

Competition Law News

Recent developments in unfair contract terms

WHAT YOU NEED TO KNOW

- The ACCC has now commenced two Federal Court cases concerning unfair terms.
- It has also identified eight specific types of contract terms which it considers contravene the unfair contracts regime under the Australian Consumer Law (ACL), and signalled its intention to undertake enforcement action in relation to unfair terms.

WHAT YOU NEED TO DO

- Consider whether the terms in your standard form consumer contracts, including any terms of the type identified by the ACCC, comply with the ACL.
- Watch this space: the outcome of the current proceedings will provide critical guidance on this as yet untested regime.

ACCC moves to enforce the unfair contract terms regime

The ACCC is currently conducting Federal Court proceedings concerning unfair contract terms against Advanced Medical Institute Pty Ltd, and commenced a separate proceeding against ByteCard Pty Limited last week.

The ACCC also recently released the Unfair Contract Terms – Industry Review Outcomes Report (Report), which arose out of its review of potentially unfair contract terms used in the airline, telecommunications, fitness and vehicle rental industries, and in contracts used by online traders and travel agents (Review).

These cases and the Review provide guidance on the types of terms which, in the ACCC's view, are likely to be "unfair contract terms" under the ACL. We outline these terms below.

Recap - the law concerning unfair contract terms

The unfair contract terms laws apply to standard form consumer contracts entered into, varied, or renewed on or after 1 July 2010.

"Standard form consumer contracts"

A "**consumer contract**" is a contract for the supply of goods or services (or the sale or grant of an interest in land) to an individual whose acquisition of the good, service or interest is wholly or predominantly for personal, domestic or household use or consumption. (The Coalition has indicated that, if elected, it may apply the unfair contract terms regime to small business as well as consumer contracts.)

There is a rebuttable presumption that a contract which is alleged to be a "standard form" contract is in fact a standard form contract. Factors that a court will consider to determine this issue include whether the contract was prepared by one party, whether there was an opportunity to negotiate the contract terms, and whether one party had "all or most of the bargaining power" in relation to the contract.

"Unfair"?

A term in a standard form consumer is unfair if:

- i. it would cause a significant imbalance in the parties' rights and obligations under the contract;
- ii. it is not reasonably necessary to protect the legitimate interests of the party who would be advantaged by the term (there is a rebuttable presumption that the term is not reasonably necessary for this purpose); and
- iii. it would cause detriment (financial or otherwise) to a party to the contract if it were applied or relied upon.

Importantly, to the extent that a term defines the main subject matter of the contract, sets the upfront price payable under the contract, or is expressly required or permitted by law, that term will not be void even if it would otherwise be "unfair" within the meaning outlined above.

In determining whether a term is unfair, a court must consider the contract as a whole, and the extent to which the term is "transparent"; it may also consider other relevant matters. A "transparent" term is a term expressed in reasonably plain language, which is legible, clearly presented, and readily available to the party affected by it.

Exclusions

The ACL unfair contract terms regime does not apply to financial products and services (which are subject to an equivalent regime under the *ASIC Act 2001*), or to certain types of shipping arrangements.

The consequences of using unfair terms

Unfair terms are automatically void, and so unenforceable. However, the contract containing the unfair term continues to bind the parties if it is capable of operation without that term.

If a court declares that a term is unfair, the ACCC may seek injunctions and other remedies, including orders for the benefit of persons affected by the unfair term who are not party to proceedings brought by the ACCC (referred to as "non-party consumers").

The remedies the ACCC may seek include orders requiring the party advantaged by the term to prevent

or reduce loss or damage suffered by non-party consumers, including an order varying, or refusing to enforce the contract, or declaring a contract void in whole or part. These enforcement powers may have wide-ranging consequences for businesses found to have used unfair contract terms, particularly where those terms are used in mass market consumer contracts, such that there may be large numbers of non-party consumers to whom these remedies may be available.

What terms might be unfair?

The two proceedings brought by the ACCC and the ACCC's Report have identified several types of clauses which the ACCC considers constitute unfair contract terms within the meaning of the ACL, summarised in the table on page 3.

While the ACCC's view is not a statement of law, it provides guidance regarding the types of terms likely to attract its attention.

"Consider whether the terms in your standard form consumer contracts, including any terms of the type identified by the ACCC, comply with the Australian Consumer Law."

Types of clauses the ACCC considers constitute unfair contract terms within the meaning of the ACL

Potentially unfair terms	ACCC examples
<p>Terms allowing a business to unilaterally change the contract without notice to the consumer, and without either requiring the consumer's consent or allowing the consumer to terminate the contract</p>	<p><i>"You must pay all subscription fees applicable to the plan for which you have registered. You understand all fees and charges may be altered from time to time by us without notice."</i></p> <p>Terms enabling unilateral variation of the contract price in circumstances where the consumer did not have a right to terminate the contract.</p>
<p>"Entire Agreement" clauses that prevent the consumer from relying on representations made by the business or its agents</p>	<p><i>"You acknowledge that you enter into this agreement entirely as a result of your own enquiries and that you do not rely on any statement, representation or promise by us not expressly stated in this agreement."</i></p>
<p>Terms that unfairly restrict the consumer's right to terminate the contract (and, for example, suggest that the consumer may not terminate the contract even where they have the right to do so under the statutory guarantees regime in the ACL)</p>	<p><i>"You may not cancel, or otherwise terminate the Agreement or revoke any authority given under it after we certify the installation of the services has commenced."</i></p> <p>Terms requiring the consumer to give 30 days written notice before terminating the contract.</p> <p>Terms requiring payment of significant fees prior to termination.</p>
<p>Terms that have the effect of limiting the consumer's rights under the ACL statutory guarantees regime (These terms may also breach the prohibition on false or misleading representations, which attracts monetary penalties)</p>	<p><i>"You understand and agree you are assuming the entire risk as to the quality, accuracy, performance, timeliness, adequacy, completeness, correctness, authenticity, security and validity of any and all features and functions..."</i></p>
<p>Terms that make the consumer liable for things that are ordinarily outside of their control (eg unauthorised use of their service)</p>	<p>Terms seeking to exempt suppliers from liability while making the consumer liable for matters beyond their control (eg ensuring information provided to them by others was correct).</p> <p>Terms requiring the consumer to indemnify the supplier "in any circumstance".</p>
<p>Terms that grant a broad and undefined discretion to suspend or terminate the services supplied to the consumer without notice, or allow the supplier to unilaterally terminate the contract at any time, including without cause</p>	<p>A term conferring a broad and undefined discretion to cancel or suspend services in the event of "excessive or unusual use".</p>
<p>Terms that remove a consumer's credit card chargeback rights</p>	<p>Terms which seek to remove the consumer's credit card chargeback rights, which typically allow a consumer to reverse a credit card transaction if something goes wrong with the transaction (eg if the goods or services are not provided).</p>
<p>Terms that cause confusion about agency arrangements and agents' liability</p>	<p>Terms which did not clearly identify whether liability for failure to supply the consumer would attach to the agent or their principal.</p>

Conclusion

The terms identified in the ACCC's current court proceedings and its Review reflect the ACCC's view on when terms will be unfair under the as yet untested ACL unfair contract terms regime.

Businesses should consider whether their standard form consumer contracts comply with the ACL, taking into account the views expressed by the ACCC, and bearing in mind that terms of the types identified may attract additional scrutiny.

Businesses should watch this space in 2013. The outcome of the two current unfair contracts proceedings will provide important guidance on this area of law.

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