

Tight controls for standard form consumer contracts – likely NZ law change

Many standard form consumer contracts will need an overhaul if – as seems likely – a Select Committee change to the Consumer Law Reform Bill is made. In those contracts, unfair contract terms and their enforcement will not be permitted. The legislation goes into detail on what is and isn't an "unfair contract term". When the legislation is enacted, B2C providers will need to check their standard form contracts carefully.

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The unfair contract term regime would be added to the Fair Trading Act. It applies only to standard form contracts with consumers: B2C as opposed to B2B. There are also major and separate changes to Fair Trading Act obligations for B2B and we will deal with that in a later article.

The proposed change picks up Australia's unfair contract term regime in the Competition and Consumer Act 2010, so cases there provide guidance.

A standard form contract is defined in a way that such contracts are what would be expected – take it or leave it scenarios where the supplier has the bargaining power and there's little or no negotiation.

A contract term is unfair if it causes a significant imbalance in the parties' rights and obligations, and it is not reasonably necessary to protect the supplier's legitimate interests. In weighing up the position, specific regard is had to whether the term is transparent. That could include how clearly the term is displayed through to how clear-cut and understandable it is. That's basically a beefed-up version of Lord Denning's red hand test.

The proposed Act gives examples of unfair contract terms, such as terms that permit one party but not the other to:

- Avoid or limit performance of the contract;
- Terminate the contract;
- Penalise for breach or termination;
- Vary the terms of the contract;
- Vary the upfront price payable without the right to terminate the contract;
- Unilaterally to vary the characteristics of the goods and services being supplied.

Carve-outs from unfair contract terms include what is called the "upfront price" plus the definition of the main subject matter of the contract. But there's a get-out-of-jail in "upfront price" because included in upfront price are sums that only become payable on a contingency basis.

The Consumer Guarantees Act overlaps some of these requirements, but the new legislation clearly will require many B2C suppliers to fix their contracts. Like everything under the Fair Trading Act there is the prospect of attack by the Commerce Commission, by aggrieved customers and even by competitors.

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.