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Stream A: Commercial and Corporate Law in Practice
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Consumer Law Reform Update

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Overview

- Introduction to recent consumer law reform
- Unfair contract terms (**UCT**)
 - what is an UCT
 - when does prohibition apply
 - exception & real examples
 - what practitioners should consider
- Other recent amendments to consumer law [if we have time]

Introduction to recent consumer law reform

- Most significant change to consumer law since Fair Trading Act 1986 (FTA) and Consumer Guarantees Act (CGA) 1993 were introduced
- Modernises consumer law
- Better aligns consumer law with Australia

Unfair contract terms

- New prohibition:
 - for UCTs; in
 - standard form consumer contracts (SFCC)
- Comes into effect on **17 March 2015**
- Applies to new (including renewed and varied) contracts from 17 March 2015
- Exceptions for contracts of insurance
- Only Commerce Commission can seek declaration from the Court that term is an UCT

What is a consumer contract?

- Consumer contracts are contracts for:
 - the supply of goods or services ordinarily acquired for domestic, personal or household use (ie consumer goods/services as opposed to commercial goods/services); and
 - those goods or services are not acquired for:
 - resupply;
 - the use in a production or manufacturing process; or
 - (goods), repairing or treating, in trade, other goods or fixtures on land
- Includes businesses acquiring consumer goods

What is a “standard form consumer contract”?

- Court can determine any contract is a SFCC if no effective negotiation
- Factors court must consider:
 - whether 1 party has most of the bargaining power
 - whether the contract was prepared before discussions
 - was the contract presented on a “take-it or leave-it” basis
 - the extent there was an effective opportunity to negotiate
 - the extent terms take into account specific characteristics of the parties
- Presumed to be a SFCC

What is an unfair contract term?

- For a court to declare a term an UCT the term must meet the following three requirements:
 - would cause a **significant imbalance** in the parties' rights and obligations arising under the contract;
 - is **not reasonably necessary to protect the legitimate interests** of the party who would be advantaged by it [presumed to be unless proved otherwise]; and
 - would cause **detriment** (whether financial or otherwise) to a party if it were applied, enforced or relied on
- But in making that determination the court:
 - may consider any matter it thinks relevant; and
 - must consider the **contract as a whole** and the extent to which the term is **transparent**

What is *not* an unfair contract term?

- To the extent that a term of a SFCC:
 - defines the **main subject-matter** of the contract; or
 - sets the **up-front price** payable under the contract (to extent that the price term is transparent); or
 - is required or **expressly permitted** by any enactment,
that term will **not** be able to be declared unfair

How is “transparency” likely to be viewed?

- The FTA defines “transparent” as meaning a term that:
 - is expressed in reasonably plain language; and
 - is legible; and
 - is clearly presented; and
 - is readily available to an party affected by the term
- The NZCC’s Guidelines (**Guidelines**) suggest courts will adopt an ‘average reasonable consumer’ standard
- Could transparency trump unfairness?
 - *Chitty* – if clearly explained in pre-contractual material....may succeed
 - the Guidelines note that “[t]ransparency – or lack of transparency – will not in itself determine unfairness

How is the “contract as a whole” likely to be viewed?

- Whole contract must be considered, not term in isolation
- The Guidelines note “[t]his means that a term that might appear unfair on its face may not be unfair when read in the context of the other terms of a contract [and vice versa]. For example, a potentially unfair term may be counterbalanced by additional benefits such as a lower price.”
- Are there other terms that sufficiently counter-balance terms that may be viewed as unfair?

Are particular terms deemed unfair?

- The FTA includes a non-exhaustive “grey list” of the kinds of terms that may be UCTs
- The “grey list” terms are effectively terms that permit one party (but not the party) to unilaterally do something eg avoid or limit performance, terminate, vary, penalise for breach, vary upfront price, assign, interpret or limit vicarious liability or right to sue
- The Guidelines note it “will pay particular attention to [SFCCs] that contain any of the types of [grey] listed terms”

Australian Competition and Consumer Commission (ACCC)

- ACCC conducted industry report 2013 (**ACCC Report**)
- Focused on the airline (including travel agents), telecommunications, fitness and vehicle rental industries, as well as online traders
- Examples of terms that the ACCC viewed as unfair:
 - Unilaterally changing fees without consent or notice:
 - *“You must pay all subscription fees applicable to the plan for which you have registered. You understand that all fees and charges may be altered from time to time by us without notice, however, we will not increase the subscription fee for your plan until the end of the Minimum Contract Term.”* [Telecommunications]

Amended to:

- *“You must pay all subscription fees applicable to the plan for which you have registered. Failure to pay subscription or usage charges will result in the suspension or termination of your service.”*

Australian cases

- ACCC and NRM Corporation P/L and NRM Trading P/L
 - “*The customer must give 30 days written notice to terminate the contract. However, this makes the consumer liable to pay multiple fees, including an administration fee of 15%.*”
 - The court held fees for termination caused a significant imbalance in the parties’ contractual rights
- *Malam v Graysonline, Rumbles Removals and Storage (General)* [2012] NSWCTTT 197
 - terms excluded all liability for damage to any goods including in circumstances where the goods were damaged before being made available for collection
 - the tribunal declared the terms unfair as it was not satisfied that the term protected a legitimate interest and the terms were not transparent

What should practitioners consider?

- Could the term(s) be more transparent?
- Consider whole contract
- Is the term protecting a legitimate interest?
- Could the term include more explanation of the legitimate interest?
- “penalty” v “up-front price” (*OFT v Abbey National plc* - UK)
- Could the term be reciprocal?
- Could the term be more balanced?
- Could the scope of the term be narrowed?
- Does the term include unrelated matters?
- Could there be any issues with severability?

Other changes

Key changes to the FTA

- Compulsory interview powers
- Enforceable undertakings
- Management banning orders
- Increased penalties
- Unsubstantiated representations
- Contracting out
- Extended warranties
- Uninvited direct sales
- Unsolicited goods
- Internet sales (identify “in trade”)
- Layby sales
- Auctions

Key changes to the CGA

- Contracting out
- Guarantee of delivery
- Tailored guarantee for gas and electricity
- “Acceptable quality” (includes second-hand goods)
- Applies to goods sold by auction and competitive tender

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