

Unfair contract terms: Do what the regulator says or face the consequences

December 2014

Speed read

Australasian unfair contract terms law is similar in both countries. ACCC specifically targeted Telcos and car hire firms. It successfully prosecuted a Telco and now a car hire company is being prosecuted. In each case the



contracts contain the sorts of terms in many B2C contracts. The message: get ready for more action (for NZ, before the new law coming into force in March 2015).

ACCC warned car hire companies to make their standard form contracts compliant. Some did. ACCC says that Europcar didn't so it issued proceedings on 10 November. The same thing happened to Telco, Bytecard; see our article, [Unfair Contract terms developments in NZ](#).¹ The Europcar case also shows how the misleading and deceptive conduct regimes come into play too in parallel with the unfair contract term regime.

Both regulators will initially seek to educate, then to directly encourage industries to comply, and then to enforce by court action those it sees as recalcitrant. The regulators can't sue everyone (in fact they realistically can only sue a tiny fraction). But the prospect of court action does mean that suppliers may not be able to retrospectively rely on important contract terms: see [A trap: new unfair contract terms regime applies to varied and renewed contracts](#).² Therefore, the legislation in NZ is self-policing.

The Detail

The predicament that Europcar Australia³ faces shows how the new unfair contract terms regime interplays with the misleading and deceptive conduct regime.

ACCC says that the detailed Europcar car hire agreements (signed up when there is no realistic opportunity to read the fine print and negotiate terms) are unfair as they contain terms making the hirer liable for some loss irrespective of fault and/or no matter how trivial the breach.

Transparency of terms such as this is also significant in the unfair contract terms assessment. But here's a kicker. ACCC is also alleging breach of the misleading and deceptive regime (materially the same in both countries as is the unfair contract terms regime) as the website says one thing about maximum liability when the small print says there is unlimited liability in some circumstances. That makes this a prosecution issue.

Headline claims that are whittled down in the small print is a big focus for the Australasian regulators: see for example our article, ["Unlimited" claim issues for fixed line Telcos hit mobile operators too](#).⁴

The message from all this?

B2C suppliers will need to ensure compliance, the more so if they are in industries most likely to be the focus of regulators, such as gyms, Telcos, car hire companies etc. The regulators will give only so much education and warning to industry.

But in any event, the risk of not being able to rely upon terms, which could be fixed by careful drafting, indicates there should be compliance from the get-go (in NZ from March 2015). See [A trap: new unfair contract terms regime applies to varied and renewed contracts](#).⁵

1. <http://www.wigleylaw.com/assets/Uploads/Unfair-contract-terms-developments-in-NZ.pdf>

2. <http://www.wigleylaw.com/assets/Uploads/A-trap-new-unfair-contract-terms-regime-applies-to-varied-and-renewed-contracts.pdf>

3. More particularly, CLA Trading Pty Ltd, the company behind Europcar Australia

4. <http://www.wigleylaw.com/assets/Uploads/Unlimited-claim-issues-for-fixed-line-telcos-hit-mobile-operators-too.pdf>

5. <http://www.wigleylaw.com/assets/Uploads/A-trap-new-unfair-contract-terms-regime-applies-to-varied-and-renewed-contracts.pdf>

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