

Horizons

Harris Wheeler Newsletter

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Newsletter

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Proposed new Unfair Consumer Contracts Law



By Matthew Smith

It has been announced by the Federal Government that the Trade Practices Amendment (Australian Consumer Law) Bill 2009 (**the Bill**) has a proposed commencement date of 1 January 2010. This new consumer protection law will apply to contracts entered into, renewed or varied on or after 1 January 2010.

The draft legislation aims to provide protection to consumers against unfair contracts. The Bill proposes to make **terms of standard form consumer contracts void (e.g. unenforceable) where the term is unfair**. Consumer contracts are contracts for the supply of goods or services, or the sale or grant of interests in land, to individuals for wholly or predominantly personal, domestic or household use or consumption. This includes contracts that Australian consumers enter into with overseas suppliers.

What is a Standard Form Contract?

Standard form contracts are provided by one party to the transaction in a pre-prepared format. There is usually little opportunity for the consumer to negotiate changes to the wording of the contract.

There is no single definition of 'standard form contract' in the Bill. Thus the Bill provides the courts with scope to determine whether or not a particular consumer contract is to be deemed "standard form". Importantly, the Bill provides that where a contract is alleged by a consumer to be standard form, it is up to the supplier to prove otherwise.

When is a term of a Consumer Contract unfair?

Unfair terms of a contract are those which cause a significant imbalance in the rights of the parties under the contract, and are not reasonably necessary to protect the interests of the party who would be advantaged by them. It is up to the party that is advantaged by such terms, usually the supplier, to show that the term is reasonably necessary to protect their interests.

In deeming a term of a consumer contract as void, the courts have broad scope to consider anything that they regard as relevant to the particular case. However, the courts must, at a minimum, take into consideration:

- the extent to which the term would, or is substantially likely to, cause detriment to the consumer if it were to be applied or relied on;
- the extent to which the term is expressed in plain language; clearly presented and available

- to any party affected by the term; and
- the contract as a whole.

How will this affect you and your business?

Suppliers who include unfair or prohibited terms into consumer contracts on or after commencement of the new legislation will be subjected to civil penalties and damages.

The Australian Competition and Consumer Commission will be given the power to enforce the new provisions against contracts for the supply of goods and services (excluding financial services). The Australian Securities and Investments Commission will enforce the new provisions with respect to contracts for financial services.

Upon commencement of the new legislation, suppliers of goods and services to individuals will need to ensure that the terms of their consumer contracts do not include unfair unilateral provisions.

Some examples of these include:

- giving the supplier the sole right to determine breach or to terminate;
- limiting the consumer's right to sue in circumstances where similar limitations do not apply to the supplier;
- allowing the supplier to vary the terms of the agreement including the upfront price without the consumer's consent; and
- excluding liability for harm resulting from the supplier or its agents.

It is imperative that clients potentially caught by the proposed new laws do the following well before **1 January 2010**:

- seek advice as to whether the new laws will apply to their business and if so, in what circumstances;
- if caught by the new laws, clients should undertake a legal review of their current standard form contracts to determine if any of the terms will breach the new laws once they come into effect;
- based on the above legal review, the standard form contracts should be amended to remove or modify any offending clauses, and alternative strategies put in place to protect the supplier from the legal risks previously covered by those parts of the standard form contract which have been removed.

For further information or assistance regarding the proposed new law, please do not hesitate to contact Matthew Smith on 4907 6319, Katrina Reye on 4907 6318 or Kate Hamer on 4907 6306.

Note: This is a summary of an article that appears on our website. The full article can be viewed at www.harriswheeler.com.au.

What Our Clients Say...

Here's what some of our Clients have had to say about our staff.

For Micah Jenkins

Senior Associate
Insurance Law

A sincere thankyou for your kind help and support over the past two years. Your professional assistance and advice was instrumental in securing a successful outcome, bringing to close what was a very difficult time for me and my family.

For Samantha Ellis

Solicitor
Commercial Litigation

Thankyou for all your assistance. We were extremely impressed by how quickly you responded to this matter & kept us up to date throughout the process.

For Skye Morrison

Solicitor
Property Law

Thank you so much for all your help with buying our first home. You made the whole process so easy and stress free. We were very impressed with your knowledge and advice and would not hesitate to use your services again.

Are you a first home buyer, wanting to purchase a property with someone else?

By Skye Morrison

Can I purchase a property with someone who has already owned property in Australia and still receive the grant?

If your co-purchaser owned a property before 1 July 2000, you will be ineligible for the grant. If your co-purchaser owned a property after 1 July 2000 and they did not live in it for over six months, you may be eligible for the grant.

NOTE: This applies to spouses and partners, even if the property is not purchased in their name. If your spouse or partner has owned a property before 1 July 2000, you will be ineligible for the grant but if they owned a property after 1 July 2000 and did not live in it for over six months, you may be eligible for the grant

If I purchase a property with another First Home Owner, do we each receive a grant?

No, you will only be eligible for one grant between the two of you.

If I purchase a property with someone who is not my spouse or partner, but has already owned a property in Australia, am I eligible for an exemption from stamp duty, although I may not be eligible for the grant?

Yes. If you are purchasing at least a 50% share of the property, you are eligible for an exemption from duty for your share. For example, if you bought a 70% share of a property and the other 30% was bought by someone who had already owned property in Australia, you would get the

exemption from duty on your share, subject to the usual monetary limits.

For more information on how to maximise your First Home Owner Benefits call Skye Morrison, Danusia Emeljanow on 4907 6300 or Geoff Zietsch on 4935 8600.

The Federal Government's First Home Owners Boost is coming to an end!



By Skye Morrison

To maximise the grant that you receive, you must enter into a contract to purchase residential property before 30 September 2009. This will mean that you are eligible for the full \$14,000 grant (on existing homes) or \$21,000 grant (on new homes).

If you enter into a contract after 30 September 2009 but before 31 December 2009 you will only receive half of the First Home Owners Boost. This will mean that you are eligible for a \$10,500 grant (on existing homes) or a \$14,000 grant (on new homes).

Note: If you are purchasing a new home before 30 June 2010, you may also be eligible for the extra \$3,000 NSW New Home Buyers Supplement.

Small Business and General Business Tax Break – a further boost for Small Businesses



By Katrina Reye

Since the introduction of a temporary additional tax break for small and general business earlier this year, the Treasurer has since announced a further boost for small businesses.

The tax break now provides small businesses with a 50 percent (up from 30 percent) bonus deduction on all eligible assets costing \$1,000 plus GST or more where the asset is acquired between 13 December 2008 to 31 December 2009 (previously only available where the asset was acquired pre 30 June 2009). In order to claim this deduction the relevant assets must be in place and ready for use before 30 June 2010. For the purposes of this expanded tax break, small businesses are those with an annual turnover of less than \$2 million.

If you are a general business and have acquired eligible assets costing \$10,000 or more between

13 December 2008 and 30 June 2009, you may still be able to claim the 30 percent bonus deduction so long as they are installed and ready for use by 31 December 2010.

General businesses acquiring eligible assets after 30 June 2009 and before 31 December 2009 can claim a deduction at the reduced rate of 10 percent where the eligible asset is in place before 31 December 2010.

All businesses can demonstrate that they have acquired eligible assets by demonstrating that they committed to investing in an eligible asset by either entering into a contract to hold that asset or commencing construction of that asset. An eligible asset should be one that is used for the carrying on of a business principally within Australia.

To find out what assets are deductible under this temporary tax break and whether or not your business qualifies for the tax break please contact Katrina Reye on 4907 6318.

Changes to the Federal Industrial Relations System



By Emilia Pirillo

The Fair Work Act 2009 came into effect on 1 July 2009. This legislation introduces significant important changes to the Federal Industrial Relations system. Changes have been made with new Unfair Dismissal laws and the introduction of the National Employment Standards.

Unfair Dismissal

From 1 July 2009, Fair Work Australia will be the body that deal with unfair dismissal claims. As part of the new legislative changes, the definition of a 'small business' has changed and the exemption of small businesses from unfair dismissal claims has been removed. A small business is now defined as a workplace with less than 15 full time equivalent employees. Full time equivalent employees include employees who are permanent part time and casuals who work regular and consistent hours. Small business must also familiarise themselves with the Small Business Fair Dismissal Code which must be followed when dismissing employees.

Under the new laws a dismissal will be unfair if it was harsh, unjust or unreasonable, not a genuine redundancy and not consistent with the Small Business Fair Dismissal Code. An employee must be employed for a minimum of 12 months, if employed by a Small Business, or a minimum of 6 months before they are eligible to bring a claim for unfair dismissal. Employers can no longer defend dismissals for "operational reasons". However; an employer can defend a claim for unfair dismissal if it was a genuine redundancy. The new laws provide for when a redundancy will be considered 'genuine' for the purposes of an unfair dismissal claim.

National Employment Standards

The National Employment Standards (NES) provide 10 new minimum standards of employment that apply to all employees under the Federal Industrial Relations system. The NES will replace the Australian Fair Pay and Conditions Standard.

The NES has an additional 5 standards of employment that all Federal employees are entitled to. The more significant changes are in relation to the setting of maximum weekly hours of work and flexible working arrangements. Previously these conditions of employment were governed by industry awards or contracts of employment. It is important to note that when the NES commence operation, contract of employment and awards cannot provide for conditions of employment that are less than the NES. Contracts of employment and awards etc can only supplement the conditions outlined in the NES.

The NES state that an employee's maximum hours of work in a week must not exceed 38 hours for full-time employees. An employer is able to request the employee to work additional hours, however the request must be reasonable and an employee has the right to refuse if the request is unreasonable.

The NES also make provision for employees to request flexible working arrangements if they are a parent or carer of a child under school age, or a child under 18 with a disability.

These are only two of an additional five minimum standards and conditions of employment that will commence operation on 1 January 2010. Employers should familiarise themselves with the NES to ensure that contracts of employment comply with the NES by 1 January 2010.

For further information please contact Emilia Pirillo on 4907 6328 or Tony Cardillo on 4907 6300.

Profile

Together Today

Harris Wheeler Lawyers is proud to announce its strategic sponsorship of Together Today.

Launched in April 2007 and incorporated in November 2008, Together Today Cooperative Limited is all about showing people how to use energy and water more efficiently at home, work and school. The unique public/private partnership is made up of a team of prominent Foundation members from within our community including NBN, Newcastle City Council, one80 digitalpost, Coal & Allied managed by Rio Tinto Coal Australia, Macquarie Generation, EnergyAustralia, CSIRO, Hunter Water, Port Waratah Coal Services, University of Newcastle, NSW Department of Education and Training, TAFE NSW Hunter Institute and the Catholic Schools Office - Diocese of Maitland-Newcastle.

With the vision to establish the Hunter as Australia's most energy and water efficient region, Together Today

believes action drives change and works to link households, businesses and schools with local product and service providers. A range of initiatives are also delivered to support the growth of the green economy and to highlight the experiences of community and business champions.

Together Today is currently developing Hunter based campaigns in conjunction with new business members focused on household rebates along with energy and water savings. The campaigns and new Hunter Eco-Directory will be available in October 2009.

Managing Partner, Matthew Smith says **"Being a Hunter based law firm since 1892, we are committed to the region's environmental sustainability and are proud to be a part of Together Today's energy and water efficiency initiatives."**



Garlic prawns



Recipe by Doris Cameron

Serves 4

Ingredients

500 grams of raw green prawns – peeled and de-veined

1 brown onion - diced

2 cans diced tomatoes

1 whole head of garlic – crushed or finely diced

3 chillies – sliced finely removing seeds

1 tablespoon sugar

2 tablespoons white wine vinegar

1 litre of vegetable stock

Salt and pepper to taste

Parsley

Lemon

Fetta cheese

Method

Sauté onion, garlic and chillies until translucent. Add tomatoes, sugar, white wine vinegar and vegetable stock. Season with salt and pepper. Cook for at least 1 hour until the sauce thickens. (The longer the sauce is cooked the better the flavour). Stir occasionally.

Add prawns and cook until the prawns turn pink (approximately 5 minutes).

To Serve

Serve on a bed of hot rice. Add crumbled feta cheese. Place lemon wedges on side. Garnish with parsley.

Serve with a tossed green salad and crusty bread.

Kilometres for Kidz



A great show of support for such a worthy cause.

Photo by John Turton.

Kilometres 4 Kidz is a Charity Cycle Ride to raise money for the John Hunter Children's Hospital and was led by a team of 10 local business people.

The Cycle Ride lasted six days in August, starting on the Gold Coast and ending at the John Hunter Children's Hospital in Newcastle. A ride that was more than 760km's long.

Managing Partner, Matthew Smith and Partner, Brian Glendenning supported the initiative and cycled the last leg of the challenge called Olivia's Ride, from Raymond Terrace to the John Hunter Children's Hospital in 28 degree heat.

Monies raised will focus on changing the way the Hospital delivers ambulatory health care to children and young people.

Environmental Law

Mandatory disclosure of commercial building energy efficiency



On 2 July 2009 the Commonwealth of Australian Governments (COAG) signed the 'National Partnership Agreement on Energy Efficiency' allowing the Commonwealth Government to introduce national energy efficiency reforms.

By Samantha Ellis

One of the key reforms that will affect owners of commercial buildings is the mandatory disclosure of energy efficiency ratings for commercial buildings that have a net lettable area (NLA) over 2000m² from mid-2010. The energy efficiency of a building will be measured under the National Australian Built Environment Rating System (NABERS) energy scheme as it nationally known and used. The measurement of the building's energy efficiency will specifically exclude Green Power.

The current average NABERS energy rating for commercial buildings over 2000m² is a NABERS rating of 3.0 stars. The Government is pushing to raise the energy efficiency to best practice and have buildings achieve a NABERS rating of 4.5 stars as another measure to reduce greenhouse gases.

Initially the proposed Mandatory Disclosure of Commercial Building Energy Efficiency Regulation (proposed Regulation) will cover only BCA class 5 buildings. These are office buildings used for professional or commercial purposes (but excluding buildings in retail, car park, storage, production and public building classifications of the BCA). It is anticipated that the Regulation will apply to other commercial buildings and residential buildings in the future.

Under the proposed Regulation the requirement to provide a NABERS energy certificate will be triggered when:

1. a commercial office building with a NLA of 2000 m² or more, or any part of such a building that is greater than 2000 m² NLA is sold, sub-leased or a new lease negotiated;
2. and at least one of the parties to the transaction is corporation under the Corporations Act 2001.

The NABERS energy efficiency rating and assessment report of the building will have to be disclosed:

1. in any advertisement about that sale or lease (disclosure requirement is limited to an appropriate star rating, excluding Green Power);
2. to prospective buyers and tenants (a valid Building Energy Efficiency Certificate (BEEC) and Energy Efficiency Assessment Report (EEAR)); and
3. to a central registry (a valid BEEC and EEAR).

The introduction of the mandatory disclosure scheme may impact on buildings that are not energy efficient. Buildings that have low energy ratings may be exposed to the risk of decreasing rents for these building as they compete with more energy efficient buildings that are more attractive to potential Lessees due to cost savings in outgoings.

Lessors will need to ensure that commercial leases contain a provision that allows the Lessor to:

1. enter on to the property for the purpose of inspecting and measuring the energy efficiency of the building; and
2. compel the Lessee to provide information that the Lessor may require to determine the energy efficiency of the building; and
3. compel the Lessee to maintain and implement agreed energy efficient practices so as not to lower the energy rating of the building.

Lessors should also ensure that any building management agreement includes a provision for the manager to provide information that will assist the Lessor in determining the energy efficiency of the building.

Companies that own a portfolio of commercial properties should consider undertaking an audit of its stock to identify:

1. the expiration date of existing leases (noting any risky Lessees who may terminate early);
2. untenanted buildings; and
3. any buildings that it may have earmarked for sale so that the company can develop an energy audit strategy to meet the requirements of the proposed regulations.

For further information please contact Samantha Ellis on 4907 6334 or Brian Glendenning on 4907 6300.

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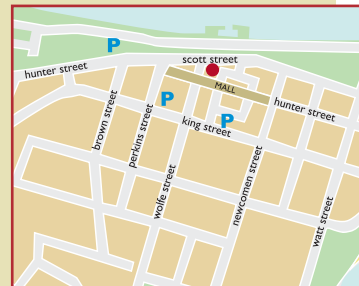
Newcastle Office

Level 3 175 Scott Street

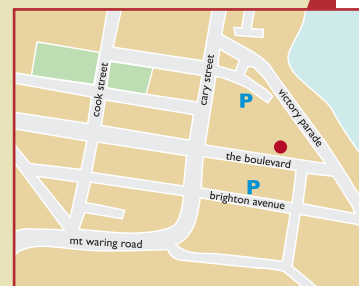
PO Box 500 Newcastle 2300

Ph: 02 4907 6300

Fax: 02 4907 6333



**HARRIS
WHEELER
Lawyers**



Toronto Office

35 The Boulevard

PO Box 234 Toronto 2283

Ph: 02 4935 8600

Fax: 02 4935 8666

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