

Many B2C contract terms unenforceable from March 2015

Speed read

We outline an action list to make changes leading up to March 2015 when the unfair contract term regime comes into force. The B2C unfair contract term regime is effective from 17 March 2015. Under the new law, a supplier only needs to have "fair" contract terms when a court orders it to do so. Realistically, that will happen only in a few cases. But here's the rub: if the court does make orders, it may well be that the supplier cannot enforce against prior breaches by the customer. Therefore, suppliers should comply from March 2015.

The new law will not have retrospective effect so suppliers only need to think about contracts that are entered, varied or renewed after 17 March 2015 (but there are question marks on this as we outline below).

Action steps include:

1. Before March 2015, review processes and B2C standard form contracts (address B2B aspects too). Have close regard to industry specific considerations.
2. Make amendments for new contracts from 17 March 2015, plus processes.
3. Put particular attention on renewed and varied contracts as they are commonplace in B2C contracts, and may happen without change to the general Ts and Cs. See our article, [A trap: unfair contract terms regime applies to varied and renewed contracts](#).¹

This article updates our March 2013 article, [New NZ Law many consumer supply contracts potentially illegal by late 2013](#).²



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The Detail

Introduction

We'll overview the Australian report, [Unfair Contract Terms- Industry Review Outcomes](#),³ then outline the implications of the new law for NZ suppliers. After that, we'll give examples from the report which apply in NZ, explaining why they are relevant.

The Australian report and its relevance to NZ

Among its many changes to consumer law, the new unfair contract terms provisions in the Fair Trading Act will introduce a requirement that standard form consumer contracts don't contain unfair contract terms. The new regime closely follows Australia's legislation introduced in 2010, the Australian Consumer Law.

The main regulator in relation to the Australian regulation, ACCC, has reviewed⁴ the consumer supply contracts in several business sectors, including telecommunications, on-line sales, airlines and car hire. The regulator considered that many clauses breached the law: most of the reviewed suppliers voluntarily changed their terms. Some didn't, and the regulator is taking and considering taking enforcement action.

The report makes clear, to all industry sectors, that the regulator, having done this review, will now increasingly look at enforcement options.

NZ's Commerce Commission typically follows that approach as well (educate, then take softer action as summarised in the report, and then enforce, on the basis that suppliers have been warned). However it might move more quickly here in view of the 15 month delay with the new law being enacted and when it becomes

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effective as that is intended as a lead-in period so that suppliers can get their processes and contracts sorted.

Why Suppliers should comply with the new regime

A big problem the Commerce Commission faces is that suppliers are only required not to use certain terms after a court order is made against that particular supplier. At one level, this makes enforcement toothless as it simply won't be practical to bring proceedings against more than a handful of suppliers (orders can only be made on a per-supplier basis). However, the sting in the tail is that, if the Commission does obtain orders, the supplier may well not be able to enforce unfair terms if the Commission obtains court orders, rendering the terms toothless. We explain this below.

Therefore, the better approach, particularly as to terms that are important to the business, is to ensure compliance. For example, a major supplier that has key terms in its contracts could have a real problem if the Commission later obtains orders from the court, thereby invalidating those terms.

How the new NZ law affects suppliers: high level overview

By way of high level summary – there is important detail too - the new law in both countries makes it a breach for consumer supply standard form contracts to contain “*unfair contract terms*”. But as noted above, that only applies in New Zealand after a court order against the supplier. However, when such a court order is made, the unfair contract term becomes unenforceable. Query whether that will apply to breaches and rights prior to the court order but after 17 March 2015. Retrospectivity of legislation can raise some complex issues, as Burrows and Carter explain at Chapter 18 of Statute Law in NZ (4th ed). This is not retrospective legislation in the general sense anyway, as the events in question do not pre-date the legislation. The issue is whether the focus on a future event (enforcement of a

contract) can apply as to a breach prior to the court order. Given the relatively clear words, the fact that there is already a retrospective provision anyway which does not deal with this issue (the Act does not apply to contracts before 17 March 2015) and the economic and social policy objectives (without retrospectivity the Act is toothless), suppliers should assume a court order means they cannot enforce prior breaches after 17 March 2015.

The legislation has extended provisions defining what unfair contract terms are: they revolve around matters such as: transparency; removing significant imbalances between suppliers and customers with “*take it or leave it*” standard form contracts, while protecting the legitimate interests of the suppliers.

Transparency and the overall terms in the contract are significant factors. A term written in legalese and buried in a long contract is less likely to be compliant than an upfront and clear statement of the same term. Transparency is important on another key issue: upfront pricing and the main subject matter of the contract fall outside the unfair contract term regime so long as they are disclosed transparently.

The new legislation gives examples of the sorts of terms that may fall foul of the unfair contract term regime.

For more detail see:

- The Commerce Commission’s guidelines on unfair contract terms, currently in draft [here](#).⁵
- Our March 2013 article on a valuable ACCC report, [New NZ Law - many consumer supply contracts potentially illegal by late 2013](#).⁶
- Our April 2013 article, [8 clauses in Telco retail contracts requiring change due to new NZ law](#).⁷
- Our August 2013 article, [Unfair contract terms developments in NZ](#).⁸

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1. <http://www.wigleylaw.com/assets/Uploads/A-trap-new-unfair-contract-terms-regime-applies-to-varied-and-renewed-contracts.pdf>
2. <http://www.wigleylaw.com/assets/Uploads/New-NZ-Law-many-consumer-supply-contracts-potentially-illegal-by-late-2013.pdf>
3. <https://www.accc.gov.au/publications/unfair-contract-terms>
4. Along with other Australian regulatory bodies with jurisdiction as to the Australia Consumer Law
5. <http://www.comcom.govt.nz/fair-trading/guidelines/draft-unfair-contract-term-guidelines/>
6. <http://www.wigleylaw.com/assets/Uploads/New-NZ-Law-many-consumer-supply-contracts-potentially-illegal-by-late-2013.pdf>
7. <http://www.wigleylaw.com/assets/Uploads/8-clauses-in-Telco-retail-contracts-requiring-change-due-to-new-NZ-law.pdf>
8. <http://www.wigleylaw.com/assets/Uploads/Unfair-contract-terms-developments-in-NZ.pdf>

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