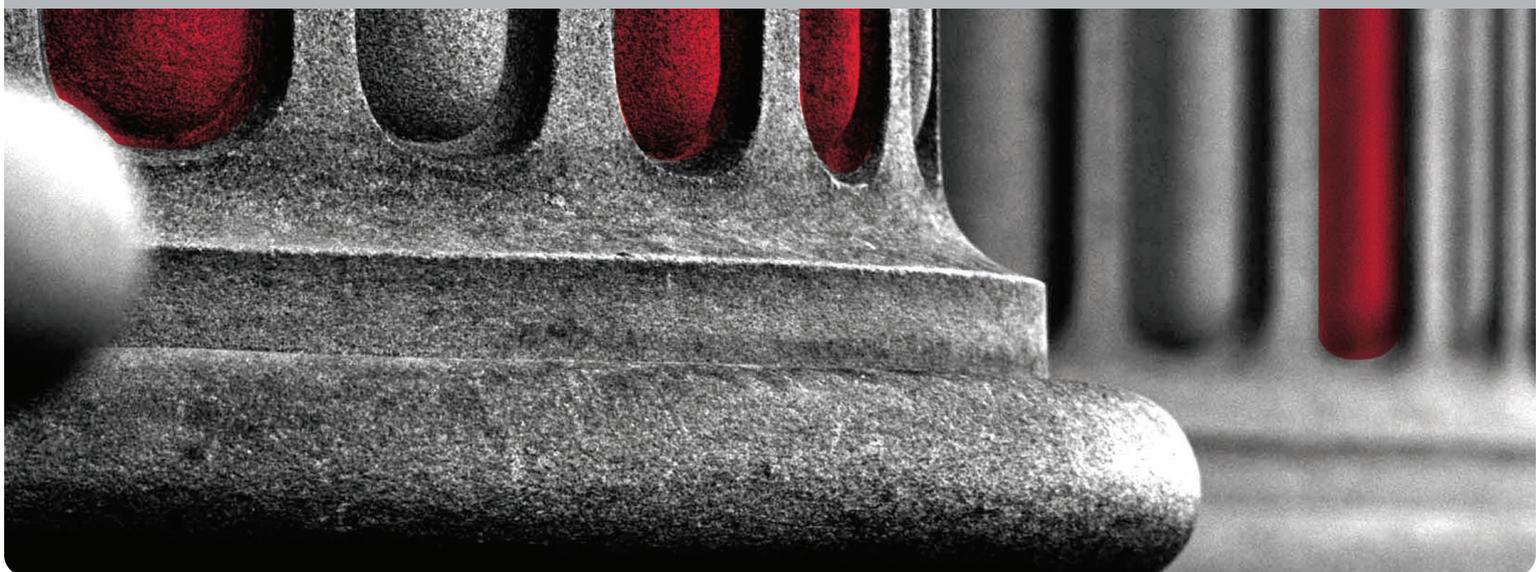


CLAYTON UTZ

Briefing Note on the Australian Consumer Law
Consultation on Draft Provisions on
Unfair Contract Terms

June 2009



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Consultation on Draft Provisions on Unfair Contract Terms

1. Overview of the Unfair Contract Terms Package

On 11 May 2009, the Honourable Chris Bowen, Assistant Treasurer and Minister for Competition Policy and Consumer Affairs, released a consultation package on national unfair contract terms legislation including exposure draft legislation (**Unfair Terms Package**) for public comment.

The Unfair Terms Package is the first stage of implementing the Australian Consumer Law regime.

The Unfair Terms Package is available from:

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

The Unfair Terms Package comprises the:

- Trade Practices Amendment (Australian Consumer Law) Bill 2009, which contains unfair contracts terms amendments to the Trade Practices Act 1974 (Cth) (**TPA**) (to cover contracts for goods and services other than financial services) and to the Australian Securities and Investments Commission Act 2001 (Cth) (**ASIC Act**) (to cover contracts for financial services and financial products) (**proposed ACL Bill**); and
- Commentary on draft unfair contract terms provisions (**Consultation Paper**).

The reforms are significant and will apply to almost all standard form contracts, including not only consumer contracts, but also contracts between businesses. This will have widespread implications and many Australian businesses will need to review all of their standard form contracts.

Examples of industry contracts that could fall within the scope of the reform include financial services contracts and lending, credit contracts, contracts to supply utilities such as water, gas, electricity and telecommunications and transport contracts for passengers and freight. In addition, standard form purchase and supply contracts will be affected. Contracts of employment are not covered.

Timing

The transitional provisions under the Unfair Terms Package state that the amended TPA and ASIC Act provisions will apply to contracts created on or after 1 January 2010 (**commencement date**). Similarly, where a contract is varied or renewed after the commencement date, the new laws will apply to the varied or renewed contract.

State and Territory Governments are able to apply the new laws under the Unfair Terms Package from the date of commencement. State and Territory application of the laws will catch those contracts that are outside the constitutional scope of the TPA and ASIC Act. At the very latest, State and Territory Governments will have to apply the new laws outlined in the Unfair Terms Package by 1 January 2011.

If you need any help or have any questions about the Unfair Terms Package please contact any one of our Clayton Utz contacts listed below.

Background

The Unfair Terms Package is intended to implement the Australian Government's policy objectives of protecting consumers, increasing competition and establishing national consistency in regulating contractual relationships.

The unfair terms proposals were published in the Australian Treasury's information and consultation paper titled "An Australian Consumer Law: Fair Markets - Confident Consumers" published in February 2009. That paper followed on from a COAG decision of 2 October 2008 and the Productivity Commission's Report of 30 April 2008.

What does the unfair terms package cover?

The Unfair Terms Package extends the Australian Government's regulatory power over contractual relations by declaring certain unfair terms to be void and empowering the Australian Securities and Investments Commission (ASIC) and the Australian Competition and Consumer Commission (ACCC) to regulate contract terms that are "unfair".

This briefing note addresses the changes that the Unfair Terms Package will make to the Trade Practices Act 1974 (Cth) (TPA) and the Australian Securities and Investments Commission Act 2001 (Cth) (ASIC Act).

When will the unfair terms package be implemented?

The Government plans to introduce the Unfair Terms Package to Parliament in June 2009. This will be the first of two legislative packages designed to reform the Australian Consumer Law regime. The Government plans to introduce the second package to the Parliament in 2010.

The Unfair Terms Package, to be introduced in June 2009 will establish national legislation to:

- regulate unfair contractual terms and create penalties;
- create enforcement powers for ASIC and the ACCC; and
- provide options for redress for parties to contracts with unfair terms, including amongst other things, declaring the unfair terms void, interlocutory and injunctive relief, compensation and specific performance.

The second package, to be introduced in early 2010, will introduce the majority of the Unfair Terms reforms, including legislation to:

- establish a new national regulatory framework for product safety;
- introduce "best-practice reform provisions" taken from State and Territory legislation; and
- extend the ambit of the TPA.

As noted above, State and Territory Governments will be able to implement the Unfair Terms Package from the date of commencement and, at the very latest, have to apply the Unfair Terms Package by 1 January 2011.

2. Application

The Unfair Terms Package applies to any standard form contract containing unfair terms which is entered into, renewed or varied after the commencement date, with the following exceptions announced by the Assistant Treasurer on 5 June 2009:

- standard form contracts where the upfront price payable for the services (including financial services), good or land supplied under the contract exceeds \$2 million;
- standard form contracts that are shipping contracts
- standard form contracts that are the constitutions of companies, managed investment schemes or other kinds of bodies.

An unfair term is deemed to be void. If possible, the contract will continue to operate and will be treated as though the term was never part of it.

What is an unfair term?

Definition

The Unfair Terms Package defines an unfair term in a standard form contract as one that:

- would cause significant imbalance in the contractual rights and obligations of the parties; and
- does not reasonably need to be included to protect the legitimate interests of the party who benefits from including the term.

Where a party claims that a term in a standard form contract was not reasonably needed to protect the other party's legitimate interests, the party relying on the term must prove, on the balance of probabilities, that the term is necessary to protect its legitimate interests.

While the question of what is "reasonably needed" is an issue for a court to determine, the Government notes its intention that a standard form term is "reasonably needed" when the need for including it "is sufficiently compelling to overcome any detriment caused" to the other party. The Government suggests that parties may be able to evidence this need by submitting evidence of their business's costs, business structure, their risk minimisation strategy and any relevant industry practices.

What should be considered?

When deciding whether a contractual term in a standard form contract is unfair, courts are given wide discretion. However they must consider:

- whether, and to what extent, the term would cause "detriment" to a party;
- how "transparent" the term is; and
- the operation of the contract as a whole.

Under the Unfair Terms Package, "detriment" is defined to include any actual detriment, as well as any substantial likelihood of detriment (financial or otherwise).

A term is "transparent" if it is expressed in reasonably plain language, legible, clearly presented and readily available to any party affected by the term.

Application to transactions between businesses

The Unfair Terms Package extends to contracts between businesses. The Consultation Paper notes that the key elements that must be proved to establish unfairness will be more difficult to show in a business-to-business standard form contract transaction (eg. parties in business to business relationships may have less difficulty proving that terms have been incorporated to protect their legitimate interests).

As a result of the Unfair Terms Package, businesses would be wise to consider the implications of terms in their standard form contracts, and the legitimate interests that the terms serve to protect.

Examples of unfair terms

The proposed Bill lists certain types of terms as ones that courts may consider to be unfair when included in standard form contracts. It is important to note that these terms are not prohibited, and will only be considered to be void if a court determines that they are unfair when considering them in light of the factors listed above.

The types of terms that the proposed ACL Bill considers *may* be unfair in standard form contracts are:

- terms permitting, or that have the effect of permitting, one party (but not another party) to:
 - (a) avoid or limit performance of the contract;
 - (b) terminate the contract;
 - (c) vary the terms of the contract; or
 - (d) renew or not renew the contract.
- terms penalising, or having the effect of penalising, one party (but not another party) for a breach or termination of the contract;
- terms permitting, or having the effect of permitting, one party to:
 - (a) vary the upfront price payable under the contract without the right of another party to terminate the contract;
 - (b) unilaterally to vary the characteristics of the goods or services to be supplied, or the land to be sold or granted, under the contract;
 - (c) unilaterally determine whether the contract has been breached or to interpret its meaning; or
 - (d) assign the contract to the detriment of another party without that other party's consent.
- terms that limit, or have the effect of limiting:
 - (a) one party's vicarious liability for its agents;
 - (b) one party's right to sue another party; or
 - (c) the evidence one party can adduce in proceedings relating to the contract.
- terms that impose, or have the effect of imposing, the evidential burden on one party in proceedings relating to the contract; and
- terms of a kind, or terms that have the effect of a kind, prescribed by the regulations.

Unaffected terms

Under the Unfair Terms Package, terms in standard form contracts cannot be considered unfair where they :

- define the subject matter of a contract;
- set the upfront price payable under a contract; or
- are required by law, or are expressly permitted by Commonwealth, State or Territory law.

The Consultation Paper notes that the policy objective of the "upfront price" exemption is to prevent the parties of a contract from challenging the negotiated price for which they have agreed to buy or sell property or services.

The term "upfront price" is defined to mean the price payable under a standard form contract before or at the time the contract is created. The Consultation Paper confirms that the Government intends this definition to include future payments, including payments calculated by formula. The definition does not include contingency payments that arise on occurrence of a particular event.

Prohibited terms

Under the Unfair Terms Package, regulations can prescribe that certain terms will be prohibited from being included in standard form contracts. Parties that include, apply or rely (or purport to include apply or rely) on these terms in a standard form contract will contravene the TPA or ASIC Act and will face civil pecuniary penalties. At this stage, there are no prohibited terms proposed for commencement.

3. Remedies and Enforcement

Enforcement under the ACL

The Government discussion paper "*An Australian Consumer Law: Fair Markets - Confident Consumer*" (**Discussion Paper**), released on 17 February 2009, flagged an increase of powers and remedies available under the proposed Australian Consumer Law. While these powers and remedies have not yet been defined, both the Discussion Paper and Consultation Paper confirm the Government's intention to grant remedial powers under the Unfair Terms Package.

The Consultation Paper notes that under the ACL, all unfair terms will be void. Where a party has included terms in standard form contracts that are deemed to be unfair, subsequent acts that rely, or purport to rely on those void terms will also be void. However, a party who relies on, or purports to rely on the void terms, will not have contravened the ACL.

In contrast, a party will contravene the ACL when:

- including prohibited unfair terms in a standard form contract;
- purporting to include prohibited unfair terms in a standard form contract;
- relying on prohibited unfair terms in a standard form contract; and
- purporting to rely on prohibited unfair terms in a standard form contract.

Any such contravention may result in a claim for relief, other remedies and/or civil penalty from the ACCC.

At this stage, there is no guidance about how the Government plans to enforce these contraventions under the ACL. However, the operation of the Unfair Terms Package under the ASIC Act provides some direction.

Enforcement under the ASIC Act

As under the ACL, unfair terms included in standard form contracts for financial products and services will also be void. As above, where terms are deemed to be unfair, subsequent acts relying on, or purporting to rely on void terms will also be void but will not amount to a contravention of the ASIC Act.

Under the proposed amendments to the ASIC Act, the following acts will amount to a contravention of subdivision BA of Part 2, Division 2 of the ASIC Act and may result in a claim for relief, remedies and / or a civil penalty:

- including prohibited unfair terms in a standard form contract;
- purporting to include prohibited unfair terms in a standard form contract;
- relying on prohibited unfair terms in a standard form contract; and
- purporting to rely on prohibited unfair terms in a standard form contract.

Penalties for contraventions

Certain acts in relation to prohibited terms will constitute a contravention of subdivision BA of Part 2, Division 2 of the ASIC Act and may result in a civil penalty.

Injunctive relief for contraventions

In the event that a person contravenes subdivision BA of Part 2, Division 2 of the ASIC Act the Minister, ASIC, or any other person can apply to the court to seek an injunction to stop the contravention indefinitely. In the interim, the Minister, ASIC, or any other person can also apply to stop the contravention until the case is heard by the court.

Other remedies for contraventions

In addition to any injunctive relief, the other party to the contract may also apply for the court to make any other order that it sees fit. ASIC may also apply on their behalf for these orders, provided it obtains written consent before proceeding.

Orders the Court can make include:

- an order that the contravening party pays compensation;
- an order declaring that the entire contract, or any part of the contract void;
- an order to restore the parties back to their original position before entering the contract;
- an order declaring that the entire contract, or any part of the contract is not enforceable;
- an order requiring the party to deal with interests in land in a specific way.

The powers given to the court are broad and provide parties with a wide range of remedies to alleviate damage caused by contraventions of the ASIC Act.

4. Further information

For further information regarding the Package, please contact one of our Clayton Utz partners below.



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