

## FAIR CALL ON UNFAIR CONTRACT TERMS

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If your business uses standard form consumer contracts when supplying goods or services to consumers, then you should double check that you have complied with the unfair contract provisions of the Australian Consumer Law or as we saw recently in the ByteCard case, you risk action from the Australian Competition and Consumer Commission (ACCC).

### What are the unfair contract laws?

Firstly, let us recap. The unfair contract provisions came into force on 1 July 2010 and apply to standard form consumer contracts – that is, those contracts which are prepared by a business for a consumer and are not negotiated individually with the consumer, but provided on a "take it or leave it" basis. Such contracts are common for mobile or Internet service providers, car hire companies and gyms.

The Australian Consumer Law states that a term in a standard form consumer contract is considered "unfair" if:

- (i) it would cause a significant imbalance in the parties' rights and obligations under the contract;
- (ii) it is not reasonably necessary to protect the legitimate interests of the party who gets the advantage of the term (i.e. generally the business); and
- (iii) it would cause detriment, whether financial or otherwise, to a party (i.e. generally the consumer) if it were to be relied on.

A court will also take into account the extent to which a term is transparent – that is whether it expressed in plain language and is legible and easy to locate, as well as the context of the contract as a whole, in determining whether a term is unfair.

### The first case on unfair contract terms

In July 2013 the Federal Court found that ByteCard Pty Ltd (**ByteCard**), an Internet Service Provider, had breached the unfair contract terms provisions of the Australian Consumer Law. We had been waiting for some time for this decision, as this was the first time proceedings were instituted in the Court by the ACCC based solely on these unfair contract term provisions.

ByteCard trades under the name NetSpeed Internet Communications and provides services including internet connectivity, domain registration, hosting, telephone services and webpage design. It used a standard form consumer contract to sign consumers up to its services.

In amongst ByteCard's standard contract were terms that:

- allowed ByteCard to unilaterally vary (e.g. increase) the price without giving the consumer the right to terminate the contract;
- required the consumer to broadly indemnify ByteCard for loss or damage in circumstances where the consumer i) had not breached the contract and ii) where the loss or damage may have been caused by ByteCard; and
- allowed ByteCard to unilaterally terminate the contract at any time without cause or reason.

The Federal Court considered that all of the above terms were unfair, and therefore void. ByteCard was ordered to pay a portion of the ACCC's legal costs.

### **What this means for you?**

These proceedings signal that unfair contract terms in standard form consumer contracts are becoming more of a focus of the ACCC's enforcement agenda and is a timely reminder for businesses to check that their standard form consumer contracts comply with the Australian Consumer Law.

The consequence of including an unfair contract term in a standard form consumer contract is that a Court can declare that term to be void, which means it will be treated as having no force or effect in any of the contracts in which it appears. The Court may also make a costs order against the respondent (as in the ByteCard matter) which can add up quite significantly.

### **Contact us**

If your business uses standard form contracts to supply goods or services to consumers, make sure that they comply with the ACL. If you would like further information on these laws and how they impact on you, please contact any of our experts below. We can provide tailored legal and practical advice to assist you with reviewing your standard form consumer contracts.

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