

DW Legal

# The PROPERTY INSIDER

*PROPERTY ESSENTIALS FOR STAYING AHEAD*

## In this Edition

### New Unfair Contract Laws

## A Pill or Poison for Property Contracts?

New consumer protection laws restricting the use of unfair terms in some property contracts will start Australia wide early next year, by the Federal Government adding to the Trade Practices Act.

### Will the new laws affect you?

The new laws apply to standard form contracts for the sale of property by companies to individual consumers.

### How will the new laws work?

Under the current Bill, if a consumer contract contains an unfair clause, that clause is of no legal effect and will be treated as if it never existed.

#### ***What is a consumer contract?***

A consumer contract is a contract for a sale of (or grant of an interest in) land to an individual whose gaining of the interest is mainly for personal, domestic or household use or consumption. Therefore, sales to companies or sales of property to individuals that will be used for investment purposes will probably not be a consumer contract.

#### ***Does the new law apply to any real estate contract?***

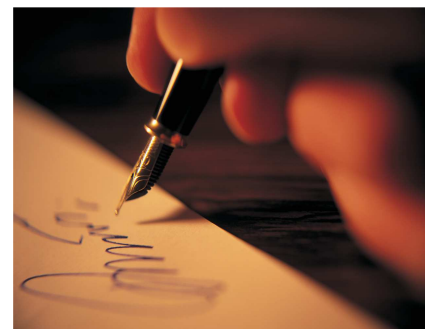
No – the contract must be a “standard form” contract.

#### ***What is a standard form contract?***

A standard form contract is basically one where the terms are not able to be negotiated by one of the parties to it - a “take it or leave it” styled negotiation. In deciding if a consumer contract is a standard contract a court must look at whether:

- one of the parties has all or most of the bargaining power;
- the contract was prepared by one party before any discussion started;
- a party was required to accept or reject the terms in the contract in the form they were presented (that is, on a ‘take-it-or-leave-it’ basis);
- a party was given an opportunity to negotiate the terms.

Most contracts that are used by developers for off-the-plan sales would fall into this category where the terms are prepared before negotiation. Also, if the negotiation is largely conducted using unchangeable clauses with only the fundamentals like the price and subject matter changing; the contract is most likely a standard form contract.



***What is an unfair term?***

A term will be unfair if the term “causes a significant imbalance in the parties’ respective rights under the contract and is not reasonably necessary to protect the legitimate interests of the advantaged party”. While each case may be different, some examples of unfair terms provided in the Bill are where one party can:

- Terminate the contract but the other party cannot;
- Penalise the other for breaching or terminating a contract;
- Change the characteristics of the property sold or the terms of the contract. This would likely include the situation where developers can change the specifications of the boundaries of the land or fixtures and fittings without discussion or compensation or potentially denying rights of the buyer to do anything about that; or
- Assign or transfer a contract to the detriment of the other party, without the other party's prior consent.

**What are the consequences?**

Some possible consequences in the event of contravention are:

- The unfair term will be of no legal effect and will be treated as if it never existed.
- In some cases, a party could terminate the contract.
- If a term entitling the seller to terminate is void, then the buyer could require the seller to proceed. Sellers can see the potential loss here particularly in a rising market;
- The ACCC may take action to declare a term void; and
- The Courts may make corrective orders.

**When will the new laws start?**

The changes will apply to “consumer contracts” entered into after the Bill becomes law, which is expected to be early next year.

**What you should do?**

- Both sellers and buyers should be careful about including one sided clauses in contracts.
- Developers using standard documentation should carefully review their contracts now.

We recommend that care be taken to ensure that potentially unfair terms are reviewed and appropriate action be taken before signing any contract.

**For further information, please contact Frank Dwyer or Peter Waller of DW Legal.**

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