BUDDLEFINDLAY

Legal update - Online terms and conditions - Time for a revamp?

Steve Nightingale, Philip Wood, Amy Ryburn, Allan Yeoman

5 December 2014

Increasingly, businesses and government are providing goods and services online. Most medium to large organisations will have *some* form of online presence - even if it is a website containing only basic information about the organisation - and there are very few websites that don't have at least some basic legal terms and conditions. They can remain unchanged for long periods of time.

This update concerns a recent case and an upcoming law change. We think the time is ripe for organisations to take a look at their online terms and conditions in light of these developments.

A new case - Enforceability of online terms

Commentators have long worried about the enforceability of online contracts, particularly so-called "browsewrap" terms, where a person is deemed to have agreed to the terms without taking any active steps to indicate their agreement. While no New Zealand Court has considered this issue yet, there have been a number of US decisions which are instructive as to how organisations should ensure their online terms and conditions are enforceable.

Last year we told you about the 'Zappos.com' case, where a US Federal Court found that Zappos.com (Zappos), a shoe retailer in the US, could not rely on its website terms and conditions because it failed to give sufficient notice of them to its customers. Zappos suffered a major data security breach affecting 24 million of its customers, in whose name a number of class action law suits were filed against Zappos. Zappos tried to argue that the matter should be dealt with by arbitration, in accordance with its website "terms and conditions" document . The US Court found that Zappos' contract with the customers was not enforceable because the terms and conditions were not made obvious to the customer at any time. They were "browsewrap" terms - only found if a customer scrolled down to the bottom of the webpage and sought them out, from amongst numerous other links depicted in small font. The Court found that there had been no 'acceptance' of the terms by the customer so Zappos could not enforce them.

In August 2014, a US appellate court again considered the enforceability of online "browsewrap" terms and conditions (*Nguyen v Barnes & Noble Inc.* 2014 WL 405649 (9th Cir. Aug. 18, 2014). In this case, the consumer, Nguyen, purchased a tablet from the Barnes & Noble retail website. Barnes & Noble had insufficient stock to complete the transaction and so cancelled it. Nguyen then issued proceedings against Barnes & Noble for false advertising and deceptive practises. Barnes & Noble sought to rely on their website terms and conditions which prohibited a customer from bringing proceedings, and stated that any disputes were to be resolved by arbitration in accordance with those terms.

The terms and conditions that Barnes & Noble sought to rely on were hyperlinked at the bottom left hand corner of every page of the Barnes & Noble website, and were in close proximity to the button a user had to click to complete an online purchase. These terms stated that the customer was indicating their intent to be bound by the terms and conditions by simply visiting the website, purchasing a product or creating an account. Nevertheless because users were never actually directed to the terms and conditions, the Court found that there was no evidence that they had actually even seen them. Because the terms did not apply, Barnes & Noble could not require arbitration and the court proceedings against them were allowed to proceed.

The Court determined that "where a website makes its terms of use available via a conspicuous hyperlink on every page of the website but otherwise provides no notice to users nor prompts them to take any affirmative action to demonstrate assent, even close proximity of the hyperlink to relevant buttons users must click on - without more - is insufficient to give rise to constructive notice." Unhelpfully, while the Court held that the website did not do enough to put a "reasonably prudent user" on constructive notice of the terms, it didn't indicate what might be sufficient notice short of actually requiring some form of active "click-wrap" assent.

Both the Zappos and Barnes & Noble cases may in part be driven by courts jealously guarding their jurisdiction to hear cases (both involved suppliers trying to enforce arbitration clauses). Both cases were decided under US law and it's by no means certain that such a case would have the same outcome in New Zealand. However, as changes in online practice in the US often lead the way, these cases are a useful indication of where best practice might be heading.

If you are trading online we suggest best practice would be to:

- Make sure that you give customers adequate notice of your terms and conditions, ensuring that they consider them before they can purchase or proceed on the website, for example by making them scroll through the terms before they can go on (an increasingly common practice), and
- Consider requiring each user to make a positive act of acceptance of these terms and conditions, for example, by clicking an "I accept" button before proceeding.

If your website provides information only (as many websites do) you may be comfortable with simply having a prominent link to your terms and conditions. We suggest reviewing your online terms and conditions and considering the question "is there anything in these terms that I am in practice likely to need to enforce against users or that I might want to rely upon if anyone ever took action against me?" If the answer to that question is yes, it is worth reconsidering the location of your terms on your website and whether a positive act of acceptance by users would be preferable.

Unfair contract terms

There is another good reason why it's a good time to relook at your online terms. The unfair contract terms (UCT) provisions in the Fair Trading Act 1986 (the Act) come into force on 17 March 2015.

Under the new regime the Commerce Commission can apply to the court to have a contract term declared unfair.

The UCT provisions will apply to all "standard form" consumer contracts. Online terms and conditions are usually standard form contracts, ie offered on a "take it or leave it" basis without any opportunity for negotiation. Many are also "consumer" contracts where they are used to sell goods or services "*of a kind ordinarily acquired for personal, domestic or household use or consumption*".

Certain terms cannot be declared to be unfair, namely:

- Terms that define the main subject matter of the contract
- Terms that set the upfront price payable under the contract, or
- Terms required or expressly permitted by an enactment.

Those exceptions aside, when the UCT provisions come into force, a court will be able to determine that a term in a relevant contract is unfair if it:

- Would cause significant imbalance in the parties' rights and obligations arising under the contract
- Is not reasonably necessary in order to protect the legitimate interests of the parties who would be advantaged by the term
- Would cause detriment (financial or otherwise) to a party if it were enforced.

The Act provides a non-exhaustive 'grey list' of potentially unfair terms. The 'grey list' terms include some terms which are very common in online contracts (such as those which limit a business' liability or allow it to unilaterally vary the terms of the contract). A term won't be automatically unfair just because it is on the grey list - it will still be subject to the three-limbed inquiry described above. The term must also be assessed for transparency and viewed in light of the contract as a whole.

Transparency requires consideration of whether the term:

- Is expressed in reasonably plain language
- Is legible
- Is presented clearly
- Is readily available to any party affected by the term.

While a lack of transparency alone is not the sole indicator that a term is unfair, one-sided terms and conditions which are buried in a website may struggle to meet the Act's requirements.

Getting your terms right really matters. If the court declares a term unfair, the particular term cannot be enforced against **any** consumer, unless it is modified as directed by the court (although in some cases it may be deleted altogether). A trader that retains an offending term in its contract is liable to a fine of $200,000 for an individual and $600,000 for a body corporate.

The new UCT provisions will apply to any contract entered into from 17 March 2015. Contracts entered into before that date are also covered if the contract is varied or renewed on or after 17 March 2015. It is therefore essential for businesses to make sure that their consumer contracts comply with the new provisions before they come into force, and thought must be given as to how the changes are communicated to new and existing customers.

If your organisation would like assistance or advice in relation to these issues, please give one of our experts a call.

Auckland

PwC Tower
188 Quay Street
Auckland 1010

PO Box 1433
Auckland 1140
New Zealand

P: +64 9 358 2555
F: +64 9 358 2055

Wellington

Aon Centre
1 Willis Street
Wellington 6011

PO Box 2694
Wellington 6140
New Zealand

P: +64 4 499 4242
F: +64 4 499 4141

Christchurch

83 Victoria Street
Christchurch 8013

PO Box 322
Christchurch 8140
New Zealand

P: +64 3 379 1747
F: +64 3 379 5659