

AUSTRALIAN CONSUMER LAW AND STANDARD CONTRACTS

- 1 On 1 January 2011, the *Trade Practices Act 1974* (Cth) changed its name to the *Competition and Consumer Act* and the *Australian Consumer Law* (Schedule 2 to the Act) came into effect.
- 2 The Australian Consumer Law centralizes consumer protection and fair trading legislation including provisions about consumer guarantees, unfair contracts, unconscionable conduct misleading and deceptive conduct and product safety. This article deals with how the consumer guarantee and unfair contracts provisions may affect standard form contracts.

Definitions

- 3 The following terms are defined in *section 2*

goods includes:

- (a) ships, aircraft and other vehicles; and
- (b) animals, including fish; and
- (c) minerals, trees and crops, whether on, under or attached to land or not; and
- (d) gas and electricity; and
- (e) computer software; and
- (f) second-hand goods; and
- (g) any component part of, or accessory to, goods.

services includes:

- (a) any rights (including rights in relation to, and interests in, real or personal property), benefits, privileges or facilities that are, or are to be, provided, granted or conferred in trade or commerce; and
- (b) without limiting paragraph (a), the rights, benefits, privileges or facilities that are, or are to be, provided, granted or conferred under:
 - (i) a contract for or in relation to the performance of work (including work of a professional nature), whether with or without the supply of goods; or
 - (ii) a contract for or in relation to the provision of, or the use or enjoyment of facilities for, amusement, entertainment, recreation or instruction; or
 - (iii) a contract for or in relation to the conferring of rights, benefits or privileges for which remuneration is payable in the form of a royalty, tribute, levy or similar exaction; or
 - (iv) a contract of insurance; or
 - (v) a contract between a banker and a customer of the banker entered into in the course of the carrying on by the banker of the business of banking; or
 - (vi) any contract for or in relation to the lending of money;

but does not include rights or benefits being the supply of goods or the performance of work under a contract of service.

supply, when used as a verb, includes:

- (a) in relation to goods—supply (including re-supply) by way of sale, exchange, lease, hire or hire-purchase; and (b) in relation to services—provide, grant or confer; and, when used as a noun, has a corresponding meaning, and *supplied* and *supplier* have corresponding meanings.

(note that a supply will include goods or services provided for free (a donation) if they are provided for promotional purposes (*section 5*))

trade or commerce means:

- (a) trade or commerce within Australia; or
 - (b) trade or commerce between Australia and places outside Australia;
- and includes any business or professional activity (whether or not carried on for profit).

- 4 A person is taken to have acquired particular goods or services as a *consumer* if the amount paid or payable is less than \$40,000 (or a greater amount prescribed by the regulations) or the goods or services were of a kind ordinarily acquired for personal, domestic or household use or consumption. However, it excludes if the goods or services are re-supplied or used up or transformed in production or manufacture (*section 3*)

Statutory Guarantees

- 5 Generally speaking, the statutory guarantees are implied warranties that apply if a person *supplies goods and services* to a *consumer* in *trade and commerce*.
- 6 The statutory guarantees for goods are
- a. good title (*section 51*)
 - b. undisturbed possession (*section 52*)
 - c. undisclosed securities (*section 53*)
 - d. acceptable quality (fit for all the purposes for which goods of that kind are commonly supplied, acceptable in appearance and finish, free from defects, safe and durable (*section 54*))
 - e. fitness for any disclosed purposes (*section 55*)
 - f. goods comply with description (*section 56*), with sample or demonstration model (*section 57*)
 - g. facilities are available for repair and spare parts for reasonable period after supply (*section 58*)
 - h. manufacturer will comply with manufacturer's express warranties (*section 59*)
- 7 The statutory guarantees for services are
- a. services rendered with due care and skill (*section 60*)
 - b. services and any resulting product reasonably fit for any purpose disclosed by consumer (*section 61 (1)*)
 - c. services, and any resulting product are of such a nature, and quality, state or condition, that they might reasonably be expected to achieve a result disclosed by consumer (*section 61(2)*)
 - d. services will be supplied within a reasonable time (*section 62*)
- 8 The statutory guarantees cannot be excluded by contract – any term is void that purports to exclude, restrict or modify the application of the division, the exercise of the conferred rights or the liability for failure to comply (*section 64*).
- 9 However, if the goods or services are not of a kind ordinarily acquired for personal, domestic or household use or consumption, a term may limit liability
- a. for goods, to replacing the goods or supplying equivalent goods or paying for the cost of supplying the same or equivalent goods, or repairing the goods or paying for the cost of repairing the goods (*section 64A(1)*)
 - b. for services, to supplying the services again or paying for the cost of supplying the services again (*section 64A(2)*)
- 10 This exception does not apply if the recipient establishes that it is not fair or reasonable for the supplier to rely on the term (*section 64A (3)*). In determining whether it is fair or reasonable the court may consider any matter relevant and must consider

- a. the strength of the bargaining positions of buyer and the supplier relative to each other, taking into account, among other things, the availability of equivalent goods or services and suitable alternative sources of supply;
- b. whether the buyer received an inducement to agree to the term or, in agreeing to the term, had an opportunity of acquiring the goods or services or equivalent goods or services from any source of supply under a contract that did not include that term;
- c. whether the buyer knew or ought reasonably to have known of the existence and extent of the term (having regard, among other things, to any custom of the trade and any previous course of dealing between the parties);
- d. in the case of the supply of goods, whether the goods were manufactured, processed or adapted to the special order of the buyer.

(section 64A(4))

- 11 This means that it not possible for the supplier to exclude liability for indirect or consequential loss unless the goods or services are not of a kind ordinarily acquired for personal, domestic or household use or consumption (and even then, it is not possible to exclude the loss if it is not fair or reasonable for the supply to rely on the exclusion)
- 12 Trade or commerce includes trade or commerce between Australia and places outside Australia (section 2 "trade or commerce"). If the proper law of the contract would be an Australian law, the statutory guarantees apply and are a mandatory law of the forum, even if the contract has a different governing law (section 67).

Unfair Contracts

- 13 Generally speaking, a term of a *consumer contract* is void if the contract is a *standard form contract* and the term is *unfair* (section 23(1)).
- 14 A *consumer contract* includes a contract for the supply of goods or services to an individual where the goods or services are acquired for personal, domestic or household use or consumption (section 23(3)).
- 15 In determining whether a contract is a *standard form contract*, a court may take into account such matters as it considers relevant but must take into account certain factors including
 - a. whether one of the parties has all or most of the bargaining power relating to the transaction;
 - b. whether the contract was prepared by one party before any discussion relating to the transaction occurred between the parties;
 - c. whether another party was, in effect, required either to accept or reject the terms of the contract in the form in which they were presented;
 - d. whether another party was given an effective opportunity to negotiate the terms of the contract;
 - e. whether the terms of the contract take into account the specific characteristics of another party or the particular transaction.

(section 27)
- 16 A term of a contract is *unfair* if
 - a. it would cause a significant imbalance in the parties' rights and obligations arising under the contract; and
 - b. it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and
 - c. it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.

(section 24(1))

- 17 In determining whether a term is unfair, a court may take into account such matters as it considers relevant but must take into account
- a. the contract as a whole
 - b. the extent to which the term is transparent (that is, expressed in reasonably plain language, legible, presented clearly and readily available to any party affected by the term)

(section 24(2) and (3))

- 18 Section 25 sets out examples of what may be unfair terms
- a. a term that permits, or has the effect of permitting, one party (but not another party) to avoid or limit performance of the contract;
 - b. a term that permits, or has the effect of permitting, one party (but not another party) to terminate the contract;
 - c. a term that penalises, or has the effect of penalising, one party (but not another party) for a breach or termination of the contract;
 - d. a term that permits, or has the effect of permitting, one party (but not another party) to vary the terms of the contract;
 - e. a term that permits, or has the effect of permitting, one party (but not another party) to renew or not renew the contract;
 - f. a term that permits, or has the effect of permitting, one party to vary the upfront price payable under the contract without the right of another party to terminate the contract;
 - g. 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 interest in land to be sold or granted, under the contract;
 - h. a term that permits, or has the effect of permitting, one party unilaterally to determine whether the contract has been breached or to interpret its meaning;
 - i. a term that limits, or has the effect of limiting, one party's vicarious liability for its agents;
 - j. a term that permits, or has the effect of permitting, one party to assign the contract to the detriment of another party without that other party's consent;
 - k. a term that limits, or has the effect of limiting, one party's right to sue another party;
 - l. a term that limits, or has the effect of limiting, the evidence one party can adduce in proceedings relating to the contract;
 - m. a term that imposes, or has the effect of imposing, the evidential burden on one party in proceedings relating to the contract.

Conclusion

- 19 Traders should review their standard terms and conditions to ensure that they comply with the Australian Consumer Law. In particular, they should review any terms that exclude or limit liability to ensure they are not void because they impermissibly exclude or limit statutory guarantees or are unfair terms.

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