How to reduce exposure under NZ B2B supply contracts under new law

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FTA obligations, such as the s9 misleading and deceptive provision, generally override contractual limitations of liability, creating a major source of uncapped compensation liability for suppliers. Suppliers can find they face unlimited liability despite contract terms. However, if, as is likely, the new Consumer Law Reform Act comes into force in the next few months, as outlined in our article, *New NZ Law - many consumer supply contracts potentially illegal by late 2013,*[1] B2B suppliers can contract out of substantial FTA liability if the right words and approach are used.[2] (For B2C customers, the new legislation will do the opposite, as noted in the article above.) But much FTA compensation liability will remain. This article provides a heads-up about the changes and implications for suppliers and their business customers. We'll start with the current FTA position and then move to the changes, dealing only with B2B sales.[3]

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Current position: FTA

If a supplier breaches the FTA commitments in section 9 (misleading or deceptive conduct), 10 and 11 (misleading representations to the public as to goods and services) or 13 (false or misleading representations), they can be liable to compensate the business customers[4] for loss and damage caused by the breach.[5] This is civil liability in addition to the risk of prosecution under the FTA.

Generally, FTA liability gazumps any limitation in the contract so that liability is unlimited, although the authorities are evolving so that the contract terms may limit liability in some instances. This will be relatively limited however. Therefore, FTA liability will often be important in the common situation where the suppliers' terms limit liability, making a contract claim unviable.

Current position: CGA

B2B suppliers can contract out of any CGA obligations – in relation to goods and services of a type supplied to consumers – if the statutory form is followed. In particular, the contracting out must be in writing. [6]

The Changes: FTA

There will be a new s12A providing that suppliers cannot make "an unsubstantiated representation". (We'll write about that change in a later article). The new FTA – at Section 5D – will enable suppliers to contract out of liability flowing from that new s12A, plus, the liability from two of the sections in the list above: s9 (misleading and deceptive conduct) and s13 (false or misleading representations).[7]

Contracting out of B2B liabilities and responsibilities will need to be in writing and, here's the rub, for the contracting out to work, it will need to be "*fair and reasonable that the parties are bound by the provision in the agreement*."

What's "*fair and reasonable*" is to be assessed based on all the circumstances in the case, including, for example:

- The subject matter of the agreement and its value;
- The respective bargaining power of the B2B parties and issues such as "*take it or leave it*" terms;
- Whether the parties, or either, were legally represented;
- Whether the supplier knew that, but for the provision in the contract, s12A or s13 (but not s9) would have been breached.

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Overseas regimes will help with the interpretation of the approach. For example, many B2B cases on detailed supply terms in the UK raise issues under the Unfair Contracts Terms Act 1997 (UK), with its reference to reasonableness. That Act has significant differences from the proposed FTA in NZ but there are useful overlaps and court decisions on those overlaps: we give an example of this in our article, *Case study: Limiting ICT B2B liabilities under new NZ law.* [8]

An unusual thing is that, despite the ability to contract out, the Commission can still prosecute as to offences on the same facts under s12A and s13. That signals an intention to drive compliance with those sections anyway, overlapping with the last point in the bullet-pointed list above. So the carve out for civil liability won't stop exposure to prosecution.

There's a bunch of issues to work through and the facts and circumstances for each supplier and/or industry sector will differ.

The changes: CGA

To bring the CGA B2B carve-out into line with the new FTA regime noted above, it won't be enough just to contract out in writing. There is also a fair and reasonable test largely mirroring the new FTA regime.[9] If it is not fair and reasonable, the carve-out won't be upheld. So, that needs focus too.

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

2. This new regime, unlike the unfair contract terms regime, is not deferred for 6 months.

3. We exclude employment and land dealings too

4. And possibly others too (and that is significant potentially given the way that FTA liability works (quite differently from normal contract or tort liability in that regard).

5. Section 43 FTA. There are other civil remedies in s43 too, but the main one is compensation (the equivalent of damages).

6. Which can be done electronically if the Electronic Transactions Act 2002 requirements are followed. Likewise as to other references in this article to "writing".

7. Contracting out can include entire agreement and no-reliance clauses, which are often used in contracts. New Section 5D(2) FTA

8. http://www.wigleylaw.com/assets/Uploads/Case-study-Limiting-ICT-B2B-liabilities-under-new-NZ-law.pdf

9. New s40A CGA

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