

Q&S DEVELOPER UPDATE

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UNFAIR CONTRACT TERMS

Amendments to the Trade Practices Act dealing with unfair contract terms came into effect on 1 July 2010. This article looks at what the new provisions provide.

What the Act says about unfair terms

The Act states that a term of a consumer contract is void if:-

- (a) The term is unfair; and
- (b) The contract is a standard form contract.

What is a consumer contract?

A consumer contract is defined as a contract for:-

- (a) The supply of goods and services; or
- (b) A sale or grant of an interest in land

to an individual whose acquisition is wholly or predominantly for personal, domestic or household use.

When is a consumer contract term unfair?

A consumer contract term is unfair if:-

- (a) It would cause a significant imbalance in the parties' rights and obligations arising under the contract; and
- (b) It is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and
- (c) It would cause detriment (whether financial or otherwise) to a party if the term were to be applied or relied on.

In determining whether the term is unfair, a court may take into account the extent to which the term is transparent and the contract as a whole. A term will be regarded as transparent if it is expressed in reasonably plain language, is legible, presented clearly and readily available to the party affected by the term. The onus of proof in determining whether a term is reasonably necessary to protect the legitimate interests of the party lies with the party seeking to rely on the term

Examples of Unfair Terms

Without being an exhaustive list, the Act sets out examples of unfair terms. These include:-

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Level 28 Central Plaza One
345 Queen Street
Brisbane

Beenleigh

99 George Street
Beenleigh

Caboolture

9 Elliott Street
Corner Morayfield Road
Caboolture

Cleveland

141 Shore Street West
Cleveland

Gold Coast

64 Marine Parade
Southport

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- (a) A term that permits one party (but not the other party) to avoid or limit performance of the contract;
- (b) A term that permits one party (but not the other party) from terminating the contract;
- (c) A term that penalises one party (but not the other party) for a breach or termination of the contract;
- (d) A term that permits one party (but not another party) to vary the terms of the contract;
- (e) A term that permits one party (but not the other party) to renew or not renew the contract;
- (f) A term that permits one party unilaterally to vary the upfront price (effectively the purchase price) payable under the contract without the right of the other party to terminate the contract;
- (g) A term that permits one party to unilaterally vary the interest in land to be sold or granted under the contract;
- (h) A term that permits one party unilaterally to determine whether the contract has been breached or to interpret its meaning;

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What is a standard form contract?

The Act states that if a party to a proceeding alleges that a contract is a standard form contract then it is presumed to be a standard form contract unless another party to the proceedings proves otherwise. In determining whether a contract is a standard form contract, a court may take into account such matters as it thinks relevant but must take into account:-

- (a) Whether one of the parties has all or most of the bargaining power;
- (b) Whether the contract was prepared by one party before any discussion relating to the transaction occurred between the parties;
- (c) Whether another party was, in effect, required to either accept or reject the terms of the contract in the form that they were presented;
- (d) Whether another party was given an effective opportunity to negotiate the terms of the contract;
- (e) Whether the terms of the contract take into account the specific characteristics of another party or the particular transaction.
- (f) Any other matter prescribed by regulation (yet to be introduced).

What are the likely problems that the Act will cause?

As with any new legislation, it is only when issues are determined by the courts through litigation that some form of clarity will exist. In the meantime, developers need to be mindful of these provisions and review their sale contracts accordingly.

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