

## Client Alert

Australia

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### New laws regulate terms in consumer contracts

*Under the new law any "unfair" term in a standard form consumer contract will be void*

The Government's *Trade Practices Amendment (Australian Consumer Law) Bill 2009*, tabled in Federal Parliament on Wednesday, will impact any supply of goods, services or interests in land to a consumer. Any "unfair" term in a standard form consumer contract will be void.

The [Bill](#) is the first Australia-wide law to significantly impact the content of contracts across all industry sectors. It is intended to commence on 1 January 2010. Sectors likely to come under particular scrutiny include property, construction, finance, IT, telecoms, utilities, transport, tourism and entertainment.

The Bill supersedes an earlier proposal to apply the unfair contract terms provisions to business-to-business transactions.

The new laws will require businesses to reconsider:

- their approach to contracting with consumers;
- the content of their contracts;
- the evidentiary support needed to justify certain terms; and
- evidence of their negotiation process.

The unfair terms law is the first part of the new national Australian Consumer Law which will become Schedule 2 of the *Trade Practices Act 1974* (Cth).

### Background to unfair terms law

The Bill is the result of a long inter-governmental discussion but little public debate. In April 2008, the Productivity Commission recommended that all Australian governments implement a national generic consumer law, including a law on unfair contract terms. The Council of Australian Governments considered the issue through 2008 and on 11 May 2009 the Federal Government released a [draft](#) of the Bill requiring comment by 22 May 2009.

**Sydney**  
Baker & McKenzie  
Level 27, AMP Centre  
50 Bridge Street  
Sydney NSW 2000

**Melbourne**  
Baker & McKenzie  
Level 19  
191 William Street  
Melbourne VIC 3000

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[Submissions](#) on the draft questioned many aspects of the provisions, but the only material change made after the public consultation process was to restrict the Bill to consumer contracts.

*There will be opportunity to comment on the Bill when it is referred to the Senate Committee.*

The Government is to refer the Bill to the Senate Economics Committee for inquiry and report by 7 September. As this will provide a further opportunity to offer input, industry associations and businesses likely to be particularly affected should monitor the Committee process.

## Overview of the laws

The new laws will apply to unfair terms in standard form consumer contracts.

A **consumer contract** is a contract for a supply of goods or services or a sale or grant of an interest in land to an individual, whose acquisition is wholly or predominantly for personal, domestic or household use or consumption. Suppliers will need to understand the individual's purpose in order to determine whether the law will apply.

Importantly, a term of a consumer contract will be **unfair** and automatically void:

- if the contract would cause a significant imbalance in the parties' rights and obligations under the contract; and
- the supplier cannot prove that the term was reasonably necessary to protect its legitimate interests. (It will be particularly challenging to prove that a term was "necessary", not merely "nice to have").

*Suppliers will need to prove the terms are reasonably necessary.*

In applying the test of unfairness, courts will be able to take into account anything they consider relevant, but will be required to consider:

- the extent to which there is a substantial likelihood that the term would cause detriment;
- the extent to which the term is in plain language, legible, presented clearly and readily available; and
- the contract as a whole. This has been criticised as too narrow. A more appropriate test would be the circumstances as a whole.

The Bill includes a "grey" list of example terms that may be considered unfair. The Government will have the power by regulation to prohibit terms in consumer contracts, but it will have no power to exempt a term from scrutiny under the unfairness test. The only terms which cannot be examined for unfairness are those which define the main subject matter of the contract, set the price payable or are required or expressly permitted by law.

*Most consumer supply terms are in standard form*

While the unfair terms law only applies to "standard form contracts", this requirement is likely to be easily satisfied. In practice, most contracts of supply to consumers are likely to fall within this term. The Bill does not define a **standard form contract** but contains a non exhaustive list of criteria to apply in determining whether a contract is "standard form". The relevant criteria address bargaining power, if the contract was prepared before any discussion between the parties, whether it was presented on a "take it or leave it" basis, whether there was an opportunity to negotiate and whether the contract was

tailored to the particular transaction. If the consumer alleges that a contract is a standard form contract, it will be *presumed* to be a standard form contract unless the supplier proves otherwise.

## Remedies

*New civil pecuniary penalties will apply*

Although an unfair contract will be void, the remainder of the contract will be enforceable if it is capable of operating without the term. If it is not, then not only will the contract be unenforceable, the consumer could receive a windfall as all monies paid under the contract would be repayable. In addition, the consumer (and anyone else affected by the breach) will have an action in damages for any loss suffered as a result of the breach against the supplier and any person involved in the contravention.

The consumer, the ACCC or other persons could seek an injunction, declaration or other remedy and courts will be able to order any remedy they think fit.

No criminal penalties will apply but a new civil pecuniary penalty will allow courts to impose fines of up to \$27,500 for companies and \$5,500 for individuals for each contravention.

## Guidance from Elsewhere?

The ACCC will issue guidance notes to assist suppliers but these may be of limited value, as they cannot prevent a term being void if it meets the tests of being "unfair" and in a "standard form contract".

The limited judicial consideration of s.32W of the *Fair Trading Act 1999* (Vic) will assist, but that provision is much narrower. The Victorian provision, which was introduced in 2003 (and which will be replaced by the new national law):

- requires both the person's use and the goods or services to be of a personal nature. The federal provision will only look to the individual's use; and
- does not consider a term to be unfair unless *in all the circumstances*, it actually created a significant imbalance and the consumer suffered actual detriment.

*Suppliers face many practical challenges*

The UK *Unfair Terms in Consumer Contracts Regulations 1999*, draft *Unfair Contract Terms Bill 2005* and certain EU laws are similar in a number of respects, but have been the subject of relatively little judicial consideration.

\* \* \* \* \*

The Bill suggests that many practical challenges are ahead for the suppliers of goods or services or interests in land to Australian consumers. Suppliers will need to resolve these and thoroughly review all contracts they use with consumers by 1 January 2010, to ensure that all terms in their consumer contracts will be enforceable.

## Further information

For further information  
please contact:

**Penny Ward**

Partner  
+61 2 8922 5167  
[penny.j.ward@bakernet.com](mailto:penny.j.ward@bakernet.com)

**Anne Petterd**

Senior Associate  
+61 2 8922 5221  
[anne.petterd@bakernet.com](mailto:anne.petterd@bakernet.com)

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