



Draft Provisions on Unfair Contract Terms

On 11 May 2009, the Federal Government released a consultation paper entitled "The Australian Consumer Law - Consultation on draft provisions on unfair contract terms". This draft implements the decision of the Council of Australian Governments (COAG) in 2008 to create a single national consumer law.

The new provisions are aimed to assist both individuals and businesses who find themselves caught by "unfair" standard contractual terms which harm and exploit the consumer.

According to the paper, a term of a standard-form contract will be deemed "unfair" if:

- it would cause a significant imbalance in the parties' rights and obligations arising under the contract; and
- the term is not reasonably necessary to protect the legitimate interests of the party who would be advantaged by the supply (the supplier).

However, even if a consumer is able to satisfy the two limbs of the unfairness test, a supplier could still argue that its legitimate interest is sufficiently compelling to overcome any detriment caused to the consumer and that in doing so, it was reasonably necessary. If this is proven on the balance of probabilities, the term will not be deemed "unfair".

The draft also provides a non-exhaustive, indicative 'grey-list' of types of terms that may be considered unfair. Some of the terms included in the list are:

- a term that permits, or has the effect of permitting, one party (but not the other party) to avoid or limit performance of the contract;
- a term that permits, or has the effect of permitting, one party (but not another party) to terminate the contract;
- a term that permits, or has the effect of permitting, one party (but not another party) to vary the terms of the contract;
- a term that permits, or has the effect of permitting, one party unilaterally to vary the characteristics of the goods or services to be supplied, or the land to be sold or granted, under the contract; and
- a term that limits, or has the effect of limiting, one party's right to sue another party.

In light of the proposed changes, all businesses renewing, varying or drafting new contracts after the commencement date of the provisions must take care to ensure that the contracts comply with the new requirements and do not offend the 'grey-list terms'.

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The Bill implementing the draft provisions is expected to be introduced into Federal Parliament in June 2009, and commence 1 January 2010.

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