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Play fair! New rules for consumer contracts

The Australian Consumer Law introduces new unfair contract provisions which will have a significant impact on the relationship between business and consumer. Corporate Partner, Mark Poczman and Dispute Resolution Senior Associate, Bill Fragos, explain.

Introduction

From 1 July 2010 amendments to the *Trade Practices Act 1974* (Cth) (**TPA**) and the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**) will give consumers the right to challenge unfair terms in standard form contracts.

This will be followed by similar provisions being incorporated into related legislation around Australia by the end of 2010. Suppliers of goods and services to consumers need to understand how these changes will affect their dealings with their customers.

Unfair terms in standard form consumer contracts

The consumer contracts covered by the legislation will be those formed or varied on or after 1 July 2010.

A term within a *consumer contract* will be **void** if it is contained in a *standard form contract* and the term is *unfair*. A consumer contract is one involving the supply of goods and services, or a sale or grant of an interest in land, to an individual *wholly or predominantly for personal, domestic or household use or consumption*.

Clearly, there may be difficulty in determining the purpose of the relevant supply. In many instances goods or services will be sought for mixed domestic and business purposes (for example internet service provider contracts may be entered into by individuals for both business and private use). Accordingly, it is likely that many suppliers will need to review their standard form contracts with consumers on the working assumption that they are consumer contracts, as defined, or alternatively have two different standard form contracts.

Business to business transactions are not covered by these legislative changes.

Standard form contracts

The term *standard form contract* is not defined in the legislation. Broadly speaking, a standard form contract will ordinarily be one that has been prepared by a party to a contract and is not subject to negotiation (i.e. a "take it or leave it" contract). There is a rebuttable presumption that a contract is a standard form contract.

Exemptions

Certain types of contracts are exempted from the unfair contracts regime. For example, various shipping contracts and contracts which are corporate constitutions will not be subject to the new amendments.

Shipping contracts are excluded because they are already subject to a comprehensive national and international legal framework. Corporate constitutions are excluded because companies have a choice regarding the rules that govern their internal management.

Insurance contracts are currently excluded from the new unfair contracts regime by the *Insurance Contracts Act 1984* (Cth). An options paper has been recently released to inform the Government's consideration of options for dealing with unfair terms in insurance contracts. However, private health insurance contracts will be subject to the new unfair contracts regime.

> *A term within a consumer contract will be **void** if it is contained in a standard form contract and the term is unfair.*

Also, certain terms are not covered by the changes: terms which define the main subject matter of the contract, or set the upfront price payable under the contract, or terms required by another law.

Unfairness

A term in a consumer contract will be unfair if it would cause a *significant imbalance* in the parties' rights and obligations arising under the contract, is not reasonably necessary in order to protect the *legitimate interests* of the party who would be advantaged by the term, and would cause *detriment* (whether financial or otherwise) to a party if it were to be applied or relied on.

The legislation includes a list of examples of the kinds of terms that may be unfair (known as the "grey list"). The grey list particularly focuses on terms which are one-sided, limit a party's liability or limit the other party's ability to take proceedings on the contract.

Consequences

An unfair term in a standard form consumer contract is void. That said, the remainder of the contract will continue to bind the parties if it is capable of operating without the unfair term. Businesses will need to consider the possible effects of a term being declared void and should carefully draft severance clauses in their contracts to cater for this.

A Court can make a declaration that a term is unfair. This can be done on application of the aggrieved consumer or of the relevant regulatory authority (the Australian Competition and Consumer Commission (**ACCC**), the Australian Securities and Investments Commission (**ASIC**) or State and Territory regulators). A declaration that a term is unfair is not of itself a contravention. If a Court makes such an order and a party seeks to rely on the unfair term the Court may make further orders against that party, including for the provision of redress to consumers not party to the Court action.

Further changes – increased enforcement powers given to regulatory authorities

The changes to the TPA and the ASIC Act increase the enforcement options and remedies available to ACCC and ASIC. The changes, which took effect from 15 April 2010, include powers exercisable without the need for Court orders including, controversially, infringement (penalty) notices in the event of breaches of certain provisions of the TPA (and the ASIC Act) and public warning notices (so called "naming and shaming" notices).

Waging a war on two fronts fatal to claim

Dispute Resolution Partner, Tom Griffith, explains the outcome of a case in which Piper Alderman successfully assisted three corporate defendants domiciled in the United Kingdom, Germany and the Cayman Islands to extricate themselves from proceedings commenced in the New South Wales Supreme Court.

The facts of this case are redolent of a university choice of law exam question.

The plaintiff was Kim Michael Productions Pty Ltd (**KMP**), a business operating in the entertainment industry and the defendants were TI Cayman, TI Germany and Tanjong UK, one of whose businesses is the operation of a tropical islands themed resort (**the Resort**) in Germany near Berlin.

KMP's claim related to production costs alleged to have been incurred in developing a proposed show to be performed at the Resort. One of KMP's allegations was that it was a term of the alleged contract that the funds payable to it for producing the show would be paid into a New South Wales bank account. On the defendants' forum challenge, KMP successfully argued that the defendants' failure to pay the funds constituted a breach of the contract that occurred in New South Wales, and that therefore the New South Wales Supreme Court had jurisdiction to hear and determine the dispute. On that basis, it was held that KMP could serve the defendants that were located outside of Australia in compliance with the relevant rules of court of the New South Wales Supreme Court.

The Court (Justice Howie) observed that the contractual term that required payment into a New South Wales bank account constituted only a tenuous connection with New South Wales, and that this was relevant to the determination of the second aspect of the defendants' forum challenge – namely that New South Wales was a "clearly inappropriate forum".

On the same day that the proceedings were filed in the New South Wales Supreme Court, KMP brought proceedings in Germany against the same parties and involving the same subject matter. Justice Howie identified that the relevant test was whether the local proceedings were "productive of serious and unjustified trouble and harassment" or were "seriously and unfairly burdensome, prejudicial or damaging".

In concluding that the test was satisfied, Justice Howie took into consideration the following factors:

- the parallel proceedings in Germany
- the proper law of the alleged contract was that of Germany
- matters of convenience such as the location of documents and witnesses, and
- the tenuous connection with New South Wales constituted by the late–asserted failure to pay an interim invoice into a New South Wales bank account.

> *"the local proceedings were "productive of serious and unjustified trouble and harassment" or were "seriously and unfairly burdensome, prejudicial or damaging"*

Justice Howie noted that the conduct relied upon in support of the repudiation (which was the central claim in the proceedings) occurred almost entirely outside of New South Wales with persons who were and still are outside New South Wales, as a result of the contract that entirely occurred outside the state, where the contract was operating under foreign law and concerned the plaintiff performing its contractual obligations outside the state.

Justice Howie concluded that the proceedings were prima facie vexatious because of the proceedings already under way in Germany. More than that, Justice Howie stated that he was "thoroughly convinced" that the local proceedings were "productive of serious and unjustified trouble and harassment" or were "seriously and unfairly burdensome, prejudicial or damaging" and that accordingly, New South Wales was a clearly inappropriate forum for the determination of the dispute.

Piper Alderman Partner, Tom Griffith acted for the defendants in these proceedings.

Foreign investment – accounting for the emergence of complex structures

On 12 February 2010 the legislation governing foreign investment in Australia was reformed to account for the emergence of complex investment structures. Corporate Partner, Simon Champion and Corporate Lawyer, Vasyl Nair summarise the recent changes.

In Australia, the Foreign Investment Review Board (**FIRB**) is responsible for examining proposals by foreign interests to undertake direct investment in Australia and making recommendations to the Government, acting by the Treasurer. The *Foreign Acquisitions and Takeovers Act 1975* (Cth) (**Act**) provides the basis for the Treasurer to examine proposed foreign investments and to ensure they are not contrary to the national interest.

Pursuant to the Act, the Treasurer must be notified of circumstances in which:

- a foreign person (alone or together with any associate) proposes to acquire a *substantial interest* in an Australian corporation, and
- that acquisition exceeds the relevant monetary threshold (see previous article on changes to the thresholds).

As a consequence of the growing use of complex investment vehicles, in early 2009 the Treasurer sought to clarify the operation of FIRB's foreign investment screening regime by making amendments to the Act. The *Foreign Acquisitions and Takeovers Amendment Act 2010* (Cth) (**Amendment Act**) implemented those amendments.

Before the introduction of the Amendment Act, a foreign person was taken to have held a substantial interest in an Australian corporation under the Act if the person (alone or together with any associate):

- is in a position to control not less than 15% of the voting power, or
- holds interests in not less than 15% of the issued shares,

in the corporation.

In order to capture more complex investment structures, the Amendment Act operates to broaden the scope of persons holding a 'substantial interest' to include a person (alone or together with any associate) who:

- is in a position to control not less than 15% of the *potential* voting power in the corporation, or
- would hold interests in not less than 15% of the issued shares in the corporation, if shares in the corporation were issued as the result of the exercise of certain *rights to* issued shares (including rights under an instrument, agreement or arrangement, whether the right is exercisable presently or in the future and whether on the fulfilment of a condition or not (e.g. convertible notes)).

While the Amendment Act did not receive Royal Assent until 12 February 2010, the amendments contemplated by it apply retrospectively from 12 February 2009 (being the date the Treasurer announced the Government's intention to amend the Act).

By widening the ambit of the term 'substantial interest' to capture complex investment structures, the Amendment Act broadens the circumstances in which FIRB must be notified of proposed foreign acquisitions in Australian corporations. Ultimately, this gives FIRB the opportunity to review more foreign investment proposals to ensure that those proposals are not contrary to Australia's national interest.

Potential investors in Australia should be aware of the changes to the Act as well as the more general function and powers of FIRB. Piper Alderman is well qualified to assist with, and regularly advises potential investors on, questions in relation to this area of law.

Further update

On 24 April 2010, the Government announced a major tightening of foreign investment rules relating to residential real estate. Of particular note is the requirement for temporary residents to compulsorily sell established property they have bought when they depart Australia.

Further, a package of harsh new civil penalty, compliance, monitoring and enforcement measures will be introduced. At the time of writing, the amending legislation which will enact these changes has yet to be released.

Consequences of Australian climate policies on investment

Although there is still no clear global consensus on how countries should regulate for climate change, businesses should be aware of the effects of, and the opportunities available from, Australia's climate policies, say Robert Pritchard and Deniz Tas.

Creation of carbon markets

The proposed Carbon Pollution Reduction Scheme (**CPRS**) is a 'cap-and trade' scheme which would establish a formal, regulated market for the sale and purchase of carbon pollution permits. It is currently manifested in the form of the *Carbon Pollution Reduction Scheme Bill 2009* (Cth), which was intended to commence on 1 July 2011. However, the Government has announced that it will "reassess" its commitment to the CPRS at the end of 2012, when the current Kyoto Protocol commitment period expires. This means that the commencement of the CPRS will be delayed until 2013 at the earliest.

In these circumstances, it must be regarded as uncertain whether the CPRS will be implemented in its current form.

> *"... the National Greenhouse and Energy Reporting Act 2007 requires major emitters to register, report and publish their emissions data..."*

However, the *National Greenhouse and Energy Reporting Act 2007* (Cth) (**NGERA**) is already in force and requires major emitters to register, report and publish their emissions data in advance of the start-up of the CPRS. Civil penalties of up to $220,000 (along with $11,000 for each subsequent day that compliance is not achieved) may be imposed on corporations and their chief executive officers for certain breaches of the NGERA. Aside from heavy civil penalties, chief executive officers are also exposed to potential criminal penalties where they knowingly (or recklessly or negligently) submit false or misleading reports. The reporting obligations under this Act will underpin any future CPRS.

GGAS

Emissions trading will continue to operate in New South Wales through the Greenhouse Gas Abatement Scheme (**GGAS**). Under GGAS, electricity retail suppliers and electricity customers, taking supply directly from the national electricity market, must ensure that the average emissions intensity of the electricity which they supply or use is reduced to meet pre-set emissions benchmarks.

Under GGAS, a penalty is charged for every excess tonne of emissions unless the liable entity surrenders a corresponding amount of abatement certificates. These certificates are created through project-based emissions reduction activities.

Purchase of renewable electricity and investment in renewable generation

The Renewable Energy Target (**RET**) scheme has been established to encourage additional electricity generation from renewable energy sources to meet the Government's commitment to achieving a 20% share of renewables in Australia's electricity supply in 2020.

To meet this 20% target, the RET requires at least 45,000 GWh of electricity to be generated by renewable energy sources by 2020, with 41,000 GWh to come from large-scale renewable projects from 2011 onwards.

To discharge this liability, a wholesale purchaser must purchase and annually surrender renewable energy certificates (**RECs**). The amount of RECs required is determined by multiplying the total electricity purchased by the renewable power percentage, which in 2010 is 5.98%. In 2010, a purchaser is liable to pay a shortfall charge of A$65 for each REC not surrendered.

RECs are a tradeable commodity and their price is market driven.

A REC is created by eligible entities, which include renewable energy-sourced power stations such as wind, hydro, landfill gas, solar and bagasse, for each MWh of renewable electricity generated.

Making it easier to sequester carbon

Investment in carbon capture and storage (**CCS**) technologies in Australia is becoming more attractive as a result of policy measures designed to encourage the development and deployment of CCS.

At the Federal level, the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth) has been amended to introduce a regulatory regime for CCS activities in Commonwealth offshore waters. It establishes a system of titles to provide proponents with rights to undertake exploration, injection and storage related activities, mirroring the existing petroleum regulatory regime under that Act.

In Victoria and Queensland, stand-alone Acts have been passed which have created state-based regulatory regimes for the conduct of onshore CCS activities in those States.

There is also a variety of funding programs available for CCS projects through the National Low Emissions Coal Initiative, the CCS Flagships Program and the Global Carbon Capture and Storage Institute.

Investment implications

Businesses need to consider the implications of Australia's current and future climate policies before making energy investments or investments that require substantial electricity purchases, particularly any effect that the CPRS and RET may have on operating costs.

Piper Alderman has a specialist team to assist clients on all climate-related energy issues.

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