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Commercial Law e-alert

Fairness in contracting – national unfair contract terms provision released for public comment

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 2010
- increased enforcement powers for state-based consumer regulators and the ACCC
- a consistent national approach to consumer protection law

As reported in our commercial law e-alert on 23 February 2009, a major aim of the Rudd Government's proposed new Australian Consumer Law is to "crack down" on unfair contracts.

On 11 May 2009, the Assistant Treasurer Chris Bowen released the draft national unfair contract terms provision for public comment. The provision is proposed to be enacted as Schedule 2 to the *Trade Practices Act 1974* (entitled The Australian Consumer Law), and as new sections 12BA-12BK to the *Australian Securities and Investments Commission Act 2001* (to bring financial services contracts into the net). The consultation paper on the proposed legislation is available at the treasury website:

<http://www.treasury.gov.au/contentitem.asp?NavId=037&ContentID=1537>

Submissions on the draft legislation close on **22 May 2009**.

This "important first part of the first tranche of the Australian Consumer Law" as it is described by the Assistant Treasurer, is intended to be introduced to Parliament in the Winter sittings (June 2009), for commencement on **1 January 2010**. The Assistant Treasurer has said the final legislation will also include new enforcement powers for the ACCC, but these are not included in the exposure draft attached to the consultation paper. Common national guidance on enforcement is to be issued by the relevant enforcement agencies prior to commencement of the legislation.

The draft legislation reflects the model agreed by the Ministerial Council on Consumer Affairs (MCCA) in August 2008, and by the Council of Australian Governments (COAG) in October 2008.

In summary, so far as unfair contract terms are concerned, the exposure draft of the 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; and
 - (b) it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term.
- 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 potential for the term to cause financial or other detriment to a party if it was applied or relied on;
 - (b) the extent to which the term is expressed in plain language, is legible, is presented clearly, and is readily available to any party affected by it; and
 - (c) the contract as a whole.

The draft legislation also contains a (non-exhaustive) list of 14 examples of the kinds of terms of a standard form contract that may be considered unfair; 9 of these relate to terms that have a unilateral effect – these are terms that allow only one 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.

The regulations may also prescribe terms that are prohibited. It is not proposed to prohibit any terms at this time, but if there are such terms prescribed in the future, including them in contracts or applying or relying on them will be a contravention of the relevant Acts and will attract a pecuniary penalty.

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.

If the legislation comes into force, existing contracts will not be affected, but contracts entered into after 1 January 2010 will be affected, as will those that are renewed or varied after that date.

Clarity in Pricing Act

ACCC clarifies new component pricing requirements

The Australian Competition and Consumer Commission ("ACCC") has released an information guide, *News for business – Component price advertising*, to explain the application of the *Trade Practices Amendment (Clarity in Pricing) Act 2008* (Cth) ("Clarity in Pricing Act") to businesses.

In addition to the general guide, the ACCC has launched a "Component pricing" page on its website (<http://www.accc.gov.au>) and has issued industry-specific guides for the motor vehicle industry, the travel industry and a guide for electrical goods, whitegoods and furniture advertising.

In the current edition of the Hunt & Hunt Commercial Update, we explain in detail how the Clarity in Pricing Act will apply. In short, from **25 May 2009**, corporations will be required to specify, in a prominent way and as a single figure, the single price for goods or services that they are supplying or promoting to consumers.

The Clarity in Pricing Act

The Clarity in Pricing Act repeals the existing section 53C of the *Trade Practices Act 1974* (Cth) ("Trade Practices Act") and substitutes a new section 53C into the Trade Practices Act. The purpose of the amendments is to prevent businesses from misleading consumers through the use of component pricing, which is the practice of pricing goods and services as the sum of multiple parts. For example, motor vehicle dealers will no longer be permitted to advertise a car as \$19,990 plus on-road costs.

If you are supplying or promoting goods or services to consumers, you must specify a single price which **must include**:

- (a) charges of any description payable by the consumer (excluding optional charges); and
- (b) any tax, duty, fee, levy or charge in relation to the supply;

but is **not required to include**:

- (c) optional charges, for example, a credit card surcharge will not need to be included in the single price where there are alternative payment options but must be included in the single price where there is no other method for payment; and
- (d) charges that are payable in relation to sending the goods to the consumer (e.g. postage, courier fees), however, where such charges must be paid by a consumer and the amount of these charges is known, you must disclose the minimum of those charges as a separate component of price (e.g. \$55 plus \$20 freight).

ACCC guidance

The ACCC has confirmed that the prohibition does not apply to representations made exclusively to businesses. However, as we noted in our Commercial Update, you might find that your company inadvertently promotes its goods or services to consumers. You may not have any control over who looks at a price list on your website.

The Trade Practices Act will require the single price to be “at least as prominent” as the most prominently displayed component of the price. The ACCC has said that a “prominent” price is one that stands out to a consumer, is clear, eye-catching and noticeable. The ACCC has echoed our recommendation that, among other things, the size, colour and type of font are important considerations in this context.

The ACCC has noted that the single price means the minimum total cost able to be quantified at the time of making the price representation and an amount is quantifiable if it can be readily converted into a dollar amount. Furthermore, if a charge is subject to variation then you must calculate it based on best available information and clearly advise the consumer that it may be subject to change.

This means that where a total price is not quantifiable but a minimum total price is known you must disclose the minimum price as a single figure and advise the consumer that not all components are included in the minimum price.

What you need to do?

1. Read our Commercial Update and visit the ACCC website for further information on the changes to the Trade Practices Act.
2. Consider whether you are supplying or promoting your goods and services to consumers.
3. When you make a price representation to consumers, remember to include all taxes, duties, fees, levies or charges that can be calculated at that time and if you are unable to quantify a component of the price, clearly advise consumers that the component is not included in the single price.
4. Ensure that the single price is displayed at least as prominently as any component prices.
5. Review your price lists, advertisements, quotes, invoices and any other documents which display your prices and seek our advice if you are unsure whether your materials are compliant with the Trade Practices Act.

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