

THE AUSTRALIAN CONSUMER LAW

There have recently been significant reforms made to the *Trade Practices Act 1974* (TPA) that will have consequences for Australian businesses. These reforms create the *Australian Consumer Law* (ACL) as a schedule to the TPA, which will now be known as the *Competition and Consumer Act 2010* (CCA). The ACL is to replace all current consumer laws in the States and Territories, meaning there will be nation-wide, uniform consumer laws. The ACL will regulate provisions including misleading and deceptive conduct, unconscionable conduct, unfair contract terms and statutory consumer guarantees.

The ACL includes both general protections, aimed at creating 'standards of conduct' and specific protections that will ban or strictly regulate certain practices and conduct.

SPECIFIC PROTECTIONS

Statutory consumer guarantees

Under the TPA, consumer guarantees were only implied guarantees. However, the ACL introduces laws for statutory guarantees, that is, laws that specifically list consumers' rights when purchasing goods and services. There is a list of 13 protections for consumers that cover the supply of goods, particularly the merchantability of those goods, and the supply of services, including the supply of services with due skill. For the supply of goods, consumers are guaranteed as to:

- Title – the right of the supplier to sell the goods;
- Undisturbed possession – the goods are not pledged as security;
- Goods free from undisclosed securities;
- Acceptable quality – regulated by the 'reasonable consumer' test, that is, what a reasonable consumer would expect from the goods;
- Supply of goods by a sample or demonstration model – the goods purchased must correspond with the goods on display;
- Reasonably available repairs and spare parts; and
- Compliance by manufacturers with express warranties.

In relation to the supply of services, guarantees are given as to:

- Due care and skill;
- Fitness for a particular purpose;
- Reasonable time for supply; and
- Guarantees not to be excluded by contract.

These guarantees cover transactions for goods and services made in trade or commerce, but exclude the sale of goods and services between individuals.

GENERAL PROTECTIONS

Unfair contract terms

The ACL will contain new laws relating to 'unfair contract terms'. An unfair contract term is defined as one that would disadvantage one party to the contract, is not necessary to protect the other party and would cause a loss (whether that loss is financial or not) to one party.

This new law makes any such term in a 'standard-form contract' (a consumer contract for the supply of goods and services) void and unenforceable. The remainder of the contract will stay in force if it can operate without the 'unfair' term.

Any contract entered into before these provisions commence will not be covered, unless that contract is renewed or varied subsequent to the date of commencement. This term will apply to business to consumer contracts but not business to business contracts. It should be noted that the 'unfair contract terms' provisions come into effect on 1 July 2010, before the majority of the ACL.

Misleading and deceptive conduct and unconscionable conduct

Provisions in the ACL relating to misleading and deceptive conduct and unconscionable conduct are very similar to those contained in the TPA. There is a ban on engaging in misleading and deceptive conduct in trade or commerce and people are prohibited from participating in unconscionable conduct. There is a guide in the ACL of factors for a court to consider when determining if someone has engaged in unconscionable conduct. The ACL contains new penalties for any breaches relating to these terms as well as breaches of unfair contract terms and consumer guarantees.

PENALTIES

Greater enforcement powers are given to the Australian Securities and Investment Commission (**ASIC**) and the Australian Competition and Consumer Commission (**ACCC**) under the consumer law. ASIC and the ACCC may issue substantiation notices, on the condition that there is reasonable and certain proof of a breach. If there is no response to this notice, a public warning notice may be published. Infringement notices may only be issued by ASIC, although this is again regulated by certain conditions.

In addition, there are new pecuniary penalties and disqualification orders that can be made by the court. These penalties can be imposed for breaches of the unconscionable conduct provisions and product safety rules. The new law would also make it possible for a court to order compensation for consumers affected by contraventions of the ACL. The maximum penalties for contraventions of the ACL are \$1.1million for bodies corporate and \$220,000 for other persons.

WHAT DOES THIS MEAN FOR YOU?

These new laws will affect any business that sells goods and/or services. It is therefore essential for businesses to ensure that they have the necessary measures in place to avoid breaching the provisions of the ACL. The complete ACL will commence operating from 1 January 2011. However, the provisions relating to unfair contract terms came into force on 1 July 2010. All businesses should conduct a review of their standard form contracts and terms and conditions of trade to ensure compliance with these provisions and avoid contraventions and related penalties.

If you have any questions in relation to this bulletin please do not hesitate to contact any of the members of CG Law's litigation team.

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