

The fine print on unfair contract terms



With new unfair contract terms provisions for consumer goods and services taking effect in March 2015 under the Fair Trading Act, the Commerce Commission has released draft guidelines for consultation, see [here](#).

While they do not override the Act, it could be very useful for businesses that commonly use standard form contracts to make submissions on the guidelines.

We also recommend that businesses who use standard form contracts for consumer goods or services review their contracts over the next six months to ensure they comply with the new regime.

Background: the unfair contract terms provisions

Broadly, the courts will have a new power to determine, on application by the Commerce Commission, that terms of standard form consumer contracts are unfair, and therefore unenforceable. Terms defining the subject matter and setting out the upfront price in the contract (provided this is transparent), and any terms specifically required by legislation, will fall outside the scope of the unfair contract terms regime.

A standard form contract is not specifically defined but as a minimum must have not been subject to effective negotiation between the parties. It is likely to include terms and conditions (perhaps in fine print attached to an invoice, quotation or purchase order) offered by a business to a contracting party on a “take it or leave it” basis, where the other party has little bargaining power or opportunity to negotiate the terms.

A term will be unfair if the court is satisfied that the term would cause a significant imbalance between the parties’ contractual rights and obligations, is not reasonably necessary in order to protect the legitimate interests of the business, and would cause detriment to one party if it were relied upon. In addition, the Court must consider the transparency of the term and the contract as a whole. “Transparency” requires that a term is expressed in reasonably plain language, legible, clearly presented and readily available. There are safe-harbours for terms which are to be considered “reasonably necessary” in insurance contracts.

The new regime includes a “grey list” of example terms which *may* be considered unfair, such as the ability for one party to unilaterally vary the contract, but this is not conclusive and will depend on court determinations. Businesses reviewing their contracts should focus on terms that fall within this list of examples, as well as converting overly legalistic terms to plain English drafting.

Importantly, only the Commerce Commission will be able to bring an application to the courts for a declaration of an unfair contract term. The Commission’s interpretation, as reflected in the guidelines, will therefore be very important.

Draft Guidelines from Commerce Commission

Helpfully, the draft guidelines highlight a list of industries that could have standard form consumer contracts: telecommunications and utilities, finance companies, gyms, residential construction, motor vehicle sales, air travel, car rental, day care centres, online apps and software, pay TV, hire purchase, retirement villages, residential tenancy and real estate.

Perhaps appropriately at the outset of this new regime, the draft guidelines do little more than explain the new regime, and provide general information on the requirements of the legislation, in a plain English format.

Despite that, there are several areas on which businesses could usefully comment. In particular, the Commission has taken a narrow view of the requirement to prove that a term is reasonably necessary to protect a business's legitimate interests. The Commission's view is that the threshold is high, would require that the interest is a legitimate interest which requires protection, and which cannot reasonably be protected by fairer means.

We think this could be an area for businesses to focus on, and take this opportunity to explain situations where contract terms might be "reasonably necessary" to protect legitimate business interests. This could lead to immediate benefits if the Commission were to recognise those circumstances in the final version of the guidelines and reduce the likelihood that the Commission will want to examine such terms in the future.

In addition, we think that the Commission could give more examples in relation to the "grey list" of potentially unfair terms to assist businesses in their contract review process. At present, the Commission's examples address only the simplest and most obvious of the points in the grey list, and not those where there could be more room for debate about whether a term is unfair.

In our view, the guidelines could also address the increasingly common use of electronic and web-based platforms for contractual relationships.

Where to from here?

The Commerce Commission is accepting submissions until 30 September 2014. We would be very happy to walk you through the likely implications of the new unfair contract term regime to your business, and assist with drafting submissions.

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