

Commercial Insights

New disclosure obligations in New South Wales require increased transparency with consumers

From 1 January 2021, New South Wales Fair Trading is proposing to enforce new disclosure obligations (which were first introduced in July 2020) contained in the *Fair Trading Act 1987 (NSW)*. The new obligations relate to how businesses that supply goods and services in New South Wales to consumers, communicate with customers and how intermediaries such as agents and brokers, communicate with customers.

The obligations require businesses to disclose the substance and effect of any terms in their contracts which may *substantially prejudice* the interests of consumers and to disclose any referral arrangements with other suppliers or commissions payable when they recommend that a consumer buys goods or services from a third party supplier.

If you are an intermediary, you need to disclose that you are under a commission or referral arrangement. You are an intermediary if you, under an arrangement that provides for a financial incentive:

- arrange contracts for the supply of goods or services from another supplier on behalf of a customer as an agent, or
- refer a consumer to another supplier of goods or services.

These new provisions in the *Fair Trading Act* are designed to increase transparency and competition and provide consumers with information to enable them to make meaningful decisions.

Importantly, the unfair contract terms regime contained in the Australian Consumer Law applies to standard form contracts. However, the new provisions in the *Fair Trading Act* apply to both standard form contracts and bespoke contracts.

Organisations which fall foul of the new disclosure obligations detailed in the *Fair Trading Act*, face potential fines of up to \$110,000 for companies and \$22,000 for individuals.

When will a supply term substantially prejudice a consumer?

NSW Fair Trading has given examples of terms that may substantially prejudice consumers. These include:

1. Clauses that exclude the liability of the supplier
2. Clauses that exclude a suppliers liability or provide that a consumer is liable for damage to delivered goods
3. Clauses that allow a supplier to sell or share data about or are provided by the consumer to a third party in a form that allows the consumer to be identified
4. Clauses that require the consumer to pay exit fees or balloon payments or other similar payments.

A contract for supply or performance of services can contain these kinds of terms but they must be disclosed and must be disclosed before the good is supplied or service is performed.

It is always difficult to state with precision what a supplier needs to do in order to be deemed to have taken reasonable steps in order to make required disclosures. New South Wales Fair Trading has suggested that the best way to meet disclosure requirements is for the disclosure to be “clear upfront and automatic” taking into account the nature of the business, the likely impact of the terms and the supplier’s resources.

Disclosures should not be difficult to understand or hidden in the small print.

This article was written by Principal, Douglas Raftesath. If you have any questions about the new disclosure obligations, please contact Douglas.



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