

Does your contract contain unfair terms?

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The Fair Trading Act introduced provisions which came into force on 17 March 2015 prohibiting any inclusion of unfair contract terms (**unfair terms**) in standard consumer contracts. The new provisions apply to all standard consumer contracts entered into after 17 March 2015 between a business and a New Zealand consumer and those contracts that are renewed or varied after that date (except insurance contracts).

The new provisions provide that a court may only declare a term in a standard form consumer contract unfair if it is satisfied that the term:

- would cause a significant imbalance in the parties rights and obligations; and
- it is not reasonably necessary in order to protect the legitimate business interests of the party advantaged by the term; and
- would cause detriment (whether financial or otherwise) to a party if it were applied, enforced or relied on.

Since the introduction of the new provisions, the Commerce Commission (which has sole responsibility for enforcing the new provisions) has carried out a series of industry-wide reviews of telecommunications, retail energy and gym contracts, to identify contractual terms that are potentially unfair. Some of the common terms that

were identified by the Commission as being potentially unfair include:

- In telecommunications contracts, terms relating to limitation of liability, unilateral variations of services, retention of prepay credit on termination, limitation of IP rights, responsibility of unauthorised charges, termination without reason, contracting out of consequential loss, charging undisclosed fees, contracting out of FTA, unilateral right to restrict or suspend services, avoiding or limiting performance of the contract, unilateral interpretation of contract, assignment of contract, variation of service and penalty clause.
- In energy retail contracts, terms relating to unilateral determination of breach of the contract, limitation of liability, unilateral contract variation, automatic renewal of fixed term contracts, contracting out of consequential loss, retention of credit balance, indemnity, assignment of contract, right of first opportunity to negotiate following termination and early termination fee.
- In gym contracts, terms relating to automatic renewal clauses in minimum term contracts, notice periods for cancellation, cancellation processes, early termination fees, unilateral

determination of a breach of the contract, unilateral contract variation and limitation of liability.

As you can see from the above, the provisions identified by the Commission as being potentially unfair are broad. It is therefore timely and important to revisit your standard terms and consider whether or not they comply with the new provisions of the Act.

Give us a call, or drop us an email if you have any questions whatsoever. We would be more than happy to assist you in providing an explanation and/or reviewing your standard terms to ensure compliance with the Fair Trading Act.

If you would like more information regarding the above, or have any questions, please contact us.

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