

A Legal Submission to the Australian Competition and Consumer Commission

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To the Australian Competition and Consumer Commission,

Enclosed in the following pages is a submission regarding how contract law interacts with unfair term provisions for standard form contracts found in the *Australian Consumer Law*. This submission is presented on behalf of Australian consumer advocate group, Choice.

I INTRODUCTION

The *Australian Consumer Law*, ¹*ACL*, enacted in 2010 contains provisions designed to protect consumers and small businesses from unfair terms in standard form contracts entered into for the purposes of personal use. Standard form contracts are used heavily by big businesses operating in industries like telecommunications and the banking sector among others. Standard form contracts are more often than not non-negotiable, lengthy and difficult to navigate and are viewed by consumers as take it or leave it in nature.² As a result, the federal government has enacted provisions protecting consumers from big businesses that may seek to implement unfair terms which restrict consumer legal rights and certain bargaining options within standard form contracts.

The regulation of unfair terms in standard form contracts is not a novel concept. Various jurisdictions have implemented similar legislation in the past with positive results for consumers. Prior to the *ACL*,³ Victoria had implemented similar legislation⁴ which in turn was modelled on statutory protections passed by the parliament of the United Kingdom.⁵ Since 2010, New Zealand has implemented its own unfair terms protection legislation⁶ based on the provisions found in the *ACL*.⁷ Unfair terms protection legislation has been scrutinised by classical contract law theorists. Such theorists believe that legislative intervention into the construction of contractual terms is an affront to the core tenets of contract law as outlined by Jessel MR in *Sampson*.⁸ Tenets such as party autonomy and personal responsibility during contracting are undermined by statutory interference eroding the freedom of contract. The orthodoxy espoused by classical contract law theorists is no longer applicable, if it ever was, in contemporary Australia. The emergence of online markets, an increase in the use of standard form contracts and the increasing costs of legal

¹ *Competition and Consumer Act 2010* (Cth) sch 2 ('*Australian Consumer Law*').

² Lindy Willmott et al, *Contract Law* (Oxford University Press, 4th ed, 2013) 906.

³ Above n1.

⁴ *Fair Trading Act 1999* (Vic) pt 2B.

⁵ *European Communities Act 1972* (UK).

⁶ *Fair Trading Amendment Act 2013* (NZ).

⁷ Above n1.

⁸ *Printing and Numerical Registering Co v Sampson* (1875) LR Eq 462, 465.

proceedings all justify the need for uniform consumer protections enshrined in legislation. Unfair term consumer protection provisions are no exception. Legislation can and should lead the way in contract law reform as it can address both consumer and business needs more rapidly than judicial reforms of the common law. Contract law is likely to remain primarily governed by the common law; however, legislative reform is necessary to ensure efficient and just judicial outcomes in modern Australia.

II CURRENT OPERATION OF UNFAIR TERMS LEGISLATION

Although common law and equity already provide mechanisms to address unconscionable behaviour in contracting, legislative protections can provide specific and clear obligations to contracting parties and ease the process of judicial review. Section 23 of the *ACL*⁹ provides that if a term of a standard form consumer contract is unfair then the term in question is void. Standard form contracts are defined in s27¹⁰ and require basic elements such as imbalanced bargaining power, the contract being entirely drafted by one of the parties, and both parties being in a position to negotiate. Certain terms are excluded from being considered unfair such as terms relating to the subject matter of the contract,¹¹ terms detailing the upfront price¹² and terms required by law.¹³ ‘Unfair terms’ is defined in s24¹⁴ as offending terms that create a significant imbalance in the rights and obligations created in the contract,¹⁵ and further, that the term is not necessary to the legitimate interests of the advantaged party¹⁶ and finally, that the term will cause economic or personal detriment to the other party.¹⁷ Sections 24(2)¹⁸ and (3)¹⁹ provide that in determining an unfair term, the term must be considered in context of the whole contract and must be transparent. A non-exhaustive list of potential unfair terms are provided in s25.²⁰ Many of the potential unfair terms found in s25²¹ were found in similar Victorian legislation²² and have been found to be legitimate unfair terms in cases such as *Backloads.com*.²³ There are few High Court decisions regarding

⁹ *Competition and Consumer Act 2010* (Cth) sch 2 (‘*Australian Consumer Law*’) s23.

¹⁰ *Ibid* s27.

¹¹ *Ibid* s26(1); *Director of Consumer Affairs Victoria v Craig Langley Pty Ltd & Matrix Pilates and Yoga Pty Ltd (Civil Claims)* [2008] VCAT 482.

¹² *Above* n9 s26(2).

¹³ *Competition and Consumer Act 2010* (Cth) s139A.

¹⁴ *Above* n9 s24.

¹⁵ *Ibid*; *Director of Consumer Affairs (Vic) v AAPT* [2006] VCAT 1493.

¹⁶ *Above* n9 s24; *PSAL Ltd v Kellas-Sharpe* [2012] QSC 31.

¹⁷ *Above* n9 s24.

¹⁸ *Above* n9 s24(2).

¹⁹ *Ibid* s24(3).

²⁰ *Ibid* s25.

²¹ *Ibid*.

²² *Fair Trading Act 1999* (Vic) pt 2B.

²³ *Director of Consumer Affairs Victoria v Backloads.com Pty Ltd* [2009] VCAT 754.

interpretation of unfair terms protections found in the *ACL*,²⁴ most of the judicial interpretation of unfair terms protection provisions come from Victorian decisions²⁵ and UK interpretations.²⁶

III CHANGING ATTITUDES TOWARDS CONTRACT LAW BY LAWMAKERS AND THE FUTURE OF CONSUMER PROTECTION LEGISLATION

Courts and legislatures in the past tended to favour classical contract law theory, leaving equitable remedies for unconscionable conduct up to the courts. The favoured view among legal institutions has been to uphold ideas such as freedom of contract and promote party autonomy and personal responsibility. However, since the passage of the *Trade Practices Act*²⁷ and its replacement by the *ACL*,²⁸ Australian parliaments have sought to erode some of the harshness of common law contract law and introduce consumer protection legislation. Contemporary Australia has moved away from the laissez-faire nature of past markets with an increased community expectation of safe products, transparent advertising and easily accessible consumer options to address the return of faulty goods. Standard form contracts are widely used by big business; therefore, it is logical that parliaments have enacted specific provisions to deal with potential abuses by big businesses towards consumers via standard form contracts. The consumer protection provisions of the *ACL*,²⁹ despite contradicting classical contract theory, are a positive step in ensuring a robust marketplace as consumer confidence in products is increased. Consumer confidence is key to continued economic growth and contemporary Australian contract law needs to reflect this reality.

The harshness of common law-contract law tends to deter everyday consumers from seeking legal relief regarding potentially unfair commercial transactions. Even though vitiating factors are available under the common law and equity, clear and uniform consumer protection legislation will provide greater surety regarding contractual disputes and provide judges with increased guidance in determining just outcomes. The *ACL*³⁰ provisions regarding unfair terms in standard form contracts are a necessary consumer protection measure as they restore some of the balance in terms of legal protections for consumers who cannot bargain with big businesses due to possessing little or no bargaining power. The *ACL*³¹ provisions do not seek to determine or regulate market prices but rather to limit big business's abuse of standard form contracts that would unduly remove legal rights from consumers. Legislative intervention on behalf of consumers is the most logical and efficient method to expand consumer protections in the marketplace. Section 18 of the *ACL*³² provides consumer protections against misleading and deceptive conduct during contracting

²⁴ *Competition and Consumer Act 2010* (Cth) sch 2 ('*Australian Consumer Law*').

²⁵ *Director of Consumer Affairs Victoria v Backloads.com Pty Ltd* [2009] VCAT 754.

²⁶ *Office of Fair Trading v Foxtons Ltd* [2009] EWHC 1681.

²⁷ *Trade Practices Act 1974* (Cth).

²⁸ Above n24.

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ *Ibid.*

³² *Competition and Consumer Act 2010* (Cth) sch 2 ('*Australian Consumer Law*') s18.

and has proved to be successful in changing business practices and boosting consumer confidence. In time, unfair terms in standard form contract consumer protections will have similar effects. This is already evident in the United Kingdom which has held similar legislative protections for some time.³³ Future legislation should provide further consumer protections against unconscionable business practice regardless if it offends the principles of classical contract theory. Whether a contract code is required is still open for debate, but consumer protections for issues such as unfair terms in standard form contracts provisions is a step in the right direction.

IV THE MYTH OF CLASSICAL CONTRACT LAW THEORY AND THE REALITY OF CONSUMER CONTRACTING

Classical contract law theory relies upon the notion that contracting parties are autonomous and rational.³⁴ On the surface, classical contract law theory appears to hold fundamental truths. Contracting parties are not forced to contract with each other, each withhold the right to negotiate on terms and consideration and contracting parties must hold the capacity to contract in the first place hence implying rationality. Classical contract law theory further argues that due to the autonomous nature of the contracting parties, minimal government intervention into contract law is necessary. Another tenet of contract law is that courts ought to take the position that unless there has been an egregious violation of the fairness of the process of contracting then courts should find to preserve all contracts where possible.³⁵ Based on these factors, it is no surprise that classical contract law theory has been the default position of common law courts for centuries, particularly from the 19th century,³⁶ as these values serve the interests of laissez-faire capitalist economies wherein contract law has largely developed. Even though equitable options regarding unconscionable contracting have been found by courts, classical contract law theory has nevertheless remained the hegemonic ideology among legal institutions and orthodox legal scholars at least within common law jurisdictions.

In reality, consumers—particularly those in the context of unfair terms in standard form contracts—are neither autonomous nor rational contracting actors. Standard form contracts are generally used by big businesses in industries such as telecommunications and gym memberships, in which consumers have no choice but to accept the contract on face value. Classical contract law theorists would argue that consumers have a choice whether to agree along with the option to explore alternative service providers; but in reality, standard form contracts tend to remain rather uniform across the respective industry. This results in consumers signing whatever is put before them. Compounding this is the fact that most consumers generally do not understand the terms of

³³ *European Communities Act 1972* (UK).

³⁴ Alexandra Sims, 'Unfair Contract Terms: A New Dawn in Australia and New Zealand?' (2013) 39(3) *Monash University Law Review* 739, 752.

³⁵ Jeannie Paterson, 'The Australian Unfair Contract Terms Law: The Rise of Substantive Unfairness as a Ground for Review of Standard Form Consumer Contracts' (2009) 33(3) *Melbourne University Law Review* 934.

³⁶ *Ibid.*

standard form contracts and are unlikely to read the contract before signing.³⁷ Big businesses rely on this fact to coerce consumers into waiving certain legal rights and consequently avoiding certain liabilities. Consumers hold limited options regarding negotiating standard form contracts and possess even fewer avenues, short of seeking legal advice, to comprehend the terms of standard form contracts. This in and of itself is an affront to the freedom of contract that classical contract law theory seeks to preserve as standard form contracts restrict the autonomy and rationality of consumers. This is why legislative consumer protections are vital in maintaining freedom of contract on behalf of consumers. As the signing of standard form contracts by consumer parties is on the surface an act of autonomous contracting, common law-contract law principles are unlikely to provide legal relief for consumers. Unfair terms in standard form contracts provisions in the *ACL*³⁸ help restore the balance of negotiating power as they provide consumers with a legal avenue to review contracts they had no say in drafting but had little option with which to disagree. Legislative intervention regarding the strengthening of consumer protections in contracts bolsters the notion of freedom of contract rather than undermining said freedom.

V CONCLUSION

Consumer protection provisions as found in the *ACL*³⁹ aid in regulating unconscionable business practices and increasing consumer confidence in the economy. Unfair terms in standard form contract provisions help to level the playing field in terms of contractual negotiations between consumers and service providers as they allow avenues for legal recompense that would not be available strictly under common law-contract law. Statutory intervention into contract law allows for rapid evolution of legal principles. Legislative reforms such as unfair terms in standard form contract provisions are necessary to ensure the future of freedom of contract as they restore autonomy stripped away by businesses with one-sided negotiating power. Further legislative reform could be introduced to increase consumer protections from unconscionable contracting, however, what exactly these reforms are and how they should be implemented is open for debate. Unfair terms in standard form contract provisions are positive for consumers, economic growth and maintaining fairness and justice within the realm of contract law.

³⁷ Andrew Robertson, 'The Limits of Voluntariness in Contract' (2005) 29(1) *Melbourne University Law Review* 179.

³⁸ *Competition and Consumer Act 2010* (Cth) sch 2 ('*Australian Consumer Law*').

³⁹ *Ibid.*

Bibliography

A Articles/Books/Reports

Alexandra Sims, 'Unfair Contract Terms: A New Dawn in Australia and New Zealand?' (2013) 39(3) *Monash University Law Review* 739

Andrew Robertson, 'The Limits of Voluntariness in Contract' (2005) 29(1) *Melbourne University Law Review* 179

Jeannie Paterson, 'The Australian Unfair Contract Terms Law: The Rise of Substantive Unfairness as a Ground for Review of Standard Form Consumer Contracts' (2009) 33(3) *Melbourne University Law Review* 934

Lindy Willmott et al, *Contract Law* (Oxford University Press, 4th ed, 2013)

B Cases

Director of Consumer Affairs (Vic) v AAPT [2006] VCAT 1493

Director of Consumer Affairs Victoria v Backloads.com Pty Ltd [2009] VCAT 754

Director of Consumer Affairs Victoria v Craig Langley Pty Ltd & Matrix Pilates and Yoga Pty Ltd (Civil Claims) [2008] VCAT 482

Office of Fair Trading v Foxtons Ltd [2009] EWHC 1681

Printing and Numerical Registering Co v Sampson (1875) LR Eq 462

PSAL Ltd v Kellas-Sharpe [2012] QSC 31

C Legislation

Competition and Consumer Act 2010 (Cth)

Competition and Consumer Act 2010 (Cth) sch 2 ('*Australian Consumer Law*')

European Communities Act 1972 (UK)

Fair Trading Act 1999 (Vic)

Fair Trading Amendment Act 2013 (NZ)

Trade Practices Act 1974 (Cth)