

First print



New South Wales

Fair Trading Amendment (Unfair Contract Terms) Bill 2010

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

Overview of Bill

The *Trade Practices Amendment (Australian Consumer Law) Act (No. 1) 2010* of the Commonwealth (along with the *Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010* currently before the Commonwealth Parliament) will insert a Schedule 2 to the *Trade Practices Act 1974* of the Commonwealth setting out the provisions of the new Australian Consumer Law agreed to by the Council of Australian Governments.

The objects of this Bill are:

- (a) to amend the *Fair Trading Act 1987* to enact provisions concerning unfair contract terms that will eventually form part of the new Australian Consumer Law when it commences, and
- (b) to make consequential amendments to the *Contracts Review Act 1980*.

Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

Schedule 1 Amendment of Fair Trading Act 1987 No 68

Unfair contract term provisions from Australian Consumer Law

Schedule 1 [1] inserts proposed Part 5G in the *Fair Trading Act 1987* containing provisions drawn from the new Australian Consumer Law relating to unfair terms in consumer contracts that are standard form contracts. A *consumer contract* is a contract for the supply of goods or services (or for a sale or grant of an interest in land in trade or commerce) to an individual whose acquisition of the goods, services or interest is wholly or predominantly for personal, domestic or household use or consumption.

The proposed Part contains the following provisions:

- (a) Proposed section 60ZC defines certain terms that are used in the proposed Part.
- (b) Proposed section 60ZD provides that an unfair term in a consumer contract that is a standard form contract is void, although the contract continues to bind the parties if it is capable of operating without the unfair term. If a contract claim in relation to a consumer contract containing such an unfair term is brought before a court or tribunal (such as the Consumer, Trader and Tenancy Tribunal) having jurisdiction to deal with the claim, the court or tribunal will be required to treat the term as being void.
- (c) Proposed section 60ZE provides that a term is unfair if:
 - (i) it would cause a significant imbalance in the parties' rights and obligations arising under the contract, and
 - (ii) it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term, and
 - (iii) it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.
- (d) Proposed section 60ZF gives examples of terms that may be unfair.
- (e) Proposed section 60ZG makes it clear that a term is not to be treated as being unfair to the extent that it defines the main subject matter of the contract, sets an upfront price payable under the contract or is a term required by a Commonwealth, State or Territory law.
- (f) Proposed section 60ZH provides that if a party to proceedings alleges that a contract is a standard form contract, it is to be presumed to be such a contract unless another party to the proceedings proves otherwise. The proposed section also sets out factors that a court or tribunal must take into account in determining whether a contract is a standard form contract.
- (g) Proposed section 60ZI provides for the proposed Part not to apply to certain kinds of marine contracts or to the constitutions of companies, managed investment schemes and other bodies.

Enforcement and remedies in relation to unfair contract terms

Schedule 1 [4] inserts proposed section 64B in the *Fair Trading Act 1987* to enable the Director-General or, with leave, a party to a consumer contract that is a standard form contract to apply to the Supreme Court for a declaration that a term in contracts of that kind is unfair.

Schedule 1 [3] amends section 62 of the *Fair Trading Act 1987* to make it clear that a contravention of proposed Part 5G does not constitute an offence. **Schedule 1 [2]** amends section 61 of the Act to make it clear a reference in Part 6 of the Act (in which sections 61 and 62 are located) to a contravention of proposed Part 5G is read as a reference to a party to a consumer contract applying or relying on a term of the contract that has been declared to be unfair by the Supreme Court in an application made under proposed section 64B.

Schedule 1 [5]–[13] amend Part 6 (Enforcement and remedies) of the *Fair Trading Act 1987* to enable the Director-General and certain other persons to obtain certain other remedies in the event that a party to a consumer contract seeks to apply or rely on a term of the contract that has been declared to be unfair by the Supreme Court in an application made under proposed section 64B.

Schedule 1 [14] amends section 86A of the *Fair Trading Act 1987* to make it clear that the Minister or the Director-General may issue public warnings under that section in relation to business practices involving the use of terms in consumer contracts that are standard form contracts that are or may be unfair.

Schedule 1 [15] makes an amendment to section 89 of the *Fair Trading Act 1987* that is consequential on the amendments made to the *Contracts Review Act 1980* by Schedule 2.

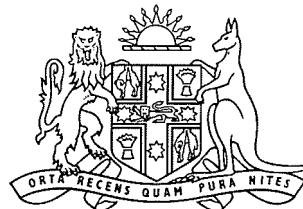
Savings and transitional provisions

Schedule 1 [16] amends Schedule 5 to the *Fair Trading Act 1987* to insert provisions of a savings or transitional nature consequent on the enactment of the proposed Act.

Schedule 1 [17] amends clause 12 of Schedule 5 to the *Fair Trading Act 1987* to enable the Governor to make regulations of a savings or transitional nature consequent on the enactment of the proposed Act.

Schedule 2 Consequential amendment of Contracts Review Act 1980 No 16

Schedule 2 amends the *Contracts Review Act 1980* to make it clear that the provisions of that Act are not limited or restricted by, and do not limit or restrict the operation of, the provisions of proposed Part 5G of the *Fair Trading Act 1987* (as inserted by Schedule 1 [1]).



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New South Wales

Fair Trading Amendment (Unfair Contract Terms) Bill 2010

No , 2010

A Bill for

An Act to amend the *Fair Trading Act 1987* with respect to unfair terms in standard form consumer contracts; and to make consequential amendments to the *Contracts Review Act 1980*.

The Legislature of New South Wales enacts:

1 Name of Act

This Act is the *Fair Trading Amendment (Unfair Contract Terms) Act 2010*.

2 Commencement

This Act commences on a day or days to be appointed by proclamation.

**Schedule 1 Amendment of Fair Trading Act 1987
No 68**

[1] Part 5G

Insert after Part 5F:

Part 5G Unfair contract terms

Note. The provisions of this Part are not limited or restricted by, and do not limit or restrict the operation of, the provisions of the *Contracts Review Act 1980*. See section 22 of the *Contracts Review Act 1980* and section 89 of this Act.

60ZC Definitions

In this Part:

constitution has the meaning given by the *Corporations Act 2001* of the Commonwealth.

consumer contract—see section 60ZD (3).

rely on, in relation to a term of a consumer contract, includes the following:

(a) attempt to enforce the term,

(b) attempt to exercise a right conferred, or purportedly conferred, by the term,

(c) assert the existence of a right conferred, or purportedly conferred, by the term.

ship has the meaning given by the *Admiralty Act 1988* of the Commonwealth.

transparent in relation to a term of a consumer contract—see section 60ZE (3).

unfair in relation to a term of a consumer contract—see section 60ZE (1).

upfront price—see section 60ZG (2).

60ZD Unfair terms of consumer contracts

(1) A term of a consumer contract is void if:

(a) the term is unfair, and

(b) the contract is a standard form contract.

(2) The contract continues to bind the parties if it is capable of operating without the unfair term.

(3) A **consumer contract** is a contract for:

(a) a supply of goods or services, or

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Schedule 1 Amendment of Fair Trading Act 1987 No 68

- (b) a sale or grant of an interest in land,
to an individual whose acquisition of the goods, services or
interest is wholly or predominantly for personal, domestic or
household use or consumption.
- (4) A reference in subsection (3) (b) to the sale or grant of an interest
in land is a reference to the sale or grant of an interest in land in
trade or commerce.

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60ZE Meaning of unfair

- (1) A term of a consumer contract 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 it were to be applied or relied on.
- (2) In determining whether a term of a consumer contract is unfair
under subsection (1), a court or tribunal may take into account
such matters as it thinks relevant, but must take into account the
following:
- (a) the extent to which the term is transparent,
- (b) the contract as a whole.
- (3) A term is *transparent* if the term is:
- (a) expressed in reasonably plain language, and
- (b) legible, and
- (c) presented clearly, and
- (d) readily available to any party affected by the term.
- (4) For the purposes of subsection (1) (b), a term of a consumer
contract is presumed not to be reasonably necessary in order to
protect the legitimate interests of the party who would be
advantaged by the term, unless that party proves otherwise.

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60ZF Examples of unfair terms

- (1) Without limiting section 60ZE, the following are examples of the
kinds of terms of a consumer contract that may be unfair:
- (a) a term that permits, or has the effect of permitting,
one party (but not another party) to avoid or limit
performance of the contract,

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(b)	a term that permits, or has the effect of permitting, one party (but not another party) to terminate the contract,	1 2
(c)	a term that penalises, or has the effect of penalising, one party (but not another party) for a breach or termination of the contract,	3 4 5
(d)	a term that permits, or has the effect of permitting, one party (but not another party) to vary the terms of the contract,	6 7 8
(e)	a term that permits, or has the effect of permitting, one party (but not another party) to renew or not renew the contract,	9 10 11
(f)	a term that permits, or has the effect of permitting, one party to vary the upfront price payable under the contract without the right of another party to terminate the contract,	12 13 14 15
(g)	a term that permits, or has the effect of permitting, one party unilaterally to vary the characteristics of the goods or services to be supplied, or the interest in land to be sold or granted, under the contract,	16 17 18 19
(h)	a term that permits, or has the effect of permitting, one party unilaterally to determine whether the contract has been breached or to interpret its meaning,	20 21 22
(i)	a term that limits, or has the effect of limiting, one party's vicarious liability for its agents,	23 24
(j)	a term that permits, or has the effect of permitting, one party to assign the contract to the detriment of another party without that other party's consent,	25 26 27
(k)	a term that limits, or has the effect of limiting, one party's right to sue another party,	28 29
(l)	a term that limits, or has the effect of limiting, the evidence one party can adduce in proceedings relating to the contract,	30 31 32
(m)	a term that imposes, or has the effect of imposing, the evidential burden on one party in proceedings relating to the contract,	33 34 35
(n)	a term of a kind, or a term that has an effect of a kind, prescribed by the regulations.	36 37

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Schedule 1 Amendment of Fair Trading Act 1987 No 68

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- (2) Before recommending the making of a regulation for the purposes of subsection (1) (n) prescribing a kind of term, or a kind of effect that a term has, the Minister must take into consideration:
- (a) the detriment that a term of that kind would cause to consumers, and
 - (b) the impact on business generally of prescribing that kind of term or effect, and
 - (c) the public interest.

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60ZG Terms that define main subject matter of consumer contracts etc are unaffected

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- (1) Section 60ZD does not apply to a term of a consumer contract to the extent that, but only to the extent that, the term:
- (a) defines the main subject matter of the contract, or
 - (b) sets the upfront price payable under the contract, or
 - (c) is a term required, or expressly permitted, by a law of the Commonwealth or a State or Territory.
- (2) The *upfront price* payable under a consumer contract is the consideration that:
- (a) is provided, or is to be provided, for the supply, sale or grant under the contract, and
 - (b) is disclosed at or before the time the contract is entered into,
- but does not include any other consideration that is contingent on the occurrence or non-occurrence of a particular event.

60ZH Standard form contracts

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- (1) If a party to a proceeding alleges that a contract is a standard form contract, it is presumed to be a standard form contract unless another party to the proceeding proves otherwise.
- (2) In determining whether a contract is a standard form contract, a court or tribunal may take into account such matters as it thinks relevant, but must take into account the following:
- (a) whether one of the parties has all or most of the bargaining power relating to the transaction,
 - (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 either to accept or reject the terms of the contract (other than the terms referred to in section 60ZG (1)) in the form in which they were presented,	1 2 3 4
(d)	whether another party was given an effective opportunity to negotiate the terms of the contract that were not the terms referred to in section 60ZG (1),	5 6 7
(e)	whether the terms of the contract (other than the terms referred to in section 60ZG (1)) take into account the specific characteristics of another party or the particular transaction,	8 9 10 11
(f)	any other matter prescribed by the regulations.	12
60ZI	Contracts to which this Part does not apply	13
(1)	This Part does not apply to:	14
(a)	a contract of marine salvage or towage, or	15
(b)	a charterparty of a ship, or	16
(c)	a contract for the carriage of goods by ship.	17
(2)	Without limiting subsection (1) (c), the reference in that paragraph to a contract for the carriage of goods by ship includes a reference to any contract covered by a sea carriage document within the meaning of the amended Hague Rules referred to in section 7 (1) of the <i>Carriage of Goods by Sea Act 1991</i> of the Commonwealth.	18 19 20 21 22 23
(3)	This Part does not apply to a contract that is the constitution of a company, managed investment scheme or other kind of body.	24 25
[2]	Section 61 Interpretation	26
Insert at the end of the section:		27
(2)	A reference in this Part to a contravention of Part 5G (or a provision of that Part) is a reference to applying or relying on, or purporting to apply or rely on, a term of a consumer contract that the Supreme Court has declared under section 64B to be an unfair term.	28 29 30 31 32
(3)	In this section: <i>consumer contract</i> has the same meaning as it has in Part 5G. <i>rely on</i> , in relation to a consumer contract, has the same meaning as it has in Part 5G.	33 34 35 36

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Schedule 1 Amendment of Fair Trading Act 1987 No 68

[3] Section 62 Offences against this Act	1
Insert “or Part 5G” after “60Y” in section 62 (1).	2
[4] Section 64B	3
Insert after section 64A:	4
64B Declarations by Supreme Court concerning unfair contract terms	5
(1) The Supreme Court may, on an application made under subsection (2), declare that a term of a consumer contract that is a standard form contract is unfair.	6
(2) An application for a declaration may be made only by the Director-General or, with the leave of the Supreme Court, by a party to a consumer contract that is a standard form contract.	9
<i>Note.</i> Section 86 enables the Minister to intervene in proceedings brought before the Supreme Court under this Act.	10
(3) A declaration made under this section that a particular term of a consumer contract that is a standard form contract is unfair binds all parties to consumer contracts of that kind, unless the Supreme Court orders otherwise.	14
(4) This section does not:	15
(a) limit any other power of the Supreme Court to make declarations, or	16
(b) prevent a party to a consumer contract that is a standard form contract from bringing proceedings in a court or tribunal of competent jurisdiction for relief in respect of a term of a consumer contract that is void because it is unfair.	17
<i>Note</i> Section 60ZD provides that an unfair term in a consumer contract that is a standard form contract is void, although the contract continues to bind the parties if it is capable of operating without the unfair term. If a contract claim in relation to a consumer contract containing such an unfair term is brought before a court or tribunal (such as the Consumer, Trader and Tenancy Tribunal) having jurisdiction to deal with the claim, the court or tribunal will be required to treat the term as being void.	26
(5) Words and expressions used in this section that are defined for the purposes of Part 5G have the same meanings as they have in that Part.	33
[5] Section 65 Injunctions	36
Insert “, 5G” after “5F” in section 65 (1) (a).	37

[6] Section 66 Other injunctions	1
Insert “, 5G” after “5F” in section 66 (1) (a) (i).	2
[7] Section 66A Show cause action may be taken by Director-General	3
Insert “other than Part 5G” after “this Act” in the definition of <i>unlawful conduct</i> in section 66A (1).	4
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[8] Section 67 Order to disclose information or publish advertisement	6
Insert “, 5G” after “5F”.	7
[9] Section 68 Actions for damages	8
Omit “or 5F” from section 68 (1). Insert instead “, 5F or 5G”.	9
[10] Section 69 Finding in proceedings to be evidence	10
Omit “or 5F”. Insert instead “, 5F or 5G”.	11
[11] Section 72 Other orders	12
Insert “, 5G” after “5F” where secondly occurring in section 72 (1).	13
[12] Section 72 (2) and (3)	14
Insert “, 5G” after “5F” wherever occurring.	15
[13] Section 72 (4)	16
Insert “, 5G” after “5F” where secondly occurring.	17
[14] Section 86A Public warning statements	18
Insert “(including the use of terms that are or may be unfair in consumer contracts that are standard form contracts within the meaning of Part 5G)” after “business practices” in section 86A (1) (c).	19
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[15] Section 89 Saving of rights and remedies	22
Insert at the end of section 89 (1):	23
Note. See also section 22 of the <i>Contracts Review Act 1980</i> .	24

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[16] Schedule 5 Savings and transitional provisions	1
Insert after clause 11H:	2
11I Fair Trading Amendment (Unfair Contract Terms) Act 2010	3
(1) Part 5G (as inserted by the <i>Fair Trading Amendment (Unfair Contract Terms) Act 2010</i>) applies to a contract entered into on or after the day on which that Part commences (<i>the commencement day</i>).	4 5 6 7
(2) Except as provided by subclauses (3)–(5), Part 5G does not apply to a contract entered into before the commencement day.	8 9
(3) If a contract is renewed on or after the commencement day, Part 5G applies to the contract as renewed, on and from the day (<i>the renewal day</i>) on which the renewal takes effect, in relation to conduct that occurs on or after the renewal day.	10 11 12 13
(4) If a term of the contract is varied on or after the commencement day and subclause (3) has not already applied in relation to the contract, Part 5G applies to the term as varied, on and from the day (<i>the variation day</i>) on which the variation takes effect, in relation to conduct that occurs on or after the variation day.	14 15 16 17 18
(5) If subclause (4) applies to a term of a contract, sections 60ZD (2) and 60ZH (as inserted by the <i>Fair Trading Amendment (Unfair Contract Terms) Act 2010</i>) apply to the contract.	19 20 21
[17] Schedule 5, clause 12	22
Insert at the end of clause 12 (1):	23
<i>Fair Trading Amendment (Unfair Contract Terms) Act 2010</i>	24

**Schedule 2 Consequential amendment of Contracts
Review Act 1980 No 16**

[1] Section 4 Definitions

Insert after section 4 (2):

(3) Notes included in this Act do not form part of this Act.

[2] Section 22 Operation of other laws

Insert “or unfair contract terms” after “unjust contracts”.

[3] Section 22, note

Insert at the end of section 22:

Note. Part 5G of the *Fair Trading Act 1987* makes provision in relation
to unfair contract terms.

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