that permits, or has the effect of permitting, one



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party (but not another) to avoid or limit performance of the contract.

- (e) A term that permits, or has the effect of permitting, one party (but not another) to renew or not renew the contract.
- (f) A term that penalises, or has the effect of penalising, one party (but not another) for a breach or termination of the contract.
- (g) A term that permits, or has the effect of permitting, one party (but not another) to vary the upfront price payable under the contract without the right of another party to terminate the contract.

## 4.2.3 Considerations of a court in determining whether a contract is 'unfair'

A court may take into consideration any matter that it

considers relevant in determining whether a term in the contract is unfair. However, the court must consider the extent to which the term would cause detriment (financial or otherwise) to the party if it were relied on, the extent to which the term is transparent, and the contract as a whole.

### (a) Detriment

Courts will have regard to whether the term has caused detriment to consumers (individually or as a class), or whether there is a substantial likelihood that detriment will result.

### (b) Transparency

A lack of transparency in a term may be found to cause a significant imbalance in the parties' rights and obligations. A term is likely to be considered transparent if it is expressed in reasonably plain language, legible, presented clearly and readily available to any party affected by the term.

### (c) The contract as a whole

The fairness of a term will not be considered in isolation; it must be assessed as part of the whole contract and in context. A term may be seen as less or more fair in light of another counterbalancing term within the contract.

## 4.3 The effect of including an unfair term

A term in a consumer contract that is unfair will be void. However, the contract will continue to bind the parties if the unfair term can be severed, with the balance of the contract operating without the term.

The Act permits the ACCC or a party to a standard contract to

apply to court for a declaration that a term is unfair. If a party subsequently seeks to rely on the unfair term, the court may grant an injunction, an order prohibiting payment, an order providing redress, or any other order the court considers appropriate.

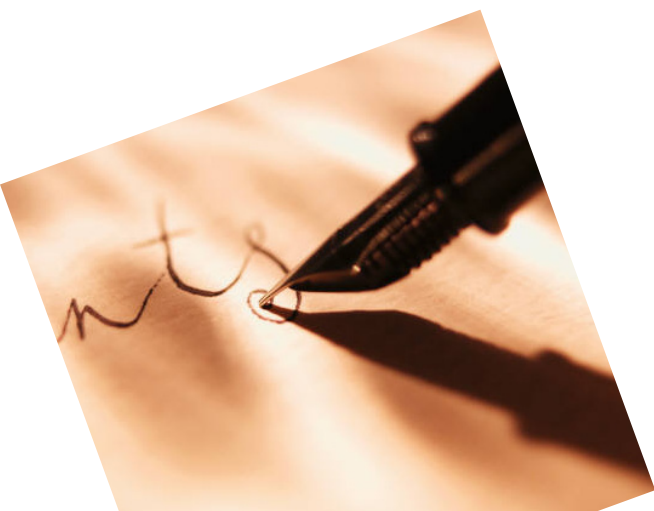
## 5 ENFORCEMENT OF THE AUSTRALIAN CONSUMER LAWS

The Act introduces new civil penalties, new enforcement powers for regulatory bodies and the power for courts to order redress for consumers affected by breaches of the Act.

### 5.1 Contracts for consumer goods and services

Importantly, in a number of respects, the Act expands the powers of the ACCC. The consumer laws give the ACCC new enforcement powers including the ability to issue or seek civil monetary penalties, disqualification orders, substantiation notices, infringement notices, refunds for consumers, public warning notices and court orders requiring a supplier to provide redress.

It appears likely that the ACCC and state and territory consumer protection agencies will work together to ensure compliance with the unfair contract terms regime. In contrast, the role of tribunals and courts will be to determine whether a term is unfair and to order the appropriate relief if a contravention of the Act has occurred. It will not be the role of



the ACCC or any other regulators to determine whether a term is unfair.

## 5.2 Contracts for financial products and financial services

Financial products and services are regulated by ASIC. The Act gives ASIC greater enforcement powers in relation to the unfair contract terms regime for financial products and services. New enforcement powers include the ability to issue or seek civil pecuniary penalties, banning orders, substantiation notices, infringement notices, refunds for consumers, public warning notices and court orders requiring a supplier to provide redress.

In this context, the role of courts will be to determine whether a term is unfair and to order the appropriate relief if a contravention of the unfair contract terms provisions has occurred.

## 6 TIMING AND TRANSITIONAL MATTERS

The Act will apply to terms within standard-form consumer contracts entered into on or after 1 July 2010. A contract entered into prior to that date will not be subject to the Act unless it is varied after 1 July 2010 (in which case the Act will apply to the contract as varied) or is renewed after that date (in which case the Act will apply to the contract as renewed).

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