

## Consumer Law

July 2010

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### Unfair Terms

New laws came into force on 1 July 2010 which protect consumers from contract terms which are unfair. A term of a consumer contract (not a business-to-business contract) will be void if it is:

1. unfair; and
2. the contract is a standard form contract.

A consumer contract is a contract for:

1. a supply of goods or services; or
2. a sale or grant of an interest in land;

to an individual whose acquisition of the goods and services or interest is wholly or predominately for personal, domestic or household use or consumption.

Thus it does not apply to contracts with companies or any other form of business-to-business contracts.

A term is unfair if:

1. it will cause a significant imbalance in the parties' rights and obligations under the contract; and
2. it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and
3. it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.

A Court may take into account any matters it thinks relevant but must take into account the extent to which the term is expressed in plain language, the extent to which it is legible and clearly presented and the contract as a whole.

The legislation gives more than a dozen examples of terms that might be considered to be unfair including:

1. a term that permits one party (but not the other) to avoid or limit performance of a contract;
2. a term that permits one party (but not the other) to terminate a contract;
3. a term that permits one party (but not the other) to vary the terms of a contract.
4. a term that unilaterally permits a party to vary the characteristics of goods or services to be supplied.

This Alert is intended as an alert only. It does not purport to be a comprehensive advice. Readers should seek professional advice before acting in relation to these matters.

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Only a Court can determine what is unfair so that the ACCC cannot issue an infringement notice (see below) in relation to a term it decides is unfair. The contract can continue to bind the parties if it capable of operating without the unfair term.

The fundamental terms of the contract namely the price and the main subject matter cannot be unfair terms.

A standard form contract is one that is basically provided by a party with most of the bargaining power to another on a take it or leave it basis. Where there is no effective opportunity to negotiate the terms it is likely to be a standard form contract.

Certain shipping contracts are excluded from the legislation and so are the constitutions of companies, managed investments schemes and other incorporated bodies.

### Infringement Notices

The ACCC may now issue infringement notices where it has reasonable grounds to believe that a person has contravened certain consumer protection laws. The notice will include the nature of the alleged contravention and the amount to be paid if the person wishes to avoid court action. The penalty amount will vary depending on the alleged contravention and on whether an individual or a corporation is involved. Penalty amounts for a corporation of \$6,600.00 and for an individual of \$1,320.00 are the highest by also the most common.

The ACCC has recently issued its first infringement notices to a number of restaurants and cafes throughout Australia. These businesses used menus that according to the ACCC failed to state a single price for menu items in circumstances which would contravene Section 53C of the TPA. This section requires a single price to be stated for the supply of goods or services. They failed to provide the total price where weekend and holiday surcharges applied. For example, a menu that states that “a surcharge of 10% applies on public holidays” is in breach of the law.

#### Contacts:

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