New B2C Unfair contract terms regime won't be backdated

Keypoints

Suppliers need to address changes sooner than later, despite a change clarifying the new regime won't apply to pre-Act contracts.

There's a 2nd likely set of changes to this regime following the changes reported on in our last article in our series on the consumer law reform, namely, *Fair Trading Act changes for B2C unfair contract terms and for B2B: an update*.[1] This time, apart from a carve out for insurance policy terms - an important protection for insurers - the main change would mean that 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.

To meet the obligations of the Act, suppliers won't have to amend their existing contracts. But for the great majority of suppliers with on-going relationships, they will need to address this sooner or later, as contracts are renewed or a term is varied. Suppliers should still, early on, plan for how they will handle the new law, especially if they are doing a standard form contract refresh.

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.

As we've noted earlier, based on the Australian regulators' views, many contracts in typical consumer supply scenarios won't comply; see *New NZ Law – many consumer supply contracts potentially illegal by late 2013*.[2]

July 2013

In July, Government released another Supplementary Order Paper (SOP), replacing the earlier underlying SOP. Finalisation of the Act is close: it's likely to be in force within months, although for some of the multiple obligations, there will be a breathing space as introduction is delayed beyond Royal Assent.

The biggest change in the SOP is clarification that the new unfair contract terms regime won't apply to contracts entered before the Act came into force, assuming the SOP is enacted. 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:[3]

> "....*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 those suppliers will need to address the requirements sooner or later. Just the variation of one term of the contract would be enough.

©Wigley & Company 2013

New B2C Unfair contract terms regime won't be backdated

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 (or maybe in some other way: we haven't yet analysed this fully). 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 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. One of the other issues, and an important one, is that suppliers can't enforce a provision that is declared not to comply with the unfair contract terms regime, even though the term was agreed before that declaration: we expanded on this in our article, *Fair Trading Act changes for B2C unfair contract terms and for B2B: an update*.[4]

---

1. http://www.wigleylaw.com/assets/Uploads/Fair-Trading-Act-changes-for-B2C-unfair-contract-terms-and-for-B2B-an-update.pdf
2. http://www.wigleylaw.com/assets/pdfs/2013/New-NZ-Law-many-consumer-supply-contracts-potentially-illegal-by-late-2013.pdf
3. These are the changes to new s 26A proposed in the July 2013 SOP
4. http://www.wigleylaw.com/assets/Uploads/Fair-Trading-Act-changes-for-B2C-unfair-contract-terms-and-for-B2B-an-update.pdf

Wigley+Company
PO Box 10842
Level7/107 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.