

The main provisions of the *Consumer Rights Act* (Act) came into force on 1 October 2015. It consolidates and updates the UK's fragmented consumer protection laws, making the regime easier to understand and bringing it firmly into the digital age.

The new law also impacts brands by:

- allowing for greater likelihood that advertising and promotional material could be treated as a contractual term
- allowing consumers a greater range of civil remedies
- increasing the prospect of more class actions

Every consumer-facing business will be affected by the changes. Brand owners should take action now to ensure that their marketing communications and contractual terms comply with the new rules.

### Increased Consumer Rights and Remedies

The Act introduces tiered remedies where goods supplied are defective. Consumers now have 30 days to reject faulty goods and obtain a refund. Once the right to reject is lost, a consumer has the right to repair or replacement. Importantly, the brand owner is only afforded one opportunity to repair the goods. If the attempt to repair fails, the consumer is entitled to a price reduction or a final right to reject.

For the first time, contracts for digital content are treated as a separate category from goods and services. Digital content is defined widely, covering any data which is produced and supplied in digital form – so this would include streamed music, downloaded apps and software programs. Consumers are broadly entitled to the same rights and remedies as those under the supply of goods, except there is no right to reject faulty digital content (only repair or replacement).

Consumers are also given greater protection in relation to the supply of services. Where a service has not been performed with reasonable care and skill, consumers are entitled to re-performance or a price reduction.

The Act implies as a term of every consumer contract a requirement that goods be, amongst other things, of satisfactory quality, as described, correctly installed and that they match any sample provided. Similarly, digital content must be of satisfactory quality, fit for purpose and as described. The Act says that statements made in advertising should also be taken into account when assessing whether goods or digital content are of "satisfactory quality".

For contracts to supply services, the Act implies a term that the services will be provided with reasonable skill and care and in line with information provided about the service. Any description of the services or the brand, whether said or written, will also be treated as a term of the contract if it was taken into account by the consumer during its decision-making process. These obligations extend to promises or claims made by agencies (on behalf of brands) in marketing communications and advertising copy.

The *Consumer Contracts (Information, Cancellation and Additional Charges) Regulations* – which came into force in June 2014 and overhauled the distance selling regime – introduced a requirement that certain information be provided to consumers before they are bound by a contract. The Act now adds an additional layer of requirements on brand owners by treating certain of that pre-contractual information as a term of the contract.

### Unfair Terms

The Act merges pre-existing consumer protection rules on fairness and extends the old fairness test and transparency requirements to consumer notices. A notice or a term will be unfair (and therefore unenforceable) if, contrary to the requirement of good faith, it causes a significant imbalance of the parties' rights and obligations to the detriment of the consumer. Only terms that relate to the subject matter or price of the contract are exempt from the fairness test.

The Act extends the non-exhaustive, indicative and illustrative 'grey list' of terms that may be regarded as unfair. Guidance from the Competition & Markets Authority (CMA) says that it considers terms which exclude liability for consequential loss as potentially unfair because they have the potential, in certain circumstances, to prevent a consumer from seeking redress when it should be available.

There is a separate and distinct requirement of transparency, which will be met if a term or notice is expressed in plain and intelligible language. (A further condition of "prominence" applies to contract terms only.) CMA guidance states that, in the interests of transparency, references to terminology such as "indemnity" and "consequential loss" should be avoided – as consumers are unlikely to understand their true meaning.

## Recommendations for Brand Owners

The new provisions under the Act give consumers stronger rights under contract and competition law. As a result, brand owners may start to see more cases of disaffected consumers taking measures to enforce their rights, including participation in collective action for anti-competitive behaviour.

Brand owners should update their Ts&Cs and business practices with consideration for the new consumer rights and remedies. Closer attention should also be paid to quality assurance and control mechanisms to help spot defects in products before they are sold – as consumers are entitled to reject defective goods after only one unsuccessful attempt to repair.

Marketing and advertising materials should be scrutinised to ensure that information and claims relating to the brand's products or services are accurate, transparent and fair. Brand owners may be contractually obliged to honour certain claims made in communications with consumers. Therefore, marketing materials made by, or on behalf of, the brand should be closely monitored.

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