



# The Changing Regulatory Landscape

- Unfair terms
- Unsubstantiated representations
- Responsible lending
- Unreasonable fees
- Fair dealing
- Commerce Commission (CC) & Financial Markets Authority



# Unfair Contracts (UC) - The Basics

- Unfair terms in standard form consumer contracts can be declared unenforceable
- Comes into force 17 March 2015
- Claims (criminal and civil) can only be brought by the Commerce Commission
- Following in footsteps of UK and Australia
- CC released Draft Guidelines on UC – Submissions due 30 September 2014

# Standard Form Consumer Contract

- "Consumer", CGA definition (goods/services ordinarily acquired for personal, domestic, household use/consumption)
- Key = type of services, not type of consumer, so may include business to business transactions – unless the provider contracts out.
- Standard Form Contract (SFC) – lack of "effective negotiation"/take it or leave it.
- Includes home loan, credit card, not business loan or derivative.
- If a party alleges there is a SFC, will be a rebuttable presumption.

# Practical Example

## - Your Credit Card

- Services under a credit card are ordinarily acquired for personal use = consumer (yes)
- Standard Form Contract (SFC) indicators:
  - Terms not subject to effective negotiation (yes)
  - One party has most of the bargaining power (yes)
  - Contract prepared by one party before transaction occurred (yes)
  - Do terms take into account the specific characteristics of the party? (not the customer)
  - Contract on take or leave it basis (yes) Haggling over price? (no)
  - Reverse onus, if CC says it's a SFC - you need to prove otherwise/prove genuinely negotiated



# Unfair Terms?

- Some terms outside UC regime;
- Subject matter of contract;
- Upfront price;
- Terms required or expressly permitted by legislation



# Upfront Price?

- "Upfront price" is excluded IF it is transparent
- "Transparent" means:
  - Is expressed in reasonably plain language;
  - Is legible;
  - Is presented clearly;
  - Is readily apparent to any party affected by the term
- CC – term not transparent if hidden, obscured in fine print, different webpage/different part of document or phrased in complex or technical language.

# What is "unfair"?

- Three limb test for unfairness:
  - Term causes significant imbalance in parties' rights and obligations AND
  - Term not reasonably necessary to protect the legitimate interests of the party advantaged AND
  - Term would cause detriment if applied, not limited to financial detriment .
- Court considers if term is transparent + contract as a whole.
- Presumption term not reasonably necessary, provider must prove.



# What about Existing Customers on SFC?

- Applies to contracts entered into or varied or renewed once UC come into force.
- So where a SFC is varied regularly, net effect is existing customers are covered.
- eg credit card T&C may be varied - so will include all existing customers.
- What if price is varied, interest rates change? Upfront price excluded from scope.

# What Terms Might be Unfair?

## Examples:

- One party can limit/avoid performance
- One party can terminate
- One party can vary terms
- One party can renew or not
- One party can vary upfront price, without other party having right to terminate
- One party can assign without consent
- Term limits one party's right to sue
- See CC's Draft Guide for practical examples.



# Can you Contract Out?

- Can contract out of FTA if parties are in trade
- BUT- needs to be in writing AND fair and reasonable parties bound = uncertainty?
- "Fair and reasonable" = subject matter of agreement; value of services; was it a take it or leave it contract; was independent advice obtained?
- However can't contract out of unfair contract provisions

# Unfair Contracts - Consequences

- Only CC can apply for declaration that term is unfair/ customers can ask CC to act.
- Unfair term cannot be enforced, relied upon or included in a SFC + damages & refunds.
- Declaration may impact other SFC, not just one before the Court.
- Contravention is an offence under FTA → fines \$600K per contravention (and UC claims potentially linked to misleading/deceptive claims)
- Note the CC now has compulsory interview powers.

# Next Steps

- Identify the standard form consumer contracts
- Review/revise terms against examples list & more generally
- Make sure upfront price and terms are "transparent" (new gloss)
- Allow lead time for contract changes and watch for relevant UK/Australian cases
- BUT banks/reputable financial institutions not obvious target
- cf rental car company, utilities providers, gym, phone/internet provider, hire purchase...?

# Unsubstantiated Representations

- Only Commerce Commission can bring proceedings
- Representations re services need to be substantiated when you make them
- Doesn't matter if statement is true, must be able to substantiate
- Court considers research, nature of information relied upon and extent to which person relied on standards/codes
- Need good paper trail re higher risk areas eg advertising claims, website claims, media representations

# CREDIT CONTRACTS AND CONSUMER FINANCE ACT AMENDMENT ACT 2014



# What has changed?

- Responsible lending provisions & code
- Changes to credit contract disclosure requirements.
- Drafting tightened on unreasonable fees (June 2015).
- Changes to rules on interest rates.
- Civil limitation 3 years, reasonable discoverability test
- Increased penalties to align with FTA & infringement notices.



# Changes to Fees

- Prepayment fees: clarified for fixed rate contract, tightened- “average administrative costs” to “administrative costs”.
- Separate tests for credit & default fees.
- Reasonable standards of commercial practice retained BUT Select Committee says subordinate to the main cost based test and helps to inform it.

# Limitation

- Previously one and three year limitation periods for civil actions which were difficult to reconcile
- Moved to three years after the date on which the loss or damage was discovered or ought reasonably to have been discovered
- Limitation period of 3 years aligns with FTA

# What have the Rules on Fees Achieved?

- Consultation process leading to draft CC guidelines in 2010.
- Enforcement activity mainly with lower tier lenders.
- Limited case law to date.
- No settled approach to accounting treatment of costs.

# Sportzone – Motor Trade Finance

- 2013 – CC prosecution of Sportzone sold & financed, MTF also financed, some fees found to be unreasonable.



# Sportzone – Motor Trade Finance

- HC largely adopted CC's narrow reading → variable costs [direct & indirect] & directly related fixed costs if "closely relevant".
- Rejected broad interpretation → any direct or indirect costs having a beneficial relationship with fee activity recoverable (full cost absorption approach)
- General overheads of business **not** recoverable [cf MTF → allocated almost all overheads to fees]
- Toogood J "*In assessing the reasonableness of an establishment fee, the recovery of any portion of fixed cost items such as depreciation, premises costs, IT costs, head office functions, and return on capital would require a strict application of the close relevance test.*"
- Sportzone is more conservative than the CC guidelines, more restrictive on overheads- on appeal late 2014- uncertainty.

# Responsible Lending Code

- Courts grappling with how to apply principles in practice ... meanwhile ...
- Content of the RLC "may" include processes, practices or procedures that a lender should follow to ensure that fees are not unreasonable under s44.
- Evidence of creditor's compliance with RLC provisions on fees is evidence that a fee is not unreasonable.
- MBIE discussion paper- questions on what RLC may include.

# Responsible Lending and Fees - Issues

- Can you have a one size fits all "process practice of procedure"?
- Whilst RLC focus is on process, opportunity to give guidance on substance- relevant cost categories/accounting principles?
- Do we need CA's decision in Sportzone on appropriate accounting principles? Australian guidance (exception fees)?
- Will the CC's guidelines be subsumed into the RLC? Is this appropriate given CC has a regulatory function? The CC's "guidelines" then have some legislative force cf current position.

# Key Dates for Your Diary

- 18 December 2013 – Fair Trading Act Amendment Act passed
- 17 June 2014 – unsubstantiated representations under FTA
- 13 August 2014 – Discussion Paper responses on responsible lending
- 17 March 2015 – Unfair Contracts under FTA
- March 2015 – MBIE to finalise responsible lending code
- 6 June 2015 – new rules on credit and default fees & new responsible lending principles