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*Antitrust,
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Unfair contract terms - ACCC moves to enforcement phase

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Overview

The Australian Competition and Consumer Commission's (ACCC) period of grace concerning the use of unfair contract terms in standard form consumer contracts is over. Following an industry review which prompted some businesses to remove or modify identified problematic terms, the ACCC is now moving to an enforcement phase.

The ACCC has recently completed a review of standard form consumer contracts used in a number of industries and has now published its report entitled "ACCC's Unfair Contract Terms – Industry Review Outcomes", which, in addition to the outcomes of the review, provides guidance to businesses on how the ACCC will view certain terms in standard form consumer contracts. The industries subject to the ACCC's review were:

- airlines
- telecommunications
- travel
- fitness
- vehicle rental
- online retail.

These industries were selected after consideration of a number of factors, such as the high level consumer complaints and potential for widespread consumer detriment.

The ACCC is understood to have received a good level of cooperation from businesses within these industries, many of which responded to the ACCC's concerns by removing or amending potentially unfair terms. However, the ACCC has reported that some businesses have not addressed problem terms and the ACCC will now consider taking further action to achieve compliance.

Unfair contract terms regime

The national unfair contract terms regime is found in the Australian Consumer Law in Schedule 2 of the *Competition and Consumer Act 2010* (Cth). The regime applies to standard form "consumer contracts" which are contracts for the supply of goods or services (or the sale or grant of interest in land) to a person who acquires it wholly or predominantly for personal, domestic or household use or consumption.

The regime does not apply to business to business contracts.

Since coming into effect in Australia on 1 July 2010, the regime provides that a term in a standard form consumer contract will be unfair where it:

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- causes a significant imbalance in the parties' rights and obligations
- is not reasonably necessary to protect the legitimate interests of the party advantaged by that term
- would cause detriment (whether financial or otherwise) if it was relied upon or applied.

In assessing fairness, a court will consider the contract as a whole, and the extent of transparency in the term (eg. whether it is expressed in plain language and legible). Terms found to be unfair are void and unenforceable.

Remedies are available where there is detriment or substantial likelihood of detriment to consumers or a class of consumers. The ACCC, Australian Securities and Investments Commission (where financial services contracts are concerned) and Australian state and territory regulators are responsible for enforcement.

ACCC's 8 key issues

During the industry review, the ACCC focused on eight key contractual terms, requiring businesses to remove or amend terms that:

- allow a business to change the contract without consent from a consumer
- cause confusion about the agency arrangement and that unfairly seek to absolve the agent from any liability
- unfairly restrict the consumer's right to terminate the contract
- suspend or terminate services being provided to the consumer under the contract
- make the consumer liable for things that would ordinarily be outside their control
- prevent the consumer from relying on representations made by the business or its agents
- seek to limit consumer guarantees
- seek to remove the consumer's rights to a credit card chargeback facility when buying the service through an agent.

The report sets out examples of unfair terms. It also provides guidance on the ACCC's concerns and how the unfair terms might be remedied or amended to the satisfaction of the regulator. The report also highlights areas where the ACCC will continue to pursue concerns where businesses have failed to respond positively.

Additional consumer protection matters

In the course of its unfair contract terms review, the ACCC also identified and sought amendments from businesses to address terms which:

- allow a business to use a customer's personal details for reasons greater than what is required for the supply of the service
- seek to limit the jurisdiction by which an online trading contract is governed
- seek to grant irrevocable, perpetual and royalty-free rights to an online trading business to use a consumer's correspondence/communications for any purpose
- need to be more transparent, in plain English and more accessible.

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The ACCC also invites businesses to consider reducing the length and complexity of standard form consumer contracts in order to improve transparency and accessibility.

ACCC's enforcement phase

The ACCC has foreshadowed enforcement action against those businesses that have not responded to its identified concerns during the review, and has singled out businesses operating in the vehicle rental industry. However, the ACCC has also warned that it is now entering an enforcement stage across the board.

Unfair terms review recommended

The ACCC encourages businesses to review the terms and conditions in standard form consumer contracts in light of the findings and make amendments where necessary to ensure compliance. Accordingly, we recommend that businesses across all industries (including those contracting with Australian consumers online) review their standard form consumer contracts to ensure:

- compliance with the unfair contract terms regime, and in particular, the eight key issues identified by the ACCC as the focus of future enforcement action
- contracts and terms are transparent and accessible
- terms do not mislead consumers or breach statutory consumer guarantees.

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