

***Ensuring Compliance
with the New Australian
Consumer Law***

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ENSURING COMPLIANCE WITH THE NEW AUSTRALIAN CONSUMER LAW

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Scope

This paper looks at the effect the new *Australian Consumer Law* (“**ACL**”) will have on contracts commonly used by independent schools in Australia.

The paper describes the ACL, analyses the unfair terms provisions and then applies those provisions to a school enrolment contract. The paper also refers to other consumer protection provisions of the existing and proposed legislation.

School Contracts

There are many contracts entered into by schools. For example, there are:-

- enrolment contracts;
- excursion contracts;
- computer hire contracts;
- employment agreements;
- contracts with suppliers of goods and services to the school.

The ACL will apply to the first three examples above and not to the last two. Employment agreements are excluded by the definition of ‘services’.¹ The ACL at present does not apply to contracts between businesses.

Australian Consumer Law

The *Trade Practices Amendment (Australian Consumer Law) Act* 2010 inserts the ACL as Schedule 2 of the *Trade Practices Act* 1974 (Cwth) (“**TPA**”). The ACL comes into effect on 1 July 2010.

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

¹ *Trade practices Act* 1974 (Cwth) s.4

*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.*²

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.³

The single, national law is to be based on the existing consumer provisions of the *TPA* 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

The legislation coming into effect on 1 July 2010 introduces the concept of ‘unfair terms’ into federal legislation and increases the powers of the Australian Competition and Consumer Commission (“**ACCC**”) to enforce consumer legislation. There is currently a second Bill before parliament, the *Trade Practices Amendment (Australian Consumer Law) Bill (No2) 2010*, intended to implement the remainder of the purposes expressed by COAG.

Procedural and Substantive Focus

Apart from the Victorian *Fair Trading Act 1999*, both the general law and statute law in Australia concerned with unfairness in contracts have focused on procedural aspects related to the formation of the contract rather than the fairness of the terms in the contract.⁴

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

² The Honourable Dr Craig Emerson, second reading speech, *House of Representatives Hansard* 24 June 2009, p. 6981.

³ Joint Communiqué: Ministerial Council on Consumer Affairs Meeting, Friday 4 December 2009.

⁴ *Contracts Review Act 1980 (NSW)*, *Trade Practices Act 1974 (Cwth)* – unconscionable conduct, Consumer Credit Code.

Redressing the Imbalance

Consumer legislation has, until now, been less effective than intended. There have been a number of factors contributing to this:-

- the legislation itself has not been strong enough
- the powers of enforcement have been limited
- individual consumers were unlikely to spend money on enforcement
- it has been difficult to prove basic things such as that there was a standard form contract, that the products or services supplied were for consumers and that the terms complained of went further than necessary for the supplier

Government has taken all these things into account and has now:-

- strengthened the legislation and made it universal
- given effective powers to ACCC to enforce the legislation
- undertaken to provide resources to allow ACCC, rather than individual consumers, to enforce consumer rights
- reversed the onus of proof on some aspects so the supplier is required to disprove assumptions.

These changes will have a dramatic effect on consumer law in Australia.

Base Provision

A term of a consumer contract is void if:-

- (a) *the term is unfair; and*
- (b) *the contract is a standard form contract.*⁵

“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*⁶ Andrew Smith J set out two differing ways of looking at the word “term” used in similar legislation in the UK:

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

⁵ ACL Section 2(1).

⁶ *Office of Fair Trading-v-Abbey National PLC* [2008] EWHC 875 (Comm)

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 wording 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.

In *The Office of Fair Trading-v-Foxtons Ltd*⁷, 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*⁸ 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 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*⁹.

The definition refers specifically to the purposes for which the consumer acquires the goods or services. It will be a matter of fact in each case as to the purposes for which an individual consumer acquired the goods and services.

A contract between a school and parents of a student will be a contract for supply by the school of educational services for personal use: that is, the personal use will be the application of the services for the development of the student.

⁷ *The Office of Fair Trading-v-Foxtons Ltd* [2009] EWCH 1681 (ch) (10 July 2009)

⁸ *Director of Consumer Affairs-v-AAPT Ltd* (civil claims) [2006] VCAT 1493 at [13]

⁹ ACL section 2(3)

The expression “personal, domestic or household use or consumption” is used elsewhere in the *Trade Practices Act*¹⁰.

The original *Trade Practices Act* in 1974 defined a consumer, in part, as somebody who acquired services “of a kind ordinarily acquired for private use or consumption and the person does not acquire the services for the purposes of, or in the course of, a profession, business, trade or occupation or for a public purpose”¹¹.

The *Trade Practices Act Review Committee* recommended to the Minister in 1976 that the definition be changed:-

*9.44 But there are some transactions which will inevitably be above the monetary limit, which would be encompassed by the present definition and should continue to be encompassed – in the interests of the non-commercial consumer. A contract for the construction of a family home is one example. For this reason, the Committee considers that a further category should be added to the definition of “consumer”, where the transaction relates to goods or services priced over \$15,000.00. That category would include all acquisitions of goods or services of a kind ordinarily obtained for person(sic), domestic or household uses, a category which, the Committee considers, would have limited application above \$15,000.00. We recognise that the boundaries of such a category are not wholly certain, but believe that in practice that uncertainty is likely to affect only a limited number of cases.*¹²

This was changed in 1977 when Section 4B was introduced and used the expression ‘personal, domestic or household use or consumption’ for the first time.

In determining the meaning of the expression the courts will adopt two principles of importance. The first principle is set out in *Project Blue Sky Inc-v-Australian Broadcasting Association* [1998] 194 CLR 355 at 381 [69] – [70], where McHugh, Gummow, Kirby and Hayne JJ said:-

The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute. The meaning of the provision must be determined “by reference to the language of the instrument viewed as a whole”. In Commissioner for Railways (NSW)-v-

¹⁰ Section 4B(1)(a)(ii), Section 51AB(5), Section 74A(2)(a)

¹¹ *Trade Practices Act* 1974 No. 51 Section 4(3)(b)

¹² *Trade Practices Act Review Committee Report to the Minister for Business and Consumer Affairs* August 1976 p.64

Agalianos, Dixon C J pointed out that “the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed”. Thus, the process of construction must always begin by examining the context of the provision that is being construed.

A legislative instrument must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals.

The second principle of importance in determining the meaning of the expression was set out by Lockhart and Gummow JJ in *Accounting Systems 2000 (Developments) Pty Ltd-v-CCH Australia Ltd*¹³ at 503-504:-

As is the case with Part IV of the [TPA], the evident purpose and policy underlying Part V, which includes S 52, recommends a broad construction of its constituent provisions, the legislation being of a remedial character so that it should be construed so as to give the fullest relief which the fair meaning of its language will allow: see the discussion of the authorities by Mason C J in Devenish-v-Jewel Food Stores Pty Ltd [1991] 172 CLR 32 at 44. The precise boundaries of the territory within which Section 52 operates remain undetermined: Concrete Constructions (NSW) Pty Ltd-v-Nelson [1990] 169 CLR 594 at 601.

*Minchillo-v-Ford Motor Company of Australia*¹⁴ was a case requiring the court to determine whether a prime mover was acquired for ‘personal, domestic or household use or consumption. Ormiston J, with whose reasons Fullagar and Brooking JJ concurred, stated at 617:

*The argument must be rejected, for it takes no proper account of the use of the words “ordinarily acquired”. **Although the words “domestic or household” have a similar connotation, “personal” use is clearly intended to cover a wider field, but the primary contrast intended to be drawn is with commercial or business use, whatever other personal activities a vehicle may be used for.** In the case of a prime mover it is hard to see that it would, in the ordinary understanding of those words, be “ordinarily acquired for personal use”. The causes of action under Sections 74B and 74D relied upon by the appellants were therefore rightly dismissed by the trial judge.*

¹³ (1993) 42 FCR 470

¹⁴ *Minchillo-v-Ford Motor Company of Australia* [1995] 2 VR 594

In the light of the principles set out above and with the comments by Ormiston J in *Minchillo*, it is difficult to see how educational services acquired under an enrolment contract could be other than “personal”. They are certainly not used by the parents or the student for business or commercial purposes.

The fact that the services are acquired by a parent for application to someone else (their child) does not take the services out of the definition of “consumer contract” in the ACL. *Minchillo* makes it clear that the word ‘personal’ has a wider meaning than that the goods or services are acquired to be used or consumed by the acquirer and no-one else.

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;*
 - (c) *it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.*
- (2) *In determining whether a term of a consumer contract is unfair under subsection (1), a court may take into account such matters as it thinks relevant, but must take into account the following:-*
- (a) *the extent to which the term is transparent; and*
 - (b) *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”¹⁵.

¹⁵ *Jetstar Airways Pty Ltd v Free* [2008] VSC 539 [105]

In order for a term to be “unfair” all three 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 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.¹⁶

The expression is used elsewhere¹⁷. 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 ‘unjust’. This has the effect of allowing the court a wide discretion to determine whether the term is offensive or not¹⁸. 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. Apart from that, anything that advantages the supplier is in its interest.

The full element requires that the term be ‘reasonably necessary in order to protect the legitimate interests’ of the supplier. ‘Protect’ could be contrasted with words such as ‘enhance’ or ‘advance’. The term should maintain the supplier’s commercial position rather than advance it.

The term must be ‘necessary’ to protect the interests. If those interests would be maintained without the term, it is unnecessary. The question as to whether it is necessary must be judged within ‘reasonable’, objective bounds.

¹⁶ Macquarie Dictionary Online, 4 January 2010

¹⁷ *Trade Practices Act 1974* (Cwth) s.51AC(3)(b), *Contracts Review Act 1980* (NSW) s.9(2)(d)

¹⁸ *West v AGC (Advances) Ltd and others* (1986) 5 NSWLR 610 at 621E.

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.¹⁹

There is a presumption that the term is not reasonably necessary until the supplier proves otherwise (s.3(4)).

Detriment

The third limb of unfairness is that the term would cause detriment. The original legislation required the court to take the likelihood of detriment into account in determining whether a term is unfair. The Senate required that the Bill be amended so that there must definitely be detriment to the consumer before the term is unfair.

“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.

The terms “transparency” and “legitimate interests” derive from the concept of ‘good faith’ and represent an attempt to clarify by statute the two elements of procedure and substantive content which comprise ‘good faith’.

¹⁹ Dr J.M.Paterson *The elements of a prohibition on unfair terms in consumer contracts* (2009) 37 ABLR 184

There is no reference to “good faith” in the ACL but it is useful to look at the definitions by the courts as providing the source of the terms ‘transparency’ and ‘legitimate interests’. The current UK provisions²⁰ refer and the Victorian provisions enacted in 2003 referred to “good faith” in their definitions of unfair terms. In *Jetstar Airways Pty Ltd-v-Free*²¹ Justice Cavanough said at para 48:-

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.*²²

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:-

There then follow 14 examples.

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

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

²⁰ 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 the contract, to the detriment of the consumer*

²¹ *Jetstar Airways Pty Ltd-v-Free* [2008] VSC 539

²² *Director General of Fair Trading-v-First National Bank PLC* [2000] QB 672.

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). Applied to a school enrolment contract, these are:-

- (a) did the school have most of the bargaining power?
- (b) was the contract prepared before any discussion about the terms of the enrolment?
- (c) were the parents required to take it or leave it?
- (d) were the parents given an effective opportunity to negotiate the terms
- (e) was the contract tailor made for the transaction or was it 'off the shelf'.

School enrolment contracts are standard form contracts.

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 term²³.

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

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

²³ ACL Section 2(1) and (2).

*valid promises are severable...If the substantial promises were all illegal or void, merely ancillary promises would be inseverable.*²⁴

This passage has been approved in a number of cases.²⁵

In *Niemann-v-Smedley*²⁶ 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.

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*, the court may, on the application of the ACCC, declare that a term of a consumer contract is an unfair term.

²⁴ *McFarlane-v-Daniell* [1938] 38 SR (NSW) 337 at 345

²⁵ *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

²⁶ *Niemann-v-Smedley* [1973] VR 769 at 778

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 ACCC 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.

The ACCC has told a Senate Committee that it is assigning more staff to act on cases where companies use unfair contracts²⁷.

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.

²⁷ The Australian Financial Review, 28 April 2010 p7

Assessment of Unfair Terms

Appendix 1 contains examples of clauses changed or deleted after action by the Office of Fair Trading in the United Kingdom²⁸. The examples are organised around the kinds of terms exemplified in s.4 of the ACL.

There is a draft *Guide to Unfair Terms* published by the ACCC and available on its website. There is also a brochure from Consumer Affairs Victoria to provide assistance with their legislation²⁹. The Victorian guidelines rely heavily on the decision in *Director of Consumer Affairs-v-AAPT Ltd*. Care should be taken in using the Victorian guidelines because the *AAPT* case was overruled in some aspects by *Jetstar Airways Pty Ltd-v-Free* [2008] VSC 539.

Appendix 2 is a flow chart for deciding whether a term is unfair by working through the elements of the definition.

Misleading and deceptive conduct

Section 52 of the *TPA* prohibits a corporation, in trade or commerce, engaging in conduct that is misleading or deceptive or is likely to mislead or deceive. The proposed second part of the ACL will contain provisions regulating false or misleading representations about goods or services. As presently proposed, a person must not make a false or misleading representation:-

- that services are of a particular standard, quality, value or grade
- that a particular person has agreed to acquire goods or services
- that purports to be a testimonial by any person relating to goods or services
- that goods or services have sponsorship, approval, performance characteristics, accessories, uses or benefits
- with respect to the price of goods or services³⁰

The pre-enrolment process often involves interviews of the student and parents at which representations are made about aspects of the school and services it provides. The process will commonly include the provision of a prospectus or other brochures setting out the attributes of the school.

²⁸ *Unfair Contracts Terms Bulletin No 4* Office of Fair Trading (UK) 19971

²⁹ *Preventing Unfair Terms in Consumer Contracts* Consumer Affairs Victoria 2007

³⁰ *Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010* Schedule 1 Section 29

It is easy for marketers to overstate aspects of the school's assets. The content of the interviews and the written material provided to applicants for enrolment should be reviewed carefully to ensure that none of the statements are false or misleading. Notes made of comments by parents should be retained.

Section 87ZL of the TPA empowers the ACCC to give a person a notice requiring them to substantiate claims or representations made in connection with the supply of services.

“Core terms”

A term that defines the main subject matter of the enrolment contract is not subject to the voiding provision of Section 2 of the ACL.

Many enrolment contracts do not contain a statement of the purpose or obligations of the school under the contract. It seems obvious that the school undertakes, expressly or impliedly, to provide educational services to the parents for the benefit of the student. Care should be taken to ensure that the quality or extent of the services is not exaggerated. Generally, this clause will not be subject to avoidance as an unfair term.

A term that sets the 'upfront' price payable under the enrolment contract will similarly be protected from the voiding provision of Section 2 of the ACL.

An enrolment contract commonly lasts for the whole of the period during which the child is at the school. This could be anything up to 13 years. It is not possible to fix a figure at the commencement of the first year of enrolment and have that amount apply for the rest of the student's stay at the school. The enrolment contract usually requires the parents to pay the fees set by the school from time to time. To the extent that this clause refers to the fees applying at the commencement of the first year, they may attract the protection of section 5 of the ACL as a “core” term.

Fee increases

Clause 4(1)(f) gives an example of a term of a consumer contract that “may” be unfair. It is a term that permits, or has the effect of permitting, one party to vary the upfront price payable under the contract without the right of another party to terminate the contract.

Enrolment contracts do not often have any fixed method of increasing the fees. Fee increases are normally determined by school boards in the light of the profit and loss budget for the coming year. The implicit suggestion in the example of Section 4(1)(f) is that the parent should be given a right to terminate the contract after the new fees have been published.

Rules and regulations

The enrolment contract is a short document which usually requires the parents to comply with the rules of the school. It should also require the parents to ensure that the student complies with the rules of the school.

The rules of the school are constantly evolving. While it would be possible to attach a copy of the rules to the enrolment form, those rules will likely be changed if the child is at the school for any period of time.

Changing the rules after the enrolment contract is signed is effectively or potentially varying the terms of the contract in the sense that it alters the obligations of the parent under the contract. Mostly, the alterations of the rules will not have any significant consequences in terms of the enrolment contract. However, there are some aspects of the rules that are more likely to affect the obligations under the enrolment contract than others. Rules relating to discipline of students in particular may be controversial when disciplinary action is taken against the student.

Clauses such as this will find little sympathy with the ACCC, I anticipate, where there is no adequate means of communicating changes of rules to the parents.

The school might perhaps promote its rules in status so that the rules generally are not amended unless there is a very good reason. Perhaps the school board could be required to approve any change in the rules to give some added assurance to the parents that their interests will be taken into account.

Communication generally

As mentioned above, the enrolment contract will refer to documents published by the school which may be changed from time to time. Obvious examples are the school's privacy policy and rules of behaviour.

It is important that parents who are obliged under the enrolment contract to comply with these documents and to ensure that the student complies with them are kept informed of alterations to those documents.

This might be done by mass email transmissions but it might be better to do it by publishing these documents on the school's website, perhaps with a section noting where amendments are made to the base documents.

Enrolment forms in the past have commonly stated that it will be adequate communication with the parents if an announcement is made at school assembly. This seems to me to be manifestly inadequate and probably places parts of the enrolment agreement in jeopardy under the unfair terms protection.

Discipline

The case that provides most illumination on the question of disciplinary powers within independent schools in Australia is *Bird-v-Campbelltown Anglican Schools Council*³¹.

The headmaster of Broughton Anglican College determined to exclude Charles Bird from the college. An action was brought against the school by Charles (suing by his mother acting as his tutor), Mrs Bird and Mr Bird who were the parents of Charles.

The defendant was the Campbelltown Anglican Schools Council which was a body corporate constituted under a private act of the New South Wales Parliament. The college was registered as a non-government school under the *Education Act 1990* (NSW).

The plaintiffs sought:-

- judicial review of the decision and relief consequent on an alleged breach of contract
- a declaration that the decision was invalid
- an order in the nature of certiorari setting the decision aside

³¹ *Charles Phillip Bird by his tutor Vrede Jane Bird-v-Campbelltown Anglican Schools Council* [2007] NSWSC 1419

- what was in essence a mandatory injunction requiring the college to readmit the plaintiff as a student of the college

The plaintiffs alleged that:-

- (a) the defendant was required to afford the plaintiff natural justice and procedural fairness
- (b) the defendant denied natural justice to the plaintiff in making the decision
- (c) the decision was affected by actual or apprehended bias
- (d) The judge noted the question as to whether the measure of natural justice was owed to Charles or to one or both of his parents. He made no decision about that.

The judge noted a “pervasive” observation by Lord Devlin in a published report about misconduct by students:-

*Contract is the foundation of most domestic or internal systems of disciplines...:
cf report on the Cambridge Sit-in 1973, para 154*

Amongst 12 principles noted by the judge relating to the question as to whether certiorari was available were the following:-

- (vi) *The headmaster is not a statutory tribunal. The source of his powers vis a vis the first plaintiff is the conditions of enrolment signed by Mrs Bird on 6 March 2007*
-
- (x) *Where the source of power is contractual, the decision is not subject to judicial review: Whitehead-v-Griffith University [2003] 1 QD R 220*

At [33] Justice Einstein quoted with approval from the decision of Campbell J in *McClelland-v-Burning Palms Surf Life Saving Club* [2002] NSWSC 470 where his honour said at [97]:-

In Australia, the preferable view is that natural justice comes to operate in private clubs and associations by the rules of those private organisations being construed on the basis that fair procedures are intended, by recognising the possibility that express words or necessary implication in the rules could exclude natural justice in whole or part.

.....

But the principles of natural justice cannot override the express provisions of the rules, and it could not be “contrary to the essence of justice” for the executive council honestly and bona fide to exercise all its powers and duties under the rules.

Justice Einstein found in relation to the enrolment contract for Charles Bird that the disciplinary powers in the contract were not subject to the rules of natural justice either expressly or by necessary implication. The contractual obligations in the present case would be varied only to the extent to which there were some contrary public policy or there was some equity which precluded the parties to the contract from relying on their strict contractual rights. There was neither in the circumstances surrounding the expulsion of Charles Bird.

The case is clear authority that, at general law, the terms of the contract between the parents and the school will define the disciplinary powers. The contract may contain a provision specifically excluding the rules of natural justice. There is no public policy of a type which could override those contractual obligations.

This raises the question as to whether the unfair terms provisions of the ACL might avoid a term in a contract excluding a requirement of procedural fairness or natural justice. The examples given in Section 4(1)(b) “a term that permits, or has the effect of permitting one party (but not another party) to terminate the contract” and (h) “a term that permits, or has the effect of permitting, one party unilaterally to determine whether the contract has been breached or to interpret its meaning”, are relevant. These examples indicate that a clause of the kind with which we are presently concerned “may be unfair”.

Applying the flowchart from Appendix 2 of this paper to such a clause, I believe that all the elements are satisfied down to the question as to whether the clause is reasonably necessary in order to protect the legitimate interests of the school.

There is clearly an argument that a school has an important interest in maintaining discipline within the school community. This interest ultimately is principally for the benefit of other students in the school.

I believe a term specifically removing a right to natural justice is on the border line of unfairness. The safer approach would be to require natural justice principles to be applied to serious disciplinary matters or, at least, some of those principles. I am very hesitant to

recommend the full formality of procedural fairness or natural justice be introduced because of the significant time and energy required to comply with those requirements.

It would be normal in an expulsion process to define the allegations carefully and to allow the student an opportunity to respond. I suggest those elements should be incorporated into the discipline clause in an enrolment contract to try to avoid the term being characterised as unfair and therefore void.

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Appendix 1

Examples of Unfair Terms From United Kingdom OFT (references are to Section 4 of ACL)

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.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.

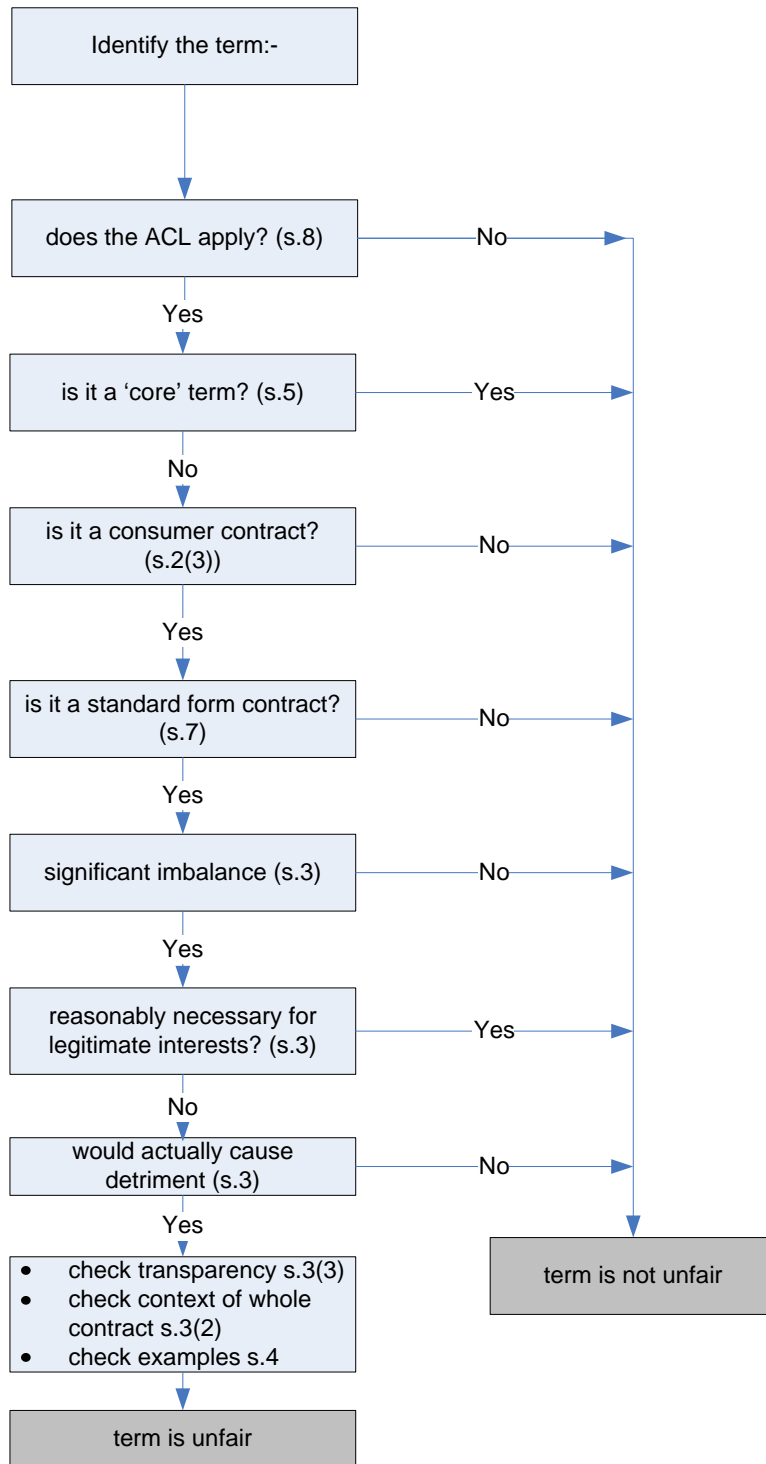
(Deleted)

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 2



**ENSURING COMPLIANCE WITH THE NEW AUSTRALIAN
CONSUMER LAW**

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School Contracts

- Enrolment contracts
- Excursion contracts
- Computer hire contracts
- Employment agreement
- Contracts with suppliers

Australian Consumer Law

- A new national unfair contract terms law
- Product safety
- Consumer guarantees
- Enhance effectiveness
- Minimise costs

Redressing the Imbalance

- Strengthened the legislation
- Made it universal
- Powers to the ACCC
- Reversed the onus of proof

Base Provision

A term of a consumer contract is void if:

- a) the term is unfair; and
- b) the contract is a standard form contract.

Base Provision

A **term** of a consumer contract is void if:

- a) the term is unfair; and
- b) the contract is a standard form contract.

Base Provision

A term of a **consumer contract** is void if:

- a) *the term is unfair; and*
- b) *the contract is a standard form contract.*

Unfair Term

- Significant imbalance
- Reasonably necessary to protect the legitimate interests
- Detriment
- Take into account:
 - term is transparent
 - contract as a whole

Examples of Unfair Terms

- May be unfair
- “Grey list”

Standard Form Contract

- Did the school have most of the bargaining power?
- Was the contract prepared before any discussion about the terms of the enrolment?
- Were the parents required to take it or leave it?
- Were the parents given an effective opportunity to negotiate the terms?
- Was the contract tailor made for the transaction or was it ‘off the shelf’?

Severability

- *McFarlane v Daniell*

Enforcement

- Declared void by a court
- Contravention
- More staff

Core Terms

- Defines the main subject matter
- Sets the up-front price
- Required by a law

Assessment of Unfair Terms

- Office of Fair Trading in the United Kingdom
- s.4 of the ACL
- *Guide to Unfair Terms* published by the ACCC
- Brochure from Consumer Affairs Victoria
- Appendix 2 - Flowchart



Misleading and Deceptive Conduct



Fee Increases

We will pay within 14 days of invoice the fees set by the school from time to time.



Rules and Regulations

- We will comply with the rules and policies of the school and we will ensure the student complies with the rules and policies.
- The school may amend its policies from time to time by an announcement at school assembly.

Discipline

Bird v Campbelltown Anglican Schools Council

Dismissal clause:

It is recognised and agreed to that the school reserves the right to dismiss any student if and when, in the opinion of the school, his or her presence in the school is determined not to be in the best interests of the student, or is deemed to be detrimental to other students. In this event, all tuition paid will be forfeited to the school as liquidated damages and no refund will be provided. All unpaid fees owed to the school on the last date of attendance will also be due and payable at that time.