



## CONSUMER LAW UPDATE THE AUSTRALIAN CONSUMER LAW

The Australian Consumer Law reforms represent the most far-reaching consumer law reforms since the introduction of the *Trade Practices Act 1975 (Cth)* (TPA) in 1975. Currently, there is a complex array of national, State and Territory consumer laws (including various State and Territory Fair Trading Acts and Sale of Goods Acts and numerous other provisions scattered among various State, Territory and Federal Acts). The reforms will rationalise and reform key aspects of these laws and, according to the Productivity Commission, are expected to save Australians up to \$4.5 billion a year.

The reforms are occurring in two stages:

- the new provisions dealing with unfair contracts which commenced on 1 July 2010; and
- the harmonisation across Australia of implied consumer warranties and conditions, anticipated to come into effect in 2011.

### UNFAIR CONTRACTS

The first part of the reforms, which took effect on 1 July 2010, introduced national unfair contracts provisions, new penalties for consumer law infringements and improved options for consumer redress. They also gave new enforcement powers to the Australian Competition

and Consumer Commission (ACCC) and Australian Securities and Investments Commission (ASIC).

The unfair contracts reforms are significant, and may have a significant impact on businesses.

The new laws allow for Courts to examine the fairness of standard form consumer contracts. Business-to-business contracts are excluded from the scope of the reforms except in very limited circumstances.

Under the laws any term of a standard form contract is void if it is found to be unfair. A term will be unfair where:

- there is an imbalance in the parties' rights and obligations; and
- the term is not reasonably necessary to protect the legitimate interests of the supplier.

In determining whether a term is unfair a court must take into account the extent to which the term would cause (or is likely to cause) detriment, the term's level of transparency and the effect of the contract as a whole.

Certain terms such as definitions and contracts for insurance and financial products and services businesses are excluded from the regime. A party that uses or tries to use a prohibited term will be taken to have contravened the Australian Consumer Law (and will be exposed to the full range of penalties and options for redress).

As part of the reform process, the ACCC and ASIC were tasked with preparing national guidelines on the enforcement of the unfair contracts regime. This guide was released on 1 June 2010 and is available to download from the ACCC's website.

The unfair contracts reforms apply after 1 July 2010 to all new consumer contracts entered into as well as to all renewed or varied contracts (but only to the extent of the renewal or variation).

### Improved Powers for the ACCC and ASIC and new Penalties

Under the new reforms, the ACCC and ASIC is able to

- seek civil pecuniary penalty orders for breaches of certain provisions of the Act, with penalties ranging from \$220,000 for individuals to \$1.1 million for corporations;
- deal with minor breaches of the consumer protection provisions by issuing infringement notices. A person who receives a notice is not obliged to pay but if he or she does so the ACCC or ASIC cannot take any further action;
- issue substantiation notices to businesses requiring them to produce documents or provide information to substantiate representations made by them. The

notices will assist the ACCC and ASIC to determine whether there has been a breach of the consumer law;

- seek redress for consumers not party to enforcement proceedings which is aimed at preventing businesses from profiting from consumer detriment just because the loss to each individual consumer is minimal or the harm is widely spread;
- publish public warning notices in certain circumstances (you may have seen notices of this kind issued by State Offices of Fair Trading in respect of "fly-by-night" operators and "phoenix" companies); and
- seek disqualification orders (orders prohibiting persons from acting as directors of corporations where there have been repeated infringements of the consumer law).

## HARMONISATION OF CONSUMER LAWS

The second part of the reforms will change the name of the TPA to the "Competition and Consumer Act": and:

- broaden the scope of the legislation to cover "persons," not just "corporations;"
- modify the existing unfair practices provisions (such as those dealing with misleading and deceptive conduct, false or misleading representations, unsolicited supplies, pyramid schemes, referral selling, harassment and coercion);
- implement specific protections relating to consumer transactions (such as consumer guarantees, unsolicited selling, lay-by arrangements and other unfair practices);

- prescribe information standards for goods and services; and
- implement a new national product safety and regulatory regime.

We will provide further details as they are made available.

### For more information, please contact:

Susan Proctor, Managing Partner  
susan.proctor@bradleyallen.com.au

(02) 6274 0953

Allyson Hogan, Lawyer  
allyson.hogan@bradleyallen.com.au

(02) 6274 0824