

LegalUpdate

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The Australian Consumer Law: what does it mean for the property industry?

The Australian Consumer Law makes a term of a consumer contract void if it is unfair and a standard form contract. To the extent possible, the contract remains binding without that term.

A term in any "standard form" consumer contract with an individual is unfair if it both causes a significant imbalance in the parties' rights and obligations arising under the contract and it is not reasonably necessary to protect the legitimate interests of the advantaged party.

A consumer contract is a contract for a supply of goods or services or a sale or grant of an interest in land to an individual whose acquisition is wholly or predominantly for personal, domestic or household use or consumption.

The law applies to any consumer contract you enter into, renew or vary from 1 July 2010. If a pre July contract is varied, it only applies only to the varied term.

We have developed streamlined procedures to assist us review your contracts and standard wording to reduce the risk that terms in your contracts do not comply with the Australian Consumer Law and are found to be unenforceable.

Application to property transactions

The law has potential application to all your property transactions involving individuals. It should always be considered.

For example, it applies to any contract for sale of land from a developer to an individual. Similarly, it may apply to the grant of any lease, licence, easement, joint venture, home loan, investment loan or mortgage transaction involving an individual.

Recommendations for developers

- Review your contracts to determine whether any term is "unfair" in the legal sense - particularly those that reserve discretionary or unilateral rights.
- Delete potentially unfair terms unless there is a business need.

- If there is a business need, then if possible, change the term so that it directly relates to the subject matter of the contract or sets the upfront price - the Australian Consumer Law does not apply to such terms.
- Check any other terms that are weighted towards the business to ensure that they are not disproportionate to the need to protect legitimate business interests. If possible, allow the term to operate both ways.
- Keep detailed reasons why terms were included in contracts to provide the necessary justification for the term - consider incorporating outlines and acknowledgments as to why certain terms are included both in pre-contract disclosure and in the contract.
- If there is an opportunity for the consumer to negotiate contract terms, ensure any negotiations are recorded and undertaken in good faith.
- Ensure that contracts are clear and well structured - all terms should be expressed in plain language, be legible and presented clearly.
- Give master sale contracts to banks as early as possible to ensure that the contract is still "bankable".

Determining whether a contract is a "standard form contract"

A standard form contract is generally a "take it or leave it" contract (eg banks, gyms, phone companies etc).

The law presumes all your contracts are "standard form".

A court, in determining whether you may rebut that presumption, may take anything into account but must take into account:

- who has all or most of the bargaining power, and
- was the contract prepared before any discussions, was there a real opportunity to negotiate or was it presented as take it or leave it?

Examples of standard form contracts

Generally, an "off the plan" sale contract is a standard form contract.

So is a lease to an individual.

When is a term "unfair"?

A term is "unfair" when:

- it causes a significant imbalance in the parties' rights and obligations arising under the contract
- it is not reasonably necessary to protect the legitimate interests of the developer, and
- it would cause detriment, even if just non-financial.

Examples of unfair terms

Examples in the statute provide guidance on issues of concern. The examples set out that a term may be unfair if it permits only the advantaged party (eg a developer) to:

- avoid or limit performance of the contract
- terminate the contract
- vary the contract
- renew or not renew the contract
- vary the upfront price payable without including a purchaser's right to terminate
- vary the characteristics of the interest in land to be sold or granted
- penalise a purchaser for a breach or termination of the contract
- determine whether the contract has been breached or to interpret its meaning
- limit vicarious liability for its agents
- assign the contract to a purchaser's detriment without the purchaser's consent

Or a term may be unfair if it:

- limits a purchaser's right to sue
- limits the evidence a purchaser can adduce in legal proceedings
- imposes the evidential burden on a purchaser in legal proceedings

Exempt terms

The law does not apply to a term of a consumer contract to the extent that it:

- defines the main subject matter of the contract (eg the interest in land to be purchased)
- sets the upfront price payable under the contract
- is a term required or expressly permitted by a law of the Commonwealth or a State or Territory.

Consequences

A claim against you in relation to an alleged unfair term may involve:

- the disadvantaged party or the ACCC taking action to seek a declaration that the term is unfair and void
- the ACCC seeking an injunction to prevent the advantaged party from relying on it, or
- a court making remedial orders if the advantaged party has relied on an unfair term.

Conclusion

The changes represent a significant change to Australian consumer laws. It is important that you ready your business for them.

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