New NZ Law – many consumer supply contracts potentially illegal by late 2013

Speedread

This is the first of a series of articles dealing with one of the most radical contract law changes for years affecting all suppliers of goods and services: the unfair contract terms regime under the new Fair Trading Act amendments coming into force later this year.[1]

An Australian regulatory report this month on closely aligned law shows how NZ suppliers could potentially breach the new Fair Trading Act obligations. The report gives specific examples of clauses that aren't compliant (and wouldn't be compliant in NZ too). Those clauses are frequently used in NZ supply contracts. From our experience, most detailed standard form supply contracts will be in breach. The new report provides heads-up guidance to what NZ suppliers will need to change.

Later articles will deal with:

- The impact in specific industries, starting with telecommunications followed by on-line sales. Both were a main focus of the Australian report, given multiple breaches by Telcos and on-line vendors in clauses often used here too;
- B2B supply contract implications, including the changes allowing contracting out of the Act in B2B deals, subject to an additional new regime specific to B2B;
- Tips to help suppliers retain strong terms while remaining compliant.

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Introduction

We'll overview the Australian report, *Unfair Contract Terms- Industry Review Outcomes* [2], 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 NZ Consumer Law Reform 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 reviewed[3] 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 suppliers voluntarily changed their terms. Some didn't, and the regulator is 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).

How the new law affects suppliers

By way of high level summary – there is very important detail too - the new law in both countries makes it a breach for consumer supply standard form contracts to contain "unfair contract terms". The legislation has extended provisions defining what unfair contract terms are: they revolve around what is to be expected: 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

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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. We outline some of these below, when dealing with the ACCC report.

There's a carve out for B2B transactions, just as there is under the Consumer Guarantees Act (NZ), so long as the right steps are taken. There are other issues for B2B transactions where changes to the FTA will make a big difference. We will deal with those in a later article.

Specific clauses covered in the Australian report

Clauses commonly seen in NZ supply contracts, and covered by ACCC, include the following (we only give examples: the report contains more):

Terms that allow the supplier to change the contract without consent:

Those terms will often be unfair contract terms. Additionally, even where, say, the change in terms gives the customer the right to terminate the contract, the term may still be unfair. As we pointed out some years ago, such clauses would often be effective under contract law: see our article, *Queen's Counsel Battles Air New Zealand: Can a Supplier Unilaterally Change Contract Terms?*[4] The new law changes all this.

This creates big challenges for suppliers as it is difficult in the real commercial world to change standard form contract terms after they are first agreed online or by some other means. Try asking Sales and Marketing to allow "opt-in" acceptance of new terms from customers, and the challenges in changing the terms for thousands of customers will quickly be apparent, practically and from a marketing perspective. Yet change is often essential: the requirement in this new law is but one example by which suppliers must introduce new terms (otherwise they would be acting illegally).

What all this says is that contracts will need to be carefully designed to enable compliant yet relatively easy change of terms binding retail customers.

Terms that unfairly restrict consumer's right to terminate the contract:

Suppliers often have contracts that lock-in the customer for extended periods, while also giving the supplier the right to pull the plug at any time. Such terms, says the ACCC, can unfairly penalise the customer. Under the new law, suppliers will need to have good reason to lock in customers.

There's a corollary of this, seen often in telecommunications supply contracts, for example: the early termination charge. We'll deal with those in our forthcoming article on this new law and implications for Telcos.

Terms that prevent the consumer from relying on representations by supplier

As the ACCC said:

> "Broadly drafted clauses that seek to absolve a business of responsibility for statements they, or their agents, make to consumers may be unfair. The ACCC achieved important compliance outcomes by engaging with businesses on entire agreement clauses, except in the case of the vehicle rental industry.
>
> These types of terms can lead to a significant imbalance in the parties' rights and obligations, and can potentially confuse and mislead consumers.
>
> The ACCC found this type of problematic term to be an issue in all industries reviewed, especially in the telecommunications industry. Due to the length and complexity of telecommunications standard form contracts, consumers often rely heavily on verbal representations made at the point of sale to form their understanding of the deal being offered. A term enabling a business to disclaim any responsibility for these representations is unfair."

This unfair contract term issue highlights also the overlap with other statutory law in both countries: in NZ that includes the existing provisions of the Fair Trading Act, the Consumer Guarantees Act and the Contractual Remedies Act. Existing Fair Trading Act provisions, for example, impact entire agreement and no-reliance clauses.

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In other words, achieving compliance by suppliers requires consideration of the broader legal position too.

Lack of transparency and the contract as a whole

These are not direct unfair contract term issues but rather significant factors in deciding if a term is unfair. Many NZ consumer supply contracts in NZ will fail on this factor as terms are lost in the detail, written in legalese, and buried among other clauses which are not reasonably necessary for suppliers. For more detail, see our 2012 article, *To read or not to read…online Ts and Cs. Or Hamlet* [5]. Unnecessarily long and obscure contracts will potentially be in breach of the new law.

In our experience, many terms in supply contracts are largely irrelevant when assessed through a correct "*What's important*?" filter. What is truly important is often not what appears to be so, on an initial quick review. Careful design and careful drafting can produce more effective and more legally enforceable contracts.

What can be done to achieve supplier objectives while remaining compliant?

There is much that can be done to retain supplier's objectives in consumer supply terms while still remaining compliant with the new legislation. We deal with this in a later article.

1. The Consumer Law Reform Bill, making changes to the Fair Trading and other Acts, has passed its second reading: the regime described in this note applies from 6 months after Royal assent, so the regime should be in place late this year.

2. https://www.accc.gov.au/publications/unfair-contract-terms

3. Along with other Australian regulatory bodies with jurisdiction as to the Australia Consumer Law.

4. http://www.wigleylaw.com/assets/pdfs/2005/QCBattlesAirNewZealand.pdf

5. http://www.wigleylaw.com/assets/Uploads/To-read-or-not-to-read.pdf

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