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The current state of Contract Law in Australia and why it is important for rural managers to understand it

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Abstract: Farmers are business managers and as such they must understand the law or they are likely to fall foul of it. This especially applies to contract law, with which they deal constantly. Contract law is made up of the common law – as the courts have decided it – and statute law- as the state and federal parliaments have enacted statutes which modify the common law. The most important and most recent of the latter is the new Australian Consumer Law.

Key Words: Contract, consumer, unconscionable.

Introduction

This article is addressed to anyone who runs an agricultural business, whether it be broad acre cropping, a sheep and cattle operation, a horticultural or viticultural business or a horse breeding stud, wherever in Australia that business is located.

While your operations may vary in your everyday activities and in your objectives, you will have two things in common with the rest of my audience – first, you are aiming to make a profit and second, you are intimately connected with a large network of laws, state and federal, which, whether you like it or not, control many aspects of your operation and your relations with your neighbours, competitors and workers.

I would not presume in this short article to be able to explain all these laws, but I do encourage you to find some way of researching the particular laws which relate to you, which most of you have probably already done. Establish and cultivate contacts in your local Department of Primary Industry (by whatever name it goes in your state), in your local Department of Environment and Water, in your local Work Cover Authority and Department of Industrial Relations – these contacts will be invaluable in updating you with regard to changes in the law.

The same applies to your own particular Professional Association – Farmers, Horticultural etc – as contacts in these organisations should help you a lot.

To the above you should add your local solicitor.

Researching Federal and State Laws

I make these points because you must be aware of the laws under which you operate your business – ignorance of the law is no excuse, they say, and, though trite, this is usually true. This may mean a little research,

but luckily the Internet has made this much easier than it used to be.

You are probably aware that all federal, state and territory legislation (that is, Statutes and Regulations), is available on the Internet - federal law at www.comlaw.gov.au, and also at www.austlii.edu.au. The former is operated by the Commonwealth Attorney General's office and the latter is an independent professional website.

For state and territory legislation use this website: www.legislation.nsw.gov.au – simply change the 3 digit jurisdiction indicator for the one you want. Thus for Queensland law go to www.legislation.qld.gov.au, and so on.

I don't necessarily recommend rushing to research an Act of Parliament every time you have a problem, but occasionally it is good to know precisely where to find what the law says.

Business of any sort involves contracts

An understanding of Contract Law is very important to any business operator.

A contract is a promise or a set of promises between two or more parties for the breach of which the law will provide a remedy.

Does a contract have to be in writing? No, and the majority of contracts are verbal. They are none-the-less valid for not being in writing so long as no dispute arises about what the parties actually agreed.

What follows from this is that the more important the contract, the more necessary it is to have it in writing.

Generally speaking, a contract in writing must contain ALL the terms, and it cannot be added to verbally. It can of course be added to in writing if both parties agree to the addition, and with modern word processing facilities this simply means amending the original written contract, printing out a new

copy for each party, and adding new signatures and dates.

When you sign a written contract

You will be bound by all the terms in it whether you have read them or not. Your signature implies that you have read the contract, understood it and agree with all the terms.¹³

It is therefore extremely important that you never sign a contract until you have read it thoroughly.

If, however, unfair pressure has been brought to bear on you to sign the contract, you may be able to avoid being bound by it. Such unfair pressure is called “unconscionable conduct” and can include:

- Not being given time to get professional advice on its content, and
- The other party taking advantage of a disadvantage of yours of which they are aware.

Such a disadvantage could be a language problem, a mental disability, illness, or education.

We will look at unconscionable conduct in more detail below.

Needless to say the reverse applies – you should not use such conduct to force another person to sign a contract with you.

The new Australian Consumer Law

Concerned at the number of different federal, state and territory laws which dealt with fair-trading and consumer protection, the Australian Competition and Consumer Commission and its state and territory counterparts have developed over the last few years this new body of law which came into effect on 1st January 2011 and “replaces previous Commonwealth, state and territory consumer protection legislation”.¹⁴

For unknown reasons this important piece of legislation is not an independent Act but is contained in a schedule to the Competition and Consumer Act 2010 (Cth).

It is the inclusion in this new law of unfair contract terms which make it important to introduce it here.

Unfair terms in a contract

The new Australian Consumer Law (ACL) brings in the concept of unfair terms in a

¹³ Toll Pty Ltd v Alphapharm Pty Ltd &Ors [2004]HCA 52

¹⁴ The ACL – Consumer Guarantees – a guide for businesses – ACCC and others. Introduction p.2

Standard Form Contract. This is a written contract, used by a business for all its clients, and which binds a consumer when they sign it (other than as we have seen above).

It is the sort of document which efficient businesses use and amend to reflect the terms of each contract they are involved with so they do not have to reinvent the wheel for each new agreement.

Often if you sign such a contract you are not given a chance to negotiate the terms. If, however, such terms are unfair, a court may decide that they do NOT bind you as a consumer.

So what makes a term unfair?

Under the ACL a term is unfair if:

- it could cause a **significant imbalance** between your rights and obligations and those of the business,
- the term is not **reasonably necessary** to protect the legitimate interests of the business,
- it would cause you **detriment** (financial or non-financial) if the business tried to enforce it,
- the term is not presented **clearly** and expressed in **reasonably plain language**,¹⁵
- any term fails to meet these requirements you should discuss it with your legal advisor to see if you can avoid being bound by it. S.25 of the ACL gives a number of examples of unfair terms,
- a term permits, or has the effect of permitting, one party (but not another party) to vary the terms of the contract,
- a term permits, or has the effect of permitting, one party (but not another party) to terminate the contract, or
- a term limits, or has the effect of limiting, one party's right to sue another party.

Note that these provisions do not apply if there is no standard form written contract involved, or if you are not a consumer.

It is important to realise that you do not need to rush off to a court to have a term in a contract declared “unfair” – the very fact that you recognise what may be an unfair term could enable you to persuade the business with which you are dealing to remove it from the contract or vary it in your favour.

Let’s now look at unconscionable conduct in a little more detail.

Contracts - unconscionable conduct

¹⁵ www.accc.gov.au – search for “unfair contract terms” and ACL s.24.

The common law of contract, that is, the law as the courts have interpreted it over the last 200 years or more, has recently been supplemented to a large degree by statute law. Much of this happened in the last quarter of the 20th century and this has recently been summarised in the new ACL (see below for more details).

Unconscionable conduct – taking advantage of another person's known weakness to get a contractual advantage for yourself - has been prohibited for a quarter of a century or more – first under the Common Law and later by part IVA of the Trade Practices Act.

This was repealed in late 2010 and unconscionable conduct is now covered by part 2-2 of the ACL. The wording is almost exactly the same as before. Section 21 lists examples of what a court would consider if such conduct is alleged:

- (a) the relative strengths of the bargaining positions of the supplier and the [consumer](#); and
- (b) whether the [consumer](#) was [required](#) to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the supplier; and
- (c) whether the [consumer](#) was able to understand any [documents](#) relating to the [supply](#) or possible [supply](#) of the [goods](#) or [services](#); and
- (d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the [consumer](#); and
- (e) the amount for which, and the circumstances under which, the [consumer](#) could have [acquired](#) identical or equivalent [goods](#) or [services](#) from a [person](#) other than the supplier.

Examples of where unconscionable has been found by a court include:

- where one party failed to give the other party time to consult a lawyer before signing a contract;¹⁶
- where one party took advantage of the other's alcoholism;¹⁷ and
- where a bank knew that the consumer couldn't understand business English but made no attempt to find an interpreter.¹⁸

You will note that the Unfair Terms part of the ACL and the Unconscionable Conduct part

overlap a little. This is to your advantage as a consumer.

If you are not a consumer, as defined below, and the other party to your contract has engaged in unconscionable conduct against you, you will have rights under the common law (in other words because of previous court judgments), but not under the ACL.

So what is a consumer?

The definition of consumer in the ACL replaces all former definitions in the Trade Practices Act and the state Fair Trading Acts.

Under the ACL, you are a consumer:

- if you buy goods or services for less than \$40 000; or
- the goods or services were of a sort normally acquired for personal or household use or consumption; or
- the [goods](#) consisted of a vehicle or trailer [acquired](#) for use principally in the transport of [goods](#) on public roads.¹⁹

You are NOT a consumer if:

you buy goods for the purpose of re-supply; or

for the purpose of using them up or transforming them, in [trade or commerce](#);

in the course of a process of production or manufacture; or

in the course of repairing or treating other [goods](#) or fixtures on land.

Looking at some examples might clarify this a little.

- Example 1: You buy \$20,000 worth of hay to feed you stock. You are NOT a consumer because you bought the hay for the purpose of using it up in trade or commerce (your farm).
- Example 2: You buy \$50,000 worth of concrete, tiles, fencing and fibreglass for your new swimming pool, You ARE a consumer because all the goods are for private and domestic purposes.
- Example 3: You buy a new truck for \$100,000 for carting stock, hay and other farm products to market or to other properties. You ARE a consumer because the truck is principally for the transport of goods on public roads.
- Example 4: You contract with a painting firm for paint and its application on/in your homestead. The contract for goods and services is worth \$65,000. You ARE a consumer because the goods and services are for personal and domestic purposes.
- Example 5: You arrange for a construction firm to carry out repairs and refurbishment of your shearing shed. You

¹⁶ Commercial Bank of Australia v Amadio (1983)151 CLR 447

¹⁷ Blomley v Ryan (1956)99CLR

¹⁸ See 4 above. Same case

¹⁹ The Australian Consumer Law s.3

are NOT a consumer because the goods and services provided are to be used in the course of repairing or treating other [goods](#) or fixtures on land.

Does it matter if you are not a consumer?

It will not affect the validity of your contract, but you will not be able to take advantage of any of provisions of the ACL if you are not a consumer. In your business life you will alternate – some contracts you enter into will be contracts where you are a consumer, and in others you will not be a consumer.

In some contracts you will not be a consumer, but the other party will be. In other contracts – business to business contracts – neither party will be a consumer.

What this means is that the ACL will only cover the consumer – but non-consumers have rights also. Discuss this with your solicitor if you want clarification.

The Australian Consumer Law (ACL) – Consumer Protection

This law came into force in all Australian states and territories from 1st January 2011 but although the explanatory guide explains that it “replaces all previous Commonwealth, state and territory consumer protection legislation”, this is not strictly the case. Many state laws – such as the Sale of Goods Acts and in NSW the Contracts Review Act – are still in force, even though much of their content is already covered in the new law. However, they will probably disappear when the review process of the ACL is completed by the end of 2011.

What else is there in the ACL?

We have looked at Unfair Contract Terms and Unconscionable Conduct, so what else is there that rural business operators should understand?

Some of you may remember s.52 of the old Trade Practices Act – one of the most powerful and frequently used parts of that law. It still exists as s.18 of the ACL and is worth setting out in full.

This section states: “A [person](#) must not, in [trade or commerce](#), engage in conduct that is misleading or deceptive or is likely to mislead or deceive.”

That is fairly straightforward, but you must understand that it covers not only deliberate misleading conduct but also conduct which misleads unintentionally, and also covers lack of action or explanation where such action should have been taken.

Such conduct often takes place in pre-contractual negotiations but can also be found in the performance of a contract, and if proven, will give the innocent party grounds

for legal action against the misleaders/deceiver.

A case law example may help explain this. Company C was hoping to sell a restaurant business, and advertised it. They said it would seat a certain number of people, but this number exceeded their licensed seating. During the course of negotiations they provided profit figures to the prospective purchaser, and these too proved to be an exaggeration. The sale went through but the purchasers sued for a substantial sum which the federal court agreed had been the result of the misleading and deceptive conduct of the company.²⁰

In another case a company was marketing a product called “The Ion Mat” which, the company claimed, emitted negative ions which would “reduce stress and assist in reducing cancer causing cells” and would cure a number of other ailments. In a case against the company by the ACCC, the Federal Court found that all the claims were false and ordered the company to cease advertising and selling the Ion Mat.²¹

This section (s.18) does not carry a penalty, but only provides ammunition for legal action.

All the other consumer protection sections which we are about to mention, and the provisions for unconscionable conduct, carry a maximum penalty in some cases of \$1.1 million if the offender is a company or \$220,000 if the offender is not a company.²² So this legislation has teeth if a court decides to use its powers.

Unfair practices

Part 3.1 of the ACL is entitled “Unfair Practices” and lists a number of these which protect the consumer against an unscrupulous supplier of goods and services, including the sale of land. These have been taken almost without change from Part V of the Trade Practices Act. The Misleading and Deceptive conduct provisions are expanded in this part, to include specifically (for example) employment. It is an offence under the ACL to engage in conduct which could mislead persons seeking employment about the availability, nature, terms or conditions of the employment, or any other matter relating to the employment.²³

As an example, a company advertises a position, and responds to an applicant by

²⁰ Henjo Investments v Collins Marrickville (1988) FCA 418.

²¹ ACCC v Giraffe World (1999) FCA 1511.

²² ACL s.224.

²³ ACL s.31.

offering them an interview. The applicant accepts and attends the interview but is unsuccessful. They discover that prior to the date of their interview another person had already been appointed to the position.

This would appear to be a breach of the ACL as when they interviewed the applicant there was no longer a position available. This could make the company liable to a prosecution and a fine of up to \$1.1 million.

This is an example of the previous s. 52 TPA, now s. 18 of the ACL, applying to a "business to business" dispute and not involving a consumer.

Other unfair practices include pyramid selling, bait advertising, claiming payment for unsolicited goods or services, and use of harassment or coercion in relation to payment for goods or services.

It is not either possible or desirable in an article like this to go into great details about the provisions of the ACL, but one thing should be of interest. Have you ever called in a tradesman to do a major job and on completion received a one line bill? If, like most of us, you have probably wondered how the bill was made up but been not too keen to ask in case the tradesman got cranky.

The ACL solves this for us. S.101 states if services are supplied to a consumer, the [consumer](#) may request that the supplier (of services) give the [consumer](#) an itemised bill that:

(a) specifies how the [price](#) of the [services](#) was calculated; and

(b) includes, if applicable, the number of hours of labour that related to the [supply](#) of the [services](#) and the hourly rate for that labour; and

(c) includes, if applicable, a list of the materials used to [supply](#) the [services](#) and the amount charged for those materials.

The supplier must provide such an account within seven days or face prosecution and a penalty of \$15,000 if they are a company or \$3,000 if they are not.

Since we all spend a great deal of our time as consumers and since the ACL is a long and complex, but extremely important, piece of legislation, it would be well worth finding out from your nearest Office of Fair Trading, from the Australian Competition and Consumer Commission or from your own professional association whether any familiarisation courses on the ACL are available in your region, and if so try to attend one.

I think you will find it well worth your while.

Summary

The points which have been highlighted in this article are

- An understanding of contract law and especially the significance of signing a written contract is important to every business person.
- It is important in every contract to know if you are a consumer or not.
- If you are a consumer, the Unfair Contract terms of the ACL may protect you.
- Be aware of what constitutes Unconscionable Conduct and learn to recognise it – and avoid it yourself.
- Try to learn about the Australian Consumer Law and how it can protect your interests.

