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UNFAIR CONTRACT TERMS – TRADE PRACTICES AMENDMENT (AUSTRALIA CONSUMER LAW) ACT (NO 1) 2010

The *Trade Practices Amendment (Australia Consumer Law) Act (No 1) 2010* ("the Act") applies to all consumer contracts entered into, or terms varied or renewed after 1 July 2010. Industries that are affected by the changes include telecommunications, finance, domestic building, gyms, motor vehicles, travel and utilities.

A "consumer contract" means an agreement for the supply of goods or services (or sale or grant of an interest in land) to an individual who acquires the goods, services or interest wholly or predominantly for their own personal, domestic or household use or consumption.

The Act makes changes to various provisions of the *Trade Practices Act 1974* and *Australian Securities and Investment Commission Act 2001* to prohibit unfair contract terms in consumer contracts.

Which types of contracts does the Act apply to?

The Act only applies to "standard form" contracts and does not apply to business to business contracts. It also does not apply to certain shipping contracts (such as contracts for the carriage of goods by ship), contracts that are constitutions of companies, managed investment schemes and other types of bodies or contracts under the *Insurance Contracts Act 1984*. Private health insurance contracts are not regulated under the *Insurance Contracts Act 1984* and therefore need to comply with the unfair contract law provisions.

A "standard form contract" is not defined in the Act but is likely to be a contract prepared by a business which is given to a

customer to sign without the customer having the opportunity to negotiate the terms and conditions. These contracts cover mortgage, loan agreements, terms and conditions on public transport tickets, utilities, residential leases, concert, theatre or sporting events tickets

What constitutes an "unfair" term?

The Act deems a term in a consumer contract to be "unfair" if the term:

- (a) Causes significant imbalance in the parties' rights and obligations arising under the contract;
- (b) Is not reasonably necessary to protect the legitimate interests of the party who will benefit from the term; and
- (c) Causes detriment to a party if the term applies.

A consumer contract may be "unfair" if:

- (a) It penalises only the consumer but not the supplier of goods and services, in the event the contract is terminated;
- (b) The supplier can change or vary contract terms (such as the price, goods or service without the consent of the consumer);
- (c) The supplier has the sole right to interpret the meaning of the contract or the right to determine if the contract has been breached;
- (d) The supplier can avoid, restrict, terminate or renew the contract, whereas the consumer has no right to do so;
- (e) The consumer's right to sue the supplier over the contract is restricted; or
- (f) The term or the contract overall is difficult to read or understand (for example, the size of the font maybe too small, sentences are too long, technical terms are hard to understand or confusing).

If a court considers a term “unfair” in a consumer contract the term will be set aside and if the contract can operate without the unfair term, the remaining terms in the contract will remain enforceable. To decide whether or not a consumer contract is unfair, a court may consider any matters it considers relevant but in any case, must consider the extent to which a term is clear and the contract as a whole.

The Act does not apply to a term that defines the main subject matter of the contract, prescribes the "upfront price" payable under the contract or is required, or expressly permitted, by law. The "upfront price" paid under a consumer contract is the consideration for the supply, sale or grant under the contract and is disclosed to a party at or before the time the contract is entered into, but excludes any other consideration that is dependent on the occurrence or non-occurrence of a certain event.

What are the remedies and penalties for breaching the Act?

The Federal Court has the power to grant remedies including awarding damages or orders for specific performance. A party who tries to enforce a term in a contract which is unfair would breach the provisions of the Act. Furthermore, the Australian Competition and Consumer Commission (“ACCC”) and the Australian Securities & Investments Commission (“ASIC”) can make an application to the court for a declaration that a consumer contract term is unfair.

There are also civil pecuniary penalties that may be made against a party that contravenes the Act. The ACCC or ASIC may apply to the court for orders prohibiting an individual who breaches the Act, from managing a corporation for a certain period of time.

The ACCC and ASIC have the power to issue infringement notices to individuals who contravene the Act (up to a maximum of \$6,600 for a body corporate). If an individual fails to pay the amount specified in an infringement notice issued for an alleged contravention, then the ACCC or ASIC may commence civil or criminal proceedings against the individual for alleged contravention. If an individual pays the infringement notice, this would not amount to an admission of liability.

CONCLUSION

The Act may encourage consumers and regulators to challenge standard form contracts making it difficult for a business to rely on their terms of trade. It is therefore recommended that all standard contracts with consumers be reviewed carefully to ensure that no unfair terms are included in contracts. Businesses should also be aware of the remedies available to consumers and the penalties for non-compliance of the Act.

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