



Legal & Regulatory Webinar

Unfair Contract Term Provisions in *Australian Consumer Law*

Division 2A of NSW *Fair Trading Act* (Sections 47A/47B)

Jamie Nettleton & Cate Sendall

22/10/20



Unfair Contract Terms – ACL provisions

Applicable Contracts



“standard form contracts”
(“take it or leave it”)



Consumer Contracts
Purchase agreements
Autoship agreements
Subscription agreements

Small Business Contracts
Distributor agreements
Policies and Procedures
Subscription agreements

When will a term be unfair?

To be unfair, a term must satisfy each of the following:

1. cause a **significant imbalance** in the parties' rights and obligations
2. not be **reasonably necessary** to protect the **legitimate interests** of the party advantaged by the term
3. **cause determinant** to a party if it were to be relied upon

In deciding whether a term is unfair, courts must also consider:

- A. the transparency of the term.
- B. the contract as a whole.

What types of terms risk being unfair?

- Unilateral variation
- Limited liability
- Wide indemnities
- Termination
- Automatic renewal
- Governing law & jurisdiction

Fair Trading Act (NSW)

- Division 2A - Provisions relating to disclosure requirements and information standards
- Commencement date of 1 July 2020

Section 47A - Disclosure of prejudicial terms in supply

- Obligation of supplier
- Supply to consumer
- Goods or services
- Disclosure of terms that substantially prejudice the interests of consumer
- In advance of supply (no time limit)

Section 47A - Examples of terms that may substantially prejudice

- Exclude liability of supplier
- Where consumer is liable for damage to goods delivered
- Supply of consumer data to third parties
- Obligation of consumers to pay exit fee etc.
- As specified in regulations

Section 47A - Issues for direct selling sector

- Who is a consumer?
- Is there a relevant supply?
- Disclosure:
 - When?
 - How?
 - What?

Section 47B - Disclosure of referral fees, commissions

- Obligation on “intermediary”
- Make consumer aware of existence of “arrangement”
- But only where arrangement provides for intermediary to receive a financial incentive

Section 47B - What is an intermediary?

- Person who
 - under arrangement that provides for a financial incentive and **either**:
 - arranges contracts for the supply of goods or services as an agent; or
 - refers consumers to another supplier of goods or services
 - is prescribed by, or belongs to class of persons prescribed in regulations
- BUT NOT
 - person, or class of persons, excluded by regulations.

Section 47B - What is a financial incentive?

- Commission
- Referral fee
- Kind of payment prescribed in regulations

Section 47B - What does this mean for direct selling sector?

- Intermediaries
- Financial incentive
- Make consumers aware of arrangement

= **Disclosure**

Copyrights

Unless otherwise indicated, copyright in all materials contained on this presentation is owned by Addisons. You may use the materials contained on this presentation for your personal use. No part of the materials however may be reproduced, adapted, published or communicated for commercial use without prior written permission of Addisons and you must provide appropriate attribution to the firm, the author of the publication and when and where it was first published if such commercial use is authorised.

Disclaimers

The material contained in this presentation is provided by Addisons ('we' or 'us'). Your use of this website is governed by the terms of our Privacy Policy, our Copyright notice and this Disclaimer.

The contents of this presentation do not constitute legal advice and should not be relied upon as a substitute for legal or other professional advice. We make no warranties or representations about the material contained in this presentation. This presentation may contain links to other websites that may be of interest to you. We make no warranties or representations about these websites.

Liability is limited by a scheme approved under the Professional Standards Legislation.

Thank you



Level 12, 60 Carrington Street
Sydney NSW 2000 Australia

ABN 55 365 334 124
Telephone +61 2 8915 1000

mail@addisons.com
www.addisons.com

Liability limited by a scheme approved under Professional Standards Legislation