

Property/Retirement Village Alert

1 December 2009

NEW AUSTRALIAN CONSUMER LAW

Background

A new national consumer law regime will be implemented through amendments to be made to the *Trade Practices Act 1974* (Cth) and the *Australian Securities and Investments Commission Act 2001* (Cth). The amendments are set out in the *Trade Practices Amendment (Australian Consumer Law) Bill 2009* and will be known as the Australian Consumer Law ("**Consumer Law**"). Although there is legislation dealing with unfair terms in Victoria, there is no such legislation in the other States and Territories. The Consumer Law will apply throughout the country, to all States and Territories.

Commencement

The main provisions of the Consumer Law dealing with unfair terms will commence on 1 January 2010.

Application to retirement villages

The Consumer Law provides that certain types of terms included in a "consumer contract" are deemed to be void. A consumer contract is a contract for the supply of goods or services or the sale or grant of an interest in land to an individual who acquires the goods, services or interest wholly or predominantly for personal, domestic or household use or consumption. The Consumer Law will therefore apply to resident contracts for a retirement village.

Unfair terms

A term is deemed to be unfair if:

- 1 it would cause a significant imbalance in the party's rights and obligations arising under the contract;
- 2 it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and
- 3 the contract is a standard form contract.

As most retirement village operators use standard form contracts, that is, contracts which are prepared in a standard format prior to being submitted to the resident or their representative which are offered on the basis that the resident must accept or reject the terms of the contract as a whole, it is likely that retirement village contracts will be a standard form contract for the purposes of the Consumer Law

In addition, the Consumer Law directs that a Court may take into account matters including the extent to which the term would, or there is a substantial likelihood that it would, cause detriment to one party if it were relied upon, the extent to which the term is transparent (that is, expressed in plain language and is clearly presented) and the terms of the contract as a whole.

The Consumer Law also lists a number of examples of terms which may be unfair including:

- 1 a term that permits one party but not the other, to avoid, limit the performance of, terminate, renew or not renew or vary the terms of the contract;
- 2 a term that permits one party to vary the upfront price payable under the contract without the right of the other party to terminate. The upfront price is the consideration provided for the supply under the contract but does not include any other consideration that is contingent upon the occurrence of a particular event;
- 3 a term that permits one party to unilaterally vary the characteristics of the goods and services to be supplied or the land to be sold or granted;

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- 4 a term that permits one party to unilaterally determine whether the contract has been breached or to interpret its meaning, or has the effect of penalising one party for a breach or termination of the contract, but not the other;
- 5 a term that permits one party to assign the contract to the detriment of the other without the other party's consent;
- 6 a term that limits one party's right to sue the other party.

Exception

If a term is required or expressly permitted by any other statute, then that term cannot be deemed to be an unfair term under the Consumer Law.

Prohibited terms

The Consumer Law also provides that certain terms may be prescribed by regulation as being a prohibited term in a consumer contract. A prohibited term is deemed to be void. At this stage, there are no such prescribed terms for the purposes of the Consumer Law.

Consequences of breach

If a consumer contract contains an unfair term or a prohibited term, that term is deemed to be void. The remaining terms of the contract will remain intact. The inclusion of an unfair term or a prohibited term is not of itself a contravention of the Consumer Law which could lead to enforcement action being taken. However, if a party attempts to rely upon or enforce an unfair term or a prohibited term, the other party may seek relief from the Courts by way of, for example, an injunction or an award of damages. This conduct may also lead to enforcement action being taken under the Trade Practices Act.

Action for operators

Operators should therefore consider reviewing their contracts so as to ensure that there are no terms which could be deemed to be unfair terms under the Consumer Law.

For example:

- 1 a term which provides that the operator may unilaterally vary the building works, finishes and fittings in a residential unit under a pre-agreement for lease;
- 2 a contract which provides that the upfront price may be unilaterally varied without the resident having the opportunity to terminate the contract;
- 3 a term which provides that it is only the operator who can determine how the contract is to be interpreted or whether there has been a breach of the contract;

may be unfair terms under the Consumer Law.

If you have any queries or would like more information on these provisions please contact:



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