



New unfair contract terms law

Will terms in your property contract be void?

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Effect of the new unfair contract terms law on property transactions

The Trade Practices Amendment (Australian Consumer Law) Bill 2009 was introduced into the Senate on 26 October 2009. It is proposed to be passed as law later this year but at this stage is still to be considered by the Senate.

When passed as law the Bill will create a national unfair contract terms law. Currently, Victoria is the only state in Australia which has unfair contract terms law under the Victorian *Fair Trading Act* (Part 2B). The proposed new law is similar but not exactly the same as the Victorian law and will have application Australia wide.

It is proposed to come into effect on 1 January 2010 as part of the Australian Consumer Law Package but the timetable for commencement may change. It will have substantial impact on financial services and in that respect will take effect as an amendment to the *ASIC Act* 2001. However, in addition it will have much wider application to contracts with consumers generally and this part of the package will take effect as an

amendment to the *Trade Practices Act* 1974.

General principles

The unfair contract terms provisions apply to consumer contracts only. They are defined in the Bill as contracts 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, services or interest is wholly or predominantly for personal, domestic or household use or consumption.

The new law will not apply to business contracts except if one of the parties is a sole trader.

For example, a contract for the sale of land to an individual person for the purpose of that individual's principal place of residence would be subject to the unfair contract terms provisions.

Under the new law, a term in a consumer contract will be void if:

- the term is unfair; and
- the contract is a standard form contract.

“An unfair term in a standard form (consumer) contract will be void”



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What is an unfair term?

A term in a consumer contract will be unfair if the term:

- causes a significant imbalance in the parties' rights and obligations under a standard form contract; and
- is not reasonably necessary to protect the legitimate interests of the party who will be advantaged by the term.

In finding a term in a consumer contract unfair a court may take into account any matters that it considers relevant. However, the court must take into account the following:

- the extent to which it will cause detriment or substantial likelihood of detriment (whether financial or otherwise) to a party if the term was to be applied or relied on;
- the extent to which a term is transparent; and
- the contract as a whole.

Terms not covered by the new law

Terms that:

- define the subject matter of the consumer contract;
- set the upfront price payable under the consumer contract; or
- are required or expressly permitted by another law,

are not subject to the unfair contract terms provisions except to the extent that they may be a prohibited term.



“An off the plan property sale contract would more than likely be a standard form contract”

What is a standard form contract?

There will be a presumption that a contract is a standard form contract unless it can be shown to be otherwise.

The following matters will be considered relevant in determining this:

- whether one of the parties has all or most of the bargaining power;
- whether the contract was prepared by one party before any discussion relating to the transaction commenced;
- whether another party was in effect required to accept or reject the terms in a contract in the form they were presented;
- whether another party was given an effective opportunity to

negotiate the terms of the contract;

- whether the terms of the contract take into account the characteristic of another party to the transaction.

An off the plan property sale contract would more than likely be a standard form contract.

What types of terms might be unfair?

Examples of terms used in consumer contracts that may be unfair are listed in the legislation. However whether they are in fact unfair would depend on the circumstances.

Possible examples of unfair terms are terms that:

- permit or have the effect of permitting one party (but not another party) to avoid or limit performance of the contract;
- permit or have the effect of permitting one party (but not another party) to terminate the contract;
- permit or have the effect of permitting one party (but not another party) to vary the terms of the contract;
- permit or have the effect of permitting one party (but not another party) to renew or not renew the contract;
- permit or have the effect of permitting one party to vary the upfront price under the contract without the right of another party to terminate the contract;
- permit or have the effect of permitting one party unilaterally to

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“Businesses should start reviewing their standard form contracts now to ensure that they are compliant”

vary the characteristics of the goods or services to be supplied or the interest in land to be sold or granted;

- permit or have the effect of permitting one party unilaterally to determine whether the contract has been breached or to interpret its meaning;
- permit or have the effect of permitting one party to assign the contract to the detriment of another party without the other party's consent;
- limit or have the effect of limiting one party's rights to sue another party;
- penalise or have the effect of penalising one party but not the other party for breach or termination of the contract.

It is standard in the property industry for off the plan sale contracts to contain many terms that allow a developer to vary the terms of the sale contract by amending the area of the land to be sold or the easements and restrictions that may be noted on title, upon registration of the plan of subdivision.

The standard clauses permitting such terms in an off the plan sale contract may potentially be unfair contracts terms and therefore void under the provisions of the new legislation. Also an affected party could obtain an injunction to prevent the other party from relying upon an unfair contract term or seek an order for damages.

Contracts entered into prior to the making of the law will not be affected unless they are subsequently varied in which case the whole of the contract will be subject to the law.

The Bill provides for a range of civil penalties for contravention of

the new legislation and disqualification orders will be available for breaches of certain aspects of the Australian Consumer Law.

Businesses should start reviewing their standard form contracts now to ensure that they are compliant with the new legislation including making sure that the contracts contain provisions allowing severance of void terms.

Careful consideration also needs to be given to variations of consumer contracts entered into prior to the passing of the Bill to avoid making them subject to the new law. ■

Nancy Bramley-Moore is a partner of Makinson & d'Apice.



External control of tenants

In these difficult financial times it has unfortunately become more common for landlords to be confronted with a corporate tenant which has been placed under external control. This may have been brought about voluntarily by the tenant or by the act of a creditor of the tenant.

Regardless of how the external control is brought about, a landlord probably more than ever can benefit from having a basic understanding on the types of external control and the effect each of these have on the relationship.

Types of external control

The three most common types of external control are:

1. Receivership

Purpose

A receiver is generally appointed by a secured creditor pursuant to powers under a mortgage or charge which are exercised when the tenant is in default.

The receiver is concerned with the satisfaction of the debt owed to the party which appointed and is not concerned with the debts owed to any other creditors except to the extent, if any, that such debts impact on the debt owed to the creditor which appointed the receiver. The receiver's obligation is to satisfy the debt owed to the relevant creditor.

Impact on landlord

The main focus of the landlord is usually to ensure that the lease continues to be complied with and

to be aware which party is responsible for doing so.

From the time of appointment the receiver is given a 7 day open "grace period" to decide whether to exercise rights in relation to the premises.

A receiver incurs personal liability for rent and other amounts payable by the tenant if the receiver fails within the 7 day period to give notice that the receiver does not propose to exercise rights in regard to the premises. The receiver becomes personally liable for the period commencing 7 days after the commencement of the receivership and whilst the receiver continues to use or occupy the premises.

2. Administration

Purpose

Administration is generally a voluntary process in which the directors of a tenant believe the tenant is or is about to become insolvent and so place the tenant into voluntary administration.

The role of an administrator is to investigate the financial position of the tenant and advise creditors whether it will be in their best interests to either return the management of the tenant back to its directors or enter into a deed of company arrangement or wind up the tenant. In this section we are dealing only with voluntary administration.

Period of administration

Administration is a temporary process. The administration begins



on the appointment of the administrator and generally ends after the second creditors' meeting which usually takes place 20 business days after the administration began.

At the second creditors' meeting the creditors may resolve that the tenant execute a deed of company arrangement or that the administration should end or that the company be wound up.

The deed terminates the voluntary administration and only comes into existence with the majority of the creditors approving it. It binds all creditors of the tenant for the time being and not just those whose debts were due and payable prior to the deed.

From a landlord's perspective it is important to note that its rights in respect of the property are not affected by the deed except as the

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deed provides and where the landlord voted in favour of the resolution to proceed with the deed.

Impact on the landlord

Unless the Court or the administrator consents, a landlord cannot recover premises being used by the tenant when it is under administration. This does not prevent a landlord recovering possession if steps had already been taken before the administration began.

It should also be noted that personal guarantees cannot be enforced while the tenant is under administration but can be enforced once a deed of arrangement is entered into.

The administrator is provided with a 7 day "grace period" in which he can give a notice that the premises are surplus to the needs of the tenant and so the administrator will not be exercising any rights in relation to it.

If the notice is given, the landlord is usually able to then terminate the lease. If the notice is not given the administrator is personally liable for the rent that accrues after the 7 days.

“The type of external control of a corporate tenant will impact on its relationship with the landlord”

3. Liquidation

Purpose

Liquidation (or winding up) is the main means by which the existence of a tenant company is brought to an end.

It can be voluntary or involuntary and the procedure is largely governed by statute. Involuntary winding up usually results from a court order brought about an application of a creditor.

The primary aim of the liquidator is gather all of the tenant's assets and sell them to pay the tenant's creditors. Generally landlords are unsecured creditors.

Impact on landlord

The liquidator has no personal liability for the payments due under the lease unless the liquidator and the landlord enter into an agreement for the continued leasing of the premises. Usually a landlord will terminate the lease upon a tenant going into liquidation due to the limited potential to recover amounts owing to it.

It is rare for a liquidator to seek to continue with a lease.

If the lease is not terminated by the landlord, the liquidator may on behalf of the tenant disclaim the premises as being onerous. If the liquidator has failed to disclaim then the landlord may make application to force the liquidator to decide whether or not to disclaim.

The effect of the disclaimer is to terminate the lease. ■

Chris Drayton is a partner of Makinson & d'Apice.





Defects and disclosure

“A vendor may also be liable under either the Trade Practices Act or the Fair Trading Act”

The duty of a vendor to make certain disclosures to a purchaser about a property is governed partly by the common law and partly by a variety of statutory provisions depending upon the various categories of defect involved. The statutory provisions are extensive and outside of the scope of this article which will focus on a vendor's obligations under the common law and the standard Contract for Sale.

Types of defects

The duty to disclose defects in a property will depend on whether the defect can be classed as a latent or a patent defect in title. A latent defect is one which is generally not discoverable on an inspection of the property. A patent defect is one that is visible to the eye or which would be discoverable by the exercise of reasonable care by the purchaser when inspecting the property. Generally, the vendor will need to disclose latent defects while there is no duty to disclose patent defects. It follows that the principle of caveat emptor in relation to patent defects applies, meaning in effect let the buyer beware.

A further category of defect relates to whether the defect is a type that could be described as a defect in quality. If so, it does not matter whether the defect is latent or patent as the principle of caveat

emptor will apply. Some examples of defects in quality include:

- town planning restrictions;
- breach of a development consent provision;
- structural danger; or
- pest infestation of a building the subject of the sale.

Exceptions

As always seems to be the case, there are some important exceptions to the principle of caveat emptor. Where a vendor has fraudulently concealed a defect in the property and intends that the purchaser act on that concealment or makes a representation about the property and that representation is untrue, the vendor may be liable. Importantly the mere fact that the misrepresentation relates to a defect that would be considered a defect in quality will not necessarily prevent an action being brought by the purchaser for the misrepresentation. In addition a vendor may also be liable under either the *Trade Practices Act* or the *Fair Trading Act* for misleading or deceptive conduct that relates to a defect that may not be actionable under the general law of disclosure.

Standard Contract for Sale

In addition to the general law of disclosure and the above statutory provisions, the standard Contract for

Sale includes certain contractual provisions dealing with vendor disclosure. The main provisions impose an obligation on the vendor to pass unencumbered legal title to the property to the purchaser on completion of the contract as well as providing for a number of defects in respect of which the purchaser cannot make a claim for compensation or obtain some other remedy including defects which are disclosed in the Contract.

A Contract for Sale will often include special conditions which tend to limit the rights of a purchaser with regard to defects in a property. Such clauses may require the purchaser to in effect “put up with” either a particular defect or provide that no action can be brought in relation to a number of general items. However, there is a risk to vendors that despite these limitations, the general law of disclosure and in particular the law regarding misrepresentation or misleading and deceptive conduct under the *Trade Practices Act* and *Fair Trading Act* may still offer some cause of action to a purchaser.

Accordingly, the decision to make any disclosure or alternately not to make a disclosure by a vendor in the process of selling a property is always an important consideration. ■

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- Biodiversity Banking and Offsets Scheme
- GST on forfeited deposits
- Green Leases
- Land tax increase

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- Love thy neighbour – an update on problems with trees
- Changes to NSW mortgage duty
- The decision in *Black v Garnoch*
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