

Unfair contract terms law: first case is against ISP

Speedread

Our recent articles summarise the Australian regulator's report on unfair contract terms compliance. Now the regulator has chosen an ISP as the first supplier against which to issue proceedings solely under that new law.

The regulator's report is relevant to New Zealand as well as Australian suppliers, and we've also introduced ways in which to be compliant, including crafting terms and circumstances so that they would be enforceable, and not unfair under the legislation.

Expect the cases to start coming in waves, and they'll clarify suppliers' obligations in Australia and New Zealand.

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In its report, the ACCC noted that many suppliers including Telcos amended the contracts after concerns were raised directly by ACCC. Some didn't and so ACCC will start taking the next steps including against suppliers who will now be assumed to have read the ACCC report.

ACCC have issued proceedings¹ against Bytecard, an ISP trading as Netspeed Internet Communications. That's the first case devoted only to the unfair contract terms regime.

Says the ACCC:

"The alleged unfair contract terms [which should be declared void]:

- enable ByteCard to unilaterally vary the price under an existing contract without providing the customer with a right to terminate the contract;
- require the consumer to indemnify ByteCard in any circumstance, even where the contract has not been breached, and the liability, loss or damage may have been caused by ByteCard's breach of the contract; and

- enable ByteCard to unilaterally terminate the contract at any time with or without cause or reason."

Such terms, and variations on them, are seen in a number of supply contracts on both sides of the Tasman.

ACCC further says that "It also considers that these clauses are not reasonably necessary to protect ByteCard's legitimate business interests." The key to advancing the supplier's position lies in that point. If the reason for having a term is carefully considered and documented, and the term and context carefully crafted, suppliers will often get provisions that are reasonably wide. For example, it is possible to reframe the terms used by ByteCard, as noted above, so they are tighter and yet achieve most of what the supplier needs.

1. <http://www.accc.gov.au/media-release/accc-institutes-proceedings-against-bytecard-pty-limited-for-unfair-contract-terms>

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