



This update provides general information only and does not constitute legal advice. If you want legal advice on any of these issues, please feel free to contact me.

Hi - Important Update – MAY 2014

This update follows a more detailed update that I sent out in February. It focuses on:

- provisions in B2B consumer contracts that purport to contract out of provisions of the Consumer Guarantees Act or Fair Trading Act and
- on how the new unfair contract terms regime under the Fair Trading Act will apply to non B2B consumer contracts in particular - if you provide goods or services to non business consumers, your contracts/terms etc will need to be revised to ensure that you don't fall foul of the legislation.

The legislation affects many different types of contracts for the supply of goods or services.

17 June 2014 (only 6 weeks away) - contracting out of the Consumer Guarantees Act and of the Fair Trading Act:

June is a key month for commercial contracts that are deemed to be consumer contracts under these Acts. In particular, the ability to contract out of the provisions of these Acts in relation to B2B consumer contracts will depend on whether it is fair and reasonable to do so. In that regard, the negotiability of those contracts will be a key determinant. A take it or leave it contract (where one party has no negotiating opportunity) may make the contracting out provisions in it unfair and unreasonable i.e. ineffective. So B2B consumer contracts of all kinds should be reviewed first, to enable contracting out of some sections of the Fair Trading Act, if that is desirable, and secondly, to ensure that all provisions that contract out of either Act would be considered to be fair and reasonable. (I refer to whether contracting out is desirable because for some businesses, to be seen to be contracting out of the legislation may give the wrong signals to customers. There may be a tension between self preservation and customer relations.)

If you choose not to review your contracts, then you take the risk that a customer will bring proceedings with a view to having a contracting out provision declared to be unfair/unreasonable. If successful, the provision may be unenforceable and if it involves a breach of the Fair Trading Act, you could be liable to a penalty under the legislation (up to \$600K for corporates and up to \$200K for individuals).

Contracts would include sales/leases of services or goods that would ordinarily be acquired for personal household or domestic use or consumption, even if they might also be ordinarily acquired for business purposes. Exceptions include where you sell goods or services to a trader who will re-supply them in trade e.g. sale of inventory to a retailer, or who will consume them in the course of production or manufacture. (Where the exceptions apply, your customer is not a consumer and that Act would not apply.)

So far as I can see, the new contracting out regime will apply to both existing and new contracts.

17 March 2015 Unfair Contract Terms Regime:

The unfair contract terms regime will come into force. The experts seem to feel that this will be more of an issue if you contract with non B2B consumers i.e. non traders who acquire from you goods or services that would ordinarily be acquired for personal household or domestic use or consumption. Under these contracts, you can't contract out of the Consumer Guarantees Act or the Fair Trading Act but more than that, your contracts will be subject to the unfair contract terms regime.

Many common clauses will be deemed to be unfair if the contract is deemed to be a standard form consumer contract, the clauses aren't reasonably necessary to protect your legitimate interests, and they would cause detriment to the other party if relied upon. Examples would include limitation of liability clauses, exclusion of liability clauses, penalty clauses, clauses giving one party only the right to vary the contract or to assign it (etc). But the regime involves more than that. Legalistic clauses and short hand clauses that a lay person can't readily understand would also fall foul of the regime. Contracts must be clear, transparent, and fair, so that consumers are not directly or indirectly deprived of any rights that they may have under the law.

The new unfair contract terms regime will not apply to contracts entered into before the effective date of the legislation, unless those contracts are varied or renewed. However, it is possible that even an increase in a payment under a say, a CPI clause, would be deemed to be a variation.

Businesses need to review their contracts, where they may be deemed to be standard form consumer contracts, to ensure that going forward, their new contracts will be as safe as possible from the regime and so that any variations or renewals of existing contracts can be amended as required. Whilst a customer can't bring any form of proceedings, they can complain to the Commerce Commission, which has the role of policing the regime. If your contract interests the Commission and it takes proceedings, not only may your contract term be declared to be unfair and unenforceable, but you could be liable to a penalty under the Fair Trading Act (up to \$600K for corporates and up to \$200K for individuals).

Reviewing and re-wording contracts may not be a simple or quick exercise. While some things will be very clear, some guess work will be required in some cases as to what may be an unfair term.

As noted briefly above, some experts seem to think that in relation to the unfair contract terms regime, the Commerce Commission will focus mainly on non B2B consumer contracts, leaving it to the parties to B2B consumer contracts to dispute whether any contracting out provision is fair and reasonable.

You have been warned. It is risk assessment and decision time in terms of reviewing your contracts.

Please don't hesitate to contact me if I can help you with your consumer contract terms or any other business law or commercial law matter.

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