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## Could new rules on consumer sales affect you?

On 1 October 2015 the Consumer Rights Act 2015 takes effect. It changes the law regarding sales of goods and services to consumers, both in store, by tele-sales and on-line. Are you up-to-speed with the changes?

### What are the changes?

- They re-state (with slight changes) and bring into one place existing rules on the sale of goods and services, and unfair terms in consumer contracts;
- They change the rules relating to consumer remedies. The changes shouldn't cause much surprise, and your existing complaints and redress procedures may already offer what the new rules require, but you will need to check this;
- They introduce new consumer rights relating to sale of "digital content". This is the most prominent change, but in practice is unlikely to be that onerous on suppliers;
- Terminology has changed – you may need to adjust the language of your terms of sale, web-notices and related materials to keep them up-to date;
- Probably the most important point to remember is that how you (or your sales staff) describe the service you provide forms part of your contractual promise to the customer. Any qualifications need to be very clearly and understandably set out. The same applies to certain key statements about goods. Errors in such information may entitle the consumer to the statutory remedies set out below.

*"A key change is that how you describe the service you provide forms part of your contractual promise to the customer."*

These obligations fall on the immediate supplier, who sells goods or services to the consumer, rather than the original manufacturer.

## New remedies?

If a product or service isn't up to scratch, what you have to offer the consumer varies depending on whether it is goods, services or digital content. For a broad overview of the remedies available, see text box opposite.

Keep in mind that while the cost of repair may, in practice, exceed the original price, the obligation to give a refund will never exceed the price paid. That said, the customer can also sue for damages, but cannot recover twice for the same loss.

## "Digital content"

For the past 20 years or so, it hasn't been clear whether the supply of software and other forms of digital content constituted "goods" or "services". The customer's implied rights under statute depended on which categorisation applied. But in practice it usually didn't matter much because a minimum quality level still applied. Now we have a clear statement of the law that:

- "Digital content" is "data which is produced and supplied in digital form";
- When you sell digital content, the consumer has rights as if they were buying goods (the content must be of satisfactory quality, fit for purpose and comply with its description);
- "Sell" includes free content provided as a package with goods, services or other digital content which is paid for;
- Digital content delivered on a physical medium (such as a compact disc) is treated as goods;
- Where the content is a streaming service, or depends on access to a website, you will need to be clear in your contract about how long the consumer will continue to have access to such facilities. Otherwise the time period must be "reasonable";
- As an extra obligation, if your content damages other data or a device of the consumer (e.g. on which it is downloaded) because you didn't exercise reasonable care and skill, you have an obligation to repair the damage or pay "appropriate" compensation;

This obligation applies where you provide digital content under any contract, so potentially applies in a wider set of circumstances than the core obligations referred to above (satisfactory quality etc). For example a "free" app offered in return for providing the user's email contact details is likely to be covered. In the past anyone who downloaded a defective app which damaged their tablet or other device would have to rely on suing in negligence, whereas now their rights and remedies are clearly set out – albeit that failure to use "reasonable care and skill" must still be shown (as with negligence).

## Remedies

### Goods:

- The consumer may, within 30 days of delivery, reject the goods (and must receive a refund); or
- He can require you to repair or replace the goods; and
- If they still don't work the consumer is entitled to an "appropriate" price reduction (which can be up to 100%) or can reject the goods and receive a refund.

### Services:

- The consumer can require repeat performance within a reasonable time (and without significant inconvenience to the consumer). If this isn't or cannot be performed a price reduction/refund must be given.

### Digital Content:

- The consumer may require repair or replacement. If neither is possible or repair isn't properly effected, an "appropriate" price reduction/refund (which can be up to 100%) must be given.

## Can I restrict my CRA liability under the contract?



Generally "no". The core obligations implied under the CRA cannot be excluded or limited.

However, other terms and related remedies can be limited to the extent that they are "fair". This test replaces the old "reasonableness" test which applied under the Unfair Contract Terms Act ("UCTA"). A term is "unfair" if "contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations ... to the detriment of the consumer".

There have also been some new additions to the so called 'grey list' (of terms that are likely to be regarded as unfair), including the imposition of disproportionate cancellation charges and setting the prices in the contract after the consumer is bound to it.

The best course is to make sure that the customer has sufficient material drawn to their attention before sale in order to understand both the benefits of what is on offer, and its limits.

## New enforcement powers

The CRA also introduces new enforcement powers for consumer regulators including Trading Standards and the Competition and Markets Authority.

In the past, the main enforcement tools used by regulators have been criminal prosecutions (usually reserved for "rogue traders" and certain infringements relating to pricing or descriptions of products/services) and/or civil injunctions known as "Stop Now Orders" (under which businesses could be required to cease infringing practices).

Under the CRA, regulators will have new powers to seek much broader orders from the civil courts. These will include requiring businesses to pay compensation to consumers who have suffered loss due to an infringement of consumer law (e.g. where products have been mis-sold) and/or to take active steps to comply with the law in future. The new powers will apply to all consumer protection law infringements, not just breaches of the CRA.

This raises the stakes for retailers found to have infringed consumer law; whereas in the past, the main concern was often reputational damage, retailers will now be more exposed to potentially significant financial liabilities as well.

*"The new enforcement powers raise the stakes for businesses found to have infringed consumer law."*

## FOR FURTHER INFORMATION, PLEASE CONTACT

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