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Svantesson, Dan Jerker B; Holly, Loren

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Loren Holly

Dan Jerker B. Svantesson

*Bond University*, dan\_svantesson@bond.edu.au

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# An Overview and Analysis of the National Unfair Contract Terms Provisions<sup>+</sup>

Dan Jerker B. Svantesson\* & Loren Holly\*\*

The Commonwealth Parliament has recently introduced the Australian Consumer Law, a legislative regime for a national consumer protection framework. One of the most significant changes to consumer protection within Australia has been the introduction of provisions governing unfair contract terms within consumer contracts. This article outlines the new provisions and examines the way in which the law is likely to be applied by the courts, with reference to relevant case law relating to the similar provisions found in legislation in Victoria and New South Wales and UK.

## 1. Introduction

The Australian Consumer Law (“ACL”) represents a major overhaul of Australian consumer protection law and replaces provisions within the *Trade Practices Act 1974 (Cth)* (“TPA”), along with 17 State and Territory Acts, to implement a national consumer law framework.

The ACL has been introduced after a process of cooperation between the Federal Government and the States and Territories. It draws on conclusions found by the 2008 Productivity Commission *Review of Australia’s Consumer Policy Framework* and existing best practice in State and Territory laws.

As the ACL will be a law of the Commonwealth, as well as a law of the States and Territories, the provisions contained within the ACL will apply to the activities of all businesses in Australia, regardless of whether or not they meet the relevant criteria to be classed as corporations under the TPA.<sup>1</sup>

Perhaps the most significant of the changes being implemented by the ACL is the introduction of national provisions governing unfair contract terms. The goal of the provisions is to improve protection for consumers by removing unfair terms in standard form contracts. The unfair term provisions apply to standard form contracts entered into on or after 1 July 2010 and to terms of existing such contracts as renewed or varied after this date.<sup>2</sup>

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\* Associate Professor, Faculty of Law Bond University, Gold Coast Queensland 4229 Australia, Ph: +61 7 5595 1418, E-mail: Dan\_Svantesson@bond.edu.au, (www.svantesson.org).

\*\* Solicitor, Melbourne Victoria. Ph: +61 403 721 454.

<sup>1</sup> *Implementing the ACL* (2010) Australian Treasury <[<sup>2</sup> \*A guide to the unfair contract terms law\* \(2010\) \[4\] Victorian Consumer Affairs <](http://www.treasury.gov.au/consumerlaw/content/default.asp?> at 20 July 2010.</a></p></div><div data-bbox=)

New South Wales<sup>3</sup> and Victoria<sup>4</sup> have passed legislation that applies the unfair contract terms in those jurisdictions to non-corporations effective from 1 July 2010.

The unfair contract terms provisions contained in the ACL are also included in a new Part 2, Division 2, Subdivision BA of the *Australian Securities and Investment Commission Act 2001* (Cth) (“ASIC Act”), with respect to financial products and services.

The provisions are generic consumer protection laws, in that they provide a consumer with a right to take legal action in response to the harm they suffer as a result of the conduct of the business.<sup>5</sup>

This article outlines and analyses the Australian Consumer Law’s unfair contract provisions.

## 2. Background

The Australian Consumer Law’s unfair contract provisions have an interesting history and have found their way into Australian law in a somewhat unorthodox manner, as the starting-point is found in an EU Directive.

In recognition of the importance of cross-border consumer trade, and the diversity in the approaches taken by individual Member States towards consumer protection, a Council Directive on unfair terms in consumer contracts came into force on the 11<sup>th</sup> of May 1993. The Directive required the Member States to implement relevant legislation before the end of 1994. This Directive was, for natural reasons, implemented in the UK, and this implementation inspired Victoria to amend its *Fair Trading Act 1999* (Vic) so as to introduce a version of the EU unfair contract provisions (referred to throughout as “the Victorian Legislation”). The success of this approach has, in turn, been a catalyst for calls for a nationwide adoption of unfair contract provisions.

As a result, Victorian cases are likely to have a significant bearing on the interpretation of the new Federal legislation. Thus, they are discussed throughout this article to demonstrate the likely effect of the Australian Consumer Law’s unfair contract provisions.

Further guidance may also be drawn from the application of the *Contracts Review Act 1980* (NSW) (referred to throughout as the “*Contracts Review*

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Forms+and+publications?OpenDocument&1=10-Listing~&2=-Utility+Buttons~&3=17-Forms+and+publications~#unfair> at 21 July 2010.

<sup>3</sup> *Fair Trading Act 1987* (NSW).

<sup>4</sup> *Fair Trading Amendment (Unfair Contract Terms) Act 2010* (Vic).

<sup>5</sup> *Australian Consumer Law – Fair Markets, Confident Consumers* (2009) Australian Treasury < <http://www.treasury.gov.au/consumerlaw/content/default.asp> > at 22 July 2010.

Act”). It gives New South Wales courts power to award remedies to consumers that have been affected by procedural or substantive unfairness. The *Contracts Review Act* allows a court to find a contract to be “unjust” and rule that the contract is void or make an order to vary the contract. Thus, it overlaps with the Australian Consumer Law’s unfair contract provisions. For example, both the ACL and the *Contracts Review Act* allow remedy to a consumer where the consumer has not had a reasonable opportunity to negotiate the terms of the contract.

Further, to determine whether a matter is unjust, a court applying the *Contracts Review Act* may take into consideration the bargaining powers of the parties in making the contract, whether the terms were able to be negotiated and whether it was practical for the party seeking relief to negotiate the alteration of or reject any of the provisions of the contract, and what the educational or economic circumstances of the parties were when making the contract.<sup>6</sup>

The purpose of the ACL is to implement a new, national law governing consumer protection in Australia. In doing so, the ACL is replacing a number of State and Territory Acts. However, the ACL is not intended to replace the *Contracts Review Act*.<sup>7</sup> The ACL and the *Contracts Review Act* will continue to work together because of the differing intentions of each Act.

The distinction between the ACL and the *Contracts Review Act* lies in that the ACL focuses more on the contents of the terms of the contract, whereas the *Contracts Review Act* governs the circumstances that caused the parties to enter into the contract.

Before the introduction of the unfair contract term provisions, submissions were heard from interested parties, such as business groups, consumer groups, and the Australian Treasury.

All interested parties recognised the need for national consumer laws, but the parties were divided on the need for unfair contract provisions and, further, the expansion of the powers of regulatory bodies (see below – ‘Enforcement’).

Business groups argued the unfair contract terms would cause unnecessary cost to businesses, in having to review their standard form contracts.<sup>8</sup> They further argued the provisions would cause uncertainty in the law, caused by the evidentiary presumptions in favour of consumers.<sup>9</sup>

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<sup>6</sup> Section 9 *Contracts Review Act* 1980 (NSW).

<sup>7</sup> *The Australian Consumer Law – An Introduction* (2010) Australian Treasury <<http://www.treasury.gov.au/consumerlaw/content/default.asp>> at 21 July 2010.

<sup>8</sup> *The Australian Consumer Law and Unfair Contract Terms - Fact Sheet* (2009) Sparke Helmore <[http://218.185.51.17/sparke/news/publications/the\\_new\\_australian\\_consumer\\_law\\_and\\_unfair\\_contract\\_terms/fact\\_sheet\\_the\\_australian\\_consumer\\_law\\_and\\_unfair\\_contract\\_terms.jsp](http://218.185.51.17/sparke/news/publications/the_new_australian_consumer_law_and_unfair_contract_terms/fact_sheet_the_australian_consumer_law_and_unfair_contract_terms.jsp)> at 29 September 2010.

<sup>9</sup> *Ibid.*

Consumer groups contended that disclosure of the alleged unfair term to the consumer should not be a factor considered by the Court in deciding whether a term is unfair, while small businesses urged the unfair contract provisions should be applied to transactions between businesses.<sup>10</sup>

Nevertheless, having reviewed all of the submissions, the Senate Committee was of the view the Bill was appropriate to act in the interests of all parties concerned.

It is worth noting that, on the day the ACL was passed, the Minister for Financial Services, Superannuation and Corporate Law, Chris Bowen, released an Options Paper seeking comments to address unfair terms included in insurance contracts. Currently, insurance contracts are excluded from the operation of the provisions of the unfair contract provisions within the ASIC Act.<sup>11</sup> The results of this Options Paper may see the amendment of the relevant legislation, to apply unfair contract term provisions to insurance contracts.

### **3. Unfair terms of consumer contract (s. 2)**

Under Section 2, which represents the heart of the ACL, unfair terms in consumer contract will be void. However, a contract will continue to bind the parties to the contract to the extent that the contract is capable of operating without the unfair term.<sup>12</sup>

#### **2 Unfair terms of consumer contracts**

- (1) A term of a consumer contract is void if:
  - (a) the term is unfair; and
  - (b) the contract is a standard form contract.
- (2) The contract continues to bind the parties if it is capable of operating without the unfair term.
- (3) A consumer contract is a contract for:
  - (a) a supply of goods or services; or
  - (b) a sale or grant of an interest in land:  
to an individual whose acquisition of the goods, services or interest is wholly or predominantly for personal, domestic or household use or consumption.

To properly understand this Section, we must first ascertain the meaning of the some key terms. A ‘consumer contract’ is a standard-form agreement (see below) for the supply of goods or services that is wholly or predominantly for personal, domestic or household use or consumption.<sup>13</sup> We can here note a departure from the complex definition of a “consumer” found in TPA s. 4B, in favour of a simpler reference to personal, domestic or household use or consumption. While this brings Australian consumer protection law (in this limited setting) in line with the approach of many other countries, and that of

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<sup>10</sup> Ibid.

<sup>11</sup> Ibid.

<sup>12</sup> Victorian Consumer Affairs, above n 2, 4.

<sup>13</sup> Victorian Consumer Affairs, above n 2, 7.

several international instruments, it must be acknowledged that it represents a narrowing of the scope of application.<sup>14</sup>

The law applies equally to contracts in all forms, including written and oral, online, over the phone and face-to-face.<sup>15</sup> Under the ASIC Act, a similar definition of a consumer contract applies in relation to financial products and services.<sup>16</sup>

The ACL does not specifically define the term ‘standard form contract’. In general terms, a standard form contract is a contract that is prepared by one party to the contract (usually the business), containing a generic set of terms and conditions where the other party (the consumer) has not had an opportunity to negotiate the terms. Further, a standard form contract is offered to a consumer on a ‘take it or leave it’ basis.<sup>17</sup> Section 7 provides the following:

#### **7 Standard form contracts**

- (1) If a party to a proceeding alleges that a contract is a standard form contract, it is presumed to be a standard form contract unless another party to the proceeding proves otherwise.
- (2) In determining whether a contract is a standard form contract, a court may take into account such matters as it thinks relevant, but must take into account the following:
  - (a) whether one of the parties has all or most of the bargaining power relating to the transaction;
  - (b) whether the contract was prepared by one party before any discussion relating to the transaction occurred between the parties;
  - (c) whether another party was, in effect, required either to accept or reject the terms of the contract (other than the terms referred to in section 5(1)) in the form in which they were presented;
  - (d) whether another party was given an effective opportunity to negotiate the terms of the contract that were not the terms referred to in section 5(1);
  - (e) whether the terms of the contract (other than the terms referred to in section 5(1)) take into account the specific characteristics of another party or the particular transaction;
  - (f) any other matter prescribed by the regulations.

The onus of proof is reversed in relation to proving the existence of a standard form contract. This reverse onus of proof will allow the consumer to bring an action without suffering any additional detriment in having to prove the agreement is the result of a standard form contract. Furthermore, it allows the court to examine whether the contract has the effect of being a standard form

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<sup>14</sup> For an interesting discussion of the various uses of the term ‘consumer’ under the new consumer protection framework, see: J W Carter, ‘The Commercial Side of Australian Consumer Protection Law’ (2010) 26 *Journal of Contract Law*, 221, 224-228.

<sup>15</sup> Victorian Consumer Affairs, above n 2, 4.

<sup>16</sup> Australian Securities and Investments Commission Act 2001 (Cth), s. 12BF.

<sup>17</sup> *Australian Consumer Law – A Guide to Provisions* (2010) Australian Government <<http://www.treasury.gov.au/consumerlaw/content/default.asp>> at 20 July 2010.

contract, without being required to consider acknowledgements by the consumer that the contract has been negotiated, or the inclusion of a term in the contract, outlining that the consumer agrees the contract has been negotiated between the parties.<sup>18</sup>

A further term that we need to define is 'goods'. While generally rather uncontroversial, there has been much debate surrounding whether computer software fell under the definition of goods in the Sale of Goods Acts and the TPA. Most recently, the New South Wales Supreme Court in the case of *Gammasonics Institute for Medical Research Pty Ltd v Comrad Medical Systems Pty Ltd*<sup>19</sup> held that software did not constitute goods per the current definition of 'goods'.

In light of the above, the ALC has amended the current definition of "goods" contained within the TPA to include computer software in the definition. The new definition comes into effect on 1 January 2011.<sup>20</sup>

#### **4. Meaning of unfair (s. 3)**

Moving away from the generality of s. 2 discussed above, s. 3 provides what can be seen as a detailed definition of the term "unfair".

##### **3 Meaning of unfair**

- (1) A term of a consumer contract is unfair if:
  - (a) it would cause a significant imbalance in the parties' rights and obligations arising under the contract; and
  - (b) it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and
  - (c) it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.
- (2) In determining whether a term of a consumer contract is unfair under subsection (1), a court may take into account such matters as it thinks relevant, but must take into account the following:
  - (a) the extent to which the term is transparent;
  - (b) the contract as a whole.
- (3) A term is transparent if the term is:
  - (a) expressed in reasonably plain language; and
  - (b) legible; and
  - (c) presented clearly; and
  - (d) readily available to any party affected by the term.
- (4) For the purposes of subsection (1)(b), a term of a consumer contract is presumed not to be reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term, unless that party proves otherwise.

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<sup>18</sup> Sparke Helmore, above n 9.

<sup>19</sup> [2010] NSWSC 267.

<sup>20</sup> See Schedule 1 of the Trade Practices Amendment (Australian Consumer Law) Act No (2) 2010.



Section 3(1)(b) uses the term “legitimate interest” in reference to the inclusion of the term in the contract. The interpretation of “legitimate interest” will be the duty of the court. However it will likely require businesses to produce evidence to prove the necessity of the term with reference to the efficacy of the business. Commentators have suggested this may be done through the production of material relating to the business’ costs and structure, the need for the mitigation of risks or particular industry practices to the extent that such material is relevant.<sup>21</sup>

It has also been suggested that it would be useful for businesses to gather and record information on the commercial rationale for the inclusion of particular terms in their standard form contracts, so that the information may be introduced into evidence if the term is later challenged.<sup>22</sup>

Section 3(2)(a) requires the Court to consider the extent to which the term is transparent and section 3(2)(b) requires the consideration of the contract as a whole in determining whether the term is unfair.

Commentators in the field have indicated that the transparency requirement of section 3(2)(a) will not operate to automatically find a term unfair if it does not meet the transparency requirement. In the same vein, a term that is transparency will not, in itself, disprove the unfairness of the term.<sup>23</sup>

The unfair contract provisions in the United Kingdom use the phrase ‘plain and intelligible language’ rather than ‘transparent’. Notwithstanding, the practical effect of these two phrases is likely to be the same, and the case of *Office of Fair Trading v Abbey National plc*<sup>24</sup> per Smith J may provide some guidance regarding how the term ‘transparent’ may be interpreted:

[Transparency] requires not only the actual wording of individual clauses or conditions be comprehensible to consumers, but that the typical consumer can understand how the term affects the rights and obligations that he and the seller or supplier have under the contract.

The requirement for transparency was discussed in the VCAT case of *Director of Consumer Affairs Victoria v AAPT Ltd (Civil Claims)*<sup>25</sup> (“the AAPT case”), where it was made clear that even where a contract contains terms that favour the consumer, the favourable term may not counterbalance the unfair term if the consumer is unaware of the unfair term. The consumer may be unaware of the unfair term where it is implied in to the contract, hidden in the terms and conditions, in a schedule or another document or

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<sup>21</sup> Victorian Consumer Affairs, above n 2, 14.

<sup>22</sup> Hodgson, F, *Jetstar v Free Litigation Update* (2009) Blake Dawson <[http://www.blakedawson.com/Templates/Publications/x\\_publication\\_content\\_page.aspx?id=56537](http://www.blakedawson.com/Templates/Publications/x_publication_content_page.aspx?id=56537)>

<sup>23</sup> Victorian Consumer Affairs, above n 2, 15.

<sup>24</sup> [2009] UKSC 6.

<sup>25</sup> [2006] VCAT 1493.

where the term is written in legalese.<sup>26</sup> The AAPT case held that this may result in an information imbalance in the favour of the business.

The AAPT case, in interpreting what constitutes an ‘unfair term’, found there are two distinct types of unfair terms:

1. Terms that cause such an imbalance that they are unfair even if they were individually negotiated or brought to the consumer’s attention; and
2. Other terms that cause less (but still significant) imbalance. These terms are only fair if they have been individually negotiated or brought to the consumer’s attention.<sup>27</sup>

Furthermore, the requirement of the court to consider the contract as a whole in section 3(2)(b) may require the court to weigh up the benefit or detriment to the consumer under the contract as a whole. A term that is alleged to be unfair may be seen in a better context when the detriment to the consumer is viewed in conjunction with the counterbalancing terms. For example, a potentially unfair term may be included in a consumer contract but may be counterbalanced by additional benefits, such as a lower price, being offered to the other party.<sup>28</sup> It is also worth noting that where a particular term is decided to be unfair in one case, it will not necessarily be unfair in every contract.<sup>29</sup>

A case that dealt significantly with unfair contract provisions was the case of *Jetstar Airways Pty Ltd v Elizabeth Winifred Free* (“*Jetstar v Free*”). *Jetstar v Free* was the first decision of the Victorian Supreme Court to consider the effect of the equivalent Victorian unfair contract provisions. As judgments such as this provide a valuable insight into how the ACL provisions will likely be interpreted by the courts, it is worth devoting some time to this case.

At first instance, *Jetstar v Free* was heard in the Victorian Civil and Administrative Tribunal (“VCAT”).<sup>30</sup> Ms Free purchased two return plane tickets for herself and her sister. The tickets were purchased online from the respondent airline company, Jetstar, as part of a special introductory offer and Ms Free paid \$437.39 per person for return tickets.

In purchasing the tickets, Ms Free indicated she agreed to Jetstar’s “Fare Rules” by clicking an ‘I Agree’ button. There were more expensive tickets available that permitted ticketholders to change the name of the passenger, among other particulars.

Subsequently, Ms Free sought to change the name of the passenger on the second ticket. In accordance with the “Fare Rules”, Jetstar charged Ms Free a

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<sup>26</sup> Victorian Consumer Affairs, above n 2, 15.

<sup>27</sup> Cox, N, *Five things you need to know about unfair terms* (2010) Mallesons Stephen Jacques < <http://www.mallesons.com/publications/2008/Feb/9323887w.htm>>

<sup>28</sup> Victorian Consumer Affairs, above n 2, 16.

<sup>29</sup> Ibid.

<sup>30</sup> *Free v Jetstar Airways Pty Ltd (Civil Claims)* [2007] VCAT 1405.

“change fee” of \$75 in addition to a \$600.90 fare difference between the original and the current ticket prices. Ms Free sought a refund of the fare difference on the basis that it had been imposed under an unfair contract term. Senior Member Vassie found in favour of Ms Free.

In interpreting the unfair contract provisions of the Victorian Legislation, Senior Member Vassie found that the charges cause a significant imbalance in the rights and obligations of the parties. Member Vassie found that Jetstar received a windfall for providing a service for which the passenger had already paid. In light of this, it was found the term was unfair within the meaning of the Victorian Legislation.

Jetstar appealed against the decision in the Supreme Court of Victoria<sup>31</sup> and succeeded on the following grounds:

1. VCAT erred in finding that the imposition of the charge caused a significant imbalance in the parties’ rights and obligations, by failing to take into account the benefit to Ms Free from the right to transfer the ticket to another person; and
2. VCAT erred in assessing the effect of the imposition of charges on the parties’ rights and obligations independently, rather than in the context of the contract as a whole.<sup>32</sup>

In the appeal, Cavanough J discussed at length when a ‘significant imbalance in the parties’ rights and obligations’ would occur.

Jetstar submitted that VCAT failed to take into consideration that the right to transfer the ticket to another person counterbalanced the additional fees, and further, that there were other, more expensive, fares available at the time of Ms Free’s purchase which would have allowed Ms Free to cancel (with a refund), and make name and address changes without charge. Jetstar submitted that VCAT concentrated solely on the additional payment that Ms Free was required to make.

Cavanough J noted that the Victorian Legislation required the examination of both rights and obligations of the parties. He found this required a consideration of the balance of the parties’ rights and obligations both under the alleged implied term and *under the contract as a whole*. Accordingly, the Court considered that any detriment to a consumer from a particular term must be weighed against any countervailing benefits rather than consider it in isolation. In this regard, the position taken by Cavanough J in *Jetstar v Free* has been affirmed in the provisions under the ACL, where it has been made explicit that the contract as a whole must be taken into consideration in determining whether a term of that contract is unfair.

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<sup>31</sup> *Jetstar Airways Pty Ltd v Elizabeth Winifred Free* [2008] VSC 539.

<sup>32</sup> *Ibid* 100 – 144.

Cavanough J also found that VCAT had not given proper consideration to the rights that had accrued to Ms Free under both the alleged implied term (the ability to substitute a passenger name) and the contract (a very low ticket price), each of which acted as a counterbalance to the burden of the fare difference she had to pay.

The Jetstar decision, at both the first instance and appeal, dealt significantly with the term “contrary to the requirements of good faith”, as required under the Victorian Legislation. The Court’s findings regarding this requirement have not been discussed here, as this requirement has not been replicated in the ACL provisions.<sup>33</sup>

Leaving the Jetstar case, it is also interesting to note how the transparency requirements under the ACL may be undermined to some extent by the *Corporations Amendment Regulations 2010 (No. 5)* (“the *Corporations Act Amendment*”), and it will be interesting to watch how the two Acts interact. The *Corporations Act Amendment* commenced on 22 June 2010, and requires companies to issue shorter Product Disclosure Statements (“PDS”) for margin loans, superannuation and managed investment schemes. The *Corporations Act Amendment* is being phased in over 24 months, beginning from 22 June 2011.

Previously under the Corporations Act 2001 (Cth), it was stated that the information included in the PDS must be worded in a clear and concise matter, however, there was no limit on the length of the PDS.<sup>34</sup> The Corporations Act Amendment has imposed a page limit of either four or eight pages, depending on the product being supplied.

The logic behind the imposition of a page limit was the expectation that a smaller PDS would encourage consumers to read the information contained in the PDS, thus making more informed decisions in relation to the financial products.<sup>35</sup>

Although these requirements will improve the quality of the advice provided by financial institutions to consumers, there is one predominant concern creating a conflict between the ACL and the *Corporations Act Amendment*.

Under the *Corporations Act Amendment*, financial institutions are able to incorporate any information that is required to be provided in the PDS at an extrinsic source (i.e. outside of the PDS), provided there is a reference contained within the PDS informing consumers of where to find that

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<sup>33</sup> Hudgson, F, above n 25.

<sup>34</sup> *New Product Disclosure Statement Regulations* (2010) Pricewaterhouse Coopers <<http://www.pwc.com.au/legal/assets/legaltalk/LegalTalk-Alert-28Jun10.pdf>>

<sup>35</sup> *Ibid.*

information.<sup>36</sup> It can be assumed the easiest way to do this would be a reference to the institution's website.<sup>37</sup>

The ability to incorporate information by reference is subject to Part 7.9 of the Corporations Act 2001, meaning that there can be no omission that would be materially adverse from the point of view of a reasonable consumer.<sup>38</sup>

However, many interested parties are concerned that, despite the application of Part 7.9, the consequence of an ability to incorporate by reference will be that the information available to a consumer will be dispersed over several arenas, to allow financial institutions to comply with the Corporations Act Amendment. As mentioned above, the AAPT case held that a term may be unfair where it is buried in fine print or another document. Financial institutions may unknowingly be breaching the ACL following the AAPT decision, to allow them to comply with the Corporations Act Amendment.

## 5. Examples of unfair terms (s. 4)

Not only does the new legislation define “unfair contracts” in detail (s. 3), like its counterparts in the UK and Victoria, it also contains a list of terms that are likely to be regarded as unfair.<sup>39</sup> This approach creates a degree of certainty for both consumers and businesses.

### 4 Examples of unfair terms

- (1) Without limiting section 3, the following are examples of the kinds of terms of a consumer contract that may be unfair:
  - (a) a term that permits, or has the effect of permitting, one party (but not another party) to avoid or limit performance of the contract;
  - (b) a term that permits, or has the effect of permitting, one party (but not another party) to terminate the contract;
  - (c) a term that penalises, or has the effect of penalising, one party (but not another party) for a breach or termination of the contract;
  - (d) a term that permits, or has the effect of permitting, one party (but not another party) to vary the terms of the contract;
  - (e) a term that permits, or has the effect of permitting, one party (but not another party) to renew or not renew the contract;
  - (f) a term that permits, or has the effect of permitting, one party to vary the upfront price payable under the contract without the right of another party to terminate the contract;

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<sup>36</sup> *Slimming down – short and simple PDS* (2010) Minter Ellison <<http://www.minterellison.com/public/connect/Internet/Home/Legal+Insights/Alerts/NA-Short+and+simple+PDS>>

<sup>37</sup> Pricewaterhouse Coopers, above n, 37.

<sup>38</sup> *Abridged PDS Regime* (2010) Allens Arthur Robinson <<http://www.aar.com.au/pubs/fmres/cufmaug10.htm>>

<sup>39</sup> As pointed out by Professor Carter, there are several key differences between the examples outlined in the new framework and its UK counterpart. See further: J W Carter, ‘The Commercial Side of Australian Consumer Protection Law’ (2010) 26 *Journal of Contract Law*, 221, 238-241.

- (g) a term that permits, or has the effect of permitting, one party unilaterally to vary the characteristics of the goods or services to be supplied, or the interest in land to be sold or granted, under the contract;
  - (h) a term that permits, or has the effect of permitting, one party unilaterally to determine whether the contract has been breached or to interpret its meaning;
  - (i) a term that limits, or has the effect of limiting, one party's vicarious liability for its agents;
  - (j) a term that permits, or has the effect of permitting, one party to assign the contract to the detriment of another party without that other party's consent;
  - (k) a term that limits, or has the effect of limiting, one party's right to sue another party;
  - (l) a term that limits, or has the effect of limiting, the evidence one party can adduce in proceedings relating to the contract;
  - (m) a term that imposes, or has the effect of imposing, the evidential burden on one party in proceedings relating to the contract;
  - (n) a term of a kind, or a term that has an effect of a kind, prescribed by the regulations.
- (2) Before the Governor-General makes a regulation for the purposes of subsection (1)(n) prescribing a kind of term, or a kind of effect that a term has, the Minister must take into consideration:
- (a) the detriment that a term of that kind would cause to consumers; and
  - (b) the impact on business generally of prescribing that kind of term or effect; and
  - (c) the public interest.

The Australian Treasury stated that the examples that may constitute unfair contract provisions have been based on relevant case precedents in other jurisdictions (such as under the Victorian Legislation and the relevant UK legislation).<sup>40</sup>

The examples in section 4 are to provide guidance only, and do not prohibit the use of those terms. They are not intended to create a legal presumption that the terms listed are unfair.<sup>41</sup> However, as noted by Professor Carter, the practical impact of this list of terms is that those terms will be presumed to be unfair, what else would be the point of including them?<sup>42</sup>

Additional examples of terms that may be unfair may be found in guidance provided by industry bodies; for example, the Telecommunications Consumer Protections Code<sup>43</sup> provides guidance specific to the telecommunications industry on these issues.<sup>44</sup>

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<sup>40</sup> *Australian Consumer Law – Fair Markets – Confident Consumers* (2009) Australian Treasury < <http://www.treasury.gov.au/contentitem.asp?NavId=014&ContentID=1484>>

<sup>41</sup> Victorian Consumer Affairs, above n 2, 17.

<sup>42</sup> J W Carter, 'The Commercial Side of Australian Consumer Protection Law' (2010) 26 *Journal of Contract Law*, 221, 238.

<sup>43</sup> (C628:2007).

<sup>44</sup> Victorian Consumer Affairs, above n 2, 17.

We will now examine the types of terms listed in s. 4.

**5.1 Section 4(1)(a): A term that permits, or has the effect of permitting, one party (but not another party) to avoid or limit performance of the contract**

In its commentary on the ACL, Victorian Consumer Affairs (“VCA”) indicated that terms might be less likely to be considered unfair if they prefaced in a way that ensures the consumer understands the affect of the term on their rights under the contract.<sup>45</sup>

**5.2 Section 4(1)(b): A term that permits, or has the effect of permitting, one party (but not another party) to terminate the contract**

The AAPT case dealt with a clause that allowed one party to terminate the contract. Morris J found that an immediate termination clause for any breach of the contract in a mobile phone contract had the potential to be too broad in application, and was thus found to be unfair.

A customer may have breached the agreement in a manner which is inconsequential, yet faces the prospect of having the service terminated. Further, if the customer changes his or her address (which will not necessarily be the address for receipt of billing information) this will also provide a ground to AAPT to terminate the Agreement. Because these provisions are so broadly drawn, and are one sided in their operation, they are unfair terms within the meaning of the FTA.<sup>46</sup>

Furthermore, the VCA has indicated that terms stating that the consumer cannot cancel the contract under any circumstance, or only with the business’ consent, regardless of the business’s actions or omissions in relation to the transaction, may also be found to be unfair.<sup>47</sup>

**5.3 Section 4(1)(c): A term that penalises, or has the effect of penalising, one party (but not another party) for a breach or termination of the contract**

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<sup>45</sup> Victorian Consumer Affairs, above n 2, 18.

<sup>46</sup> *Director of Consumer Affairs Victoria v AAPT Limited* [2006] VCAT 1493, 53.

<sup>47</sup> Victorian Consumer Affairs, above n 2, 20.

The VCA has indicated that section 4(1)(c) may be used to find that terms imposing penalties for trivial breaches of contract by a consumer are unfair.

Commentators have suggested that an amount payable by a consumer in order to terminate a contract exceeds the actual cost to the business of dealing with the termination; the term is likely to be unfair.<sup>48</sup> This is because the general law on liquidated damages must only subject consumers to damages that are justifiable, rather than damages that are imposed as penalties. The termination fee must be a genuine pre-estimate of the supplier's loss.<sup>49</sup> The assessment is made prospectively at the time of contract, and as such, it is irrelevant if the termination fee is ultimately more than the actual loss suffered by the consumer.<sup>50</sup>

In relation to financial institutions, the guidance released by ASIC (CP 135) asking for comments on unfair contract terms in the context of mortgage early exit fees will provide an indication of potential unfair terms.<sup>51</sup>

#### **5.4 Section 4(1)(d): A term that permits, or has the effect of permitting, one party (but not another) to vary the terms of the contract**

An example of an unfair unilateral variation clause was identified in the VCAT case of *Director of Consumer Affairs Victoria v Trainstation Health Clubs Pty Ltd (Civil Claims)* (decided under the Victorian Legislation).<sup>52</sup> The Tribunal found that a clause in a consumer contract allowing a health club operator to unilaterally change the location of the club within a 12km radius of the original location was unfair. The term was found to be unfair as the term was not one that the consumer's attention is specifically drawn, and which has the potential to operate in a way that disadvantages the consumer.<sup>53</sup>

#### **5.5 Section 4(1)(e): A term that permits, or has the effect of permitting, one party (but not another party) to renew or not renew the contract**

A term that allows only the business a right of renewal will unfairly disadvantage the consumer, and may be found to be unfair. The consumer may suffer detriment where a contract is not renewed, or is automatically renewed without the consumer's consent.

An example of an automatic renewal clause is often found in continuing contracts, such as the contract with a water or electricity provider. Where the business unilaterally decides not to renew the contract without providing

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<sup>48</sup> *The new Australian Consumer Law – it has arrived* (2010) Freehills  
<<http://www.freehills.com.au/5880.aspx>>

<sup>49</sup> See the High Court case of *Ringrow Pty Ltd v BP Australia Pty Ltd* [2005] HCA 71 at [32].

<sup>50</sup> Australian Treasury, above n 1.

<sup>51</sup> Freehills, above n 49.

<sup>52</sup> [2008] VCAT 2092.

<sup>53</sup> Victorian Consumer Affairs, above n 2, 19.



notice to the consumer, the consumer is likely to suffer detriment in being without that service.

An automatic renewal clause will not be held to be unfair where the automatic renewal of the contract is reasonably necessary, such as in the circumstance mentioned above of water and energy providers, and where the automatic renewal does not cause a significant imbalance between the parties. The VCA has stated that provided the consumer, prior to the expiration of the contract, is given the right not to have the contract renewed or is not required to pay a fee if they wish to withdraw from the agreement following the automatic renewal, the term is unlikely to be considered unfair.<sup>54</sup>

**5.6 Section 4(1)(f): A term that permits, or has the effect of permitting, one party to vary the upfront price payable under the contract without the right of another party to terminate the contract**

An example of the potential operation of this provision may arise where there is a term in a consumer contract allowing the business to charge a price on delivery for goods that is a higher price than quoted to the consumer at the time the order was placed.

VCA indicated that a variation clause detailing the upfront price payable under the contract will be less likely to be considered unfair if consumers are able to end the contract if they do not agree to the variation.<sup>55</sup> This means the consumer should not be left worse off for having entered into the contract.

**5.7 Section 4(1)(g): A term that permits, or has the effect of permitting, one party unilaterally to vary the characteristics of the goods or services to be supplied, or the interest in land to be sold or granted, or the financial goods or services to be supplied under the contract**

The AAPT case mentioned throughout is relevant to the operation of this provision. In the AAPT case, a term in a contract for mobile phone services allowed AAPT to ‘vary a Supplier or its products, or vary [AAPT’s] charges from time to time without notice to you [the consumer]’.<sup>56</sup> Member Morris found the term was unfair, stating:

This term causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer. For example, it would enable AAPT to reduce the number of calls that a person could make pursuant to a prepaid mobile phone service which

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<sup>54</sup> Victorian Consumer Affairs, above n 2, 20.

<sup>55</sup> Ibid.

<sup>56</sup> At 54.

the person had entered into in good faith. This term was an unfair term.<sup>57</sup>

The VCA has stated that if the intention of a business in including a unilateral variation clause in the contract is to permit changes that are limited in scope, and the consumer understands and agrees to the changes in advances, the term is less likely to be found to be unfair.<sup>58</sup> In order to ensure the compliance with these requirements, the business should make clear to the consumer:

- the variation that might be made and in what circumstances;
- defining how far the variation can extend; or
- providing the consumer with a right to terminate the contract without penalty if the business cannot supply the goods as agreed under the contract.<sup>59</sup>

Within the telecommunications industry, s 5.1.3(d)(ix) of the *Telecommunications Consumer Protections Code*<sup>60</sup> notes that a term may be unfair if it permits the provider to unilaterally vary the characteristics of goods or services during a fixed term contract with less than 21 days notice to the consumer, and without offering the consumer the right to terminate the agreement within 42 days of the date of notice.

#### **5.8 Section 4(1)(h): A term that permits, or has the effect of permitting, one party unilaterally to determine whether the contract has been breached or to interpret its meaning**

The VCA provided an example of the operation of this provision. Where a contract contains a term that limits any testing of a product that the consumer alleges to be faulty to testing conducted by the business, the term may be found to be unfair.<sup>61</sup> A fairer term in this circumstance would be a term referring the faulty product to independent assessment.<sup>62</sup>

#### **5.9 Section 4(1)(i): A term that limits, or has the effect of limiting, one party's vicarious liability for its agents**

Vicarious liability is of central importance for effective consumer protection. Thus, the inclusion of a provision that effectively limits a company's vicariously liability for the action of its employees or sales staff may be regarded as unfair.

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<sup>57</sup> At 54.

<sup>58</sup> Victorian Consumer Affairs, above n 2, 20.

<sup>59</sup> Ibid.

<sup>60</sup> (C628:2007).

<sup>61</sup> Victorian Consumer Affairs, above n 2, 23.

<sup>62</sup> Ibid.

**5.10 Section 4(1)(j): A term that permits, or has the effect of permitting, on party to assign the contract to the detriment of another party without that party's consent**

In the VCAT case of *Director of Consumer Affairs Victoria v Backloads.com Pty Ltd (Civil Claims)*,<sup>63</sup> Tribunal Member Harbison found that a term in a removalist contract allowing the removalist company to 'assign its rights and the rights of any persons on behalf of whom it is acting, to collect all charges and payments from Clients to the Contractor' was unfair under the Victorian Legislation.<sup>64</sup> It was held to be unfair as it 'has the object or effect of assigning rights in respect of the contract to an unidentified non-party' and because it 'creates uncertainty for the consumer because the "Contractor" is not a party to the [...] contract'.<sup>65</sup>

**5.11 Section 4(1)(k): A term that limits, or has the effect of limiting, one party's right to sue another party**

The VCA has stated that a term that requires a consumer to bring legal proceedings in a foreign court may be considered unfair under this provision of the ACL.<sup>66</sup>

**5.12 Section 4(1)(l): A term that limits, or has the effect of limiting, the evidence one party can adduce in proceedings relating to the contract**

A term, such as a conclusive evidence term, is likely to be unfair under the provisions. A conclusive evidence term is a term that stipulates that documents produced by one party to the contract (for example, invoices of amounts owing issued by the business) are prima facie evidence of their contents. These terms may have the effect of deterring a consumer accessing legal remedies.

A term that has the effect of limiting the consumer's perception of their legal rights is also likely to be unfair under this provision. For example, a term specifies that evidence available for presentation is limited to the contract itself and excludes any evidence on pre-contractual negotiations may have the effect of altering the consumers' understanding of their rights. While court rules may allow the presentation of such evidence in certain circumstances, if a consumer is not aware of the rules of evidence, they may be deterred from taking action against the business or in seeking legal advice in relation to the matter because of the term.<sup>67</sup>

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<sup>63</sup> [2009] VCAT 754 at 4.

<sup>64</sup> Ibid.

<sup>65</sup> Ibid.

<sup>66</sup> Victorian Consumer Affairs, above n 2, 24.

<sup>67</sup> Victorian Consumer Affairs, above n 2, 25.

### **5.13 Section 4(1)(m): A term that imposes, or has the effect of imposing, the evidential burden on one party in proceedings relating to the contract**

The VCA has indicated that a term that requires a consumer to provide evidence of unreasonable or potentially unprovable elements of a dispute, such as the authority of a staff member of the business to make representations where such information is in the hands of the business not the consumer, may be unfair.<sup>68</sup>

This provision has the same effect as (1)(l) above – the term need not limit the consumer’s rights, but merely limit the consumer’s perception of their legal rights to constitute an unfair term.<sup>69</sup>

### **5.14 Section 4(1)(n): A term of any kind, or a term that has the effect of any kind, prescribed by the regulations**

The elements to be considered by the Minister as contained in s 4(2) must ensure that consumer, business and public interests are all considered before a term is listed as unfair.

### **5.15 Other possible terms**

Alongside the commentary that has been discussed above in relation to the unfair term examples provided in the ACL, commentators in the field have suggested that a range of other terms may also be found to be unfair under the provisions.

For example, commentators have suggested that terms under which consumers acknowledge they have read or understood the contract may be unfair.<sup>70</sup> A significant example of this term may be found in e-commerce transactions, where the consumer is required to check a box during the transaction confirming they understand the contract and have read the provisions. Most transactions conducted online currently contain a requirement to this effect.

Establishing whether a consumer has understood a contract is an objective matter and cannot be determined simply by requiring a consumer to acknowledge the same. Moreover, there is generally no legal advantage to this clause as the law has always regarded a person as being bound by a contract once they have executed it, regardless of whether they have read and understood the contract.

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<sup>68</sup> Ibid.

<sup>69</sup> Ibid.

<sup>70</sup> Australian Treasury, above n 1.

Notwithstanding the above, the clause may be unfair as it may create the perception in a consumer's mind that there are no legal remedies available to them once they have agreed to such a term. Once again, the unfairness results from the consumer's interpretation of the term, rather than the effect of the term at law.<sup>71</sup>

It has also been suggested that terms that require a deposit equal to a substantial part of the purchase price may be unfair. A deposit is an amount intended to ensure that the consumer is genuine in their intention to purchase, usually to provide 'peace of mind' to the supplier that they do not have to deal with other potential purchasers. A deposit is provided to cover costs in the supplier allocating resources to the contract and pay costs associated with the preparation of the contract. As a general rule, a supplier is allowed to retain a purchaser's deposit if the consumer terminates the contract, provided the deposit is a reasonable amount, regardless of the loss suffered by the supplier.

In contrast, a pre-payment should be refunded to the consumer under a contract, if the consumer opts out of the contract, save for any actual and reasonable losses suffered by the other party to the contract.

Notwithstanding the above, commentators have argued that a clause that requires all or substantially all of the purchase price to be paid as a deposit may be found to be unfair as it departs too significantly from the standard right of a consumer to pay on delivery and acceptance of the goods (or performance of the service).<sup>72</sup>

In the same vein, terms that require consumers to pre-pay for installation of goods are likely to be found to be unfair, as pre-payment monies are generally only paid to cover the initial costs of the supplier – such as obtaining materials.

Terms that require a significant portion of the purchase price to be paid before completion of the contribution are likely to be found to be unfair as they reduce the consumer's bargaining power in respect of legal recourse for breach of contract or defects in goods.

## **6. Terms that define main subject matter of consumer contracts etc. are unaffected (s. 5)**

### **5 Terms that define main subject matter of consumer contracts etc. are unaffected**

- (1) Section 2 does not apply to a term of a consumer contract to the extent that, but only to the extent that, the term:
- (a) defines the main subject matter of the contract; or
  - (b) sets the upfront price payable under the contract; or
  - (c) is a term required, or expressly permitted, by a law of the

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<sup>71</sup> Ibid.

<sup>72</sup> Ibid.

- Commonwealth or a State or Territory.
- (2) The upfront price payable under a consumer contract is the consideration that:
- (a) is provided, or is to be provided, for the supply, sale or grant under the contract; and
  - (b) is disclosed at or before the time the contract is entered into;
- but does not include any other consideration that is contingent on the occurrence or non-occurrence of a particular event.

Section 5 places some important restrictions on the application of s. 2. We analyse those restrictions below.

### **6.1 Section 5(1)(a): Terms that define the main subject matter of the contract**

The main subject matter of a contract refers to the goods or services (including land, financial services or financial products) that the consumer is acquiring under the contract. The main subject matter may also include a term that is necessary to give effect to the supply under the contract, or without which the supply could not occur.<sup>73</sup>

Terms that define the main subject matter of the contract have been excluded from the unfair contract provision terms as a result of the VCAT decision of *Director of Consumer Affairs Victoria v Craig Langley Pty Ltd & Matrix Pilates and Yoga (Pty Ltd) (Civil Claims)*<sup>74</sup>. The Tribunal held that the terms defining the main subject matter of a consumer contract will invariably be the subject of genuine negotiation and therefore will be excluded from unfair contract term provisions.

Member Harbison stated:

[T]erms of a consumer contract which have been the subject of genuine negotiation should not be lightly declared unfair. This legislation is designed to protect consumers from unfair contracts, not to allow a party to a contract who has genuinely reflected on its terms and negotiated them, to be released from a contract term from which he or she later wishes to resile.<sup>75</sup>

### **6.2 Section 5(1)(b): Terms that set the ‘upfront price’ payable under the contract**

The upfront price is the amount that the consumer agrees to pay in consideration for the contract. It is worth noting that section 53C of the TPA

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<sup>73</sup> Victorian Consumer Affairs, above n 2, 9.

<sup>74</sup> [2008] VCAT 482.

<sup>75</sup> Ibid 66.

imposes an obligation regarding businesses to provide a single price, and will apply alongside the unfair contract term provisions.

In the context of a financial product or service—for example, a consumer credit agreement—the upfront price includes the amount borrowed and the interest payable and any fees associated with the service, but does not include contingent fees, such as default fees (s 12BI(3) of the ASIC Act). As a result, principal and interest cannot be challenged under the unfair contract terms provisions.

The upfront price would not include fees levied as a consequence of an event occurring during a period of the contract. These fees are not necessary for the provision of the supply or sale under the contract, but are additional to the upfront price. The upfront price, therefore, will not include terms that impose additional fees for a default or exit, over and above the price for the goods or services acquired.<sup>76</sup> As a result, these terms of the contract could be challenged under the unfair contract provisions.

The upfront payment price is excluded from the unfair contract provisions, as it would be contrary to general contract law to allow parties to a contract to challenge easily understood upfront prices payable.<sup>77</sup>

### **6.3 Section 5(1)(c): Terms that are required or permitted by law**

There are many terms expressly permitted to be included as a matter of public policy, and these may be necessary to ensure the validity of specific transactions. An example of such a term can be found in s 68B of the TPA, which states that a term of a contract for the supply of recreational services will not be void by reason only that the term excludes, restricts or modifies the implied warranties in s 74 of the TPA relating to warranties in relation to the supply of services.

## **7. Contracts to which the unfair contract provisions do not apply (s.8)**

### **8 Contracts to which this Part does not apply**

(1) This Part does not apply to:

- (a) a contract of marine salvage or towage; or
- (b) a charterparty of a ship; or
- (c) a contract for the carriage of goods by ship.

(2) Without limiting subsection (1)(c), the reference in that subsection to a contract for the carriage of goods by ship includes a reference to any contract covered by a sea carriage document within the meaning of the amended Hague Rules referred to in section 7(1) of the Carriage of Goods by Sea Act 1991 .

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<sup>76</sup> Ibid.

<sup>77</sup> Australian Treasury, above n 1.

(3) This Part does not apply to a contract that is the constitution of a company, managed investment scheme or other kind of body.

Shipping contracts are excluded from the unfair contract provisions as they are subject to the comprehensive legal framework (nationally and internationally) that deals with marine contracts.<sup>78</sup>

Further to the above, section 15 of the Insurance Contracts Act has the effect that the unfair contract term provisions will not apply to those terms that are regulated by that Act. However, private health insurance contracts, state and Commonwealth government insurance contracts and re-insurance contracts (among others) are not regulated by the Insurance Contracts Act and will be subject to the unfair contract terms laws.<sup>79</sup>

## 8. Enforcement

As mentioned throughout, the unfair contract terms provisions for consumer goods and services will be enforced by consumer protection agencies. At the Commonwealth level, the provisions will be enforced by ACCC, except for the provisions contained in the ASIC Act in relation to financial products and services, which will be enforced by ASIC.

The states and territories will be required to enforce the law at state level within their respective jurisdictions.

Where enforcement matters involve both general issues and issues pertaining to financial products and services, provisions have been implemented to enable the delegation of functions between the enforcement agencies. The goal of this power is to ensure the most appropriate agency has the power to deal with the matter.

The court in which to bring an enforcement action may differ depending on which agency takes action or depending on which state/territory the consumer and/or business are based. Some state consumer protection legislation also allows action to be brought in a tribunal rather than a court, such as in Victoria, in the Victorian Civil and Administrative Tribunal.

Under s 87AC of the TPA and s 12GBA of the ASIC Act, either the ACCC, ASIC or a party to a standard form consumer contract may apply to the court for a declaration that a term of the contract is an unfair term.

Where a court makes a declaration that a term is unfair, and a party subsequently seeks to apply or rely on the term, the court has the power to grant one, or a number of, the following remedies:

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<sup>78</sup> Victorian Consumer Affairs, above n 2, 11.

<sup>79</sup> Victorian Consumer Affairs, above n 2, 12. See section 9 of the *Insurance Contracts Act* 1984 (Cth).



- an injunction (per s 80 of the TPA / s 12GD of the ASIC Act);
- an order prohibiting payment or transfer of money (per s 87A of the TPA and s 12GN of the ASIC Act);
- an order to provide redress to non-party consumers (discussed below – per s 87AAA of the TPA / s 12GNB of the ASIC Act);
- an other order the court deems appropriate (per s 87 of the TPA / s 12GM of the ASIC Act.<sup>80</sup>

Furthermore, both ACCC and ASIC have power under the ACL and ASIC Act respectively to seek court orders for the benefit of persons that are not parties to proceedings where:

- the respondent is a party to a consumer contract and advantaged by a term of the contract in relation to which the court has made a declaration that it is an unfair term;
- the declared term has caused or is likely to cause a class of people to suffer loss or damage;
- the class includes people who have not been a party to enforcement action in relation to the declared term.<sup>81</sup>

In relation to non-parties, the court may make the following remedies orders for loss or damage suffered:

- declare all or part of a contract to be void (either before or after the date the order is made);
- vary a contract or arrangement as the court deems appropriate;
- refuse to enforce all or any of the terms of a contract;
- direct the respondent to refund money or return property to a non-party consumer;
- direct the respondent to repair or provide parts for a product provided under a contract a contract at the respondent's expense;
- direct the respondent to provide services to the non-party at the respondents expense; or
- direct the respondent to terminate or vary an interest in land that way created or transferred by the contract.<sup>82</sup>

The court has been given the power to award redress to non-parties as, where a term is found to be unfair, it is likely to have implications beyond the case of an individual complainant, as standard form contracts are usually offered to a number of consumers at the same time (particularly in the case of online transactions).

The power to award redress to non-parties has the potential to have large financial and reputational consequences against the business using the unfair term.<sup>83</sup>

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<sup>80</sup> Victorian Consumer Affairs, above n 2, 28.

<sup>81</sup> Victorian Consumer Affairs, above n 2, 27.

<sup>82</sup> Victorian Consumer Affairs, above n 2, 28.

Section 233 of the ACL also gives regulatory bodies the power to issue a written notice containing a warning about the conduct of a person where:

- (a) the regulator has reasonable grounds to suspect that the conduct may constitute a contravention of provision of Chapter 2, 3 or 4 of the ACL (this includes the unfair contract provisions);
- (b) the regulator is satisfied that a person has, or is likely to, suffer detriment as a result of the conduct; and
- (c) the regulator is satisfied it is in the public interest to issue the notice.<sup>84</sup>

The final remedy available is the power given to regulatory bodies to issue substantiation notices. These notices will require the business to substantiate claims it has made in the marketplace. The regulatory body also has the power to request a person to produce documents that may evidence the representation. A business issued with a substantiation notice has 21 days in which to comply, or apply in writing to the regulatory body for an extension of time.

Providing false or misleading information in response to a substantiation notice may result in a pecuniary penalty being imposed on the business.

A regulatory body may issue a public warning notice pursuant to s 233(2) of the ACL if a business fails to comply with a substantiation notice.

It is worth noting that the power under s 247 of the ACL that gives regulatory bodies the power to apply to the court for an adverse publicity campaign does not apply to a breach of the unfair contract provisions.

## 9. Concluding remarks

In highlighting the importance of the unfair contract provisions, Dr Paterson points out that:

[W]hile measures designed better to inform consumers about the terms of their contracts are important, they do not resolve concerns about the substantive fairness of those terms. Consumers do not fit the model of the competent and rational contracting party presumed by classical contract theory. Decisions to accept onerous or unbalanced contract terms are not necessarily a calculated risk assumed by consumers in return for a concession in price. Rather, the insights of behavioural economics suggest that there are significant limitations on the decision-making processes of consumers relating to 'rational, social, and cognitive factors', which are not necessarily improved by consumers being provided with more information about the incidental terms of their contracts. Such measures may not ensure that these terms become part of the decision by consumers to enter into a

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<sup>83</sup> Hudgson, F, above n 25.

<sup>84</sup> *Australian Consumer Law Update: Unfair Contract Provisions in force July 1 2010, as more amendments pass Parliament* (2010) Stephens Lawyers <  
<http://www.stephens.com.au/view/22/20100630110213>>

standard form contract in any meaningful sense. To the contrary, it is suggested that under the UCTL consumers may be better able to choose between the various goods and services offered to them precisely because they can 'leave the detail of standard form contracting to be regulated by the law.'<sup>85</sup>

Thus, there can be no doubt that the introduction of the Australian Consumer Law's unfair contract provisions represents a significant strengthening of Australia's consumer protection. However, just how significant it will be is obviously dependent on its practical application, and thus remains to be seen.

If one dares to make a prediction, we suggest that the clarity and certainty provided by the Australian Consumer Law's unfair contract provisions is likely to cause businesses to re-evaluate some of their more dubious business practises and, thus, even before the first case is argued under the new law, a positive effect may have been gained.

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<sup>85</sup> Jeannie Paterson, 'The Australian Unfair Contract Terms Law: The Rise of Substantive Unfairness as a Ground for Review of Standard Form Consumer Contracts' [2009] 33 *Melbourne University Law Review* 934, 956.