

TRADE PRACTICES

New unfair contracts law: An exocet for consumers, franchisees, independent contractors

Tuesday, 12 May 2009

The Federal Government unveiled its draft unfair contracts legislation yesterday, together with an accompanying consultation paper. The legislation represents one of the most significant additions ever to the *Trade Practices Act*. The draft legislation and consultation paper can be downloaded [here](#).

At its simplest, the draft legislation provides that any term in a standard form contract that is 'unfair' will be void.

The new law is described as consumer legislation. However, the provisions reach far beyond consumer contracts to provide a powerful weapon by which many other agreements will also be able to be challenged - franchisees will use the legislation to strike down terms in franchise agreements, tenants (both commercial and residential) will be able to use them to avoid harsh lease provisions, and independent contractors will have a powerful new tool to challenge provisions in quasi-employment agreements. As a result, the new provisions are quickly likely to become among the most litigated provisions in the *Trade Practices Act*.

Key aspects of the proposed provisions include the following:

- The provisions apply only to 'standard form contracts'. This includes consumer contracts where one party has all the bargaining power; from credit card and home loans, mobile phone and internet service agreements, to airline ticket terms, train tickets and even the terms of your taxi fare home. It also includes a huge range of business contracts that either can't be negotiated or are only be negotiated to a limited extent: franchise agreements, equipment leases, supply terms, insurance contracts, software licences - the list goes on.
- The discussion paper suggests that negotiation of a contract will remove it from the scope of the provisions. However, as the legislation is currently drafted, even if some part of an agreement is negotiated, any terms that a party imposes on a 'take it or leave it' basis may still be able to be challenged under the unfair contracts provisions.
- The draft legislation provides that a term of a standard form contract will be unfair if it: (a) would cause a significant imbalance in the parties' rights and obligations; and (b) is not reasonably necessary to protect the legitimate interests of the party in whose favour it operates. The Bill gives examples of provisions that a court may consider 'unfair'. These include provisions allowing one party greater rights than the other to terminate or change a contract or allowing one party to change the product that will be supplied under the contract.
- There is no power for the court to 'write down' unfair provisions to save them. Accordingly, even if a party has a legitimate interest to protect, a provision that goes

beyond the minimum necessary to protect that interest (i.e., that is too protective) is likely to be struck out completely. Careful drafting to avoid this will be required.

- Terms that define the main subject matter of the contract or the price for that supply are exempt from the new law. Fees that are contingent on any event, however, are not exempt. Accordingly, a borrower will not be able to use this legislation to say that the up-front interest rate on a loan is unfair, because that is the price for supply that was known by the borrower at the outset. An excessive termination or transfer fee, however, may be able to be challenged. Similarly, an unfair interest rate review process might also be able to be challenged.
- In any challenge, the onus will be on the party seeking to enforce a contract to prove that a contract was not a standard form contract or that the term in dispute is fair.
- These new provisions will be cooperative legislation which will apply both as Commonwealth law and as the law of each State and Territory. It will cover all sectors of the economy, including financial services (through mirror provisions to be included in the ASIC Act). Enforcement will be by the ACCC, ASIC and each State Office of Fair Trading.
- The Minister for Consumer Affairs, Chris Bowen, has stated that the unfair contract provisions will be introduced to Parliament in June and will come into effect from 1 January 2010.
- Submissions on the consultation draft have been called for. The closing date for submissions is 22 May 2009.

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