

AN INTRODUCTION TO  
THE AUSTRALIAN  
CONSUMER LAW

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## **An introduction to the Australian Consumer Law**

1. The *Trade Practices Amendment (Australian Consumer Law) Act (No. 1) 2010* received Royal Assent on 14 April 2010 and came into force on 1 July 2010.
2. The Act introduces a single national consumer law, based on some of the consumer protection provisions of the *Trade Practices Act*. It will be known as the Australian Consumer Law (“**ACL**”). The Act also amends the *Australian Securities and Investment Commission Act 2001* (Clth) to introduce corresponding provisions that will apply to financial services. I will only deal with the amendments to the *Trade Practices Act*, Although it should be noted that the *Trade Practices Act* has been renamed as the *Competition and Consumer Act 2010*<sup>1</sup>
3. There are two important aspects to the ACL:
  - (a) provisions which make the inclusion of unfair terms in standard form non-negotiated contracts with consumers void;<sup>2</sup>
  - (b) enhanced remedies and enforcement powers.

### **Unfair term provisions**

4. A term of a consumer contract is void if the term is unfair and the contract is a standard form contract.<sup>3</sup>
5. The first point to note is that the purpose of the ACL is directed to a term of a contract, not the whole contract. In other words, the consequences of a breach of the section will only be to render a particular term void, not the whole of the contract. Indeed, this is made clear by Clause 2 which states that a contract continues to bind the parties if it is capable of operating without the unfair term.<sup>4</sup>

### **What is a consumer contract?**

6. A “consumer contract” is a contract for:
  - (a) the supply of goods or services; or

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<sup>1</sup> Trade Practices Amendment (Australian Consumer Law) Act (No. 2): Schedule 5 sub-section 2; the Act was passed by both Houses on 24 June 2010 and received Royal Assent on 13 July 2010

<sup>2</sup> Schedule 1, Part 2, Section 2(1)

<sup>3</sup> Schedule 1, Part 2, Section 2

<sup>4</sup> Schedule 1, Part 2, Section 2(2)

(b) a sale or grant of an interest in land

to an individual wholly or predominantly for personal, domestic or household use. This includes contracts with consumers for financial products or supply of financial services.<sup>5</sup>

7. An “interest” in relation to the land means:

(a) a legal or equitable estate or interest in the land; or

(b) a right of occupancy of the land or of a building or part of the building erected on the land arising by virtue of the holding of shares, or by virtue of a contract to purchase shares in an incorporated company that owns the land or building; or

(c) a right, power or privilege over, or in connection with, the land.<sup>6</sup>

8. There are two points to note in relation to the meaning of a “consumer contract” as follows:

(a) the definition does not limit the operation of the unfair contract term provisions to things of a personal, domestic or household nature. The definition will include the supply of any good, service or interest in land to a consumer provided the acquisition of what is supplied under the contract is wholly or predominantly for personal, domestic or household use or consumption;

(b) secondly, the extended definition of “interest” is such that it goes beyond the usual notions of legal or equitable estates. It include a right of occupancy of the land or of a building on the land arising by virtue of holding shares in the company or a contract to purchase shares in a company that owns the land or the building. This is a significant enlargement of the normal concept of an interest in land. It also includes a right, power or privilege over or connection with the land. This too may go far beyond normal concepts of equitable interests in land.

### **What is a standard form contract?**

9. There is a presumption that a contract is a standard form contract which must be rebutted by the supplier. The supplier in any proceedings must prove that, on the balance of probabilities, the contract is not in a standard form.<sup>7</sup>

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<sup>5</sup> Schedule 1, Part 1, Section 2(3), Schedule 3 Section 12BF

<sup>6</sup> Schedule 1, Part 1, Section 1

<sup>7</sup> Schedule 1, Part 1, Sections 7(1) and (2)

10. The Explanatory Memorandum comments that:<sup>8</sup>

*“If a party wishes to argue that the contract has been negotiated and is not in a standard form, then the rebuttable presumption requires the party that presents the contract to show that the contract is not a standard form contract. This reflects that:*

- *the claimant will usually only have evidence of the existence of one contract - their own; and*
- *the respondent is best placed to bring evidence regarding the nature of the contracts it uses and the way in which it deals with other parties to such contracts, including whether negotiations have been entered into.”*

11. In determining whether a contract is a standard form contract, the Court may consider any matter it thinks relevant. However, it must have regard to certain factors.<sup>9</sup> These include whether:

- (a) one of the parties has all or most of the bargaining power relating to the transaction;
- (b) the contract was prepared by one party before any discussion relating to the transaction commenced;
- (c) another party was, in effect, required to accept or reject the terms in the contract<sup>10</sup> in the form in which they were presented (that is, on a 'take-it-or-leave-it' basis);
- (d) another party was given an effective opportunity to negotiate the terms of the contract;<sup>11</sup>
- (e) the terms of the contract<sup>12</sup> take into account the specific characteristics of another party or the particular transaction; and
- (f) any other matter prescribed by the regulations.”<sup>13</sup>

12. The approach to the concept of standard form contracts in the ACL seems intended only to include what most lay people would anecdotally understand by the term “standard form contract”. That is to say, contracts which are pre-prepared by a supplier of goods or services without having regard to the characteristics of the other party. It seems also to follow from

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<sup>8</sup> Clause 5.73, page 71

<sup>9</sup> Schedule 1; Section 7(2)

<sup>10</sup> Other than terms excluded by section 5(1) of the ACL or subsection 12BI(1) of the *ASIC Act*

<sup>11</sup> Other than terms excluded by section 5(1) of the ACL or subsection 12BI(1) of the *ASIC Act*

<sup>12</sup> Other than terms excluded by section 5(1) of the ACL or subsection 12BI(1) of the *ASIC Act*

<sup>13</sup> Schedule 1; Section 7(2)

the use of the words “in effect” in the context of whether the other party had an opportunity to accept or reject the terms of the contract or the concept of an “effective opportunity” to negotiate the terms of the contract. In other words, the Court is obliged to look at not merely the possibility of accepting or rejecting or negotiating, but the effective circumstances in which the contract is presented to the consumer.

13. It seem to me that in practical terms the provisions of the ACL will apply to contracts which are commonly known as standard form contracts. Unless, for example, there is a real intention of the part of the supplier to present a draft contract for the supply of goods or services and to entertain effective negotiation by the consumer. It is difficult to see how that could be achieved in practical terms in high volume consumer transactions in which there is rarely, if ever, a meeting between the actual supplier and final consumer, the real interaction being between retailers or distributors and the ultimate consumer. Nonetheless, the point to remember is that all standard form contracts are potentially caught by the ACL.

### **Exempt contracts**

14. Certain contracts are excluded from the application of the unfair contract terms provisions of the ACL to the extent that:
- (a) the contract relates to certain shipping contracts; and
  - (b) the contract is a constitution of a company, managed investment scheme or other kind of body.<sup>14</sup>

### **Shipping contracts**

15. The unfair contract terms provisions will not apply to consumer contracts which are shipping contracts. Shipping contracts include:
- (a) contracts of marine salvage or towage;
  - (b) a charter party of a ship; or
  - (c) a contract for the carriage of goods by ship.<sup>15</sup>
16. A ship is given the meaning it has under section 3 of the Admiralty Act 1988.<sup>16</sup>

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<sup>14</sup> Schedule 1, Part 1, Section 8

<sup>15</sup> Schedule 1, Part 1, Section 8(1)

<sup>16</sup> Schedule 1, Part 1 Section 1

17. The Explanatory Memorandum states that:

*“These shipping contracts are already subject to a comprehensive legal framework (nationally and internationally) that deals with contractual terms in a maritime law context.”*<sup>17</sup>

18. Certainly, the ACL does make it clear that the reference 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 subsection 7(1) of the *Carriage of Goods by Sea Act 1991*.<sup>18</sup>

19. The Explanatory Memorandum notes that:

*“The amended Hague Rules consists of the text set out in Schedule 1 of the Carriage of Goods by Sea Act which, in its unmodified form, is the English translation of Articles 1 to 10 of the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, done at Brussels on 25 August 1924 (otherwise referred to as the Brussels Convention). The Brussels Convention was amended by Articles 1 to 5 of the Visby Protocol on 23 October 1968, and Article II of the SDR Protocol on 21 December 1979.”*<sup>19</sup>

20. It is not difficult to understand the reason or reasons why shipping contracts will be excluded from the ACL. As noted by the Explanatory Memorandum, there is already a detailed set of rules in relation to shipping contracts embodied in the *Carriage of Goods by Sea Act* which in turn enacts the provisions of an international convention, The Hague Rules. It would probably be inconsistent with the obligations under the Convention to impose different rules than those contained in the *Carriage of Goods by Sea Act*. Indeed, with one exception, it is reasonably unlikely that the types of contracts contemplated by shipping contracts would be considered to be consumer contracts, for example not many consumers enter into a contract of marine salvage or a contract of marine towage. However, that is not to say that a contract for the carriage of goods by sea could not, at least conceptually, be a consumer contract. For example, the transportation of household goods overseas by way of shipping container or the transportation of goods simply on a ship are the sorts of transactions that a consumer may enter into. Nonetheless, these types of contracts are specifically excluded from the purview of the ACL.

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<sup>17</sup> Clause 5.79, page 73

<sup>18</sup> Schedule 1; Section 8(2)

<sup>19</sup> Clause 5.81, page 73

### **Effect of the Insurance Contracts Act 1984**

21. Section 15 of the Insurance Contracts Act 1984 provides that a contract of insurance is not capable of being made the subject of relief under any other Commonwealth Act, a State Act or an Act or Ordinance of a Territory.
22. “Relief” means relief in the form of:
- (a) the judicial review of a contract on the ground that it is harsh, oppressive, unconscionable, unjust, unfair or inequitable; or
  - (b) relief for insureds from the consequences in law of making a misrepresentation,<sup>20</sup>
- but does not include relief in the form of compensatory damages.
23. This means that the unfair contract provisions of the ACL does not apply to contracts of insurance covered by the Insurance Contracts Act 1984.

### **What does “unfair” mean?**

24. A term is unfair if it:
- (a) causes a significant imbalance in the parties’ rights and obligations;
  - (b) is not reasonably necessary to protect the supplier’s legitimate interests;<sup>21</sup>
  - (c) would cause detriment (whether financial or otherwise) to a party if it were relied upon.
25. It can be seen at once that there are three limbs to the test of unfairness. Namely, a significant imbalance in rights and obligations and secondly, whether the term is reasonably necessary to protect the supplier’s interests, and a detriment (financial or otherwise).

### **First limb – “significant imbalance”**

26. There is no statutory definition of the concept of significant imbalance. Unfortunately, there is little guidance to be found as to the manner of interpretation or application of this test in the Explanatory Memorandum save that the memo states:

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<sup>20</sup> Section 15(2)

<sup>21</sup> Schedule 1, Section 3(1)

*“This will involve a factual determination of whether any such significant imbalance exists.”<sup>22</sup>*

27. It is likely, however, that this will be a mixed question of both fact and law. It will involve determining the relevant rights and obligations of each party and then a “balancing” assessment to determine whether there is a significant imbalance as between the parties’ rights and obligations. To me at least, this seems like an unusual test and one which could be quite difficult to apply. From the supplier’s point of view, it may involve giving factual evidence as to the practical consequences of its warranty obligations for example compared to the simple obligation of the consumer to pay the purchase price.

**Second limb – “reasonably necessary”**

28. The second limb of the test requires the Court to consider whether the term is reasonably necessary to protect the legitimate interests of the party who would be advantaged by the term.<sup>23</sup>
29. Importantly, 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 can prove otherwise in a Court.<sup>24</sup>
30. Where a claimant in proceedings has alleged that a term is unfair, it will be necessary for the respondent to establish that a term is reasonably necessary to protect its legitimate interests on the balance of probabilities. The respondent may introduce any evidence relevant to this element of the test.
31. There are a number of points to note in relation to the second test as follows:
- (a) the term of the contract will be presumed to be not reasonably necessary in order to protect the legitimate interests of the supplier;
  - (b) the supplier will have to prove that the term is reasonably necessary and that it protects legitimate interests on the balance of probability;
  - (c) the evidence to be led by a supplier may be factual evidence to demonstrate that in all the circumstances, the economic burdens on the supplier are such that a term of the type in issue is necessary in order for the supplier to carry on its business. It is not

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<sup>22</sup> Clause 5.23, page 63

<sup>23</sup> Schedule 1; Section 3(1)(b)

<sup>24</sup> Schedule 1; Section 3(4)

hard to foresee that evidence of that type might be quite complex and involve considerations of effect on the market were such a term to be held to be void.

### **Third Limb: “detriment”**

32. The court must consider whether there would be a detriment to a party if the term of the contract were to be applied or relied upon. There is no definition of “detriment” contained in the Act. However, the Explanatory Memorandum comments upon section 3(1)(c) (which was an amendment to the Bill during its passage through the Parliament) as follows:

*“5.29 The third element of the test requires the court to consider whether the term would cause financial or non-financial detriment to a party if the term were to be applied or relied on. This will involve a factual determination of whether any such detriment does exist or would exist if the term was relied on. [Schedule 1, item 1: Chapter 2, Part 2-3, paragraph 24(1)(c)]*

*5.30 A claimant in proceedings is required to prove this element of the test on the balance of probabilities.*

*5.31 By requiring evidence of whether detriment has existed or would exist in the future, the provision requires more than a hypothetical case to be made out by the claimant. In this context, a claimant does not need to have proof of having suffered actual detriment, but that detriment would exist in the future as a result of the application of or reliance on the term.*

*5.32 In this regard, a term does not need to be enforced in order to be unfair, although the possibility of such enforcement may impact on the decisions made by the party that would be disadvantaged by the term’s practical effect, to that party’s detriment.*

*5.33 Detriment is not limited to financial detriment. This is designed to allow the court to consider situations where there may be other forms of detriment that have affected or would affect the party disadvantaged by the practical effect of the term.*

*5.34 Where it is found that a term is unfair and that only future detriment would arise from the application of or reliance on that term, then the remedies available would likely be limited to a declaration that the term is an unfair term and an injunction preventing the party advantaged by it applying or relying on it, or purporting to do so. Any form of compensatory remedy would likely be limited to those situations where there is actual detriment proven.”<sup>25</sup>*

33. Several observations may be made as to this requirement:

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<sup>25</sup> Clauses 5.29-5.34, page 64

- (a) the detriment does not have to be actual, it may be an anticipated detriment. This follows from the use of the words “would cause detriment ... if it were to be applied”;
- (b) in my view, the detriment must be a realistic one, or reasonably probable, rather than simply a possibility. This also follows from the language of the sub-section which notably does not use the concept of possible detriment;
- (c) the detriment may be non-financial. This introduces a somewhat unpredictable element to the test, namely a non-financial detriment as a result of a term of a contract. Perhaps this could include an inequality of bargaining power or a limitation of rights which would not otherwise be the case. Nonetheless, it should not be overlooked when considering a term of a contract;
- (d) if a non-financial detriment is found, then the remedies would be likely to be limited to a declaration that the term is an unfair term and an injunction preventing the party advantaged by it applying or relying on it or purporting to do so. Any form of compensatory remedy would be likely to be limited to these situations where there is a material or actual detriment proven.

### **Considerations the Court must take into account**

34. In determining whether a term in a consumer contract is unfair, the Court may take into account any matter which it thinks is relevant, but the Court must take into account the following matters:
- (a) the extent to which the term is transparent; and
  - (b) the contract as a whole.<sup>26</sup>
35. Amongst other things, the Court is directed to take into account the concept of contractual “transparency”, something that is somewhat unusual. The term will be “transparent” if the term is:
- (a) expressed in reasonably plain language; and
  - (b) legible; and
  - (c) presented clearly; and

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<sup>26</sup> Schedule 1, Section 3(2)

(d) readily available to any party affected by the term.<sup>27</sup>

36. It seems that the concept of “transparency” is intended to act against the supplier in the sense that the more difficult the term is to understand or read or if it has not been physically provided to the consumer, the more likely it is that it may be held to be unfair.

### **Examples of unfairness**

37. The ACL lists particular contract terms which may be unfair,<sup>28</sup> including terms permitting the supplier to unilaterally:

- (a) avoid or limit performance of the contract;
- (b) terminate the contract;
- (c) penalise the other party for a breach;
- (d) vary the terms of the contract;
- (e) renew or not renew the contract;
- (f) vary the upfront price payable under the contract without the consumer being able to terminate it;
- (g) vary the characteristics of the goods or services supplied or financial services supplied to or to be supplied under the contract;
- (h) determine whether the contract has been breached or to interpret its meaning.

38. Other examples of a term that:

- (a) limits or has the effect of limiting one party’s vicarious liability for its agents;
- (b) permits or has the effect of permitting one party to assign the contract to the detriment of another party without the other party’s consent;
- (c) limits or has the effect of limiting one party’s rights to sue another party;
- (d) limits or has the effect of limiting the evidence one party can adduce in proceedings relating to the contract; and

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<sup>27</sup> Schedule 1, Section 3(3)

<sup>28</sup> Schedule 1, Section 4

- (e) imposes or has the effect of imposing the evidential burden on one party in proceedings relating to the contract.

39. It is useful to note that:

- (a) the examples provide statutory guidance on the types of terms which may be regarded as being of concern;
- (b) they do not prohibit the use of those terms, nor do they create a presumption that those terms are unfair;
- (c) any consideration of a term of a type listed as an example is subject to the test set out in section 3(1) namely, there may be circumstances in which the use of such a term is reasonably necessary in order to protect a party's reasonable business interests.

40. Some other general observations can be made as follows.

- (a) some of the examples are of types of terms that allow a party to make changes to key elements of a contract, including terminating it, on a unilateral basis. The inclusion of these examples does not prohibit unilateral variation terms, nor does it create a presumption that such terms are unfair. Indeed, the need for the unilateral variation of contract terms is expressly contemplated by legislation in specific contexts, including for example Parts 4 and 5 of the Uniform Consumer Credit Code (see also Parts 4 and 5, Schedule 1 of the National Consumer Credit Protection Bill 2009);<sup>29</sup>
- (b) some of the examples are of types of terms that have the effect of limiting the rights of the party to whom the consumer contract is presented. One example specifically deals with limitation of liability clauses. There are many instances in which limitations of liability are expressly permitted by national, State or Territory legislation for legitimate public policy reasons. In this regard, subsection 5(1)(c) of the ACL and paragraph 12BI(1)(c) of the ASIC Act expressly exclude references to terms that are required, or expressly permitted, by a law of the Commonwealth or a State or Territory from the application of the unfair contract terms provisions. However, this exclusion applies only to the extent that such terms are required or expressly permitted;

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<sup>29</sup> See also *Marks v GIO Australia Holdings Ltd* (1996) 63 FCR 304 at 317 per Einfeld J

- (c) one example refers to terms that penalise, or have the effect of penalising, one party for a breach or termination of the contract. At law a penalty imposed by a contract must be a genuine pre-estimate of the loss likely to be suffered by the party as a result of the breach or early termination, and should not be an arbitrary sum. If not, the terms will be invalid. However, under the unfair contract terms provision the relevant consideration is whether the term is unfair, within the meaning given to that term by the provisions;
- (d) another example refers to terms that allow for a party to assign the contract to the detriment of the other party, without the other party's consent. This example does not prohibit the use of such clauses. Indeed, assignment of contracts is expressly contemplated by other legislation, for example section 166 of the Uniform Consumer Credit Code (see also Division 2, Part 3-2, Chapter 3 and Parts 3 and 11, Schedule 1 of the National Consumer Credit Protection Bill 2009).

#### **Terms which are not “unfair”**

41. The terms that define the main subject matter of the contract, or the upfront price of goods or services, or which are required or permitted by law are not subject to the new unfair contract terms provisions.<sup>30</sup>

#### **(a) Main subject matter**

42. The Explanatory Memorandum comments that the exception for “main subject matter” is:

*“The exclusion of terms that define the main subject matter of a consumer contract ensures that a party cannot challenge a term concerning the basis for the existence of the contract.”<sup>31</sup>*

43. Where a party has decided to purchase the goods, services, land, financial services or financial product that is the subject of the contract, that party cannot then challenge the fairness of a term relating to the main subject matter of the contract at a later stage. This would seem appropriate because the party had a choice of whether or not to make the purchase on the basis of what was offered. Indeed, other remedies are available to avoid the whole of a contract, for example pursuant to section 52 of the *Trade Practices Act*.
44. However, the “main subject matter” of the contract is not defined. The main subject matter of the contract may include the decision to purchase a particular type of good, service,

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<sup>30</sup> Schedule 1, Section 5(1)

<sup>31</sup> Clause 5.59, page 69

financial service or financial product, or a particular piece of land. It may also encompass a term that is necessary to give effect to the supply or grant, or without which, the supply or grant could not occur.

**(b) Upfront price**

45. The upfront price payable under a consumer contract is the consideration that is:

- (a) 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.<sup>32</sup>

46. The Explanatory Memorandum notes that:

*“The exclusion of upfront price means that a term concerning the upfront price cannot be challenged on the basis that it is unfair. Having agreed to provide a particular amount of consideration when the contract was made, which was disclosed at or before the time the contract was entered into, a person cannot then argue that that consideration is unfair at a later time. The upfront price is a matter about which the person has a choice and, in many cases, may negotiate.”<sup>33</sup>*

47. A number of points can be noted as follows:

- (a) “Consideration” is not defined. However on ordinary principles, the upfront price would include the cash price payable for a good, service, financial service, financial product or land at the time the contract is made. It may also cover a future payment or a series of future payments;
- (b) the upfront price must be disclosed at or before the time the contract was entered into by the parties. In the case of most transactions this is reasonably straightforward, as a key pre-condition of the transaction occurring is an understanding but may not include the price to be paid;
- (c) a more difficult point is whether the “upfront” payment would include a series of payments. In some regulated credit contracts, the total amount payable includes

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<sup>32</sup> Schedule 1; Section 5(2)

<sup>33</sup> Clause 5.64, page 70

repayments and interest. This may be an “upfront payment”. I note that the Explanatory Memorandum notes that:

*“A key consideration for a Court in considering whether a future payment, or a series of future payments, forms the upfront price may be the transparency of the disclosure of such a payment, or the basis on which such payments may be determined, at or before the time the contract is made.”<sup>34</sup>*

- (d) terms that require further payments as a consequence of something happening or not happening during the contract are covered by the unfair contract terms provisions. Such payments are additional to the upfront price, and are not necessary for the provision of the basic supply, sale or grant under the contract. Such terms requiring further payments may be in the nature of exit, default or penalty fees.

### **What are the consequences?**

48. An unfair contract terms will be void but the contract will continue if it is capable of operating without the unfair term.<sup>35</sup> A business which is found to have included an unfair term and a consumer contract may also be liable for the enhanced remedies included in the Act for breach of the ACL.

### **Reforms to consumer law enforcement powers and remedies**

49. The new enforcement powers and remedies which will be available under the ACL are as follows:

#### **(a) Civil penalties**

50. Civil penalties will be available for conduct which does not warrant a criminal penalty and will now include the unconscionable conduct provisions of the TPA and certain product safety and product information provisions. These penalties vary. The maximum penalties are the same as currently (\$1.1 million for corporations and \$220,000 for individuals).

#### **(b) Disqualification orders**

51. Disqualification orders will be available for breaches of certain provisions of the ACL including for unconscionable conduct, unfair practices, pyramid selling, certain product safety and product information provisions and prohibited unfair contract terms. This will

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<sup>34</sup> Clause 5.67, page 70

<sup>35</sup> Schedule 1; Section 2(2)

prohibit individuals from managing corporations or engaging in particular activities in connection with the management of corporations.

52. The ACCC and ASIC will have the power to issue substantiation notices requiring a supplier to provide information or documents to substantiate a representation.
53. The ACCC and ASIC may issue infringement notices for breaches of the ACL with penalties of up to \$6,600. These are designed to supplement more serious penalties by facilitating the payment of relatively small financial penalties for minor contraventions without requiring Court proceedings.
54. Public warning notices may be issued by the ACCC and ASIC to inform the public of potential harmful conduct without the need for a Court order.
55. The ACCC and ASIC will also be able to seek Court orders requiring a supplier to provide redress to consumers who are not parties to a particular enforcement proceeding. This power is designed to be used where a large number of consumers suffer similar, identifiable damage. The redress can take a number of forms including refunds, repairs, the variation of a contract or orders to honour representations.

### **Part 2B *Fair Trading Act 1999* (Vic)**

56. The ACL is not the first legislative foray into the world of unfair contracts. It has been done in Victoria. Part 2B was introduced into the *Fair Trading Act* in 2003.<sup>36</sup> Some further amendments were made in 2009.<sup>37</sup> Part 2B is in essentially the same terms as the draft ACL. For example:

- (a) a term in a consumer contract is to be regarded as unfair if in all the circumstances it causes a significant imbalance in the parties' rights and obligations arising under the contract to the detriment of the consumer;<sup>38</sup>
- (b) in determining whether a term of a contract is unfair the Court may take into account, among other matters, a variety of particular objects or effects.<sup>39</sup> These are essentially the same as those provided for in the ACL;<sup>40</sup>

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<sup>36</sup> Act No. 30 of 2003 – Fair Trading (Amendment) Bill 2003

<sup>37</sup> Act No. 19 of 2009

<sup>38</sup> Section 32W

<sup>39</sup> Section 32X

<sup>40</sup> See Schedule 1, Part 2, Section 4

- (c) a supplier must not use, in relation to a consumer, a standard form contract containing a prescribed unfair term;<sup>41</sup>
- (d) a standard form contract means a consumer contract that has been drawn up for general use in particular industry, whether or not the contract differs from other contracts used in that industry.<sup>42</sup>

57. There are very few reported decisions regarding Part 2B, although some general observations about the nature of Part 2B have been made by VCAT as follows:<sup>43</sup>

*“In 2003 Victoria went further than all other states, and further than the Commonwealth Parliament, by introducing Part 2B into the Fair Trading Act 1999. As far as I know, there is no other legislation comparable to Part 2B in Australia, although there are some similar provisions in the uniform credit code enacted in all states. The purpose of Part 2B is to outlaw the use of unfair terms in consumer contracts. The Part provides that an unfair term in a consumer contract is void. It gives to the Director of Consumer Affairs the right to apply to this Tribunal for declarations and injunctions to prevent the use of unfair terms.*

*Separately, it gives power to the Director to seek an advisory opinion from the Tribunal as to whether the term is unfair.*

*And finally, it provides for a mechanism of prescribing of unfair terms. This process of prescribing has not been sought in this case and I will describe it only briefly. If an unfair term has been prescribed then it is an offence to use the prescribed term, or attempt to enforce it.”<sup>44</sup>*

58. The Tribunal went on to refer to the second reading speech and said:

*“In introducing Part 2B into Parliament, the Minister for Consumer Affairs said that the legislation:-*

*“will enable the government to step in where consumers sign take it or leave it contracts, not necessarily because of misleading, deceptive or unconscionable conduct by the trader, but which nevertheless contains terms that tip the balance unfairly and disproportionately in favour of the trader.”<sup>45</sup>*

...

*“From this passage it is clear that Part 2B was not designed to duplicate the existing sections of the Act which prohibit misleading and deceptive conduct.... Conduct of this character, which is designed to mislead a consumer into*

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<sup>41</sup> Section 32Z

<sup>42</sup> See the definitions in section 32U

<sup>43</sup> *Director of Consumer Affairs Victoria v Trainstation Health Clubs Pty Ltd* [2008] VCAT 2092 per Harbison J

<sup>44</sup> Paragraphs 10-12

<sup>45</sup> *Director of Consumer Affairs Victoria v Craig Langley & Ors* paragraphs 44

*thinking that the bargain is something other than what it is, or that they are getting something other than what they have contracted for, is capable of remedy under a different part of the Act.*

*Further, the Part is not designed to duplicate the sections relating to the prohibition of unconscionable conduct. It is clear I do not have to be satisfied that the term is unconscionable. In the Federal context, unconscionable has been defined as requiring something more than consideration of the terms of the contract. Some conduct or circumstance, other than the mere terms of the contract, must be apparent to found unconscionable behaviour.”<sup>46</sup>*

59. However, there are some significant differences between the ACL and Part 2B which should be noted as follows:
- (a) the definition of consumer in Part 2B means a person to whom goods or services have been or are to be supplied under the contract.<sup>47</sup> Whereas under the ACL the definition of a “consumer contract” includes not only a contract for the supply of goods or services, but that for a sale or grant of an interest in land in either case provided the contract is to an individual wholly or predominantly for personal, domestic or household use. Further, the “interest” in relation to the land has an extremely broad definition;
  - (b) the definition of “standard form contract” in Part 2B is quite different and not as broad as that contained in the ACL. Pursuant to the ACL, the factors that the Court is specifically directed to have regard in determining whether a contract is a standard form contract focus on the relationship of the parties and to some extent the conduct of the supplier;
  - (c) certain contracts are excluded from the application of the unfair contract terms and provisions of the ACL (shipping contracts, where the contract is a constitution of a company, managed investments scheme or other kind of body). There are no similar exemptions contained in Part 2B;
  - (d) the definition of “unfair” in Part 2B is limited to the examination of a significant imbalance in parties’ rights and obligations. However, the corresponding provision in the ACL includes a second limb, namely whether the terms is reasonably necessary to protect the supplier’s interests;

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<sup>46</sup> *Director of Consumer Affairs Victoria v Craig Langley & Ors* paragraphs 45 and 46

<sup>47</sup> See the definition in section 32U

- (e) further, in the ACL, in determining whether a term is unfair the Court is directed to take into account a variety of matters including to the extent to which the clause would cause or a substantial likelihood that it would cause detriment to the other party, the extent to which the term is transparent and the contract as a whole. The concept of contractual “transparency” is also specifically addressed by the ACL. These concepts do not appear in Part 2B;
- (f) the ACL defines certain terms which are not subject to the provisions, namely those that define the main subject matter of the contract or the upfront price of goods or services. There are no equivalent exceptions contained in Part 2B.

60. Although the terms of Part 2 are not identical to those of the ACL, their similarity is sufficient to warrant regard for decisions which assist in the interpretation of such provisions. It should also be noted that the *Fair Trading Act*, at that time of all reported decisions<sup>48</sup>, contained a test in section 32W of whether the impugned term caused a significant imbalance in the parties’ rights and obligations “*contrary to the requirements of good faith*”. That form of words no longer exists in the section 32W and to that extent the decisions are of limited value to the extent that they focus on “good faith”. The provisions of Part 2B have so far mainly been considered by VCAT, which has found unfair terms in the context of a mobile phone contract<sup>49</sup>; gym memberships<sup>50</sup> and airline tickets<sup>51</sup>.
61. In *Director of Consumer Affairs v AAPT Ltd*<sup>52</sup> the Tribunal considered the terms of a mobile telephony agreement. The Tribunal considered the meaning of the phrase “unfair term” and said as follows:

“32 *It is apparent that a term in a consumer contract is to be regarded as unfair if it causes a significant imbalance in the parties’ rights and obligations arising under the contract. It is apparent that the significant imbalance must be to the detriment of the consumer. And it is apparent that in determining whether a term causes a significant imbalance in the parties’ rights and obligations one must have regard to all the circumstances. What is less apparent is: what is meant by a “significant” imbalance? And what is the role to be given to the words “contrary to the requirements of good faith”?*”

<sup>48</sup> The requirement was deleted in early 2009

<sup>49</sup> *Director of Consumer Affairs v AAPT Ltd* [2006] VCAT 1493

<sup>50</sup> *Director of Consumer Affairs v Craig Langley Pty Ltd & Matrix Pilates & Yoga Pty Ltd* [2008] VCAT 482; *Director of Consumer Affairs v Craig Langley & Matrix Pilates & Yoga Pty Ltd* [2008] VCAT 1332; *Director of Consumer Affairs v Trainstation Health Clubs Pty Ltd* [2008] VCAT 2092

<sup>51</sup> *Free v Jetstar Airways Pty Ltd* [2007] VCAT 1405

<sup>52</sup> [2006] VCAT 1493, 2 August, per Morris J

33 *The word “significant” simply means “important” or “of consequence”. It does not mean “substantial”. It is not a word of fixed connotation and besides being elastic is somewhat indefinite.[9] However, in its context, it is designed to identify an imbalance, to the detriment of the consumer, which should be regarded as unfair. In this sense the definition is circular. But it is impossible to avoid the notion of fairness in determining whether a term causes a significant imbalance, even though this exercise is designed to ascertain whether a term is unfair.”*<sup>53</sup>

62. In the *AAPT* case the Tribunal considered various terms as follows:

- (a) a term that the supplier could vary any term of the agreement at any time in writing. The Tribunal considered the term was unfair because it permitted the supplier but not the customer to change the contract unilaterally. Further, the term had the effect of permitting the supplier but not the consumer to avoid or limit the performance of the contract;<sup>54</sup>
- (b) a term reserving the supplier’s right to suspend provision of services to the consumer in circumstances where monies were owing for more than 60 days unless the supplier had received written notice from the consumer disputing the charges in good faith. If the services were suspended in those circumstances or any other reason the supplier was entitled to charge a reconnection fee. The Tribunal considered that the term allowed the supplier to charge a reconnection fee for “any other reason” and which could embrace a reason which did not involve any breach by the supplier of its obligations under the contract. It was unfair;<sup>55</sup>
- (c) the supplier could terminate the agreement immediately by notice to the consumer if the consumer breached the agreement or if the consumer changed billing address or contact details without notifying the supplier. However, in those circumstances the consumer remained liable for all charges payable under the agreement up to the time of termination. The Tribunal noted that the consumer may have breached the agreement in a manner which was inconsequential, yet faced the prospect of having the service terminated. Further, the service could be terminated if the consumer changed address. They were found to be unfair;<sup>56</sup>

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<sup>53</sup> Paragraphs 32 and 33

<sup>54</sup> Paragraph 50

<sup>55</sup> Paragraph 51

<sup>56</sup> Paragraph 53

- (d) a term allowing the supplier to change identity or its products or charges without notice to the consumer or on 30 days notice to the consumer. The Tribunal considered this term caused a significant imbalance in the parties' rights and obligations to the detriment of the consumer.<sup>57</sup>

63. In *Director of Consumer Affairs Victoria v Craig Langley Pty Ltd & Matrix Pilates & Yoga Pty Ltd*<sup>58</sup> VCAT considered various terms of a fitness centre membership.

64. As to the requirement to consider whether terms have been individually negotiated, Harbison J said:<sup>59</sup>

*“Section 32X requires me to consider whether or not the terms have been individually negotiated. Although no guidance on how this should be applied is found in the Act, it appears to me to reflect the common sense view that terms 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 upon which he or she later wishes to resile.”*

65. The Court had little difficulty in concluding on the evidence that the terms had not been individually negotiated.<sup>60</sup> Thereafter, the Tribunal examined many clauses which were impugned and concluded that the contract as a whole was unfair. The relevant terms were as follows:

- (a) a broad and unqualified indemnity in respect of injury arising whether by negligence, breach of contract or in any other way, was considered by the Tribunal to have both the intention and the effect of penalising the consumer but not the supplier for breach of contract and to limit the consumer's right to sue the supplier;<sup>61</sup>
- (b) a term that the membership was not refundable and non-cancellable by the member during a minimum period. This clause was found by the Tribunal to enable the supplier to avoid liability for a breach of contract that would otherwise have enabled the consumer to cancel the agreement and require a refund. The term did not contemplate the possibility that the consumer might need to end the contract because of breach by the supplier of its obligations under the agreement. The Tribunal also

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<sup>57</sup> Paragraph 54

<sup>58</sup> [2008] VCAT 482, 17 March 2008, Harbison J

<sup>59</sup> At paragraph 66

<sup>60</sup> Paragraphs 66-67

<sup>61</sup> Paragraphs 71-75

considered that in some circumstances the term could constitute a penalty rather than genuine pre-estimate of loss;<sup>62</sup>

- (c) a term that if any payment due to the supplier under the membership agreement was not made on the due date entry into the agreement constituted an unconditional and irrevocable authority for the supplier without notice to debit the customer's nominated bank account or credit card for the total amount due. The Tribunal concluded that the term was unfair as it enabled the supplier to recover payments under the irrevocable authority, even where the consumer had ceased payment because of a bona fide dispute. Further, the term gave the supplier the right to decide what amount could be debited, even if the amount was greater than the consumer's contractual liability. Moreover, the term gave the supplier the right to interpret the contract and determine whether or not the consumer had breached it;<sup>63</sup>
- (d) a term that after the minimum term of the agreement had been completed the instalments would continue automatically, giving the consumer a right to use the Club and its services and would continue at the instalment rate and frequency until the consumer provided written notification 30 days prior to the termination of the agreement. The Tribunal considered that the term was unfair as it gave the consumer no power to prevent the automatic renewal of the contract and it gave the supplier but not the consumer the right to terminate the contract. In effect, if the consumer wished the contract to apply for just 12 months, the consumer must give notice exactly at the end of 11 months. Further, the contract referred to notice being required to an unidentified third party, a billing agent. The term "billing agent" was not defined, but the contract was attempting to impose a legal obligation on the consumer to make contact with the unidentified person to discharge his or her obligations to the supplier;<sup>64</sup>
- (e) a term that if the consumer wished to cancel the agreement before the expiration of the agreed minimum term proof of relocation or medical information was required, as well as a cancellation fee totalling 50% of the balance outstanding. The Tribunal concluded that the clause did not take into account the prospect that the consumer may wish to terminate the contract because of the breach by the supplier of its obligations under the contract. Further, it wrongly implied that the only possible way

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<sup>62</sup> Paragraphs 76-80

<sup>63</sup> Paragraphs 81-84

<sup>64</sup> Paragraphs 85-91

that the consumer may lawfully end the contract was by providing the information sought in the term and that even then, the supplier would have a discretion as to whether the cancellation is effective. The Tribunal concluded that the term had the object or effect of permitting the supplier unilaterally to determine whether the contract had been breached. Further, the cancellation fee as calculated was not a genuine pre-estimate of a loss and produced an arbitrary figure not related to the supplier's actual loss as a result of any cancellation;<sup>65</sup>

- (f) a term that if the consumer joined the club via a promotion that included a bonus and the consumer did not complete the minimum contract term, not only would a cancellation fee be payable but also the dollar value of the item received would be repayable to the Club. The Tribunal found that the term required a consumer who had received the benefit of a bonus to repay the dollar value of the bonus in the event the consumer terminated the contract before the end of the contract term. Accordingly, the term required the consumer to repay the supplier money which the supplier may in fact not have spent. The term did not take into account the extent to which the cost to the supplier of any bonus had already been recouped and it had the object of penalising the consumer, but not the supplier, for termination of the contract. The term therefore had the effect that required payment of a sum which may well be totally disproportionate to any loss or damage actually suffered by the supplier as a result of early cancellation of the contract;<sup>66</sup>
- (g) a term that the Club's liability for any breach of the agreement was limited to the supply of the services. The Tribunal found the term sought to exclude any legal liability in tort or in contract or otherwise, save for an action to compel provision by the supplier of the services specified under the contract. The term attempted to restrict the supplier's liability in a way which would not be apparent from the consumer's reading of the contract. Further, the term was unfair as the exclusion was made without any corresponding reciprocity for the consumer and in a way which may be totally disproportionate to any loss or damage suffered by the supplier;<sup>67</sup>
- (h) a term that the proprietor of the Club and/or the billing agent shall be entitled to assign its rights and obligations under the agreement to any new proprietor of the Club and/or the billing agent and that the consumer shall not be entitled to assign its

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<sup>65</sup> Paragraphs 92-97

<sup>66</sup> At paragraphs 98-102

<sup>67</sup> At paragraphs 103-107

rights or obligations under the agreement. The Tribunal found that the term, when looked at in the context of the agreement as a whole, put no obligation on the supplier to provide the fitness services from the particular address or of a specified type. However, the Tribunal was not convinced that an assignment of the contract would be to the detriment of the consumer. Moreover, the Tribunal was concerned that the consequences of inability to assign the contract may be much more onerous for a supplier than a consumer. The consumer might want to assign the benefit of the contract to a friend or family member because of changed personal circumstances. The fees to be charged to the consumer will reflect the estimated usage of facilities by the consumer over the contract term. It was conceivable, said the Tribunal, that a different fee might properly be charged to a membership that allowed assignment to another individual because it would be statistically more likely that a membership which could be assigned would make use of the facility more often than a membership which was limited to a single person. Accordingly, the Tribunal was not persuaded that the different treatment of assignment of the contract as between supplier and consumer was necessarily unfair;<sup>68</sup>

- (i) a term that by executing the agreement the consumer declared that he or she had read and understood the terms of the agreement and how they affected the consumer's rights. The Tribunal did not think it was appropriate to speculate as to the state of mind of the consumer without evidence and there was nothing in the term itself which pointed to a significant imbalance in the rights and obligations of the parties.<sup>69</sup>

66. A second proceeding was brought by the Director of Consumer Affairs Victoria against Craig Langley Pty Ltd & Matrix Pilates and Yoga Pty Ltd.<sup>70</sup> In that matter, Harbison J considered some terms of the gym membership agreement to be unfair as follows:

- (a) a clause authorising the business to vary the amount of the membership payments from time to time and alter direct debits for payment accordingly. The Tribunal considered that terms such as these, unilateral variations, created a significant imbalance in the rights and obligations as between the consumer and the supplier. A term which allows the trader to vary the terms of the agreement without reference to the consumer is unfair because it robs the consumer of the right to negotiate what the variation will be. A contract which allows for the unilateral variation of any term or

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<sup>68</sup> At paragraphs 108-115

<sup>69</sup> At paragraphs 116-121

<sup>70</sup> [2008] VCAT 1332, 14 July 2008

condition whatsoever ceases to be a bargain between the parties. It is a gamble, the borrower virtually placing a bet that the credit provider would honour its obligations. In essence, the contract has no efficacy if, at a whim of one party, it could be cancelled or otherwise made impossible for the borrower to comply with by unilateral amendment of one or more of its terms;<sup>71</sup>

- (b) clauses entitling the gym owner to terminate the agreement if the customer did not pay membership fees on time or to continue debiting the nominated account if fees are not paid on the due date. The Tribunal considered that such clauses presume that the consumer had failed to pay the fee on time without having a valid reason for doing so. The effectively prevent a consumer from withholding payment even if the trader does not fulfil its part of the bargain. There was no equivalent right, said the Tribunal, given to the consumer to withhold payment in the event that the trader is in breach of contract;<sup>72</sup>
- (c) the clause which provided that membership could only be cancelled prior to the expiry of the minimum term if the consumer became medically incapacitated or if relocated to an area not within 20km of the studio or if the supplier made changes to the contract which adversely affected the consumer. The Tribunal considered that the clause that the consumer had no rights to cancellation of the contract except in the circumstances set out in the term. In so doing, it purported to do away with the protection given to a consumer under various consumer protection laws including the protection of implied conditions, warranties or remedies under the *Fair Trading Act*. By identifying such a limited range of circumstances in which the membership could be cancelled, the term has the object or effect of deterring a consumer from exercising his or her rights which they may otherwise have under the contract. Accordingly, said the Tribunal, the consumer is misled into thinking that the only available mechanisms for cancelling a membership are set out in the terms;<sup>73</sup>
- (d) terms which provided for a minimum term under which the contract came to an end, after which the supplier could increase the fees to be charged by giving written notice to the consumer. However, the consumer could terminate membership after the minimum term by giving 30 days' notice. The Tribunal considered that the effect of these terms is that the purport to give the right to the supplier to unilaterally increase

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<sup>71</sup> At paragraphs 27-28

<sup>72</sup> At paragraphs 37-40

<sup>73</sup> At paragraphs 42-44

the fees to be charged as soon as the minimum term has expired. The terms also presume that the agreement will continue past the expiry date unless the consumer takes active steps by giving notice of termination to avoid this happening. The effect of the clauses, said the Tribunal, is that if the consumer does not take any action after the expiry date then contract continues. The clauses convert what appears to be a contract for a fixed period into a contract for an indefinite period;<sup>74</sup>

- (e) clauses which provided for a fee payable on termination calculated by reference to the time remaining under the contract until expiry of the minimum term. The Tribunal considered that the cancellation departure fee was calculated as a bare percentage of the outstanding time owed and not a genuine pre-estimate of the supplier's loss.<sup>75</sup>

67. In *Free v Jetstar Airways Pty Ltd*<sup>76</sup> the Tribunal considered the terms of an airline ticket booked on an internet website requiring a purchaser's request to change to a passenger name to pay a charge.

68. The Tribunal concluded that the terms identified had not been individually negotiated and that this was a matter pursuant to the ACL which was to be considered when assessing whether a term was unfair. Further, that the terms were indiscriminate because they applied, not only to instances where the customer changed the flight to a different date or time, but also where the customer requested that the passenger's name on the ticket was altered. The Tribunal concluded that such a situation was contrary to the requirements of good faith because it potentially allowed for a significant imbalance in the parties' rights and obligations and that under the contract there was a "*windfall to Jetstar to the detriment of the customer*". Accordingly, to extent that the terms subjected the consumer to payment of a fare difference when a name change was requested, the term was unfair.

69. On appeal,<sup>77</sup> the Supreme Court of Victoria allowed the appeal by Jetstar Airways Pty Ltd. The appeal was successful mainly on the basis of arguments which were not raised below, however Cavanough J rejected the interpretation of the prohibition on unfair terms which had been adopted by the Tribunal. In general terms, the argument mostly turned on the

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<sup>74</sup> Paragraphs 45-50

<sup>75</sup> At paragraphs 51-55

<sup>76</sup> [2007] VCAT 1405, 27 July 2007, Senior Member Vassie

<sup>77</sup> *Jetstar Airways Pty Ltd v Free* [2008] VSC 539, 4 December 2008, Cavanough J

provisions of “good faith” which are no longer included in Part 2B. However, Cavanough J commented on the requirement to consider the contract as a whole as follows:<sup>78</sup>

*“That requirement is inherent in the language of section 32W insofar as it calls for an enquiry into whether the term in question causes an “imbalance” in the parties’ “rights” (plural) and “obligations” (plural) “arising under the contract”. It is confirmed by the statutory injunction to consider “all the circumstances”.*

*This does not mean that each and every term of the contract is equally relevant, or necessarily relevant at all. The main requirement is to consider terms that might reasonably be seen as tending to counterbalance the term in question. The task involves an exercise of judgment against a statutory standard, rather than an exercise of discretion.”*

70. Adopting that approach, Cavanough J found that the Tribunal had fallen into error by disregarding or ignoring the distinction between more flexible and less flexible kinds of fares and the regular and open price differentiation between them in the airline industry. His Honour considered that such matters were plainly relevant to the question of “significant imbalance”. He considered that the Tribunal’s focus on the minimal cost of a simple administrative step of changing the name of a passenger was too narrow<sup>79</sup>. In the event the matter was remitted to the Tribunal for rehearing according to law.
71. It can be seen from these limited considerations of Part 2B (albeit in a slightly different form) that the Tribunal has not had a great deal of difficulty in identifying terms which it considered were unfair in standard form contracts, but which most people would routinely encounter.

### **United Kingdom authority**

72. A similar regime, not surprisingly, exists in the United Kingdom.<sup>80</sup> In the United Kingdom regime, a contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties’ right and obligations arising under the contract to the detriment of the consumer. The unfairness of the contractual term should be assessed taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all circumstances attending the conclusion of the contract and to all other terms of the contract or of another contract on which it is dependant.

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<sup>78</sup> Paragraph 127

<sup>79</sup> At paragraphs 133-135

<sup>80</sup> The Unfair Terms in Consumer Contracts Regulations 1999

73. In *Director-General of Fair Trading v First National Bank plc*<sup>81</sup> the Bank included in its common form loan agreement a term that should the borrower default on repayments, interest would continue to be payable at the contractual rate until any judgment obtained by the Bank was discharged. Accordingly, if the Court extended time for repayment of the loan, the borrower would be liable for the interest which had accrued during the extended period after all the instalments due under the judgment had been paid.

74. In the House of Lords, Lord Bingham said that:

*“A term falling within the scope of the Regulations is unfair if it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer in a manner or to an extent which is contrary to the requirement of good faith. The requirement of significant imbalance is met if a term is so weighted in favour of the supplier as to tilt the parties' rights and obligations under the contract significantly in his favour. This may be by the granting to the supplier of a beneficial option or discretion or power, or by the imposing on the consumer of a disadvantageous burden or risk or duty. The illustrative terms set out in Schedule 3 to the Regulations provide very good examples of terms which may be regarded as unfair; whether a given term is or is not to be so regarded depends on whether it causes a significant imbalance in the parties' rights and obligations under the contract. This involves-looking at the contract as a whole. But the imbalance must be to the detriment of the consumer; a significant imbalance to the detriment of the supplier, assumed to be the stronger party, is not a mischief which the Regulations seek to address.”*<sup>82</sup> (emphasis added)

75. After examining the relevant clauses of the contracts, Lord Bingham concluded that:

*“In judging the fairness of the term it is necessary to consider the position of typical parties when the contract is made. The borrower wants to borrow a sum of money, often quite a modest sum, often for purposes of improving his home. He discloses an income sufficient to finance repayment by instalments over the contract term. If he cannot do that, the bank will be unwilling to lend. The essential bargain is that the bank will make funds available to the borrower which the borrower will repay, over a period, with interest. Neither party could suppose that the bank would willingly forgo any part of its principal or interest. If the bank thought that outcome at all likely, it would not lend. If there were any room for doubt about the borrower's obligation to repay the principal in full with interest, that obligation is very clearly and unambiguously expressed in the conditions of contract. There is nothing unbalanced or detrimental to the consumer in that obligation; the absence of such a term would unbalance the contract to the detriment of the lender.”*<sup>83</sup> (emphasis added)

76. Similarly, Lord Hope concluded the terms were not unfair and said that:

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<sup>81</sup> [2002] 1 AC 481

<sup>82</sup> At page 494

<sup>83</sup> At page 495

*“Following this approach it does not seem to me that there is a significant imbalance to the detriment of the borrower in the stipulation that the interest which is payable in terms of the first part of the last sentence is to be charged after as well as before any judgment and that this obligation is not to merge in the judgment. The primary obligation in condition 4 is to pay interest on the outstanding balance due to the bank. The plain fact is that, in the event of a default by the borrower, the bank will not have recovered all of its money until the entire balance on the borrower's account has been paid. The main purpose of the last sentence is to ensure that the borrower does not enjoy the benefit of the outstanding balance after judgment without fulfilling the corresponding obligation which he has undertaken to pay interest on it as provided for in the contract. While the working out of that purpose may give rise to uncertainty in practice, the term itself does not seem to me to be unfair.”<sup>84</sup>*

### **Is the ACL necessary and can unfair contracts be the subject of sections 51AA, 51AB or 51AC of the *Trade Practices Act*?**

77. The issue of fairness within business contracts involving small businesses has, in Australia, usually been confined to considerations of equity, whether they are in estoppel or unconscionable conduct. Indeed, the authorities suggest that the Courts are reluctant to consider causes of action even in equity based specifically on the alleged unfairness of the contractual terms.
78. In *ACCC v C G Berbatis Holdings Pty Ltd*<sup>85</sup> the High Court concluded that an inequality of bargaining power, of itself, will not amount to a special disadvantage within the meaning of section 51AA of the *Trade Practices Act*. If a person is capable of understanding the nature of the transaction, an inequality of bargaining will not amount to unconscionability. Gleeson CJ said:

*“A person is not in a position of relevant disadvantage, constitutional, situational, or otherwise, simply because .of inequality of bargaining power. Many, perhaps even most, contracts are made between parties of unequal bargaining power, and good conscience does not require parties to contractual negotiations to forfeit their advantages, or neglect their own interests.”<sup>86</sup>*

...

*Unconscientious exploitation of another's inability, or diminished ability, to conserve his or her own interests is not to be confused with taking advantage of a superior bargaining position. There may be cases where both elements are involved, but, in such cases, it is the first, not the second, element that is of legal consequence. It is neither the purpose nor the effect of s 51AA to treat people generally, when they deal with others in a stronger position, as though*

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<sup>84</sup> At page 502

<sup>85</sup> (2003) 197 ALR 153

<sup>86</sup> At [11]

*they were all expectant heirs in the nineteenth century, dealing with a usurer.*<sup>87</sup> (emphasis added)

79. In the context of sections 51AA, 51AB and 51AC, the Full Federal Court in *Hurley v McDonald's Australia*<sup>88</sup> said:

“29. *There is no allegation of any circumstance that renders reliance upon the terms of the contracts unconscionable. For example, it might be that, having regard to particular circumstances it would be unconscionable for one party to insist upon the strict enforcement of the terms of a contract. One such circumstance might be that an obligation under a contract arises as a result of a mistake by one party. The mistake is an additional circumstance that might render strict reliance upon the terms of the contract unconscionable. Mere reliance on the terms of a contract cannot, without something more, constitute unconscionable conduct.*

31. *Before sections 51AA, 51AB or 51AC will be applicable, there must be some circumstance other than the mere terms of the contract itself that would render reliance on the terms of the contract "unfair" or "unreasonable" or "immoral" or "wrong". That is not the case propounded by the proposed amendments. The proposed new causes of action therefore cannot succeed. To allow the amendment would therefore be an exercise in futility. Accordingly, it should not be allowed.*” (emphasis added)

80. It seems quite clear that sections 51AB, 51AC and 51AA of the Trade Practices Act will be unlikely to operate to prevent the enforcement of a contractual term unless there are additional circumstances giving rise to unconscionability.<sup>89</sup>

## Conclusion

81. It can be seen that the ACL potentially affects all business using standard form consumer contracts. The ACL is intended to apply regardless of the particular industry in relation to which the standard form contracts are used. A variety of common, but standard form, clauses in consumer contracts may potentially be unfair pursuant to the ACL. Some examples are as follows:

### (a) Termination clauses

82. Generally, the supplier has express rights to terminate for various reasons, usually relating to non-payment. Clause 4(b) of the ACL provides such clauses as examples of “unfair” terms.

<sup>87</sup> At [14]; see also Gummow and Hayne JJ at [24] to [31]

<sup>88</sup> [1999] FCA 1728

<sup>89</sup> A similar approach seems to be apparent in the interpretation of the *Contracts Review Act 1980* (NSW), see *West v AGC (Advances) Ltd* (1986) 5 NSWLR 610 at 622 per McHugh J

Indeed, such clauses were found to be unfair in *Consumer Affairs v AAPT* and *Consumer Affairs v Trainstation Health Clubs*. Termination for minor matters may be unfair.<sup>90</sup> However, some termination clauses will be legitimate, for example termination for failure to comply with rules of a club, may be allowable.<sup>91</sup>

**(b) Exclusion clauses**

83. Pursuant to clause 4(a) of the ACL, such terms are examples of what may be unfair. In *Consumer Affairs v Trainstation*<sup>92</sup> and *Consumer Affairs v Craig Langley*,<sup>93</sup> such terms were held to be unfair. However, an exclusion clause may be fair in all the circumstances provided that it is “transparent”. A transaction fee which was disproportionate or was not related to actual loss, was “unfair in *Consumer Affairs v Craig Langley*.”<sup>94</sup>

**(c) Termination fees**

84. In a similar way in which penalties at law are invalid, so too they may be unfair pursuant to the ACL.<sup>95</sup>

**Summary**

85. The ACL introduces a new area which has potentially significant impacts for suppliers of goods and services. In my view, the ACL has a number of shortcomings:

- (a) it potentially affects most standard contracts for supply of goods or services which are not individually negotiated;
- (b) it is uncertain in its operation due to a variety of facts including:
  - (i) the broad concept of “standard form contract”;
  - (ii) the ambiguous nature of “unfair”;
  - (iii) the nature of a “transparent” term;
  - (iv) the requirement to balance “legitimate interests”;

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<sup>90</sup> See, for example, *Consumer Affairs v AAPT* at paragraph 53

<sup>91</sup> See for example, *Consumer Affairs v Trainstation Health*

<sup>92</sup> At paragraph 223

<sup>93</sup> At paragraph 75

<sup>94</sup> At paragraph 95

<sup>95</sup> Section 4

(c) there is no requirement that a claimant suffer any damage or that any “detriment” be limited to a financial detriment.

86. Legal practitioners should encourage their clients to obtain a review of standard form consumer contracts to identify which, if any, terms may be considered “unfair” within the meaning of the ACL. A review should also consider whether and how the standard form contracts can be redrafted to comply with the legislation. Any review which was undertaken for the purposes of Part 2B will not be sufficient for the purposes of the ACL.

**2 September 2010**

**Peter J. Booth**

**Victorian Bar**