FACT SHEET

Fair Trading Act

Contracting out of the Fair Trading Act

This section of the Act commenced on 17 June 2014

This fact sheet provides an overview of the new provisions on contracting out of the Fair Trading Act. It explains the situations in which businesses can and cannot contract out of the Act.

The courts have long recognised that businesses cannot contract out of their obligations to consumers under the Fair Trading Act. Recent changes to the Act make this clear. The changes also clarify the limited situations where a business may be able to contract out of some of its obligations under the Fair Trading Act, when dealing with other businesses.

The general rule: no contracting out

The new provisions make it clear that a business can't enforce any agreement (or part of an agreement) that attempts to release it from its obligations under the Fair Trading Act. Basically this means a business is bound by the Fair Trading Act despite any agreement to the contrary.

So, even if a consumer signs or agrees to something that effectively waives their rights under the Fair Trading Act, a business will not be able to hold them to it. If the business is later found to have misled the consumer– the business will have breached the Fair Trading Act.

The exception: parties in trade

There is a limited exception that allows a business to contract out of certain sections of the Fair Trading Act where:

- both parties to the agreement to contract out are in trade
- the agreement is in writing

  and
- it is fair and reasonable for them to do so.

Is it fair and reasonable to contract out?

The test of whether it is fair and reasonable for a business to contract out of certain parts of the Fair Trading Act is designed to help stop weaker parties to an agreement from losing their protections under the Act.

When a court is deciding whether a contracting out clause is enforceable, it will take into account things like:

- what is the agreement about?
- how valuable are the goods or services or interest in land?
- did one party have more bargaining power than the other when the contract was being signed?
- was each party able to negotiate the terms of the contract?
- was one party required to either accept or reject the agreement on the terms and conditions set down by the other party?
- did the party wanting to rely on the contracting out clause know they were making a misrepresentation that would have breached the Act?
- did either party get legal advice?

If, after considering these criteria, a court decides an

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agreement to contract out is in fact fair and reasonable, the contracting out clause remains valid. This means that neither party to the agreement can take action against the other for breaching the Act.

However, the Commerce Commission can still take action against a business for breaching the Act, even if a contracting out clause applies to the agreement.

What can a business contract out of?

The sections of the Act a business can contract out of (assuming it was agreed to and was fair and reasonable):

- section 9, which prohibits misleading and deceptive conduct generally
- section 12A, which prohibits unsubstantiated representations
- section 13, which prohibits false or misleading representations

  and
- section 14(1), which prohibits false or misleading representations in connection with the sale or grant of land.

Penalties for breaching the Fair Trading Act

Only the courts can make a ruling on breaches of the Fair Trading Act. Courts may fine companies found guilty of breaching provisions of the Fair Trading Act up to $600,000 and individuals up to $200,000.

A District Court may impose a management banning order against anyone convicted of these offences on two or more separate occasions within a ten year period.

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