



This diagram a summary of the main elements of the Bill. It does not purport to cover all requirements. The Bill is likely to change before becoming law. The document is subject to a Creative Commons Licence - www.creativecommons.org. The author is Holley Nethercote Commercial Lawyers. To attribute the author, please provide this link to www.holleynethercote.com.au. This diagram does not constitute legal advice, and is current as at May 2009.

A term of a consumer contract is void if it is unfair.
What is a consumer contract?

supply of goods or services by an individual or a corporation
sale or grant of an interest in land
corporation cannot indemnify an officer for payment of a pecuniary penalty or legal costs (s12GBD(1))
important facts relevant to the nature of standard form contract are in s 7
a contract containing an unfair term will continue to bind parties to the extent the contract is capable of operating without the unfair term
consider whether imbalance of bargaining power
who prepared the contract and whether it was prepared before negotiations commenced
whether one party was required to accept or reject the terms of the contract, without any changes
whether a party was given opportunity to negotiate
whether the contract takes into account specific circumstances of the parties or the transaction

is a consumer contract a Standard Form Contract?

a contract entered into after the commencement of the ACL unless the contract is renewed or varied after the commencement date of the ACL

includes contracts for the provision of financial services, or financial products (ASIC Act)

marine salvage
carriage of goods by ship
charterparty of a ship

excluded:
terms in a consumer contract that define the main subject matter, set out the upfront price, or are required by law, are excluded from the operation of the ACL & ASIC Act
constitution of a company or of a managed investment scheme or other body are excluded (ASIC Act)

Under the ASIC Act: to be a consumer contract, at least one of the parties must be an individual, and the contract is for predominant purpose of personal, domestic or household use or consumption

Contracts between businesses are excluded, except if one of the parties is a sole trader

Under the ACL: to be a consumer contract, the supply of goods or services must be to an individual whose acquisition is predominantly for personal, domestic or household use or consumption.

Unfair Contract Terms
Trade Practices Amendment (Australian Consumer Law) Bill 2009
(Note this Bill also amends the ASIC Act 2001)

Amends the Trade Practices Act 1974 Ch to establish the Australian Consumer Law (ACL) as a schedule

Amends the ASIC Act to introduce ACL provisions in relation to financial products and services

What is 'unfair'

where it would cause a significant imbalance in the parties rights and obligations
assess whether the terms would cause detriment to a party, or **substantial likelihood of detriment**
assess extent that the clause is **transparent**
if it is not reasonably necessary to protect the legitimate interests of the party advantaged by the term (section 3 ACL, S12BG ASIC Act) - **rebuttable presumption s3(4)**
assess the contract as a whole

Note: Unilateral variation clauses - not banned but use must be justified, i.e. necessary to protect legitimate business interests (e.g. variation in interest rates)

These are drawn from s 32X of the Victorian Fair Trading Act 1999.

Examples of Unfair Terms

- (a) allow only one party to avoid or limit performance
 - (b) allow only one party is able to terminate contract
 - (c) only one party is penalised for a penalty for breach or termination
 - (d) only one party is able to vary terms
 - (e) allow only one party to renew, or not renew, contract
 - (f) allow one party to vary upfront price without the right of another party to terminate contract
 - (g) allow one party to unilaterally vary goods or services supplied, or land sold or granted
 - (h) permits one party to unilaterally determine whether a contract has been breached or to interpret its meaning
 - (i) limiting of one party's vicarious liability for its agents
 - (j) one party to assign contract to the detriment of another without the other party's consent
 - (k) a term that limits one party's right to sue another party
 - (l) a limit the evidence one party can adduce in proceedings relating to the contract
 - (m) imposes the evidential burden on one party in proceedings relating to the contract
 - (n) terms prescribed in regulations (none as yet)
- 'penalty' = a common law approach. A valid penalty must be a genuine pre-estimate of likely loss and not an arbitrary sum
- Does not rule out securitisation arrangements (i.e. under s 166 of UCCC)

Prohibited terms cannot be included in a Standard Form Contract - if included, cannot be relied upon

Prohibited terms

a term which is defined as a prohibited term (in the Regulations); and the term is contained in a Standard Form Contract

Timeframe

New legislation introduced June 2009
Unfair contract terms provisions at Commonwealth level commence on 1 January 2010
State and Territory Governments expected to pass complementary legislation by end 2010

enforcement and remedies (ASIC and ACCC)

pecuniary penalties (see section 76E ACL, s 12GB ASIC Act)
criminal proceedings
disqualifying orders
substantiation notices (from the ACCC)

orders to redress loss suffered by consumers
declaring all of part of a contract void
varying all or part of a contract
order refusing to enforce all or part of a contract
order directing repayment of money
order directing a party to repair or provide parts for goods, or supply services
order varying or terminating interest in land

infringement notices
penalties (s87ZG)
non compliance with infringement notice - person liable to court proceedings

public warning notices - about conduct of a corporation
if either ACCC or ASIC suspects contravention of ACL
if in public interest
if ACCC satisfied that person suffered detriment

Declarations
Court may, on application of ACCC, make a declaration that a term of a contract is unfair or prohibited

adverse publicity order
may be made by Court in application of ASIC (ASIC Act)