

TRAINING & DEVELOPMENT PROGRAMME

# Knowledge Network

Webinar Series

## Consumer Rights and Trader Wrongs: *Changes are Coming Soon*

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# Consumer Rights and Trader Wrongs: Changes are Coming Soon

27 July 2022



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# Outline

- Introduction
- Part 2: Sales Contracts
- Part 5: Consumer Information and Cancellation Rights
- Part 9: Amendments to the Consumer Protection Act
- Part 4: Supply of Services
- Part 3: Digital Content / Services
- Part 6: Unfair Terms
- Part 8: Amendments to the Consumer Credit Act
- Part 7: Proceedings and Penalties (Enforcement)
- Q & A

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# Introduction (1)

- Relevance: *for every consumer right there's a trader obligation*
- Genesis of the Bill – to give effect to:
  - The Omnibus Directive (Directive 2019/2161)
  - The Digital Content Directive (Directive 2019/770)
  - The Sale of Goods Directive (Directive 2019/771)
- Transposition is overdue
- Farewell to some 'old reliables' (*eg the EC (Unfair Terms in Consumer Contracts) Regulations 1995*)
- Important amendments to many other enactments (*eg the Sale of Goods Act 1893, the Sale of Goods and Supply of Services Act 1980 and the Consumer Protection Act 2007*)
- For consumer legislation, the Bill and its provisions are complex

## Introduction (2)

- Application:
  - B2C contracts only: *no application to B2B* (the law is largely unaffected)
  - The current law will continue to apply to every in-scope (*ie* B2C) contract that is concluded prior to the commencement date of the Bill
- Few Parts of the Bill are mutually exclusive – most apply in combination with each other
- Key concepts (general):
  - “Consumer” means an individual acting for purposes that are wholly or mainly outside that individual’s trade, business, craft or profession.
  - “Trader” means:
    - (a) a natural person, or
    - (b) a legal person, whether (i) privately owned, (ii) publicly owned, or (iii) partly privately owned and partly publicly owned,who is acting for purposes relating to the person’s trade, business, craft or profession, and includes any person acting in the name, or on behalf, of the trader.

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# Sales Contracts (1)

## Overview

- Existing law:
  - Sale of Goods Act 1893 and Sale of Goods and Supply of Services Act 1980 (will continue to apply to B2B services)
  - “merchantable quality”, conformity with sample, conformity with description, etc
- 2022 Bill:
  - Relevant provisions replace the 1893 Act provisions (transitional arrangements)
  - “goods” means any tangible movable items ... and includes (a) any tangible movable items that incorporate, or are inter-connected with, digital content or a digital service in such a way that the absence of that digital content or digital service would prevent the goods from performing their functions, and (b) water, gas and electricity where they are supplied in a limited volume or set quantity;...

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## Sales Contracts (2)

### Principal Obligations of a Trader

- Goods must be in conformity with the sales contract. How will this be assessed? There will be detailed requirements regarding matters such as:
  - freedom of goods from encumbrances
  - conformity with description
  - general (objective) fitness for typical purpose
  - (subjective) fitness for any disclosed particular purpose
  - adequacy of quality and quantity of the goods
- Many terms are implied into the sales contract and cannot be excluded by a trader

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## Sales Contracts (3)

### Principal Liabilities of a Trader and Remedies of a Consumer

- Generally, a six-year limitation period
- Presumption of a lack of conformity with the sales contract in respect of any defect that arises in the first year
- A complex system of new consumer remedies, including:
  - Right to terminate the contract within 30 days from delivery / installation
  - Right to have the goods brought into conformity though repair / replacement
  - (Linked to bringing into conformity) Right to a proportionate reduction of the price or to exercise the final right to terminate in certain circumstances (such as a failure by a trader to bring non-conforming goods into conformity)
  - Right to withhold payment of any outstanding part of the contract price
  - On formal notice to the trader, right to terminate outside the first 30 days (possibly discounted by depreciation of the goods)



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## Sales Contracts (4)

### Commercial Guarantees

- Notwithstanding privity of contract, a commercial guarantee is binding on the guarantor – and may be enforced by a consumer – according to the terms of that guarantee and any associated advertising
- A commercial guarantee:
  - must include prescribed information
  - must not exclude or limit any otherwise-arising consumer right

### Gifts from Consumer to Consumer

- A consumer that receives a gift of goods from another consumer will be entitled to enforce the donor's rights as purchaser of the goods

# Consumer Information and Cancellation Rights (1)

- EU (Consumer Information and Cancellation Rights) Regs 2013 will be amended
- Three principal scenarios:
  - In-person on-premises contracts (*standard consumer protections*)
  - In-person off-premises contracts (*enhanced consumer protections*)
  - Distance contracts (including online marketplaces and electronic means)
- Detailed requirements for consumer information (set out in the Bill's Schedules) to be provided in each scenario (requirements vary according to context)
- Provisions apply to digital service contracts and digital content contracts
- Financial services and accommodation services (among others) are excluded

## Consumer Information and Cancellation Rights (2)

- Cooling-off periods and rights to cancel: 14 to 30 days (depending on scenario)
  - Model notices and prescribed information
  - Traders are restricted in what may be charged in the event of a consumer cancellation
  - Contracts ancillary to the off-premises or distance contract are also cancelled automatically
- A purported exclusion or limitation of a trader's obligations, or a purported waiver of a consumer's rights, will not have any effect
- A trader:
  - must obtain express consumer consent to any additional charge beyond the charge for the relevant goods or service
  - must not charge a consumer for using any particular means of payment an amount greater than the trader bears for that consumer use
- Inertia selling (unsolicited selling) will remain prohibited

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# Amendments to the Consumer Protection Act

- Amending and updating the Consumer Protection Act 2007, not wholesale reform
- Criminalisation of persistent and knowing engagement in unfair commercial practices
- Implications for websites:
  - information in respect of the order in which products are displayed, whether placement in a list of results is paid for, paid advertising, etc
  - authenticity of “reviews”
- Consumer remedies will be strengthened, including (in some scenarios) a right to terminate and a right to a price reduction if a trader engages in a prohibited act or practice
- Extension (to three years) of the limitation period for the bringing of a summary prosecution against a trader for engaging in a prohibited commercial practice, and introduction of sentencing criteria

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# Supply of Services (1)

## Overview

- Existing law:
  - Sale of Goods and Supply of Services Act 1980 (will continue to apply to B2B services)
  - European Communities (Unfair Terms in Consumer Contracts) Regulations 1995 (as amended)
  - Other laws, *eg* information rights, distance contracts, cancellation rights
- 2022 Bill:
  - Conforms consumer protection law on services with sale of goods protections
  - Wide definition of service agreements (some exceptions exist)
  - Does not override other laws/conventions that allow for limits on consumer rights or that confer greater rights on consumers

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## Supply of Services (2)

### **Principal Obligations of a Trader** (many are implied into the agreement)

- Trader must provide the service in accordance with the contract (and certain pre-contractual oral / written statements)
- Service (and any goods supplied with it) must be reasonably fit for purpose and achieve any agreed result
- Trader must supply the service with reasonable skill and care
- Unless agreed in the contract, the price must be reasonable
- Service must comply with applicable codes of practice that apply to the trader or with which the trader purports to comply

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## Supply of Services (3)

### **Consumer Remedies** (not exhaustive of other remedies)

Where the service is not supplied in accordance with the contract, a consumer has:

- a right to terminate (in some instances, immediately and without the need to request the trader to perform) and to reimbursement of certain amounts
- (unless impossible to do so) the right to have the service brought into conformity with the contract (free-of-charge and within a reasonable time) or otherwise to terminate the contract
- (in various situations including where the trader does not have the necessary skill or fails to bring the service into conformity with the contract) a right to a proportionate reduction in the price or to terminate
- a right to withhold payment (until the trader complies with the contract)

## Supply of Services (4)

### **Exclusion / Restriction Clauses are Prohibited**

- Contractual exclusion, or limitation, of specified provisions in Part 4 will not bind the consumer and for a trader to include them will be an offence
- A reference in the Bill to excluding or restricting the trader's liability includes:
  - excluding or limiting a right or remedy in respect of a liability listed above,
  - making such a right or remedy, or its enforcement, subject to a restrictive or onerous condition,
  - allowing a trader to put a person at a disadvantage as a result of pursuing such a right or remedy,
  - excluding or restricting rules of evidence or procedure, or
  - preventing an obligation arising or limiting its extent,but an agreement in writing to submit present or future differences to ADR (as defined) is not to be regarded as excluding or restricting any liability for these purposes.



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# Digital Content / Services (1)

## Overview

- Existing law:
  - Not specifically regulated
- 2022 Bill:
  - Rules for B2C contracts for ‘digital content’ and ‘digital services’, subject to exceptions
  - Similar to rules for ‘Services’ contracts
  - Apply where consumer pays or where consumer provides personal data
  - Cannot contract out

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## Digital Content / Services (2)

### Main Exceptions

- “Services” contracts
- Electronic communications service (other than number independent personal communications)
- Healthcare
- Financial service
- Gambling service
- Service provided free of charge (in money or personal data)

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## Digital Content / Services (3)

### **Principal Obligations of a Trader** (many are implied into the agreement)

- Trader must provide digital content / digital service in accordance with contract
- Subjective and objective requirements
  - fitness for purpose:
    - (a) made known by consumer and accepted by trader, and
    - (b) for which digital content or digital services of same type would normally be used
  - quantity, qualities and functionality:
    - (a) specified, and
    - (b) that the consumer may reasonably expect

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## Digital Content / Services (4)

### **Consumer Remedies** (not exhaustive of other remedies)

Where digital content/digital service not supplied in accordance with the contract, consumer has following rights (subject to some exceptions and conditions):

- a right to terminate and to reimbursement
- right to have the service brought into conformity with the contract
- right to a proportionate reduction in the price
- right to withhold payment

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## Digital Content / Services (5)

### **Exclusion / Restriction Clauses are Prohibited**

- Exclusion or restriction of specified provisions in Part 3 is non-binding on consumer
- Including such a provision is an offence

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# Unfair Terms (1)

## What does the 2022 Bill (Part 6) do?

- Transposes amendments made to existing EU Directive (93/13/EC):
  - Require effective, proportionate and dissuasive penalties (offences and fines)
  - National transposition measures required to be in force from 28 May 2022
  - Minimum harmonisation instrument.
- Replaces the 1995 Regulations and makes additional important amendments (not mandated by amendments to EU Directive):
  - Expands consumer protections
  - Introduces a “black list” of inherently unfair terms
  - Codifies some existing EU jurisprudence.

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## Unfair Terms (2)

### Scope of Application

- Any contract between a trader and consumer (with limited exceptions *eg* contracts of employment or relating to succession rights)
- “Core terms” exclusion

### Effect of Unfair Term

- Unenforceable by trader
- Can be a basis for enforcement action

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## Unfair Terms (3)

### Assessing Unfairness

- “Core terms” exclusion where the term:
  - specifies the main subject matter and lays down the essential obligations
  - relates to the adequacy of the price or remuneration payable,provided the term is “transparent” and is not on the grey-list.
- “Unfair” = contrary to the requirement of “good faith”, it causes a significant imbalance in the parties’ rights and obligations under the contract to the detriment of the consumer.
- Court is required to consider a variety of factors, including “transparency” and the extent to which the trader dealt fairly with the consumer taking his/her legitimate interests in to account.



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## Unfair Terms (4)

### Assessing Unfairness (*cont'd*)

- Black-list (always unfair). For example:
  - shorter notice period for termination of contract by trader;
  - exclusive jurisdiction for disputes somewhere the consumer is not domiciled.
- Grey-list (presumed unfair). Examples of new terms *vs* 1995 Regulations:
  - where consumer decides not to conclude or perform the contract, the consumer must pay the trader a disproportionately high sum in compensation for items not supplied;
  - trader has discretion to decide the price payable under the contract after the consumer has become bound, where no price or method of determining the price has been agreed before-hand.

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# Hire-Purchase and Consumer-Hire (CCA 1995) (1)

## Consumer Credit Act 1995 amended

- Provisions around Goods the subject of a Hire-Purchase or Consumer-Hire Agreement (“**Hire Agreements**”) are expanded
- General obligation to deliver goods “in conformity” with Hire Agreement, *eg*:
  - owner has the right to sell the goods
  - the goods are free of prior charges/encumbrances (save if disclosed)
  - hirer can enjoy quiet possession of the goods
  - prescribed subjective (section 73C) and objective (section 73D) requirements of conformity are met
  - goods are properly installed (section 73E).

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## Hire-Purchase and Consumer-Hire (CCA 1995) (2)

### Remedies

- Hirer remedies where goods are not “in conformity”:
  - Terminate the Hire Agreement
  - Require the repair or replacement of the goods
  - Proportionate reduction in purchase price
- Onus of proof is often shifted to owner

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## Hire-Purchase and Consumer-Hire (CCA 1995) (3)

### Other Consequences

- Certain “representations” constitute an offence, *eg*:
  - refunds will not be made for goods not in conformity
  - refunds will only be in the form of credit/gift voucher
  - rights/obligations in relation to goods not in conformity are restricted/excluded.
- Terms in Hire Agreements excluding/restricting owner liability:
  - constitute an offence
  - are not binding on the hirer.

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## Hire-Purchase and Consumer-Hire (CCA 1995) (4)

### Commercial Guarantees

- Hirer gets the benefit of conditions specified in advertising if more advantageous than commercial guarantee.
- Where a 3<sup>rd</sup> party provides a commercial guarantee, an owner may be liable for it.
- Guarantees transfer to subsequent hirers.
- Prescribed contents for commercial guarantee statement.
- Purported exclusion/limitation of statutory rights (or imposition of obligations beyond Hire Agreement) may be an offence and unenforceable against hirer.

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# Criminal Enforcement and Penalties

- Prosecution of summary offences by regulator
- Offences by “traders”
- Defence if exercised due diligence and took all reasonable precautions to avoid the commission of the offence
- Mechanism for measuring appropriate penalty
- Liability for costs of proceedings and investigation
- Compensation for consumers
- European Union (Cooperation Between National Authorities Responsible for the Enforcement of Consumer Protection Laws) Regulations 2020 - Fines 4% relevant turnover or €2 million for intra-EU or widespread infringement

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# Questions?



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