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Australian Consumer Law Update: Unfair Contract Provisions in force July 1 2010, as more amendments pass Parliament

In Brief

This update provides an overview of the new laws regulating unfair terms in standard form consumer contracts, the implications for businesses and other changes to consumer protection laws which come into effect on **1 July 2010**.

Businesses who supply goods or services to consumers using standard form contracts will have to review their contracts having regard to the new laws.

Types of businesses affected by these reforms will include those who offer:

- Banking or financial services, loans, and credit card contracts;
- Software licences;
- Mobile phone and telecommunications contracts;
- Domestic building contracts;
- Many online sales (ebay, iTunes etc);
- Gym memberships;
- Utilities;
- Pay-TV subscriptions;
- Travel services; and
- Motor vehicles and/or services.

Background to Reforms: Legislative Overview

In October 2008, the Council of Australian Governments agreed to implement a new consumer policy framework, the Australian Consumer Law. The Australian Consumer Law will replace provisions across 17 State and Territory Acts and in the current *Trade Practices Act 1974* (Cth). [\[1\]](#) The reforms are designed to guarantee consumers the same rights, protections and expectations about business conduct across Australia, and ensure that businesses are held to nationally equivalent obligations and responsibilities. [\[2\]](#) Notably, these reforms will culminate in a renaming of the *Trade Practices Act 1974* to the *Competition and Consumer Act 2010*; the Australian Consumer Law will be included as a schedule to the new Act. [\[3\]](#)

In the first stage of amendments, the *Trades Practices Amendment (Australian Consumer Law) Act 2010*, was passed by Parliament in March 2010, and received royal assent on 14 April 2010. The second amending Bill, the *Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010*, [\[4\]](#) passed through Parliament on 24 June 2010 and is current awaiting royal assent.

Further reforms will also be implemented under the *Competition and Consumer Legislation Amendment Bill 2010*, which will amend the unconscionable conduct provisions in the *Australian Securities and Investments Commission Act 2001 (ASIC Act)* and the *Trade Practices Act*, and amend section 50 of the *Trade Practices Act* to clarify the provisions regulating mergers and acquisitions. [\[5\]](#)

Following the implementation of the federal reforms, the State and Territories have agreed to apply the Australian Consumer Law amendments before the end of 2010, to enable the Australian Consumer Law to be fully in force nationally by 1 January 2011. [\[6\]](#)

Stage 1: Unfair Terms in Consumer Contracts

The Australian Consumer Law regulates **unfair terms in standard form consumer contracts** between businesses and consumers. These laws are largely a codification of existing court and tribunal cases dealing with consumer complaints about unfair contract terms.

On **1 July 2010**, the first stage of the reforms will come into operation under the *Trades Practices Amendment (Australian Consumer Law) Act 2010*. [\[7\]](#) These amendments lay down the framework for the Government's proposed national consumer law scheme, and primarily target two key areas: unfair terms in standard form consumer contracts and the introduction of new penalties, new consumer redress options and increased enforcement powers for the ACCC and ASIC. [\[8\]](#)

The unfair contract terms legislation comes into force amid the passing of the second stage of Australian Consumer Law Reform amendments, the *Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010*. The Bill passed through both houses of Parliament on 24 June 2010, and is currently awaiting royal assent; the provisions will come into force **1 January 2011**.

The ACCC, ASIC and the Commonwealth Department of Treasury have released comprehensive guides to assist consumers and businesses in understanding the implications of the reforms. [\[9\]](#)

Consumer Contracts

Under the Australian Consumer Law, a consumer contract is defined as a contract for:

- the supply of goods or services; or
- the sale or grant of an interest in land

to an individual whose acquisition of the goods or services or interest, is wholly or predominantly for personal, domestic or household use or consumption. [\[10\]](#)

Consumer contracts have an expanded definition under the *ASIC Act*, to cover contracts for the supply of financial products or services, for wholly or predominantly personal, domestic or household use or consumption. [\[11\]](#)

Standard Form Contracts

The Australian Consumer Law does not specifically define what constitutes a 'standard form contract'. The joint guide on Unfair Terms released by the ACCC and ASIC, suggests that "take-it-or-leave-it" contracts, prepared by

one party, which cannot be negotiated, are generally considered standard form. [\[12\]](#) Common examples of standard form contracts include:

- Banking and financial services, loans, and credit card contracts;
- Software licences;
- Mobile phone and telecommunications contracts;
- Domestic building contracts;
- Many online sales (ebay, iTunes etc);
- Gym memberships;
- Utilities;
- Pay-TV subscriptions;
- Travel;
- Motor Vehicles and/or services.

If a consumer alleges that a contract is standard form, to determine the nature of the contract, courts will take into consideration whether:

- one of the parties has all or most of the bargaining power;
- the contract was prepared by one party before any discussion relating to the transactions occurred;
- a party was required to accept/reject the contract terms in the form they were presented;
- a party was given an effective opportunity to negotiate the terms of the contract; and
- the terms of the contract take into account the specific characteristics of a party or transaction. [\[13\]](#)

Exclusions

The unfair contract terms provisions do not apply to the following types of contracts:

- Insurance contracts under the *Insurance Contracts Act 1984*;
- Constitutions of companies or managed investment schemes; or
- Certain shipping contracts (eg contracts for the carriage of goods by ship or marine towage). [\[14\]](#)

Certain kinds of contract terms also fall outside the scope of the new provisions. These include:

- Terms which define the main subject matter of a contract;
- Terms that set the "upfront price" payable under the contract (provided the price was disclosed before the contract was entered into; and
- Terms required or permitted by Commonwealth or State/Territory laws. [\[15\]](#)

When is a term unfair?

Under the definition in the Australian Consumer Law, a term will be unfair if:

- It would cause a significant imbalance in the parties' rights and obligations under the contract; and
- It is not reasonably necessary to protect the legitimate interests of the party who would be advantaged by the term; and
- It would cause detriment to a party if it were to be applied and relied on. [\[16\]](#)

In determining whether a term is unfair as defined by the Australian Consumer Law, courts must consider the contract as a whole, and whether the term is transparent (ie expressed in clear language, legible and clearly available).

The new laws also include a non-exhaustive list of 14 examples of the types of terms in standard form consumer contract terms which the court may regard as unfair. [\[17\]](#) More examples may be provided in the yet to be prescribed regulations.

Unfair terms: Consequences

Unfair terms in standard form consumer contracts will be void, however the contract will continue to bind parties if it is capable of operating without the unfair term. [\[18\]](#) If a court declares a term unfair, it has the power to grant orders as appropriate including injunctions, damages or an order for the provision of redress to non-parties. [\[19\]](#)

Additional Penalties

The Australian Consumer Law will also introduces additional civil penalties of up to \$1.1 million for corporations and up to \$220,000 for individuals, for breaches of provisions regulating unconscionable conduct and various other consumer protection provisions (excluding section 52 - misleading and deceptive conduct). [\[20\]](#)

Other Reforms: Additional Powers to ACCC and ASIC

Effective from 15 April 2010, regulators the ACCC and ASIC now have to ability to:

- Issue public warning notices:
 - Regulator can issue a public warning notice where: it has reasonable grounds to suspect that a party's conduct may breach the Australian Consumer Law/ *Trade Practices Act*, is satisfied that consumers may suffer detriment, and is satisfied that issuing the notice is in the public interest. [\[21\]](#)
- Issue substantiation notices
 - Regulator can issue a notice to a business requesting information relevant substantiating claims the business has made in the marketplace. [\[22\]](#)
- Take action on behalf of non-party consumers
 - Regulator can seek orders to give redress to persons not named in a proceedings for a contravention of the Australian Consumer Law/ *Trade Practices Act*. [\[23\]](#)
- Apply to the court for an adverse publicity campaign
 - Regulator can apply to the court for an adverse publicity order in respect of a contravention of the Australian Consumer Law/ *Trade Practices Act* or request that the court order corrective advertising. [\[24\]](#)

Stage 2: Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010

The *Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010*, which will come into effect on **1 January 2010** upon receiving royal assent, shall:

- Implement the name change of the *Trade Practices Act* to the "*Competition and Consumer Act 2010*";

- Modify and redraft existing consumer protection provisions;
- Implement a new national product safety system;
- Introduce new national law to guarantee consumer rights when buying goods and services, to replace existing laws on conditions and warranties; and
- Provide provisions to clarify that protection from unconscionable conduct relates to the terms and terms and conditions of the contract, and the ongoing behaviour of the contracting parties in addition to the process of settling a contract. [\[25\]](#)

More information on the second stage of the Australian Consumer Law reforms will follow in Stephens Lawyers & Consultants' July Newsletter.

Implications

The unfair contract provisions will affect any standard form consumer contracts which are entered into, renewed or varied from **1 July 2010**. Businesses who supply goods or services to consumers must consider whether any terms in their current contracts may be considered "unfair" under the new laws.

Stephens Lawyers & Consultants have a high level of expertise in trade practices and consumer law compliance.

Our lawyers represent leading companies in both litigious and commercial matters. Please contact us for assistance in reviewing your consumer contracts to ensure compliance with the new consumer protection regime.

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[1] For more information on the background to the Australian Consumer Law Reforms, please see: "The Australian Consumer Law: An Introduction", *The Treasury*, April 2010, available at: http://www.treasury.gov.au/consumerlaw/content/downloads/Australian_Consumer_Law_An_Introduction_April_2010.pdf.

[2] For more information on the background to the Australian Consumer Law Reforms, please see: "The Australian Consumer Law: An Introduction", *The Treasury*, April 2010, available at: http://www.treasury.gov.au/consumerlaw/content/downloads/Australian_Consumer_Law_An_Introduction_April_2010.pdf.

[3] "The Australian Consumer Law: An Introduction", *The Treasury*, April 2010, available at: http://www.treasury.gov.au/consumerlaw/content/downloads/Australian_Consumer_Law_An_Introduction_April_2010.pdf.

[4] http://parlinfo.aph.gov.au/parlInfo/download/legislation/amend/r4335_amend_c4ca264f-3696-45f6-8143-690409252c42/upload_pdf/B10BJ268.pdf;fileType=application%2Fpdf.

[5] "An Australian Consumer Law", *The Treasury*, at <http://www.treasury.gov.au/consumerlaw/content/legislation.asp>.

[6] "An Australian Consumer Law", *The Treasury*, at <http://www.treasury.gov.au/consumerlaw/content/legislation.asp>.

[7] Full text available at: <http://www.comlaw.gov.au/ComLaw/Legislation/Act1.nsf/framelodgmentattachments/FCC38729A92ED119CA25772F0019F9DB>

[8] "An Australian Consumer Law", *The Treasury*, at <http://www.treasury.gov.au/consumerlaw/content/legislation.asp>.

[9] [9] 'Australian Consumer Law: A Guide to the Unfair Contract Terms Law', *ASIC and ACCC*, 1 June 2010, available at: <http://www.accc.gov.au/content/item.phtml?itemId=930750&nodeId=737d2e2070ad014010a9f151a544a7be&fn=A%20guide%20to%20the%20unfair%20contract%20terms%20law.pdf>.

An Australian Consumer Law: A Guide to Provisions', *The Treasury*, April 2010, available at: http://www.treasury.gov.au/consumerlaw/content/downloads/Australian_Consumer_Law_A_Guide_to_Provisions_April_2010.pdf.

[10] Section 2 *Trades Practices Amendment (Australian Consumer Law) Act 2010* (Cth).

[11] Section 12BF *ASIC Act*.

[12] 'Australian Consumer Law: A Guide to the Unfair Contract Terms Law', *ASIC and ACCC*, 1 June 2010, available at: <http://www.accc.gov.au/content/item.phtml?itemId=930750&nodeId=737d2e2070ad014010a9f151a544a7be&fn=A%20guide%20to%20the%20unfair%20contract%20terms%20law.pdf>.

[13] Section 7 *Trades Practices Amendment (Australian Consumer Law) Act 2010* (Cth).

[14] 'Australian Consumer Law: A Guide to the Unfair Contract Terms Law', *ASIC and ACCC*, 1 June 2010, available at:

<http://www.accc.gov.au/content/item.phtml?itemId=930750&nodeId=737d2e2070ad014010a9f151a544a7be&fn=A%20guide%20to%20the%20unfair%20contract%20terms%20law.pdf>.

[15] Section 5 *Trades Practices Amendment (Australian Consumer Law) Act 2010* (Cth).

[16] Section 3 *Trades Practices Amendment (Australian Consumer Law) Act 2010* (Cth); Section 12BG *ASIC Act*.

[17] Section 4 *Trades Practices Amendment (Australian Consumer Law) Act 2010* (Cth).

[18] Section 2 *Trades Practices Amendment (Australian Consumer Law) Act 2010* (Cth).

[19] 'An Australian Consumer Law: A Guide to Provisions', *The Treasury*, April 2010, available at:

http://www.treasury.gov.au/consumerlaw/content/downloads/Australian_Consumer_Law_A_Guide_to_Provisions_April_2010.pdf.

[20] 'An Australian Consumer Law: A Guide to Provisions', *The Treasury*, April 2010, available at:

http://www.treasury.gov.au/consumerlaw/content/downloads/Australian_Consumer_Law_A_Guide_to_Provisions_April_2010.pdf.

[21] Section 223 *Trades Practices Amendment (Australian Consumer Law) Act 2010* (Cth); Section 12BG *ASIC Act*.

[22] 'An Australian Consumer Law: A Guide to Provisions', *The Treasury*, April 2010, available at:

http://www.treasury.gov.au/consumerlaw/content/downloads/Australian_Consumer_Law_A_Guide_to_Provisions_April_2010.pdf.

[23] Section 239 *Trades Practices Amendment (Australian Consumer Law) Act 2010* (Cth); Section 12BG *ASIC Act*.

[24] Section 247 *Trades Practices Amendment (Australian Consumer Law) Act 2010* (Cth); Section 12BG *ASIC Act*.

[25] "An Australian Consumer Law", *The Treasury*, at

<http://www.treasury.gov.au/consumerlaw/content/legislation.asp>.