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QUEENSLAND LAW SOCIETY – GOLD COAST SYMPOSIUM

21 May 2011

UNFAIR CONTRACTS TERMS AND LAND TRANSACTIONS

ANNETTE GREENHOW

1. INTRODUCTION

This presentation will consider the new unfair contract terms provisions outlined in the Australian Consumer Law (ACL). The ACL is part of the *Competition and Consumer Law Act* 2010 (Cth) that commenced in 2 stages - on 1 July 2010 and 1 January 2011. The ACL has now provided a statutory framework regarding the effect of unfair terms within a broad range of consumer contracts – including property contracts. It departs significantly from the classical contract theory and moves toward statutory and judicial intervention in assessing the fairness of contract terms.

An unfair term in a standard form consumer contract will be void. This presentation will consider the likely impact of the ACL on property transactions on property contracts that fall within the definition of a 'consumer contract'. The presentation will also examine the classification principles of an 'unfair term' for the purposes of the ACL and suggest some measures to minimise the risk of breaching the ACL.

2. BACKGROUND

The ACL was a top priority of the COAG's Business Regulation and Competition Working Group in an effort to 'deliver a seamless national economy'[1], to empower and protect consumers and to enable 'confident participation in markets where both consumers and suppliers trade fairly'. The transparency principle underpins the amendments – to deliver greater balance to the bargaining position of consumers by

[1] CCH Australian Trade Practices Commentary at para 30-510

rendering void those terms within a standard contract that are deemed unfair to the weaker party. Further, an assessment of the substantive fairness of contract terms is balanced against the parameters outlined within the ACL.

The ACL expands the current version of consumer laws now found in the *Competition and Consumer Act 2010* (formerly the *Trade Practices Act* under Parts V and IVA) and applies to States and Territories under the Intergovernmental Agreement for the Australian Consumer Law. This presentation will review the unfair terms provisions and the new penalties regime providing for additional consumer redress options.

3. LAND TRANSACTIONS

The ACL has considerable application to lawyers and their clients involved in real property contracts, including the sale or leasing of real property to individuals. There are 3 main issues to determine whether the particular contract falls under the ACL umbrella.

1. Is the contract a 'consumer contract'?

The first issue is whether the contract is a 'consumer contract'. Relevant to property contracts, the definition provides:

> *"...a contract for:*
>
> *...a sale or grant of an **interest** in land;*
>
> *to an individual whose acquisition of the ...interest is wholly or predominantly for personal, domestic or household use..."*

Note that the definition of 'interest' in broadly defined and includes any legal or equitable interest in land or a right, power or privilege over or in connection with the land. This includes sales of both completed and 'off the plan' developments. The definition goes further to include occupancy right in a company title scheme involving the ownership of land.

2. Is the consumer contract a 'standard form contract'?

If the contract falls within the definition of 'consumer contract', the next issue to consider is whether the form of the 'consumer contract' is standard – that is, is it a 'standard form contract'. In determining if a contract is a 'standard form contract', the Court may take into account any matter it considers relevant, but must take into account the following considerations:

- **Bargaining power** – whether one party has all or most of the bargaining power relating to the transaction;
- **Contract Preparation** – whether one party prepared the contract before any discussion occurred between the parties;
- **"Take it or leave it"** – whether one party was, in effect, required to either accept or reject the terms of the contract (excluding those terms that defined the main subject matter or upfront price);
- **Opportunity to Negotiate** – whether one party was given an effective opportunity to negotiate the terms of the contract (excluding those terms that defined the main subject matter or upfront price)
- **Specific Characteristics** – whether the terms (excluding those terms that defined the main subject matter or upfront price) take into account the specific characteristics of another party or the particular transaction; and
- **Prescribed** – any matters prescribed by Regulation.

3. If the contract is a standard form consumer contract, are any terms unfair?

Having satisfied the above issues, the final consideration is whether the term is 'unfair'. The impact of this determination is that an unfair term will be void and severed from the contract.

There following 3 elements will need to be satisfied for the term to be 'unfair':

(a) the term would cause significant imbalance in the parties' rights and obligation under the contract; AND

(b) the term is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; AND

(c) the term would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied upon.

A number of governing principles provide that a Court must consider if the term is transparent and must consider the contract as a whole. "Transparent" requires a consideration of the use of plain language, legibility, presentation, and availability to any party affected by the term.

A non-exhaustive list of examples of unfair terms is provided in the ACL. These include those terms that permit one party to unilaterally do any of the following acts:

(a) avoid or limit performance of the contract;

(b) terminate the contract

(c) vary the terms of the contract

(d) vary the upfront price payable under the contract with the other party having no right to terminate;

(e) renew or not renew the contract; or

(f) vary the characteristics of the interest in land to be sold or granted under the contract.

There is specific provision in the ACL excluding certain terms from being unfair. These terms relate to the following:

(1) those that set the upfront price payable under the contract (but not any other consideration that is contingent on the occurrence or non-occurrence of a particular event). For example, the purchase price and

deposit under a contract would be classed as the upfront price. However, interest payable on default might fall outside the exemption.

(2) those that define the subject matter of the contract. This would include a description of what is being sold under the contract. In existing properties, this information is readily available. However, in the case of 'off the plan' sales, where variations often occur between concept and completion, care will need to be taken in the drafting of the subject matter. Provisions that allow a developer to make changes to the property sold might be fall within the unfair terms classification.

(3) those terms required or expressly permitted by a law of the Commonwealth or a State or Territory.

4. CONSEQUENCES

An unfair term is void and severed from the contract. The contract is still binding on the parties if it is capable of operating without the unfair term.

The other consequences of breaching the ACL provisions include:

(a) Civil pecuniary penalties – the maximum penalties are $1.1m for corporations and $220 000 for individuals;

(b) Disqualification Orders prohibiting a person from managing a corporation or engaging in activities in connection with the management of a corporation;

(c) Substantiation and Infringement Notices

(d) Public warning notices – issued to the public and containing information warning the public about the conduct of a corporation; and

(e) Orders to redress loss or damage suffered by non-party consumers – effectively giving class action rights and remedies to others affected by the unfair contract.

5. SPECIFIC ISSUES RELEVANT TO STANDARD FORM PROPERTY CONTRACTS

The REIQ and the QLS settled amendments to the REIQ/QLS contracts last year to ensure that the principles of the ACL were incorporated within the Terms of Contract.

A number of property law academics have published on the impact of the ACL. Some comments include:

(a) The need to increase focus on the balance of the contract, and those terms that preserve a discretionary or unilateral right to the developer. Clauses that reserve discretion to make changes to a project or to determine matters unilaterally must be balanced by other provisions (for example, to make further disclosure or to limit permitted changes to minor variations or to ensure replacement items are of an equivalent quality).

(b) Ensuring documentation is clear and well structured. Consider outlining the legitimate interests and the need for terms that address such interests in the contract in a clear and unambiguous way.

(c) Consider keeping records of the business rationale for the decision to include key terms that might later be subject to challenge.

6. ASIC ACTION

Not surprisingly, there are no reported cases involving the ACL. The ACCC has referred complaints to the ASIC for investigation involving a developer's 'standard form' instalment contract. This shows that ASIC is taking its role seriously under the ACL and actively investigating complaints. At the date of writing, the outcome of this investigation is unknown.

7. WHERE TO FROM HERE

All contracts - both proposed and on foot - should be reviewed in light of the ACL to ascertain if they are standard form consumer contracts, including special conditions.

The terms within those contracts should be tested against the fairness principles in the ACL.

In any proposed contract or precedent, consider the following:

(a) Include severance clauses to ensure that the terms are severable wherever possible and to preserve the contract if a term is void. Think about the drafting and structure of the contract and whether the term, if severed, would render the contract inoperative.

(b) Test the relevant terms in the proposed contract or precedents against the ACL elements and as against the examples provided in the ACL.

(c) Establish evidence of good faith willingness to negotiate the terms of the contract;

(d) Identify terms that are genuinely necessary to protect the legitimate interest of the stronger contracting party and provide a transparent explanation to the other party; and

(e) Advise clients of the ramifications of the ACL and the consequences of certain clauses being deemed unfair and void. Where possible, suggest alternatives.

Professor Peter Butt has suggested two possible approaches to an interpretation of the ACL - one is where the Courts take a robust view of property contracts on the basis that standard terms have been used and accepted in the market for many years. The other is where the Courts give a ‘wide and generous interpretation’ on the basis that the ACL is designed to protect the public at large. He suggests, quite rightly, that only time will tell.