

## Consumer Law Client Alert

19 March 2010

### Update on the new Australian consumer protection laws

Regular readers of our newsletters will recall the Commonwealth Government's plans to introduce a national consumer law regime in three stages. The first stage of the reforms is the introduction of a regime regulating unfair terms in consumer contracts. The second stage is the introduction of sweeping reforms to the current consumer protection laws.

The Senate passed an amended version of the *Trade Practices Amendment (Australian Consumer Law) Bill 2009* (Cth) ("**Unfair Terms Bill**") on 17 March 2010. The House of Representatives will need to pass the Unfair Terms Bill before it becomes law, but that seems likely given Opposition support for the amended version in the Senate. The unfair terms regime will not come into effect until at least 1 July 2010, giving businesses at least 14 weeks to prepare for the impact of the regime on their operations.

Also on 17 March 2010, the Government introduced the second stage of consumer law reform, the *Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010* (Cth) ("**Bill No. 2**"). Bill No. 2 sets out proposed amendments to the *Trade Practices Act 1974* (Cth) ("**TPA**") in numerous areas of consumer protection. Bill No. 2 would also grant wider regulatory powers to the Australian Competition & Consumer Commission ("**ACCC**") and the Australian Securities & Investments Commission ("**ASIC**").

This Alert recaps the proposed amendments to the *TPA* under the Unfair Terms Bill and summarises the Bill No. 2's key proposed amendments to the *TPA*.

#### The proposed unfair terms laws

The Unfair Terms Bill will regulate unfair terms in consumer contracts that are standard form contracts entered into, renewed or varied after the regime commences for the supply of goods or services or the sale or grant of an interest in land where the acquisition of the goods, services or interest is wholly or predominantly for personal, domestic or household use or consumption. In the case of varied contracts, the regime would apply only to the extent of the variation that took effect after the commencement date.

The regime would not apply to terms that are required or expressly permitted by law, terms that set the "upfront price" payable under a contract, insurance contracts or contracts of employment. The Government has released a consultative paper relating to unfair terms in insurance contracts.

A term of a consumer contract that is a standard form contract would be void if it is unfair. If the consumer contract can operate without the unfair term, that term is severed and the remainder of the contract continues to bind the parties.

A contract alleged to be a standard form contract would be presumed to be so unless proved otherwise by another party. When determining whether a contract is a standard form contract, the Court would be required to consider several factors, including relative bargaining power between the parties, whether the contract was prepared prior to discussions concerning the transaction and whether an effective opportunity to negotiate terms was given to a party.

A term would be "unfair" if it:

- would cause a significant imbalance in the parties' rights and obligations arising under the contract;
- it is not reasonably necessary in order to protect the legitimate interests of the party advantaged by the term; and
- it would cause detriment (financial or otherwise) to a party if it were to be applied or relied upon.

The party advantaged by the term must prove that the term is reasonably necessary to protect its legitimate interests.

The Unfair Terms Bill sets out 14 examples of types of terms that might be unfair, including:

- terms that permit, or have the effect of permitting, one party but not all parties to avoid or limit performance of the contract;
- terms that permit, or have the effect of permitting, one party but not all parties to terminate the contract;
- terms that permit unilateral variation to, or renewal of, the contract; and
- terms of a kind, or terms that have an effect of a kind, prescribed by the regulations.

Under the regime, private individuals affected by unfair terms and the ACCC would be able to seek a declaration that a term of a consumer contract is unfair from the court.

### **The second stage of Australian Consumer Law reform**

Bill No. 2 weighs in at almost 400 pages and would, if passed, effectively re-write the consumer protection provisions in the *TPA*. The proposed amendments include the following highlights:

- Amending provisions prohibiting unconscionable conduct, including provisions prohibiting unconscionable conduct in the connection with the supply or possible supply of goods and services and in business transactions;
- Amending provisions prohibiting "pyramid selling schemes";
- Amending provisions prohibiting "referral selling";
- An overhaul of consumer guarantees in relation to the supply of goods, such as guarantees as to title and undisclosed securities, acceptable quality, fitness for purpose, etc, and in relation to the supply of services, such as the performance with due care and skill, fitness for purpose, reasonable time for supply, etc;
- Provisions consolidating current regulation of door-to-door selling by the introduction of the concept of "unsolicited consumer agreements" negotiated and executed at premises other than the "dealer's" premises (such as the consumer's home) or by telephone;
- Safety standards, bans on consumer goods and product-related services that do not comply with safety standards, voluntary and mandatory product recalls, liability of manufacturers for goods with safety defects; and
- Provisions regulating representations as to the country of origin of goods.

Under the amended *TPA*, the ACCC would have the capacity to:

- issue "substantiation notices" to any person who has made a claim or representation promoting or apparently intended to promote the supply of goods or services, the sale or grant (or possible sale or grant) of an interest in land or employment requiring the person to substantiate the satisfaction of the regulator the claims or representations made;
- issue "public warning notices" about the conduct of any person if the regulator has reasonable grounds to suspect that the person named in the warning notice has breached the *TPA* causing actual or likely detriment to any third party, and the regulator is satisfied that it would be in the public interest to issue the notice;
- issue "infringement notices" to persons where the regulator has reasonable grounds to suspect that the person to whom the infringement notice has been issued has engaged

in unconscionable conduct or has breached certain consumer (or investor) protection provisions.

The Senate has resolved to refer Bill No. 2 to the Economics Legislation Committee for inquiry and report by 21 May 2010.

## **Conclusion**

Following passage of the Unfair Terms Bill through the Senate, all businesses who supply consumer goods and services should now act to ensure that they comply with the unfair terms regime when it takes effect in the second half of 2010. Such steps should include a review of customer terms and conditions to ensure that such contracts do not include unfair terms, and a refreshment of policies and procedures to deal with unsatisfied customers and regulators. Businesses that do not comply with the unfair terms regime may incur pecuniary penalties of up to \$1.1 million per breach for a corporation and up to \$200,000 per breach for an individual.

The Government has also taken the first step in delivering the second stage of reform with the introduction of Bill No. 2. With a timeframe of implementation by the end of 2010, the time is now ticking on Parliament to consider the legislation proposed by the Government. Businesses should inform themselves of proposed changes to the *TPA* and associated legislation and make provision for changing the way they do business in order to comply with the legislation as it may be finally enacted.

Russell Kennedy is well-placed to advise and assist businesses who deal with consumers on a daily basis of their proposed responsibilities under both the Unfair Terms Bill and Bill No. 2. We would be happy to discuss the proposed legislation with you.

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