

In the Loop

The Hicks Oakley Chessell Williams Newsletter

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Lawyers & Notary

New consumer laws - a unified regime

Small and large businesses alike should be vigilant in reviewing their contractual documents in the face of the single, national consumer law which was passed by parliament earlier this year. *The Trade Practices Amendment (Australian Consumer Law) Act 2010 (ACL Act)* will replace seventeen Commonwealth, state and territory laws and address unfair contract terms in consumer contracts, enhance powers of the Australian Competition and Consumer Commission (ACCC) and Australian Securities and Investments Commission (ASIC), and introduce stronger penalties for misconduct.

Unfair contract terms

The new regime for unfair terms in consumer contracts will commence operation on 1 July 2010. From that date, a term in a consumer contract entered into thereafter will be void when the term is deemed to be 'unfair' and the contract is in a 'standard form'. A consumer contract is one for the supply of goods or services or the sale or grant of an interest in land to a natural person whose purchase of the goods or services or interest in land is predominantly for personal, domestic or household use.

A contract will be presumed to be a 'standard form' contract unless the proponent of the document can rebut the presumption. To determine this issue, courts will consider factors including the balance of bargaining power between the parties, whether the document was prepared by one party before any discussion relating to the transaction occurred, or whether a party was given an effective opportunity to negotiate terms.

A particular term will be held to be 'unfair' if it:

- causes significant imbalance in the parties' rights and obligations;
- is not reasonably necessary to protect the legitimate interests of the party who would be advantaged; and
- causes detriment (whether financial or non-financial).

Free seminars - contact us 9550 4600 or enquiries@hocw.com.au

Next seminar: Essentials for Corporate Management, Thursday 22 July at 7.30–9.00 am

This free seminar will deal with:

- director's obligations
- employment issues
- risk management issues
- essential documentation

When determining this question, courts will also take into account the transparency of the particular term (whether it is clear, legible and expressed in sufficiently plain language) and the nature of the contract as a whole.

Examples in the ACL Act of what types of terms may be unfair include those which permit one party (to the exclusion of the other) to:

- avoid or limit performance of the contract;
- terminate the contract;
- vary the terms of the contract;
- renew or not renew the contract;
- unilaterally vary the characteristics of goods or services to be supplied, or the interest in the land to be sold or granted, under the contract;
- unilaterally determine whether the contract has been breached or to interpret its meaning.

Terms found to be unfair will be void, even though the relevant contract may continue if it is capable of operating without the unfair terms.

The unfair terms regime will apply on or after 1 July 2010....

Businesses should review all standard form contracts in use...

The unfair terms regime will apply on or after 1 July 2010 to all new consumer contracts entered into, and to the terms in contracts which are renewed or varied thereafter.

Businesses should review all standard form contracts in use to determine whether they might constitute a 'consumer contract' and whether any terms may be classified as 'unfair' under the new regime.

Michael Kontoudis
Lawyer

An extensive questionnaire will be handed out which includes a vital 'health' check on the condition of your organisation. On completion we will provide a free evaluation and prognosis.

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When a 'fling' can be very costly

Cardboard entrepreneur and business man, Richard Pratt, died last year leaving property and company assets worth an estimated five billion dollars.

Since then, two women to whom he was not married have made claims against his sizeable estate. It is also widely understood the late Richard Pratt's wife, Jeanne is both the executrix and the primary beneficiary of his estate. The claims are currently before courts in Victoria and New South Wales.

If Mr Pratt was still alive, could either woman have made claims against him upon the irretrievable break down of their relationships under the provisions of the *Family Law Act 1975 (Cth) (Act)*? This is a hypothetical question but it also goes to the heart of how courts characterize and establish the existence of de facto relationships. This is important as it is now estimated that about 28% of men and 23% of women will never marry.

The definition of de facto relationship under the Act includes same sex couples. It also holds that a de facto relationship can exist even if one of the persons of the relationship is legally married to someone else or in another de facto relationship. (i.e. monogamy or exclusivity is not a requisite for the existence of a de facto relationship.)

When a court considers if persons have had a relationship as a de facto couple it considers:

- the duration of the relationship;
- the extent and nature of their common residence;
- if a sexual relationship exists;
- the degree of financial interdependence or dependence between them and any arrangements for maintenance;
- the ownership, use and acquisition of their property;
- the degree of commitment to a shared life;
- whether the relationship was or is registered;

- the care and support of children;
- the reputation and public aspects of the relationship.

Interestingly, courts do not appear to prioritize the above factors when they determine whether or not a de facto relationship existed. Also it is not necessary for the above factors to be evidenced for a court to rule that a de facto relationship existed.

It is therefore plausible for a court to determine a de facto relationship existed between two persons even if they never lived under the same roof and/or their families had no idea about the existence of their relationship.

Amanda Rajah
Family Lawyer

Davies, L. "Where's the Rest of My Cash (Pratt mistress wants her missing rent money and travel expenses)" [The Herald Sun](#) 2 June 2010 p.3

Wade, J.H [Australian De Facto Relationships Law](#) CCH Australia Limited at 2-600 (p.2,701)

...monogamy or exclusivity is not a requisite for the existence of a de facto relationship

Sssshhhh! Can you keep a secret?

A non disclosure agreement (NDA), or confidentiality agreement, is a legal contract in which the parties undertake to keep certain information strictly confidential.

"Confidential information" has been defined (in *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41) to be "facts or knowledge that are not in the public domain", e.g.

- technical designs or drawings
- trade secrets – e.g. computer code; chemical and mathematical formulae
- customer lists
- business plans
- marketing strategies

Use

Typically, an NDA will be used when you wish to disclose confidential information for a particular purpose, but want to ensure that the recipient does not then disclose that information to a third party.

For example, if you have an unpatented invention, you may want to show the details to potential investors to obtain funding. It would be essential that whoever sees the details sign an NDA to prevent them from disclosing information about the invention to others.

Forms

NDAs can be single or mutual agreements:

- a single NDA is where the information flows one way and only one of the parties is restricted in its use of the confidential information exchanged;
- a mutual NDA is where both parties exchange confidential information (and are both restricted in the use of that information).

Whether the NDA is single or mutual, it is important to include clauses whereby:

- the duration of the agreement is clearly provided for;
- the recipient is required to return all documentation on completion of the NDA;
- the recipient acknowledges they have no prior knowledge of the subject matter of the confidential information.

Enforcement by courts

Many of the difficulties of protecting your confidential information are overcome by using NDAs – you need only prove that the information disclosed was considered confidential under the terms of the NDA rather than proving the equitable principle of 'Breach of Confidence'.

The drafting of your NDA therefore becomes very important. A balance must be struck between:

- having the terms of the NDA specific enough (to obtain maximum protection); and
- ensuring obligations aren't overly onerous (to avoid them being struck down by the court for being either "harsh and oppressive" or "restraints on trade").

Observation

It is important to take note of how the proposed recipient of the confidential information responds when they are asked to sign an NDA. If they are reluctant, caution should be taken as this conduct indicates that it is unlikely that they can be trusted to honour the agreement.

David Levesque
Trainee Lawyer

