Commerce Commission lays out approach to unfair contract terms

The Commerce Commission has finalised the approach it will take toward the implementation of the new unfair contract term provisions in the Fair Trading Amendment Act 2013, to come into effect on 17 March 2015.

There will be no grace period for compliance.

We outline the main changes since the draft guidelines were released for consultation in August last year.

Commission’s focus

The Commission’s initial targets will be:

- those industries and practices that have proven problematic overseas or which have been the subject of complaints in the past (telecommunications, rental cars, fitness, airlines and online trading);
- those contracts causing harm to vulnerable consumers in the consumer credit area, and
- contract terms that limit competition (such as automatic roll-over or renewal terms that lock consumers into existing contracts).

The Commission’s role is important because only the Commission can seek a declaration from the Court that a term in a standard form contract is unfair. The remedy available to consumers is to complain to the Commission.

The Commission will publicise any declarations of unfairness it obtains.

Although a term declared unfair in one contract may not be unfair in another contract, traders should think carefully before using such a term and should satisfy themselves that it does not fall within the unfair contract term provisions.

Parties cannot contract out of these provisions.
Broad changes in the Commission’s thinking

The main areas of change since the draft guidelines are:

- confirmation that if the Court has found a term in a standard contract to be unfair, and if the same contract has been used by the trader multiple times, the declaration of unfairness “is likely to extend to all of the same terms contained in all of those contracts”. It might also extend to other kinds of contracts containing the same term, depending on the contract’s content and on the wording of the Court’s declaration. The Commission considers that the impact, scope and effect of court declarations will be an issue for case law.

- clarification that a business can be a consumer where the goods or services are ordinarily acquired for domestic rather than for commercial purposes and the business does not intend to resupply them in trade (e.g. a sofa in the reception area or a car which is bought primarily for personal use but leased to the business during business hours). Written evidence as to the buyer’s purpose will be relevant but will be weighed against other evidence “and may not be definitive”, and

- the Commission has stepped back from the idea that some contract terms are exempt “no matter what they contain”. Instead its approach is now that, where a term deals with several matters, each matter is subject to its own assessment, and that part of the term may be exempt while the rest is not.

Changes in detail

Definitions
- The definition of a ‘consumer’ states that a consumer is not someone who “holds himself or herself out as acquiring the goods or services for the purpose of resupplying them in trade”.
- A contract between two people in their personal capacities will not be a consumer contract. However, if the seller is usually in that business, and the buyer is using the purchase in a personal capacity, then the contract will be a consumer contract (and therefore covered by the Act). The test is: “Is the seller ‘in trade’?”

Assessing unfair terms
- The guidelines now specify that a court can declare a term unfair only if satisfied that it:
  - would cause a significant imbalance between the parties and
  - is not reasonably necessary to protect the interests of the party which would be advantaged and
  - could cause detriment, financial or otherwise.
  All three of these requirements must be met.
- The Commission’s task is to prove tests 1 and 3. The onus is on the seller to prove that, on the balance of probabilities, the term is needed to protect its legitimate interests (requirement 2). The Act contains a presumption that a challenged term is not reasonably necessary.
- Deletion (from the draft) of the Commission’s expectation the Court is likely to adopt an “average reasonable consumer” standard in assessing detriment.

Types of unfair terms
- Further clarification that a term that is not exempt, but is not on the ‘grey list’ may still be unfair. The circumstances and contract as a whole are taken into consideration.
- The Commerce Commission is likely to consider that any term limiting a seller’s liability is unfair, unless the seller can demonstrate otherwise in the context of the contract. The final guidelines allow the seller this opportunity to explain.
- The final guidelines offer further explanation as to the distinction between ‘price’ and ‘penalty’. There must be ‘consideration’ (an exchange of something of value for goods or services) in order for a term to be a ‘price term’. There is no consideration in a ‘penalty term’.

Footnotes
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Every effort has been made to ensure accuracy in this newsletter. However, the items are necessarily generalised and readers are urged to seek specific advice on particular matters and not rely solely on this text.

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Our thanks to Madeline Ashby for writing this Brief Counsel.