In this Part 1 we examine the new definitions used in the Consumer Rights Act 2015 ('CRA') and the key changes around unfair terms which apply regardless of whether a business supplies goods, services or digital content.

**Definitions of "Consumer" and "Trader"

The Consumer Rights Act ('CRA') applies to business to consumer contracts whether these are negotiated by the consumer or not.

A 'consumer' under the CRA is an individual acting for purposes that are wholly or mainly outside that individual's trade, business, craft or profession. The inclusion of the wording "wholly or mainly" makes the definition of a consumer wider than current law so more people will be caught by this definition.

Instead of referring to 'seller' as is the case under the Unfair Terms in Consumer Contract Regulations 1999 ('UTCCR'), the CRA refers to a 'trader'. A 'trader' under the CRA means a person acting for purposes relating to that person's trade, business, craft or profession, whether acting personally or through another person acting in the trader's name or on the trader's behalf – this clarifies current law and the definition of 'trader' expressly includes government departments, public and local authorities.

**One fairness test

The current law under the Unfair Contract Terms Act 1977 and UTCCR includes fairness tests to assist parties in assessing what is and is not a fair term – but, crucially, the tests between these two pieces of legislation are different.

The CRA simplifies this and adopts one uniform fairness test (adopted from the UTCCR). A term in a consumer contract will be unfair if it 'causes a significant imbalance in the parties' rights and obligations under the contract, to the detriment of the consumer'.

Whether a term is fair takes into consideration:

- the circumstances that existed at the time when the term was agreed;
- the other terms of the contract or any other contract the contract in question depends on; and
- what is being provided under the contract.

Terms should be transparent, simple to understand, not take advantage of a consumer's vulnerability and should take into account a consumer's legitimate interests.

**Exemption from fairness test

Currently, terms specifying the main subject matter or setting the price are not subject to a fairness test if they are transparent - in plain, intelligible language and legible if written. Such terms must be prominent i.e. brought to the consumer's attention in a manner that the average (i.e. 'well informed, observant and circumspect') consumer would know about the term.
Black-listed terms

There are a number of terms in the CRA which are automatically deemed unfair without applying a fairness test – if they are present in a contract, they will automatically be unenforceable. These include for example:

1. excluding liability for failure to perform with reasonable skill and care;
2. excluding liability for goods that are not of satisfactory quality or fit for purpose;
3. excluding or limiting liability for death or personal injury caused by the trader’s negligence;
4. limiting liability to less than the contract price for failure to comply with statutory terms.

Note that if a trader limits their liability to a defined sum, this term will be subject to the fairness test and may still be deemed unfair.

20 shades of grey

Currently, there is an indicative and non-exhaustive ‘grey list’ of example terms which might be considered unfair in the Schedule to the UTCCR.

The CRA adopts this list and adds to the list. You can view the ‘grey list’ here.

It pays to play fair

If a term is deemed unfair by a court it will be unenforceable and also means, from a trader’s point of view, there is a waste of time, money and resources and can potentially result in loss for a business. The CRA will expressly require a court to review contracts for fairness when there is any dispute before them about a term even if none of the parties have raised fairness as an issue. It is therefore imperative that traders review their terms and business practices now to ensure they are compliant with the CRA.

If you are a trader and you are considering terms and conditions, you should:

1. not incorporate terms you would not be comfortable signing up to yourself;
2. not hide away terms, for example, in small print and if there is anything unusual in your terms and conditions, draw the consumer’s attention to this;
3. be written in simple, clear and legible manner avoiding the use of jargon; and
4. ensure consumers are given the chance to read and understand their contracts before they sign up to them.

Further guidance for businesses in relation to the CRA is available on the Trading Standards Institute's website, accessible here.

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