

In touch with the law

The law is constantly changing and this newsletter describes developments which may be relevant to you. If you are in any doubt about these or any other aspects of the law, please make an appointment to see your solicitor.

NEW LAW ON CONSUMER CONTRACTS

Unfair contract terms invalid

A new consumer contract law can quash contract conditions that are unfair.

The new law only applies to consumer contracts, which means at least one party to the contract must be an individual acquiring a product or service wholly or predominantly for personal, domestic or household use or consumption.

The contract can be for supply of goods or services (including financial) or for the sale or grant of an interest in land, or a financial product.

The contract must also be "standard form". This is not defined in the legislation, but it usually means that the same terms are offered to all parties without negotiation.

If one party in a legal action alleges a contract is a standard form contract, the onus is on the other party to disprove it.

The new law includes some examples of contract conditions that could be unfair – such as terms that would permit one party unilaterally to vary the services to be supplied, or determine whether the contract has been breached, or interpret its meaning. A term that penalised only one party for a breach or termination might also be considered unfair.

These examples are provided in the legislation to give "guidance on the types of terms

which may be regarded as being of concern". It doesn't presume that such terms are unfair. They must still satisfy the definition of unfairness to be invalid.

A term would be considered unfair if it caused a significant imbalance in the rights and obligations arising under the contract, or if it were not reasonably necessary to protect the legitimate interests of the party advantaged by it. A term that would cause detriment – financial or otherwise – to one side if it were to be applied or relied on would also be unfair.

Businesses with standard consumer contracts should consider consulting their solicitor to ensure contracts do not contain terms that might be unfair. □



WILLS What happens if I don't leave a will?

New rules from 1 March this year affect how your assets will be distributed if you die without leaving a will.

Briefly, if you haven't left a will, your surviving spouse (which could be your de facto or domestic partner) will receive the whole estate if there are no children or the children are your spouse's. But if there are children by another relationship, for example an ex-spouse or ex-domestic

partner, the estate will be divided between the spouse and all the children according to a legal formula.

If there is no legal spouse or domestic partner or any direct descendants, a deceased's parents will receive the whole estate; otherwise, it goes to brothers and sisters or other relatives, up to and including first cousins.

If there are no entitled relatives, the estate goes to the state government. □

Even if you are married with dependants, you need a will. If a husband and wife should be killed together, in a car accident for instance, the older person will normally be presumed to have died first. The younger person might then have inherited assets from their spouse – even though they are by then dead – and if they had not made a will, the assets would be distributed under the new legal formula, regardless of what the person might have wished. □

POSITIVE OUTCOMES

Considering mental illness of offenders

By section 32 of the Mental Health Act, someone with a developmental disability, mental illness or mental condition can be diverted from the criminal justice system and given rehabilitative treatment ordered by the courts.

According to Australian of the Year Professor Patrick McGorry, four million Australians have mental health problems and 65 per cent of them have no access to treatment whatsoever. One million of those with mental disorders are young Australians aged 12 to 25.

The Attorney General has identified trends indicating a substantial increase in the numbers of people with a mental

illness who come before the courts.

If a court order is made in accordance with this section of the law, there is no finding of guilt, the charge is dismissed without conviction, and the applicant is discharged conditionally or unconditionally.

In many cases, it produces a better outcome for a person than a penalty imposed in accordance with the law, though it can have more onerous consequences, since an order can substantially limit someone's freedom.

While treatment can be helpful, particularly for young people, it is challenging to



identify those eligible for this care, obtain good expert services to make a diagnosis and prepare a report, establish

links with treatment providers and, ultimately, persuade a magistrate to use the legislation. □

INSOLVENCY

You can serve a bankruptcy notice by email

While serving bankruptcy notices by post has been valid for many years, most people still use hand delivery. But things have moved on – notice can now be served by email.

To serve a bankruptcy notice by email, numerous facts have to be proved, including the fact of service as well as date and location.

In a recent case, it was established that American Express sent a PDF of a bankruptcy notice to a customer on a certain date. American Express said that the person had a facility maintained “for receipt of electronically transmitted documents”, consisting of an email mail box on a Yahoo server he frequently accessed.

There was abundant evidence of the customer using the facility over the relevant period, and it appeared to have been his favourite mode of written communication.

The court considered that the demonstrated use of the email address provided sufficient grounds for being satisfied that documents sent to the mail box would be received by him in the ordinary course of events.

A bankruptcy notice must also be served on the debtor in Australia, but in the American Express case, there was no clear evidence showing where the

customer or his Yahoo mail box server were located.

Since the customer had a number of places of business in Australia, with vague suggestions that he might have some elsewhere in the world, the court noted that the law on electronic transactions found “place of business” to be the one with a “closer relationship to the underlying transaction” than the others.

As the customer had a business address in Kent Street, Sydney, and the address had been used in his application for credit from American Express, receipt of the bankruptcy notice was deemed to have occurred at that Sydney address. This was because the Kent Street address appeared to be the place of business having the closest relationship to his transactions with the company. □

SPECIAL DISABILITY TRUSTS

Proposals to expand beneficiaries and uses of funds

The federal government has proposed an expansion of the definition of those who can be beneficiaries of special disability trusts and the allowable uses of trust funds.

Special disability trusts were established for succession planning by immediate family

members for the future care and accommodation needs of someone with a severe disability.

The new proposals would extend beneficiaries to include people with a disability able to work up to seven hours per week. They also propose to expand the allowable uses for the trust funds to include all medical

expenses, including membership costs of private health funds, maintenance expenses of special disability trust property and discretionary spending of up to \$10,000 per year.

Consult your solicitor about the best way to set up a trust if you have a family member who may be in need of special care. □

FRAUD IN TENDER

Limitation caps won't limit liability

On the basis that it is contrary to public policy to do so, liability for fraud cannot be limited or excluded by a contract.

While difficult to prove, the consequences of a successful claim of fraudulent misrepresentation are potentially enormous. Both foreseeable and unforeseeable damages, including losses occurring as a consequence, can be recovered.

In a recent case, a satellite broadcasting company successfully claimed fraudulent misrepresentation in a contract and, despite the contract specifying a \$50 million liability cap, won an interim award of over \$340 million.

In this case, following a competitive tender process, the company had chosen the winning bid to supply a new electronic customer management system.

However, the timeline offered in the contract didn't go according to plan. In finding the time representations were false, the courts found the company had not carried out a "proper analysis" of the time estimates

and did not have "reasonable grounds" to support them.

They were made dishonestly by an employee who knew them to be false. The key company witness in the case, the employee was discredited for having purchased his MBA from a website providing online

degrees. He was also found to have forged emails and to have lied and acted dishonestly.

The courts found that the company had intended the satellite company to rely on the timeline, and it had done so to its harm.

To avoid claims of negligent

misrepresentation in a contract, it is important to maintain good internal records that substantiate any statements.

If you are responding to a tender, retain details supporting any estimates of time frames, project resources and costs. If you can show that you have undertaken a detailed analysis to justify your belief that the statements are true, a claim of fraudulent misrepresentation is unlikely to succeed. □

CREDIT HISTORY

How can businesses comply with privacy laws?

Some simple tweaks to procedures and documentation may be all that is needed to allow businesses to comply with privacy legislation while sharing customers' details with credit-reporting networks.

Credit providers, which may include corporations that allow deferred payment for goods or services, have in certain circumstances been permitted to break national privacy principles by providing customers' personal information to debt collection or credit-reporting agencies in the event of a default in payment.

Importantly for debt recovery, businesses falling within the extended definition of credit provider are permitted to request a default listing from a credit-reporting agency, so long as they comply with relevant rules.

In a recent case, the Privacy Commissioner determined that a health service provider, which had unsuccessfully tried to recover outstanding fees from a patient, did not have a sufficient credit relationship with the patient. Accordingly, it was found not to be a credit provider for the purposes of the Privacy Act.

Businesses providing goods or services to customers on deferred terms may satisfy the

definition of credit provider if they can establish that payment terms are communicated to the customer at least seven days prior to the due date. Indeed, this is the way many businesses operate.

Businesses should be wary of acting outside of the requirements of the Privacy Act because of the adverse consequences that may result.

In particular, affected persons can lodge a complaint with the Privacy Commissioner which will result in an investigation. Breaches of some provisions of the Act may also constitute an offence.

Contact your solicitor for further information. □

POOR REPUTATION

Evidence after the defamation

A key legal issue in cases of defamation is whether the court in considering possible compensation for damage to a person's reputation should take into account evidence of a person's poor reputation from the period after the defamatory material was published.

The law of defamation is concerned with the protection of reputation, and evidence of bad reputation can be produced to reduce or avoid the compensation that would be payable as a penalty.

Generally, the sort

of evidence that can be introduced into court is that which precedes the alleged defamatory incident.

However, various cases in Australia and overseas have not followed the view that evidence be limited to pre-publication of defamatory material.

In the UK, courts have found that the author of a defamatory publication could cite in defence evidence of the bad reputation of the person which postdated the defamatory material.

A case in New Zealand has accepted that since damages for defamation continue to be



incurred after the publication of defamatory material, it follows that evidence referring to a

change in the reputation of the person after the publication date would also be relevant. □

RAISING RENT DECEIT

Shopping centre landlord's misleading behaviour

How often does a leasing representative pressure a tenant by emphasising how good a deal is, when there may be no basis for that belief?

In a recent case, the landlord of a shopping centre who doubled a shop tenant's rent to \$90,000 was found guilty of both unconscionable conduct and misleading and deceptive conduct.

In a case pursued by the Australian Competition and Consumer Commission, the landlord's agent was also found to be knowingly involved in the landlord's contravention of the Trade Practices Act.

The tenant, in fear of the landlord, had initially signed a lease for more than double the previous rent over the Christmas holiday period while she was unable to contact a solicitor.

Initially, she hadn't sought further legal advice because she thought there was no point once the lease was signed. When the tenant did go to a lawyer at the end of March, the new lawyer wrote to the landlord stating "my client disputes the new rental on the grounds that



such a huge increase is not reasonable and by any means rather excessive".

The lawyer recommended a valuation be sought and

suggested the tenant pay the old rent pending the market determination. The landlord then threatened to evict the tenant if she did not pay the new

rent at short notice.

The court found that the landlord's conduct was unconscionable. Not only did the landlord engage in misleading and deceptive conduct by stating that the rent 'was very reasonable and below market rent' when it was not, but these misrepresentations were conveyed to a tenant whom the landlord was aware knew little or no English. Also, they were intended to secure renewal of the lease at a rental for which there was no basis beyond the landlord's decision to seek the stated amount, and provided very short time frames to respond.

The court ordered the landlord to refund \$65,000 plus interest of \$55,000 to the tenant, and to pay costs as well as establish a trade practices compliance and training program to be monitored by the Australian Competition and Consumer Commission. □

INTELLECTUAL PROPERTY

Hard questions on the internet

Cyberspace is at the cutting edge of intellectual property rights, with many tricky questions.

One example is the use of thumbnails by Google. If Google finds a photo on the internet, it creates thumbnails to display in search results.

A business person might think that this is terrific as long as they remain in control of the high-resolution version, but it can be argued that this is simply an adaptation of a photographic work and is a breach of copyright.

In a recent appeal by Google in response to an artist's complaint in Germany, the courts found that Google had not infringed copyright.

Another tricky question is one of advertising. Let's say that you search for Mercedes-Benz on Google, and on the results pages you get the results you expect, but in the right-hand column you see adverts for BMW. The only way Google knows to put those adverts there is to have a connection between Mercedes-Benz, cars and BMW.

In this hypothetical example,

BMW would have told Google that their adverts should be displayed whenever Mercedes-Benz was being searched. Is that a breach of trade mark law?

In a recent US case, a company lost a legal action they took because whenever Google users searched their product, they saw paid results for competitors.

A similar case run in the European Court of Justice by Louis Vuitton also failed. This case was probably more arguable, since the advertisers were actually selling counterfeit Louis Vuitton goods. □