



THE LAW SOCIETY  
OF NEW SOUTH WALES

Our Ref: MM:LJB:Property Law 2010  
Direct Line: 9926 0202

12 April 2010

Guide to Unfair Contract Terms  
Consumer Strategies  
Australian Competition and Consumer Commission  
GPO Box 520  
Melbourne VIC 3001

Dear Sir / Madam,

***Australian Consumer Law – A guide to unfair contract terms***

The Law Society appreciates the opportunity to comment on the draft publication *Australian Consumer Law – a guide to unfair contract terms*.

The Society, through its Property Law Committee (Committee) has monitored the development of the provisions governing unfair contract terms (UCT) with interest, particularly as those provisions relate to the “standard form” contracts currently used in a number of real property transactions in New South Wales.

The Guide is welcome and will be an important aid in enhancing understanding the obligations of business under this significant new law.

**ACCC Questions**

The Committee comments on the specific questions set out by the ACCC as follows:

**1. Does the guide clearly outline the obligations on business arising from the new laws?**

Generally, the Guide clearly outlines the obligations on business arising under the new law.

**2. What types of information would better assist stakeholders to understand the new laws?**

One area where the Committee considers the Guide could be expanded is in explaining the potential operation of the ACL where the supplier is not a corporation. The ACL is expressed as applying “as a law of the Commonwealth to the conduct of corporations” (section 130 *Trade Practices Act*). It may be of benefit to mention the extended operation of the Act (for example, sections 5 and 6) and the likelihood of future state and territory mirror legislation.

**3. What if any additional information would better assist stakeholders to understand the new laws?**

See the answer to 2 above.

**General comments**

The Committee makes the further observations below.

**When do the unfair contract terms provisions take effect (p4)?**

If a commencement date for the Act has not been gazetted by the time the Guide is published some more detail about how the commencement date is determined would be useful.

If the commencement date has been gazetted the paragraph can be updated to reflect this.

**Footnote 3 (p5)**

The Bill passed on 17 March 2010 now has the short title of *Trade Practices Amendment (Australian Consumer Law) Act (No 1) 2010*. References throughout the Guide will need to be updated.

The Committee notes that references to sections throughout the Guide to provisions of the ACL could potentially cause some confusion. In the Act passed on 17 March, the ACL is contained within Schedule 1 to the amendment Act, and will be located within Schedule 2 of the principal Act. There may be further confusion upon the enactment of the *Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010* which if passed as introduced will renumber the provisions of the ACL regulating unfair contracts. The Committee wonders whether there would be benefit in including within the Guide:

- An explanation of the numbering and renumbering of provisions perhaps under the heading "About the guide"; and
- A comparative table setting out the clauses of the ACL as numbered in the 2010 Act, and the renumbering in the No 2 Bill.

The footnoting method of referring to section *n* of the ACL (e.g. footnote 12) seems to the Committee to be the plainest.

The specific footnote should, in the Committee's view, refer to s 3(2) of the ACL.

**Footnotes 5 and 6 (p6)**

The date should be 2010 rather than 2009. The same comment applies to footnote 20.

**Terms that define the 'main subject matter' of a contract (p7)**

*First paragraph last sentence:*

It would be helpful to include an example of a "term necessary to give effect to the supply or grant, or without which, the supply or grant could not occur".



**Terms that are 'required or permitted' by a law (p8)**

*Third paragraph first sentence:*

The Committee believes this would benefit from a specific example. One that occurred to the Committee is that in New South Wales (and, it is understood, in other jurisdictions), many terms of a residential tenancy agreement are prescribed terms, and those terms would not be affected by the provisions of the ACL (it could be emphasised that additional terms which are not prescribed terms could be affected by the ACL).

**Footnote 19 (p17)**

The phrase (Civil Claims) should appear in the body text not the footnote as per for example, footnote 15.

**What is the difference ... consumer in the TPA (p26)?**

This section would, the Committee believes, benefit from an example. One that occurs to the Committee is the status of a non-corporate purchaser of real estate who is buying residential property not to occupy but as an investment. Such a person would clearly be a "consumer" within the meaning of section 4B. Is the purchaser a "consumer" for the purposes of the unfair contracts term provisions of the ACL?

**Conclusion**

The Committee appreciates that many of these matters may require further discussion and would welcome the opportunity to provide further input.

Once again, thank you for the opportunity to provide these comments.

Yours faithfully,

  
Mary Macken  
**President**