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UNFAIR CONTRACTS



On 17 March 2010 the Federal Government passed the *Trade Practices (Australian Consumer Law) Act 2010* which set down a number of protections for consumers against unfair contracts. This new law took effect from 1 July 2010.

How does this new law apply?

This new law will only apply to 'standard form' consumer contracts. Unfortunately the legislation does not define what a 'standard form' contract is, however details which the Courts would consider, include:

- Is the contract pre-printed and prepared before the consumer has an opportunity to negotiate? Is the consumer given a chance to negotiate?
- What is the relative bargaining power of the parties? Is the consumer at a significant disadvantage to the supplier?
- Do the terms of the contract take into account the specific consumer and the circumstances of their particular matter?

For the new law to apply, the contract must also be a consumer contract. The legislation defines this as being a contract for the supply of goods or services (including a contract for sale of land) to an individual whose acquisition of the goods or services is wholly or predominantly for personal, domestic or household use or consumption. It would seem that the drafters of the legislation were aiming to protect the position of average members of the public from unfair contracts through these new laws.

Once it has been established that the contract is a standard form consumer contract, the question will then be whether or not it is unfair. There are many points which need to be considered before determining that a term in a contract is unfair, however as a minimum it would:

- cause a significant imbalance in the parties' rights and obligations under the contract; and
- not be reasonably necessary to protect the legitimate interests of the party advantaged by the term; and
- cause detriment to the consumer.

Examples of certain terms that may be unfair would include:

- penalties under the contract for only one party but not the other;
- a right for one party to unilaterally terminate the contract;
- a right for one party to unilaterally vary the characteristics of the goods or services provided or to vary the upfront price;
- a limitation on rights to sue under the contract that only applies to one party.



What happens if a term is 'unfair'?

The immediate remedy to the consumer is that the unfair term will be void and is severed from the contract. Those remaining terms of the contract which are not unfair, will continue (if possible) to bind the parties.

If a supplier is found to have been breaching the unfair contracts law, then they may face significant penalties, including fines, they risk having public warning notices issued against them or being ordered to compensate certain losses and damages suffered by the consumers in question.

If you think you are a victim of an unfair contract or you are a business owner looking to ensure that your contracts are compliant, please do not hesitate to contact either of our offices at The Gap or Samford.

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