

FLOWER AND HART
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UNFAIR TERMS LEGISLATION



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After this paper was presented on 10 March 2010, the Senate amended the Bill and passed it on 17 March 2010. The House agreed to the Senate's amendments on the same date.

The main effect of the amendments was to:

- (a) insert as part of the definition of "unfair" a requirement that the term must cause detriment to a party before the term can be unfair. This moved an obligation for a court to "take into account" the extent to which the term would cause detriment from Section 3(2)(a).*
- (b) there is a power for Government to prescribe by regulation an example of an unfair term in the "grey list" in Section 4 of the ACL. Section 4(2) will now require the Minister to take into consideration the detriment that a term of the relevant kind would cause to consumers, the impact on business generally of prescribing that kind of term and the public interest.*
- (c) the power to prescribe "prohibited terms" has been removed. This was the "black list".*
- (d) defer commencement until 1 July 2010.*

Australian Consumer Law

The *Trade Practices Amendment (Australian Consumer Law) Bill 2009* was passed in the House of Representatives on 20 October 2009. It was introduced to the senate on 26 October 2009 but has not yet been passed at the date of preparation of this paper.

The reason for the legislation was explained by Minister Emerson as follows:

This Bill will introduce changes that will make life easier for all consumers – through clearer, fairer standard-form contracts and more effective enforcement of our consumer laws. A single national law, supported by better policy development and decision-making processes, is the best means of achieving better results for

*consumers and business. Rather than relying on 9 parliaments to make changes, this new framework will ensure responsive consumer laws with a truly national reach.*¹

Consumer law in Australia is contained within the Commonwealth *Trade Practices Act 1974* and is reflected in similar provisions of the State and Territory consumer legislation. If there is no national structure, it is likely the Commonwealth or one State or Territory will impose obligations different from other jurisdictions. In 2003, Victoria amended their *Fair Trading Act 1999* to incorporate Part 2B which prohibits unfair terms in consumer contracts. No other Australian jurisdiction has a similar provision.

The Council of Australian Governments agreed in 2008 under the *National Partnership Agreement to Deliver a Seamless National Economy* to introduce a single, national law for fair trading and consumer protection, which applies equally in all Australian jurisdictions to all sectors of the economy and to all Australian consumers and businesses.² This is the Australian Consumer Law (“**ACL**”).

The ACL is to be based on the existing consumer provisions of the *Trade Practices Act 1974* enhanced by:

- a new national unfair contract terms law
- a new national product safety legislative and regulatory framework
- a new national consumer guarantees law about implied warranties and conditions in consumer contract for goods and services
- reforms to enhance its effectiveness and minimise business compliance costs

¹ The Honourable Dr Craig Emerson, second reading speech, *House of Representatives Hansard* 24 June 2009, p. 6981.

² Joint Communiqué: Ministerial Council on Consumer Affairs Meeting, Friday 4 December 2009.

The enactment by States and Territories will fill any gaps in application of the Commonwealth legislation caused by the limitation of jurisdiction under the constitution.

It was intended that the ACL would commence from 1 January 2010. The States and Territories would then enact legislation to apply the Commonwealth legislation in each jurisdiction. All Australian jurisdictions have agreed to apply the new law in its entirety by 1 January 2011. Some jurisdictions may apply the law earlier.

The Commonwealth Legislation will form part of *the Australian Consumer Law* set out in schedule 2 of the *Trade Practices Act 1974*. Similar provisions regarding unfair terms in contracts for financial services will be included in the *Corporations Act 2001* (Cwth).

Other Jurisdictions

As noted above, Victoria legislated in this area in 2003.

The European Union issued directive 93/13 on unfair terms in consumer contracts on 5 April 1993.³

The United Kingdom has the *Unfair Contract Terms Act 1977* (“**UCTA**”) and the *Unfair Terms in Consumer Contracts Regulations 1999* (“**UTCCR**”) both of which were adopted in order to implement the EC directive 93/13.

The UCTA is directed towards limitation and exemption clauses in both business and consumer contracts. UTCCR controls a broad range of contract terms but only in consumer contracts where the terms have not been individually negotiated.

The UK legislation is said to be a compromise between two different approaches to the problem on unfair terms in continental Europe. One approach, the “German” approach, is that all

³ Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts OJL 95/29

standard term contracts should be subject to review without singling out consumer contracts for stricter control.

The alternative “French” approach is biased in favour of the consumer as the potentially weaker side of the transaction, exploited by the superior economic power of the “professional side”.⁴

Appendix 1 of this paper contains a list of countries with legislation intended for similar purposes. In addition, refer to a document ‘Concordance of Contract Laws’ for a comparison of laws in this area between China, Europe, USA and Russia⁵.

Procedural or Substantive Focus

Apart from the Victorian *Fair Trading Act* 1999, both the general law and statute law in Australia concerned with this area have focused on procedural aspects related to the formation of the contract rather than the fairness of the terms in the contract.

There has been a concept of “unconscionable conduct” at the general law and also more specifically under the *Trade Practices Act* 1974 (Cth) which is replicated in State and Territory consumer legislation. New South Wales has the *Contracts Review Act* 1980. The uniform *Consumer Credit Code* also includes an ability to review unfair contracts in a manner similar to the *Contracts Review Act*.

The ACL will concentrate on the contract clauses themselves as well as the manner of formation of the contract.

⁴ Nebbia P. *Reforming the UK Law on Unfair Terms: the Draft Unfair Contract Terms Bill* Journal of Contract Law vol 23 No. 3, October 2007

⁵ *Concordance of Contract Laws* Ted Wright University of Newcastle Australia
<http://www.newcastle.edu.au/school/law/research/concordance>

Under section 3(4) a term of a consumer contract is assumed 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.

Under section 7(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.

Placing the onus of proof under these two sections upon the provider of the goods and services removes the expense and difficulty often experienced by consumers in ascertaining and proving the facts surrounding the preparation of the contract and the formation of the contract.

The *Contracts Review Act* 1980 (NSW) apparently had a broader reach than the general law but has been criticised on the basis that procedural concerns seem to have continued to play a significant role. Also, the *Contracts Review Act* relies on litigation as a mechanism for enforcing consumer rights. Consumers will rarely enforce their rights by litigation.⁶

Effect

A term of a consumer contract is void if:-

(d) *the term is unfair; and*

(e) *the contract is a standard form contract.*⁷

⁶ *Unfair Contract Terms* – A discussion paper of the Standing Committee of Officials of Consumer Affairs Unfair Contract Terms Working Party January 2004 para 2.1.2

⁷ ACL Section 2(1).

“Term”

Is a “term” confined to a particular clause or condition of a contract or may it be comprised of several parts of the same contract? In *Office of Fair Trading-v-Abbey National PLC*⁸ Andrew Smith J set out two differing ways of looking at the word “term”:

It might be said that in Regulation 6(2) the expression “term” does not refer to a particular clause or condition in the seller’s or supplier’s documentation, but is directed to how the contract sets out a particular obligation or right, whether that obligation or right is contained in a single clause or condition or whether it is to be found by drawing together elements of it found in different places in the contractual documentation; and so that if the Regulation is to exclude an assessment of the fairness of that right or obligation, it is that which must be set out in plain, intelligible language. Or it might be said that in Regulation 6(2) the expression “term” connotes the word of a particular clause or condition, and that the wording cannot be said to be “intelligible” unless the consumer can understand from the contract both what the clause and condition actually says and how it affects the parties’ rights and obligations.

Andrew Smith J considered that he did not have to choose between those two alternatives. In *The Office of Fair Trading-v-Foxtons Ltd*⁹ (“**Foxtons 2009**”), Justice Mann “unhesitatingly” adopted the first of the two alternatives in considering the provisions of real estate commission contracts.

In *Director of Consumer Affairs-v-AAPT Ltd*¹⁰ Justice Morris felt that the word “term” seemed “to require some element of integrity, that is an element that can stand alone or be identified as a

⁸ *Office of Fair Trading-v-Abbey National PLC* [2008] EWHC 875 (Comm)

⁹ *The Office of Fair Trading-v-Foxtons Ltd* [2009] EWCH 1681 (ch) (10 July 2009)

¹⁰ *Director of Consumer Affairs-v-AAPT Ltd* (civil claims) [2006] VCAT 1493 at [13]

separate part of a contract. This does not mean that an element must be severable to be a “term”.

Consumer Contract

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*¹¹.

The ACL does not apply to contracts between businesses.

The same goods or services might be acquired for personal use in some circumstances and for business purposes in others. Motor vehicles and mobile phones are two obvious examples of this, but many goods and services will have different purposes for different purchasers.

In *Director of Consumer Affairs-v-AAPT Ltd*¹² Justice Morris interpreted the definition of “consumer contract” in the Victorian legislation. That definition is as follows:-

“Consumer contract” means an agreement, whether or not in writing and whether of specific or general use, to supply goods or services of a kind ordinarily acquired for personal, domestic or household use or consumption, for the purposes of the ordinary personal, domestic or household use or consumption of those goods or services;

This definition is different from the definition of “consumer contract” set out in section 2(3) of the ACL. AAPT had argued that the test of the purposes for which the contract is entered into is

¹¹ ACL section 2(3)

subjective, depending in part on the intention of the supplier. The definition in the ACL leaves no room for any argument that it is the intention of the supplier that is relevant for the purpose of defining the contract. The definition refers specifically to the purposes for which the consumer acquires the goods.

Where an individual is bringing action against the supplier, it will be a matter of enquiry as to the purposes of that particular consumer in purchasing the goods or services. In representative actions, it is suggested that it will only be necessary to show that one or more people would acquire goods or services under the relevant contract for personal domestic or household use or consumption in order to show that the contract is a “consumer contract”.

The definition of a ‘consumer’ in The European Union Directive 93/13, mirrored in the UTCCR, is:-

any natural person who, in contracts covered by this Directive, is acting for the purposes which are outside his trade, business or profession

This definition is of similar effect to the definition of ‘consumer contract’ above. In *Foxtons 2009*, the OFT in the United Kingdom brought an application seeking relief from some terms of a standard form letting contract entered into between Foxtons and landlords. It was not disputed that some of the landlords with whom Foxtons dealt were ‘consumers’.

People who rented their houses while travelling, people who relocated for employment or ‘lifestyle’ choices, people who let part of their property to pay off a mortgage and people for whom their property investment represented part of their pension plan or long term saving were typical consumers of the letting services.

¹² *Director of Consumer Affairs-v-AAPT Ltd* (civil claims) [2006] VCAT 1493 at [21]

As was pointed out in interlocutory proceedings in *OFT v Foxtons*¹³ (“**Foxtons 2008**”), in actions by individual consumers their particular circumstances may be analysed to see if they are consumers. In pre-emptive or collective actions by the consumer advocates, the relief is sought on behalf of a typical consumer and the assessment as to whether the contract terms are fair is carried out on the weaknesses and susceptibilities of a typical consumer.

In *Foxtons 2009*, Justice Mann stated that where it was necessary for him to form views on things such as the mindset, thinking or attributes of a typical consumer, he would do so *on an analogous footing to that on which the court approaches the attributes of the reasonable man in other realms, such as the realm of tort*.¹⁴

Prohibited Terms

Section 6 renders void a term in a consumer contract if it is a “prohibited term” in a standard form contract. A prohibited term is a term of a kind prescribed by the regulations (s. 6(4)). This is sometimes referred to as the “blacklist”.

Under section 6(2) it is an offence for a person to include a prohibited term. Under section 6(3), it is an offence to apply or rely on a prohibited term.

There has been some controversy about the inclusion of a black list. The argument is that the unfairness of a term depends very much on the circumstances of each contract and there should not be a list of unfair terms in the legislation.

In its consultation paper¹⁵ Treasury said of prohibited terms:-

¹³ [2008] EWHC 1662 (Ch) (17 July 2008)

¹⁴ At para 31.

¹⁵ Consultation paper on draft provisions on unfair contract terms issued by the Commonwealth Treasury 11 May 2009

After the consultation process earlier in 2009, it was decided not to prohibit any terms at this time. The power to proscribe unfair terms in the regulations in section 6 could be exercised if the enforcement of the provisions shows that there are particular problems with terms which would justify their prohibition.

Unfair Term

The ACL defines an unfair term:-

- 3 (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.*
- (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 would cause or there is a substantial likelihood that it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on;*
- (b) *the extent to which the term is transparent; and*
- (c) *the contract as a whole.*

The onus will be upon the person providing the contract to establish any defence on the ground that the relevant contract is not a standard form contract and to establish any defence that the term is necessary in order to protect the interests of that party.

“Significant” means, principally at least, “significant in magnitude”, or “sufficiently large to be important”, being a meaning not too distant from “substantial”¹⁶.

In order for a term to be “unfair” both limbs of the definition in section 3 must be satisfied. The first limb is readily understandable. The second limb, that the term *is not reasonably necessary to protect the legitimate interests of the party who would be advantaged by the term* requires more analysis.

“Legitimate Interests”

The reference to “the legitimate interests” of a party in section 3(1)(b) is difficult to understand.

The definition of “legitimate” in the Macquarie Dictionary online includes the following:-

1. according to law; lawful;
2. in accordance with established rules, principles, or standards;
3. of the normal or regular type or kind;
4. in accordance with the laws of reasoning; logically inferable; logical: a legitimate conclusion
7. genuine; not spurious.¹⁷

The expression is used elsewhere¹⁸. Where it is used elsewhere, it is taken as one of a number of elements to be considered in determining whether a term is ‘unconscionable’ or

¹⁶ *Jetstar Airways Pty Ltd v Free* [2008] VSC 539 [105]

'unjust'. This has the effect of allowing the court a wide discretion to determine whether the term is offensive or not¹⁹. For the ACL the element is critical to determining whether the term is unfair – it is not one of a number of indicators. It should therefore be necessary to define the term more closely in interpreting the ACL.

One expects 'legitimate interests' should be lawful. They should also be of a normal kind judged by contemporary standards in the business to which they relate. Most standard form contracts will exist in a competitive business environment and there will be clauses and contracts with which the subject term may be compared. Where there are no industry norms, one might look for a sense of proportionality in the term. Dr Paterson has made the following suggestion:

It is suggested that determining whether an otherwise unbalanced term is reasonably necessary to protect the legitimate interests of the party who would be advantaged by the term will typically involve considering whether the term is an attempt by that party to respond to risks inherent in the transaction, as opposed to an opportunistic attempt to appropriate gains not contemplated as part of the original bargain. The question of whether a term is reasonably necessary to protect suppliers' legitimate interests will typically involve an inquiry into proportionality. To avoid being found unfair, a term must be a proportionate response to the risks it seeks to address.²⁰

Note that a term is assumed not to be reasonably necessary for s.3(1(b)) unless the advantaged party proves that it is (s.3(4)).

¹⁷ Macquarie Dictionary Online, 4 January 2010

¹⁸ Trade Practices Act 1974 (Cwth) s.51AC(3)(b), Contracts Review Act 1980 (NSW) s.9(2)(d)

¹⁹ *West v AGC (Advances) Ltd and others* (1986) 5 NSWLR 610 at 621E.

²⁰ Dr J.M.Paterson *The elements of a prohibition on unfair terms in consumer contracts* (2009) 37 ABLR 184

“Transparent”

A term is defined in section 3(3) as being “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.

This definition was based on a similar definition used in section 14 of the UK Law Commission’s draft Unfair Contract Terms Bill 2004²¹.

These tests should be applied to the individual consumer, where action is brought by an individual. They should be applied to a ‘typical consumer’ in pre-emptive or collective applications using the test of the reasonable person referred to in *Foxtons 2009*.

Good Faith

The use of the expressions “legitimate interests” and “transparent” may reflect the notion of “good faith” which has been difficult for the courts to define. “Transparency” refers to the procedural requirements of good faith. “Legitimate interests” refers to the substantive content.

The current UK provisions²² refer and the Victorian provisions enacted in 2003 referred to “good faith” in their definitions of unfair terms. There is no reference to “good faith” in the ACL. In *Jetstar Airways Pty Ltd-v-Free*²³ Justice Cavanough said at para 48:-

²¹ UK Law Commissions 2004 *Unfair Terms in Contracts* at Appendix A.

²² UTCCR 5(1) *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’ rights and obligations arising under*

Finally, I would observe that I would agree with the observation of Professor Beale that the “requirements of good faith” have a procedural aspect and a substantive content. A term in a consumer contract might cause such a significant imbalance in the parties’ rights and obligations arising under the contract (to the detriment of the consumer) that the term is unfair even if the term is individually negotiated or brought to the attention of the consumer. On the other hand, there will be other terms in consumer contracts which will not be regarded as unfair if, and only if, individually negotiated; or, if, and only if, brought to the attention of the consumer.

In *Director General of Fair Trading-v-First National Bank PLC* Lord Justice Peter Gibson said:-

Terms must be reasonably transparent and should not operate to defeat the reasonable expectations of the consumer. The consumer in choosing whether to enter into a contract should be put in a position where he can make an informed choice.²⁴

Clause 32W of the *Fair Trading Act 1999* (Vic) was in these terms:-

A term in a consumer contract is to be regarded as unfair if, contrary to the requirements of good faith and 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.

The words underlined in the section set out above were deleted by the *Fair Trading and Other Acts Amendment Act 2009* (No. 19 of 2009) (Vic). This followed the statement in the consultation paper on draft provisions on unfair contract terms issued by The Commonwealth Treasury 11 May 2009:

the contract, to the detriment of the consumer

²³ *Jetstar Airways Pty Ltd-v-Free* [2008] VSC 539

²⁴ *Director General of Fair Trading-v-First National Bank PLC* [2000] QB 672.

The definition will not make reference to good faith, given the uncertain application of the principle at common law in Australia. In its report, the PC [Productivity Commission] noted the potential for differing interpretations of good faith, and considered that other definitions of an unfair term may be equally apt.

Examples of Unfair Terms

Section 4 gives examples of unfair terms. It begins

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;*

There then follow 12 more examples including, in s.4(n), *a term of a kind, or that has an effect of a kind, prescribed by the regulations*. There are none prescribed, so far.

This list of examples is informally referred to as the “grey list”.

These examples would include some provisions normally included in contracts such as:-

- (a) a right for one party to terminate the contract summarily (there will of course be a common law right for both parties to terminate the contract);
- (b) any clause that effectively provides for additional payments by a purchaser if the purchaser defaults;

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- (c) a provision enabling a vendor to change the nature of goods to be provided, usually in specified circumstances;
- (d) a term allowing one party to decide subjectively whether certain circumstances exist;
- (e) limitations on the right of one party to sue another party;
- (f) onus of proof provisions.

Note that the examples given must still meet the criteria of section 3 as to whether they are an unfair term. The examples, according to the legislation, “may be unfair”. There will need to be an enquiry in each case to determine whether a particular term satisfies the definition of an unfair term.

Clearly, a clause of a kind exemplified in section 4 will be more difficult to defend as a fair term than a clause of a kind not exemplified.

Standard Form Contract

The test as to whether a contract is a standard form contract is contained in section 7. As mentioned above, there is a presumption that there is a standard form contract unless the respondent proves otherwise.

In making a determination as to whether there is a standard form contract, a court may take into account such matters as it thinks relevant, but must take into account the six factors mentioned in section 7(2). These are:-

- (a) did one party have most of the bargaining power?
- (b) was the contract prepared before any discussion about the transaction?

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- (c) was one party required to take it or leave it?
- (d) whether one party was given an effective opportunity to negotiate the terms
- (e) whether the contract was tailor made for the transaction or was 'off the shelf'.

One can think of numerous examples of contracts which are likely to fall within the definition of a standard form contract. Some contracts might be a little unexpected: for example, school enrolment contracts and contracts for legal services.

Severability

Under Section 2, a term of a consumer contract is void if the term is unfair and the contract is a standard form contract. However, the contract continues to bind the parties if it is capable of operating without the unfair term²⁵.

Under Section 6, a term of a consumer contract is void if the term is a prohibited term and the contract is a standard form contract. It is an offence for a person to include a prohibited term in a consumer contract that is a standard form contract.

Under Section 6(5) the contract continues to bind the parties if it is capable of operating without the prohibited term.

The contractual consequences of an unfair term and a prohibited term are the same but the act of including a prohibited term is an offence under Section 6.

Both Section 2 and Section 6 import the test of severability from the general law.

The leading statement in Australia on severability is contained in *McFarlane –v- Daniell*:

²⁵ ACL Section 2(1) and (2).

When valid promises supported by legal consideration are associated with, but separate in form from, invalid promises, the test of whether they are severable is whether they are in substance so connected with the others as to form an indivisible whole which cannot be taken to pieces without altering its nature... If the elimination of the invalid promises changes the extent only but not the kind of the contract, the valid promises are severable...If the substantial promises were all illegal or void, merely ancillary promises would be inseverable.²⁶

This passage has been approved in a number of cases.²⁷

In *Niemann-v-Smedley*²⁸ the Supreme Court of Victoria said that severance would not be possible in the case of conduct “involving a serious element of moral turpitude” or “obviously inimical to the interest of the community so as to offend almost any concept of public policy”. Tax evasion was listed as one example of such conduct.

Because of the wording of the ACL it will not be necessary to enquire as to the morality of the occasion. The ACL provides that the contract will bind the parties if it is capable of operating without the unfair term – in the words of Chief Justice Jordan in *McFarlane-v-Daniell* “if the elimination of the invalid promises changes the extent only but not the kind of the contract, the valid promises are severable”.

It is difficult to think of a clause that would be unfair that could not be severed from the contract. In order for a clause to be “unfair”, Section 3(1)(b) requires that the term is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term.

²⁶ *McFarlane-v-Daniell* [1938] 38 SR (NSW) 337 at 345

²⁷ *Thomas Brown & Sons Ltd-v-Fazal Deen* [1962] 108 CLR 391 at 411, *Carney-v-Herbert* [1985] 1 A.C. 301 and *Niemann-v-Smedley* [1973] VR 769

²⁸ *Niemann-v-Smedley* [1973] VR 769 at 778

Any kind of term that is reasonably necessary to protect the legitimate interests of the advantaged party will not be unfair.

Enforcement

An individual consumer may seek relief from an unfair term in a contract by having the term declared void by a court. In most cases of consumer contracts, a consumer will not be able to justify the cost of an application against the supplier.

Under section 87AC of the *Trade Practices Act 1974* after it is amended, the court may, on the application of the commission, declare that:-

- (a) a term of a consumer contract is an unfair term; or
- (b) a term of a consumer contract is a prohibited term.

Under section 87(5A), after the Act is amended:-

A reference in this section to a contravention of a provision of the Australian Consumer Law includes a reference to applying or relying on, or purporting to apply or rely on, a term of a consumer contract that the court has declared under section 87AC to be an unfair term or a prohibited term.

Characterising the application of a declared unfair term or the reliance on a declared unfair term as a “contravention” allows the courts to make a wide range of orders affecting the contravener.

The Commission may make an application pursuant to section 87(1B) on behalf of one or more persons identified in the application who have suffered loss from the contravention. Those persons must have consented to the making of the application before the application was made.

Unaffected Terms (Core Terms)

Section 5 of the ACL provides that the voiding provision of section 2 does not apply to a term of a consumer contract to the extent that the term:-

- (a) defines the main subject matter of the contract; or
- (b) sets the up-front price payable under the contract; or
- (c) is a term required, or expressly permitted by a law of the Commonwealth or a State or Territory.

Under section 5(2) the “up-front” price is the consideration payable for the supply, sale or grant under the contract and which is disclosed at or before the time the contract is entered into.

Assessment of Unfair Terms

If instructed to review contracts for clients under the unfair terms provisions of the ACL, it is suggested that the review proceed as follows:-

1. identify the term;
2. is it a ‘core’ term?;
3. is there a “consumer” contract;
4. is the contract a “standard form contract”;
5. is there a significant imbalance in the parties’ rights and obligations?;
6. does the term come within the examples of s.4 and does it nevertheless fulfil the requirements for an “unfair term”?;

7. if not within the examples, is the term “unfair”;
8. check the procedure by which the term is made known to the consumer to satisfy the “transparency” tests.

Appendix 2 contains examples of clauses changed or deleted after action by the Office of Fair Trading in the United Kingdom²⁹. The examples in Appendix 2 are organised around the kinds of clauses exemplified in s.4 of the ACL.

There is also a brochure from Consumer Affairs Victoria to provide assistance with their legislation³⁰. The Victorian guidelines rely heavily on the decision in *Director of Consumer Affairs-v-AAPT Ltd*. Care should be taken in using these Victorian guidelines because the *AAPT* case was overruled in some aspects by *Jetstar Airways Pty Ltd-v-Free* [2008] VSC 539.

Appendix 3 is a flow chart for deciding whether a term is unfair by working through the elements of the definition.

²⁹ *Unfair Contracts Terms Bulletin No 4* Office of Fair Trading (UK) 19971

³⁰ *Preventing Unfair Terms in Consumer Contracts* Consumer Affairs Victoria 2007

Appendix 1

Contract Regulation Elsewhere

Country	Legislation	Year
USA	<i>Uniform Commercial Code</i> (this is a Federal legislative proposal addressed to fifty state legislatures. However, nearly all American states have enacted a stated based Uniform Commercial Code).	1952
Israel	<i>Standard Contracts Law</i>	1964
Sweden	<i>An Act Prohibiting Improper Contract Terms</i>	1971
Germany	<i>Law on Standard Contract Terms</i>	1977
United Kingdom	<i>Unfair Contract Terms Act</i>	1977
Ireland	<i>Sale Of Goods And Supply Of Services Act</i>	1980
Luxembourg		1983
Portugal		1985
European Union	<i>Unfair Terms In Consumer Contracts Directive</i>	1993
France	<i>Consumer Code (Articles L132-1- L132-5)</i>	1995
Thailand	<i>Unfair Contract Terms Act</i>	1997

Appendix 2

Examples of Unfair Terms

1. **Avoiding or limiting performance 4(a)**

No claims whatsoever will be entertained and no liability attaches to the Company in any event for goods sold at discount prices as remnants or as sub-standard stock.

Goods sold at discount prices, as remnants or as substandard stock will be identified and will be stated to be sold as such.

Crucial Trading Ltd – Bulletin 2

2. **One party terminating the contract 4(b)**

The Club reserves the right to withdraw and cancel the ticket, without offering refund, solely at its discretion for any reasons without having to enter into correspondence with the purchaser.

In the event of the Holder...contravening any of these Conditions or the Holder being involved in any incident of crowd misbehaviour or the use of bad language, the Club reserves the right to withdraw the Ticket without refund. The Club also reserves the right, with due cause, to withdraw the Ticket with refund with an explanation to the Holder who shall have the right to challenge the decision in the event that the Holder considers that the Club has acted without due cause. In the event of such challenge, the Club shall appoint an independent arbitrator to determine whether the Club has acted with due cause.

Birmingham City Football Club – Bulletin 4

3. **Penalties 4(c)**

This invoice must be produced upon collection of garments. Failure to comply will result in all charges being made again.

This invoice must be produced upon collection of garments

House of Elegance – Bulletin 4

Interest will be charged at the rate of 10% per month or part thereof on any sum outstanding for more than seven days following the delivery and installation of the goods...*(Deleted)*

Kitchen Magic Ltd – Bulletin 4

4. Unilateral variation 4(d)

We reserve the right to alter hours of business if found necessary and change the annual membership system and/or price structure. *(Deleted)*

Falkirk Sunbed, Solarium, and Ladies Health Club – Bulletin 1

5. Unilateral renewal 4(e)

We may cancel a membership at any time by sending seven days' notice by recorded delivery to your last known address and in such an event you will receive a pro rata refund of your subscription, unless the service has been used. We reserve the right to decline renewal of any membership.

If excessive use of the service has occurred, e.g. through failure to seek permanent repair following any temporary repair effected by an agent or due to lack of routine vehicle maintenance, we may cancel the membership by sending seven days' notice by recorded delivery to your last known address.

Britannia Rescue Services Ltd – Bulletin 3

6. Variation of price 4(f)

Fluctuations. Invoices are strictly nett and the quoted price will be adjusted to meet any price variations in labour or materials occurring after the date of quotation. *(Deleted)*

.0.0.0.0.0.1.A.A.A.Abbeyflow Ltd – Bulletin 2

The Company may increase the service charge at any time after 12 months from the Agreement date by giving note in writing to the Customer stating the new Service Charge and

the date (not being earlier than the date of the notice) on and after which the new Service Charge shall become effective.

We can change our service or monitoring at any time after 12 months from the date of this agreement...

...Our new charges will be index-linked. The index we use is the latest monthly BEAMA index (electrical engineering) published before the date we send you the invoice...

Chubb Alarms Ltd – Bulletin 4

7. Variation of characteristics 4(g)

If, for any reason, the Company is unable to supply a particular item of furniture or a particular appliance, the Company will notify the Customer. The Company will normally replace it with an item of equivalent or superior standard and value.

*If, for any reason **beyond the Company's reasonable control**, the Company is unable to supply a particular item of furniture or a particular appliance, the Company will notify the Customer. With the agreement of the Customer the Company will replace it with an item of superior standard and value.*

Moben Kitchens, a division of MKD Holdings Ltd – Bulletin 1

The Company reserves the right at any time and without notice to vary or alter any of the design specifications and packaging of equipment described in its sales literature.

The Company will use its best endeavours to supply the customer with the exact goods ordered but where this is not possible the company will notify the customer as soon as possible of any alterations to the design, specifications and packaging of the equipment described in the sales literature and where the alteration is fundamental to the goods ordered the customer may terminate this contract and any deposit paid will be refunded.

GP Care Supplies – Bulletin 3

8. Unilateral interpretation

The vehicle must not have suffered any damage, whether repaired or not, which in the opinion of your Rover Car Dealer will cost or has cost more than £150 to repair.

[Rover agreed to amend the term to allow for an independent assessment by an RAC expert. The costs of any such assessment are to be borne by the losing party.]

Rover Group Ltd – Bulletin 1

9. Limiting vicarious liability 4(i)

I understand that All Star Soccer Schools, or the organisation providing facilities, their franchisees, their agents and their employees are not under any liability whatsoever in respect of personal injury, loss or damage howsoever caused whilst attending an All Star Soccer Schools' course.

All Star Soccer Schools franchisees, their agents and their employees are insured against loss or injury through their negligence.

All star Soccer Schools – Bulletin 1

10. Assignment 4(j)

This Agreement and the benefits and advantages herein contained are personal to the Member and shall not be sold, assigned or transferred by the Member but the Company's obligations may be performed by the Company's Agents or assigns and the Company may assign the benefit of this agreement.

Membership is not transferable.

Intrim Fitness Centre – Bulletin 4

11. Restricting right to sue 4(k)

Arbitration. And any dispute or difference of any kind whatsoever which arises or occurs between the Customer and the Company in relation to any thing or matter arising under, out of or in connection with this Agreement shall be referred to arbitration under the Arbitration Rules of the Chartered Institute of Arbitrators.

Arbitration. Where the Customer does not deal as consumer and any dispute or difference of any kind whatsoever which arises or occurs between the Customer and the Company in relation to any thing or matter arising under, out of or in connection with this Agreement shall be referred to arbitration under the Arbitration Rules of the Chartered Institute of Arbitrators.

Henlys Group plc – Bulletin 2

12. Limiting evidence 4(I)

In the case of purchasing a used vehicle I/we certify that before signing the document my/our attention has been drawn to the age of the vehicle and the fact that any defects may be present. In addition I/we understand that it is a Term of Contract that I/we should examine the vehicle before signing the order form to satisfy myself/ourselves as to its condition. *(Deleted)*

I have read, understood and agreed the terms and conditions on the reverse of the form and in particular my attention has been drawn to and I have read and to the extent applicable, agree the provisions of clause 6, 10 and 11. *(Deleted)*

I have been informed and I understand and agree that the mileage recorded on the odometer must be considered incorrect. I confirm that I read and understood a similarly worded disclaimer as that above which was fixed to the odometer when I viewed the vehicle. I agree that no oral representation whatsoever was made in respect of the accuracy of the recorded mileage. *(Deleted)*

Caledonia Motor Group – Bulletin 4

Appendix 3

