

Is your Business Compliant with the Unfair Contracts Legislation?

The Trade Practices Amendment (Australian Consumer Law) (No 1) 2010 was passed by the Commonwealth Government and came into operation as at 1 July 2010.

The Fair Trading Act 2010 was passed by the WA State Government in December 2010 and in most part took effect as at 1 January 2011.

One of the major new pieces of legislation was that a term of a “consumer contract” is void if that term is “unfair” and if the contract is a “standard form contract”

1. Consumer Contract

A contract is a “consumer contract” if it 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 inland is wholly or predominantly for personal, domestic or household use or consumption.

It is clear that the unfair contracts legislation does not apply to business-to-business transactions.

2. Unfairness

A term of a contract will be unfair if it satisfies 3 criteria:

- it would cause a significant imbalance in the rights and obligations arising under the contract;
- it is not necessary to protect the legitimate interest of the party who would be advantaged by that term in the contract; and
- it would cause detriment (financial or otherwise) to a party if that term were to be applied or relied upon.

It is important to note that an allegedly unfair term is presumed not to be reasonably necessary and it is up to the party who seeks to enforce that term to prove otherwise.

Whether a contract is unfair must also be considered in light of the contract as a whole and the extent to which the allegedly unfair term is “transparent”. The term “transparent” is defined as being expressed in reasonably plain language, legible, presented clearly and readily available to anyone affected by the term. It is not yet entirely clear what this means in practice.

The legislation provides examples of the kinds of contracts that might be considered to be unfair. That list includes:

- a term that permits one party, but not the other party, to terminate the contract;
- a term that permits one party, but not the other party, to change the terms of the contract;
- a term that penalises one party, but not the other party, for a breach or termination of the contract.

Unfair contracts legislation has been enacted in other Australian states for longer periods. In Victoria there are a number of cases which have considered the concept of “significant imbalance” and these decisions seem to indicate that:

- “significant”, means substantial rather than simply non-trivial;
- the whole of the contract must be considered, including any other terms of the contract that might be “trade-offs” for what could be construed as an unfair term;
- industry practices are relevant.

3. Standard Form Contract

The term “standard form contract” is not defined in the legislation, but there is a list of factors which the courts can take into account when deciding if a contract is standard form:

- whether one party has all or most of the bargaining power;
- whether the contract was prepared before the parties started negotiations;
- whether there was any ability to negotiate the terms of the contract or whether it was presented on a “take it or leave it” (other than in relation to elements such as price and the essential subject matter of the contract);
- whether the contract takes into account the individual parties or is a “one size fits all” contract.

Exemptions

An unfair contract term will not be void if it defines the main subject matter of the contract or defines the upfront price. For instance, the purchase price for property.

The legislation does not apply to certain maritime contracts or to constitutions of companies, managed investment schemes or other kinds of bodies.

If there has been a Breach

It is not a breach of the law to sign a contract with an unfair term, but it is a breach to seek to rely upon or enforce an unfair term in a contract.

Once a term has been declared unfair, various remedies are available, including:

- civil penalties (up to \$1.1m for corporations);
- having persons disqualified from managing corporations for a period of time;
- infringement notices (including monetary penalties);
- substantiation notices compelling the party served to give information and/or produce documents;
- public warning notices.

It is notable that a company cannot indemnify an employee against penalties.

If you have any queries about the unfair contracts legislation, please call or email our office.

Nova Oldfield
Principal Solicitor



Suite 14
531 Hay Street
SUBIACO WA 6008

Telephone: 08 9331 5722
Facsimile: 08 9331 5744

Email: admin@oldfieldlegal.com.au
www.oldfieldlegal.com.au

Unit 26
66 Bannister Road
CANNING VALE WA 6155