

A trap: new unfair contract terms regime applies to varied and renewed contracts

Speed read

Suppliers likely need to address the new unfair contracts regime as to pre-17 March 2015 contracts sooner than later, despite a change clarifying the new regime won't apply to those contracts before renewal and variation.

While the new regime will not apply to terms that were agreed before the Act comes into force, that is so until there is a variation of a term in the contract, or renewal of the contract, at which point there must be compliance as to the total contract. Probably the supplier's issues as to varied and renewed contracts apply only from the date of renewal or variation. But that is not entirely clear, and there might be effect going back further.

A big issue for suppliers will be what constitutes a variation or renewal. Does a price increase anticipated by the contract constitute a variation for example? Does a contract running over after the initial term ends constitute a renewal? Both of those examples are common in practice.

Suppliers should, early on, plan for how they will handle the new law.



November 2014

The Detail

Under s 26A, the new unfair contract terms regime won't apply to contracts entered before that regime becomes effective, namely on 17 March 2015. So suppliers under the many millions of existing consumer supply contracts won't have to make changes immediately.

But they will when there are variations or renewal. That is because the prohibitions on unfair contract terms:¹

"...do not apply to any contract entered into before this section comes into force; but if the contract is varied or renewed on or after this section comes into force, the contract must be treated as a new contract [so the unfair contract terms regime will apply from that point]"

The great majority of supply contracts, if they continue, are varied or renewed: so B2C suppliers (which can also impact B2B) will need to address the requirements sooner or later.

Just the variation of one term of the contract would be enough.

What is enough to trigger the turning point, "the contract is varied or renewed"? While contract law and the contractual interpretation provisions would help the interpretation of the statutory provision, such broadly framed legislation may be interpreted purposively, in the context of protecting consumers, etc. So, for these purposes, do price increases, or addition of services, anticipated by the contract, mean that "the contract is varied"? A typical contract for mobile phone services, for example, will provide for those changes and have those changes often. Will a mobile contract running over after the initial term ends (again, that frequently happens) mean that "the contract is ... renewed"? And, given this is consumer protection legislation, how much regard will the courts have to specific wording of clauses, where some contracts may be varied or renewed, where other contracts

A trap: new unfair contract terms regime applies to varied and renewed contracts

are not, in the same circumstances? Would standard contract interpretation principles be departed from when interpreting and applying the legislation?

And what about things happening outside the formal contract document such as online terms? Especially in an online context, they can have contractual effect.

Given these and other issues, including the challenges in migrating to new contracts in many instances, suppliers should start planning for how to deal with this likely new law sooner than later.

Finally, there is an issue arising from the drafting of the Act. Read literally, s 26A means that, whenever a contract is varied or renewed, the unfair contract term regime applies as from the date of the original contract (which would mean that any unfair contract term back to that date would not be enforceable, if the court later makes an order). However, taking a purposive approach, we think it more likely the court would say that the regime applies only from the date of variation or renewal. But that is not certain.

1. s 26A FTA proposed in the July 2013 SOP

Wigley+Company
PO Box 10842
Level 6/23 Waring Taylor Street, Wellington
T +64(4) 472 3023 E info@wigleylaw.com
and in Auckland
T +64(9) 307 5957
www.wigleylaw.com

We welcome your feedback on this article and any enquiries in relation to its contents. This article is intended to provide a summary of the material covered and does not constitute legal advice. We can provide specialist legal advice on the full range of matters contained in this article.