



CORPORATE & BUSINESS SERVICES

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S O L I C I T O R S

WHAT IS UNFAIR UNDER THE NEW AUSTRALIAN CONSUMER LAW?

The aim of the new Australian Consumer Law ("ACL") is to provide a single, national law regarding consumer protection and fair trading to replace the myriad State, Territory and Commonwealth laws in this area.

The reforms have been passed by the Trade Practices Amendment (Australian Consumer Law) Acts (No. 1) and (No. 2) 2010. All state and territory governments will introduce application legislation to apply the entire ACL in each of their jurisdictions.

What do the new laws do:

- 1 Change the name of the Trade Practices Act 1974 ("TPA") to the Competition and Consumer Act 2010 from 1 January 2011;
- 2 Inserts the ACL as schedule 2 to the TPA. It will be schedule 2 to the Competition and Consumer Act 2010;
- 3 The ACL will be administered by the Australian Competition and Consumer Commission ("ACCC") and each State and Territory's consumer law agency;
- 4 Amends the Australian Securities and Investments Commission Act 2001 so from 1 July 2010 the ASIC will administer new law to deal with unfair terms in consumer contracts for financial products and services;
- 5 Provides a single set of definitions and interpretive provisions;
- 6 Creates a national law on unfair contract terms;
- 7 Provides a single set of provisions regarding unfair practices and fair trading;
- 8 Provides national consumer guarantee provisions;
- 9 Creates a national regime for unsolicited consumer agreements and rules for lay-by agreements;
- 10 Provides for a new product safety legislative regime; and
- 11 Creates new provisions relating to information standards applying to goods and services.

UNFAIR CONTRACTS:

One of the changes is a new national law dealing with unfair contract terms in standard form consumer contracts. It is found in Part 2 of the ACL (Schedule 2). It applies to the activities of all businesses in Australia, whether or not they are a corporation and is effective for new contracts from 1 July 2010. The new law also covers existing contracts which are renewed or varied from 1 July 2010.

STANDARD FORM CONSUMER CONTRACTS:

A consumer contract is a contract to supply goods or services, or to sell or grant an interest in land, to an individual wholly or predominantly for personal, domestic or household use or consumption. A standard form contract is typically one that has been prepared by one party to the contract and is not subject to negotiation between the parties.

The law does not apply to insurance contracts subject to the *Insurance Contracts Act 1984* (Cth).

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In This Issue

WHAT IS UNFAIR UNDER THE NEW AUSTRALIAN CONSUMER LAW?

Page 1

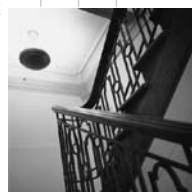
RESTRAINT OF TRADE - \$2 MILLION DAMAGES

Page 2

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WHAT IS UNFAIR UNDER THE NEW AUSTRALIAN CONSUMER LAW

CONTINUED FROM PAGE 1

TEST:

A three part test is to be applied by the court to determine if a term in a standard form consumer contract is unfair:

- 1 The term must cause a significant imbalance in the rights and obligations of the business and consumer who are parties to the contract;
- 2 The term must not be reasonably necessary to protect the legitimate interests of the party that would be advantaged by it;
- 3 The term must cause detriment if it were to be applied or relied upon.

The court must also consider how transparent the term is and the contract as a whole.

EXAMPLE:

An example of a term that might be considered unfair is one that permits, or has the effect of permitting, one party, but not the other, to terminate the contract. If a business is allowed to cancel a contract at will, without it being reasonably necessary to protect the business's legitimate interests, perhaps in response to an inconsequential breach of contract by the consumer, then it may be considered unfair by a court.

WHAT TO DO:

Businesses may continue to use standard form consumer contracts but if a term in a standard form is found by a court to be unfair then the term will be void and the court may make a declaration that the term is unfair. Once such a declaration is made, the court may award other remedies, including an injunction and damages. It would also be a contravention of the ACL to continue to use or rely on the term. If a contract can continue to operate without the unfair term it will remain binding.

Business clients should review the terms of their standard form consumer contracts and decide whether or not they need to be amended in order to reduce the risk of any term being held to be unfair.

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RESTRAINT OF TRADE \$2,000,000 DAMAGES

An effectively drafted restraint of trade clause in a share sale agreement, resulted in damages awarded of over \$ 2 million in *Orica Investments Pty Limited v William McCartney* [2010] NSWSC 488.

Shares in Bronson & Jacobs (Bronson) were purchased by Orica from McCartney and a number of other shareholders, formalised in a share sale agreement dated 27 April 2004 for a total of \$110 million. Bronson supplied chemical raw materials to pharmaceutical, cosmetics, food and aromatic industries.

As part of the share sale agreement, McCartney agreed not to carry on any business that is similar to, or in competition with, Orica's business, either directly or indirectly for a period of 5 years. Further restrictions included no enticement away from Orica of customers, suppliers or employees of the business. Following the sale McCartney remained as a consultant until February 2005.

Ingredients Plus registered as a company on 12 January 2005, with one of the shareholders and director the ex General Manager of the Bronson company. Ingredients Plus operated in competition to Bronson, employed several ex Bronson senior employees and secured distribution rights from a supplier previously with Bronson, Clos.

HOW WAS THE RESTRAINT OF TRADE BREACHED?

- McCartney provided working capital to Ingredients Plus with a beneficial shareholding.
- McCartney was a secured lender to Clos so that a decision was unlikely without his involvement regarding who Clos would supply.
- McCartney solicited Bontoux, the person behind Clos to transfer the Clos distributorship to Ingredients Plus.
- Employees of Bronson left to join Ingredients Plus due to McCartney's promise to support Ingredients Plus.

ASSESSMENT OF DAMAGES

The threshold test considered what was the risk that Clos would terminate the distributorship agreement following Orica's purchase of Bronson? For this matter, it was 'almost a certainty'.

Bronson attempted to find alternative suppliers and convince their customers they were appropriate substitutes. The Clos products were of high quality and many customers were used to those products.

The award of damages to Bronson totaled \$2,304,697.04.

McCartney put himself in a position where the breach was highly likely to occur. If he had the inclination to commence a rival enterprise, then the share sale agreement including the restraint should have not been signed. Once signed, McCartney was locked into the agreement for 5 years, unless it could be shown that it was unreasonable. Orica's purchase of shares was \$110 million, so a restraint was reasonable.



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