

CONSUMER RIGHTS ACT 2015

The Consumer Rights Act 2015 applies to contracts with consumers for the sale of goods, digital content and services concluded on or after 1 October 2015. In this briefing note, we highlight some of the key features of the Act.

SUMMARY

The Act consists of three main parts:

1. a consumer's rights and remedies when purchasing goods, digital content and services;
2. what constitutes unfair terms; and
3. the reform of consumer enforcement powers and private actions in competition law.

To a large extent, the Act consolidates and builds on existing legal requirements but there are some notable changes:

Notable changes from existing legal requirements include the wider definition of "consumer"; rights and remedies for "digital content" and expansion of consumers' remedies.

- the Act introduces a wider definition of "consumer". This now includes individuals acting "mainly" as well as "wholly" outside that "individual's trade, business, craft or profession". This expands the reach of the Act as it means that a "consumer" could include sole traders and individuals purchasing goods or services for both home and professional use;
- new rights and remedies in respect of "digital content" as distinct from goods and services are introduced for consumers. This covers downloaded music, games and films;
- the Act clarifies and expands a consumer's remedies which consumers for defective goods, digital content and services, providing a tiered approach; and
- it widens the prohibitions on unfair terms in consumer contracts and also applies these to consumer notices.

GOODS

Statutory quality standards retained and expanded

Prior to the Act, consumers had various rights in respect of goods under the Sale of Goods Act 1979. In particular, goods had to be of satisfactory quality, fit for purpose and conform to any description or sample provided by the trader. These quality standards are replicated in the Act but there is a new requirement that goods sold must match any model seen or examined by the consumer (e.g. a car in a showroom). This right applies unless the trader alerts the consumer to specific differences.

Tiered remedies for defective goods

The existing remedy system is revamped by the Act so that consumers have the choice of a tiered system of remedies for defective goods. These are summarised below.



Within 30 days from delivery of the defective goods the consumer can either:

- a) reject the defective goods and claim a refund (the “short term right to reject”); or
 - b) require that the defective goods are repaired or replaced.
- The consumer can choose whether they want the goods to be repaired or replaced (unless one of the options is disproportionately expensive for the trader).
 - If the consumer exercises this right, the 30 day period for the “short term right to reject” is paused until the consumer receives back the repaired or replaced goods. On return of the goods, the consumer has the remainder of the 30 day period, or 7 days (whichever is longer) during in which time they can reject the goods (if still defective).
 - The consumer only needs to allow the trader one attempt at repairing or replacing the defective goods.
 - The repair/replacement must be provided within a reasonable time and without significant inconvenience to the consumer.
 - The time limit for the short term right to reject may be shorter if the goods in question can be expected to perish in less than 30 days.

After 30 days from delivery if goods are still defective the consumer can either:

- a) require that the defective goods are repaired or replaced; or
- b) if repair/replacement (i) does not work; (ii) is impossible; (iii) cannot be provided within a reasonable time or without significant inconvenience to the consumer; or (iv) is not provided, the consumer can:
 - o reject the defective goods and claim a refund (the “final right to reject”); or
 - o retain the defective goods but receive a price reduction.

When a refund is required, this must be a full refund except in the case of a motor vehicle or for goods where over 6 months has passed from delivery. In such cases, the trader may make a deduction from the refund to account for use of the goods by the consumer.

Unless the contract states otherwise the trader must collect the goods being rejected.

Other rights and remedies

Pre-contractual information will form part of the contract with the consumer - Under legislation which came into force in 2014, traders are obliged to provide consumers with certain pre-contract information, for example, details about delivery charges (the “Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013”, please click [here](#) to see our Briefing Note on the Consumer Contracts Regulations). As a result of the Act, much of this pre-contract information will form part of the contract with the consumer. This means that pre-contract information given to the consumer cannot at any time be changed without the consumer’s agreement. If the trader breaches this obligation, the consumer can recover costs it incurs as a result up to the amount of the price paid for the goods.

- **Installation of goods** – Where goods are incorrectly installed by the trader, the goods will be deemed not to conform with contract and the consumer will have the right to (i) a repair or replacement; or, failing that (ii) reject the goods and claim a refund.
- **Digital content in goods** – If goods have a digital content element (e.g. a mobile phone with pre-loaded digital content) and the digital content element does not meet the statutory quality requirements in respect of digital content (described below), the goods themselves will be defective for the purposes of the Act and the remedies described in the table above will apply.
- **Goods must be delivered in 30 days** – Unless there is specific agreement with the consumer about when delivery will occur, the trader must deliver goods without undue

delay and no later than 30 days after the day on which the contract is entered into with the consumer. Failure to do so can entitle the consumer to either terminate the contract or require re-delivery, the remedy available will depend on the circumstances.

DIGITAL CONTENT

There are specific rights and remedies in respect of “digital content”.

Digital content is widely defined as data “produced and supplied in digital form”.

- **“Digital content” is widely defined** - For the purposes of the Act, digital content is defined as data “produced and supplied in digital form”. It includes downloaded software, games, ringtones and apps. Up until now, the position of such items as either “goods” or “services” has been unclear. The rights in respect of digital content apply to both content which is “sold” and content which is licensed to consumers.
- **Free digital content** – The statutory rights in respect of digital content do not apply to free digital content except consumers will have (i) the right to compensation for damage to other devices; and (ii) rights in respect of unfair terms.
- **Statutory quality standards for digital content** – Digital content must be of satisfactory quality, fit for purpose and as described.
- **Tiered remedies for defective digital content** – Where digital content does not adhere to the statutory quality standards, consumers can require that defective digital content is repaired or replaced. If such repair or replacement is (i) impossible; or (ii) not performed by the trader within a reasonable time and without significant inconvenience to the consumer, the consumer can claim a price reduction (which can be 100% of the price of the digital content). So although consumers cannot “reject” digital content, they still may be able to get a full refund in practice. Also, the trader is not limited to one attempt to repair or replace the digital content.

Other rights and remedies

- **Pre-contractual information will form part of the contract with the consumer** – As is now the case in goods contracts (discussed above), much of the pre-contract information which the trader is required to provide to the consumer under the Consumer Contracts Regulations will now form part of the digital content contract (for example, information about arrangements for payment). This means that the pre-contract information given to the consumer cannot, at any time, be changed without the consumer’s agreement. If the trader breaches this obligation, the consumer can recover costs it incurs as a result up to the amount of the price paid for the digital content.
- **Consumer can claim compensation for damage caused** - Consumers can claim compensation in the event that digital content causes damage to a device or other digital content owned by the consumer where such damage would not have occurred if the trader had exercised reasonable skill and care. In such circumstances, the trader must either repair the damage or compensate the consumer for the damage.

SERVICES

- **No definition of “services”** – However, guidance from the Department for Business, Innovation & Skills suggests that this covers a wide variety of services, from hairdressers to painting and decorating businesses. One notable exception is that in Scotland, if the service is provided for free, the services provisions in the Act will not apply.
- **A contract to manufacture goods will be a goods contract** – Where a trader is manufacturing goods for a consumer (e.g. a seamstress making a dress), then the agreement with the consumer should be viewed as a goods contract, albeit that a service is provided. Conversely, if the end product is merely evidence of the trader’s performance of the services (e.g. writing a will), the contract with the consumer will be a services contract. This distinction is important as it affects the remedies available to the consumer.
- **Statutory quality standards for services** - Services must be performed using reasonable skill and care, reflecting the position prior to the Act. However, in determining whether the standard has been met, the test will not be end-result based, but fault based with the actual performance being assessed.

- **Services should be provided within a reasonable time and for a reasonable price** - If a contract does not fix the time for performance of the services, or the price for the services or how this will be calculated, the default position is that the services must be performed within a reasonable time and the consumer must pay a "reasonable price". "Reasonable" is not defined and will be a question of fact which is likely to depend on relevant industry practice. If the services are not performed within a reasonable time, the consumer can require a price reduction.
- **Tiered remedies for defective services** – If services are not performed with reasonable skill and care, the following remedies are available:

CONSUMER REMEDIES FOR DEFECTIVE SERVICES	
<p>The services are not performed with reasonable skill and care.</p>	<ul style="list-style-type: none"> • The consumer can require re-performance of the service (or that part which is defective). <i>Re-performance must be carried out at the trader's own expense, within a reasonable time and without significant inconvenience to the consumer.</i> • If such re-performance is not possible or is not done within a reasonable time, the consumer can require a price reduction. <i>The Act does not specify how a reduction is calculated but requires this to be an "appropriate amount". Guidance from the government's Explanatory Notes to the Act suggests the amount should be the difference between the price of the service and the value of the service actually provided.</i>

Other rights and remedies

Information provided about the service or the trader is binding

- **Statements about the services or the trader may be binding** – Anything which the trader has said (orally or in writing) to the consumer about the service or the trader which is taken into account by the consumer when deciding whether or not to buy or making any decisions about the service after purchase, will form part of the services contract between the trader and the consumer. Prior to the Act, consumers wishing to claim that a trader had supplied misleading information had to rely on bring a misrepresentation claim which can be hard to establish. Consumers now have the benefit of specific statutory remedies (see table below).
- **Pre-contractual information will form part of the contract with the consumer** – As is now the case in goods contracts and digital content contracts, (discussed above), pre-contract information which the trader is required to provide to the consumer under the Consumer Contracts Regulations will now form part of the services contract. This means that the pre-contract information cannot, at any point, be changed without the consumer's agreement. If the trader breaches this obligation, the remedies described in the table below will apply.

The consumer protections under the Unfair Contract Terms Act 1977 and the Unfair Terms in Consumer Contracts Regulations 1999 are now swept into the Act.

UNFAIR TERMS

Previously consumers have been afforded protection against unfair contract terms by virtue of the Unfair Contract Terms Act 1977 and the Unfair Terms in Consumer Contracts Regulations 1999. These protections are now swept into the Act. The Act will apply to both negotiated and non-negotiated contract terms.

The "fairness test"

The central proposition is retained by the Act that a term will be 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" but there are some additional requirements:

- **Consumer notices** - Both contract terms and terms in consumer notices will be subject to the fairness requirements. A "consumer notice" is one which relates to the rights or

obligations between a trader and a consumer or excludes (or attempts to exclude or restrict) the trader's liability. Notices can include announcements, written or otherwise and any other communications which are intended to be seen or heard by a consumer. Terms in consumer contracts and consumer notices which do not meet the "fairness" test will not be enforceable or binding on a consumer.

- **Core terms must be transparent and prominent** - Core terms are provisions which (i) specify the main subject matter of the contract or notice; or which (ii) deal with the adequacy of the price. The Act states that such terms are not subject to the "fairness test" if they are both transparent and prominent. A term is "transparent" if it is legible and written in plain and intelligible language. A term will be "prominent" if it is drawn to the consumer's attention in a way which means a reasonably well informed, observant and circumspect consumer would be aware of the term. The requirement for such terms to be "transparent and prominent" is new. It means that key terms cannot be hidden in small print.

There are additional "grey list" terms

Unfair terms legislation has long contained a "grey list" of those terms in consumer contracts and notices which may be regarded as "unfair". The list is non-exhaustive and a term will not be "unfair" simply because it is on the list. This list is replicated in the Act, subject to few amendments for clarity and the following additions:

- any term that requires a consumer who has decided not to conclude or perform a contract to pay the trader a disproportionately high sum in compensation or for services which have not been supplied;
- any term that allows the trader to determine the characteristics of the subject matter of a contract after the consumer is bound by the contract; and
- any term that allows the trader discretion to determine the price payable under a contract after the consumer is bound by the contract.

CONSUMER REMEDIES FOR BREACH OF INFORMATION REQUIREMENTS	
<p>The services are not performed in line with information provided by the trader <i>about the services</i>.</p>	<ul style="list-style-type: none"> • The consumer can require re-performance of the service (or that part which is defective). • If such re-performance is not possible or is not done within a reasonable time, the consumer can require a price reduction.
<p>The services are not performed in line with information <i>about the trader</i>.</p> <p><i>For example, a consumer with strong ethical beliefs engages a trader on the basis of the trader's assurance that it pays workers the living wage but in fact the trader only pays the minimum wage.</i></p>	<p>The consumer can require a price reduction.</p>

OTHER

There are changes to enforcement powers

In addition to the above, the Act seeks to clarify and streamline the powers of regulators to enforce consumer law. It develops the measures which can be imposed by regulators on traders who breach consumer law.

Introduction of new rules for private actions in competition law

The Act facilitates private damages actions for breach of competition law by:

- providing for opt-out collective actions;
- broadening the remit of the Competition Appeal Tribunal (the "CAT") in terms of the type of competition cases it can hear and streamlining the procedure for bringing a private action before the CAT; and
- providing for voluntary redress schemes (approved by the CMA) which are designed to encourage out-of-court settlement.

WHAT SHOULD I DO?

Traders must ensure that their marketing materials, point of sale materials and terms and conditions are compliant with the Consumer Rights Act 2015. In practice this means that:

- pre-sales information must accurately describe the products or service being supplied;
- terms and conditions of sale and returns policies must offer the rights and remedies to a consumer in accordance with the Act. This includes the right to a refund if the short term right to reject applies. This also applies to sales made in store as well as online;
- sales terms should be reviewed to ensure that they do not contain any of the terms which are considered unfair under the Act and the guidance issued by the Competition and Markets Authority (the relevant enforcement body for consumer rights).

A failure to comply can result not only in sales terms being unenforceable but can also lead to financial penalties and reputational damage.

KEY CONTACTS

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