

Fair Trading Act changes for B2C unfair contract terms and for B2B: an update

Speedread

The proposed new law has been altered this week to push out commencement of the B2C unfair contract terms regime to around late-2014. However, the changes also confirm that the Act will operate retrospectively where suppliers seek to enforce unfair contract terms. Suppliers with terms declared to be unfair won't be able to enforce them. So this may be an issue for suppliers as early as this year.

Many terms that might otherwise be seen as unfair will be out of the regime if the supplier does the right thing in how it designs the contracts, related material, and the services. After all, a clause which at first blush looks to be unfair may in fact be entirely reasonable and appropriate in the particular circumstances. Also important will be to have documentation (a paper trail) to show that the supplier has assessed the position and to show why it considers the term is fair in the circumstances. An overall systemic approach would be valuable.

The B2B regime, enabling carve-out from some FTA obligations, would now start 6 months later (probably late this year).

April 2013

We continue our series of articles starting with *New NZ Law – many consumer supply contracts potentially illegal by late 2013*¹ and *How to reduce exposure under NZ B2B supply contracts under new law*².

This week, supplementary order papers have been released, proposing changes to the Consumer Reform Bill. There are changes on top of amendments we address here.

An important change is made to the B2C unfair contract terms regime for standard form supply contracts, to clarify when the regime bites:³

- Only when a court has declared a term to be unfair is there an obligation not to use the term in contracts.⁴
- A supplier cannot enforce⁵ a term declared to be an unfair contract term "...even if the term was included in the contract before the declaration was made...".

Because of the retrospective effect of that second point,⁶ suppliers are likely to be better off to address their unfair contract terms situation sooner than later. Otherwise they could end up with unenforceable contract terms on

important issues. Plenty of typical terms in NZ supply contracts would not pass the Australian regulators' views on what is acceptable, and the suppliers could end up not being able to enforce terms that are otherwise enforceable if framed correctly.

There's no problem under the regime until and if the Commission seeks a court declaration. In practice, one of the times that is most likely to happen is when a supplier seeks to enforce a term. Therefore, getting the term right is desirable, so that it is enforceable, even though a declaration cannot be made until later.

The proposed legislation is unusual in not being fully self-policing, unlike much other trade practices law. It certainly will be challenging for the Commission to enforce for this reason: while that will make it easier for suppliers - as the Commission may not seek a declaration and couldn't do so in the multiple cases as it doesn't have the resources - there is nonetheless the prospect that the Commission will seek a declaration in a supplier's circumstances. While the Commission has its hands tied behind its back, generally, that means there should be compliance.

**Fair Trading Act
changes for B2C
unfair contract
terms and for
B2B: an update**

Many terms that might otherwise be seen as unfair will be out of the regime if the supplier does the right thing in how it designs contracts, related material, and the services. After all, a clause which at first blush looks to be unfair may in fact be entirely reasonable and appropriate in the particular circumstances. Also important will be to have documentation (a paper trail) to show that the supplier has assessed the position, and to show why it considers the term is fair in the circumstances. An overall systemic approach would be valuable.

1. [http://www.wigleylaw.com/assets/pdfs/2013/
New-NZ-Law-many-consumer-supply-contracts-
potentially-illegal-by-late-2013.pdf](http://www.wigleylaw.com/assets/pdfs/2013/New-NZ-Law-many-consumer-supply-contracts-potentially-illegal-by-late-2013.pdf)

2. [http://www.wigleylaw.com/assets/Uploads/
How-to-reduce-exposure-under-NZ-B2B-supply-
contracts-under-new-law.pdf](http://www.wigleylaw.com/assets/Uploads/How-to-reduce-exposure-under-NZ-B2B-supply-contracts-under-new-law.pdf)

3. At new s26A FTA

4. The legislative change would also confirm that the same term can be used if a court says that it can be included in a contract in a way that complies with a court direction.

5. Or rely upon, or apply

6. Yet to be reviewed is whether this retrospectivity applies (a) only to contracts entered after the new regime comes in (b) applies to all existing contracts or (c) some variation on those two options.

Wigley+Company

PO Box 10842
Level 7/107 Customhouse Quay, 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.