Australian Consumer Law: Unfair Contracts and other Litigation

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AUSTRALIAN CONSUMER LAW: UNFAIR CONTRACTS AND OTHER LITIGATION

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1. The Australian Consumer Law ("**ACL**") has now been in operation for a reasonable period of time. The purpose of this paper is, firstly, to examine the unfair contract provisions of the ACL and how those provisions may operate in future litigation. Unfortunately, there is yet to be a judgment delivered on the unfair contract provisions. Accordingly, this paper will examine case law concerning the former Victorian unfair contract provisions and how similar results may arise under the new ACL.

2. Secondly, this paper will examine a small selection of cases decided under the ACL over the past year.

A. Unfair contracts legislation

3. At the time of writing this paper, there has yet to be a decided case on the unfair contract provisions of the ACL. Accordingly, this paper will focus on case law dealing with the former Victorian unfair contract provisions, which help to illustrate the types of situations in which the provisions in the ACL may apply.

4. The unfair contract provisions are contained in Part 2-3 of the ACL. Broadly, the provisions can apply to void a term in a standard form consumer contract if that term is unfair: s 23(1), ACL. The threshold questions that must therefore be answered are whether:

   (a) the contract is a consumer contract;

   (b) the contract is a standard form contract; and

   (c) the term is unfair.

A.1. Consumer contract

5. 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: s 23(3), ACL.

6. The provisions are limited to contracts where the recipient is a natural person. In determining whether a contract is a consumer contract, the provisions require one to consider the purpose of the acquisition. This may create difficulties for a supplier in some situations in which the goods or services could be used for both personal/domestic/household use and for other uses.

7. A consumer contract can also include a contract for a sale or grant of an interest in land. An interest in land means:

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

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

(c) a right, power or privilege over, or in connection with, the land: s 2, ACL.

8. The unfair contract provisions could apply to, for example:

(a) certain contracts relating to unregistered interests in land;

(b) residential tenancies;

(c) contracts for sale of units in a residential property development.

A.2. Standard form contract

9. There is no definition of a “standard form contract” in the ACL. There is a rebuttable presumption that a contract is a “standard form contract”: s 27(1), ACL. This shifts the

evidential burden to the supplier and makes it easier for the consumer to prove that the threshold test is met. A supplier can, of course, adduce evidence to rebut this presumption and show that the contract is not a standard form contract.

10. There are certain mandatory factors set out in the ACL that a court ***must*** take into account in determining whether a contract is a "standard form contract". A court is also permitted to take into account any other matters it considers relevant.

11. The mandatory factors are as follows:

(a) Whether one of the parties has all or most of the bargaining power relating to the transaction;

(b) Whether the contract was prepared by one party before any discussion relating to the transaction occurred between the parties;

(c) Whether another party was, in effect, required to accept or reject the terms of the contract (other than certain excluded terms set out in s 26(1));

(d) Whether another party was given an effective opportunity to negotiate the terms of the contract (other than certain excluded terms set out in s 26(1);

(e) Whether the terms of the contract (other than certain excluded terms set out in s 26(1)) take into account the specific characteristics of another party or the particular transaction;

(f) Other matters can be prescribed by the regulations.

12. The above factors all point towards situations in which the consumer has no opportunity to negotiate the contract and are required to sign a contract that is used in all the supplier's transactions with consumers. Simply giving the consumer a purported opportunity to negotiate the contract will not protect a supplier from litigation under the unfair contract provisions. Any opportunity to negotiate the terms of a contract must be an "effective" opportunity. In other words, the consumer must be able to genuinely negotiate the terms.

13. The Victorian *Fair Trading Act 1999* previously contained similar provisions dealing with unfair terms in standard form contracts. Those provisions were based on similar UK legislation. In his speech for the introduction of those Victorian provisions on 21 May 2003, the Minister for Consumer Affairs said that the legislation:

> *prohibits unfair terms in consumer contracts, along the lines of similar United Kingdom legislation but with a further provision enabling the Government to prescribe terms in standard form consumer contracts as unfair, which will enable the Government to step in where consumers sign take-it or leave-it contracts, not necessarily because of misleading, deceptive or unconscionable conduct by the trader, but which nevertheless contained terms that tipped the balance unfairly and disproportionately in favour of the trader.*

14. Pre-printed contracts that are not the subject of genuine negotiation would generally constitute a standard form contract. Commenting on the former Victorian provisions, in *Director of Consumer Affairs Victoria v Craig Langley Pty Ltd & Matrix Pilates & Yoga Pty Ltd* [2008] VCAT 482, Vice President Harbison said that:

> *.... Although no guidance on how this should be applied is found in the Act, it appears to me to reflect the commonsense view that terms of a consumer contract which have been the subject of genuine negotiation should not be lightly declared unfair. This legislation is designed to protect consumers from unfair contracts, not to allow a party to a contract who has genuinely reflected on its terms and negotiated them, to be released from a contract term from which he or she later wishes to resile.*
>
> *67. I can visualise that it might be very difficult to argue that a term was unfair if it had been arrived at after genuine negotiation, and represented a compromise between the positions of both parties. However, I find from the evidence in this case that none of the impugned terms have been individually negotiated. This is clear from the pre-printed and standard form nature of the contracts themselves, and the evidence of Luana Pappa and Therese Windahl.*

15. Accordingly, it will be difficult for a party to argue that the provisions apply where a contract has been the subject of genuine negotiation.

A.3. Unfair terms

16. A term is unfair if:

(a) It would cause a significant imbalance in the parties' rights and obligations arising under the contract; and

(b) It is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and

(c) It would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.

17. All three of these conditions must be met for the term to be unfair.

18. The first condition has scope to present significant difficulties for a court in determining what constitutes a "significant imbalance" in the parties' rights and obligations. The former Victorian provisions contained the same requirement. Litigation on that provision highlights the difficulties that may arise in interpreting this requirement.

19. In *Director of Consumer Affairs Victoria v AAPT* [2006] VCAT 1493, President Morris took a qualitative approach to the meaning of this requirement:

> *The word "significant" simply means "important" or "of consequence". It does not mean "substantial". It is not a word of fixed connotation and besides being elastic is somewhat indefinite.*

20. In *Jetstar Airways Pty Ltd v Free* [2008] VSC 539, Cavanough J disagreed with this approach and took a different view:

> *104 In AAPT[95], President Morris asserted that the word "significant" in s 32W means "important" or "of consequence", and that it does not mean "substantial". He acknowledged that "significant" is a word of somewhat elastic and indefinite meaning. However he concluded that, in s 32W, the word is intended to bring in the notion of unfairness (despite the circularity involved in that proposition) and thus, in turn, presumably, the notion of contrariety to the requirements of good faith. To the answers I have already given to that line of reasoning, I would add that, in the phrase "significant imbalance", the word "significant" seems to me to carry, or to include, a quantitative sense. The word can certainly carry the meaning "substantial".[96] As Thomas JA said in Emaas v Mobil Oil Australia Ltd[97], the word "significant" very much takes it meaning from the context in which it is used. His Honour referred with approval to the following comment of an American court (which had previously found favour with Young J in Coombs v Bahama Palm Trading Pty Ltd[98]):*

While ... determination of the meaning of "significant" is a question of law, one must add immediately that to make this determination on the basis of the dictionary would be impossible. Although all words may be "chameleons, which reflect the colour of their environment", "significant" has that quality more than most. It covers a spectrum ranging from "not trivial" through "appreciable" to "important" and even "momentous".

105 I recognise the perils of attempting to paraphrase statutory language, but, in my view, the context of the word "significant" in s 32W shows that it means, principally at least, "significant in magnitude", or "sufficiently large to be important", being a meaning not too distant from "substantial". If that be right, the interpretation of s 32W adopted in AAPT is all the more unlikely.

21. The conflict in these two decisions highlights the difficulties that may arise in interpreting similar requirements in future litigation on the ACL.

22. The second condition that must be met for a term to be "unfair" is that the term must not be reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term. Once again, the onus of proving this condition is reversed. A term is presumed to meet the condition, unless the contrary is proven: s 24(4), ACL.

23. The third condition requires that the term "would" cause detriment to a party if it were to be applied or relied on. The detriment can be both financial and non-financial. It is important to note that no *actual* detriment is required. If, however, there is no actual detriment then the remedies available are likely to be limited.

A.3.1. Examples of unfair terms

24. The ACL contains, in section 25, a number of examples of types of terms that may be unfair. Those examples are not exhaustive. Furthermore, simply because a term may fit within one of the examples does *not* mean that the term will be unfair. The term must meet the conditions in s 24(1) to be unfair.

25. The examples are as follows:

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

(b) A term that permits, or has the effect of permitting, one party (but not another party) to ***terminate*** the contract;

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

(d) A term that permits, or has the effect of permitting, one party (but not another party) to ***vary the term*** of the contract;

(e) A term that permits, or has the effect of permitting, one party (but not another party) to ***renew*** or not renew the contract;

(f) A term that permits, or has the effect of permitting, one party to vary the upfront price payable under the contract without the right of another party to terminate the contract;

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

(h) A term that permits, or has the effect of permitting, one party ***unilaterally to determine*** whether the contract has been ***breached*** or to interpret its meaning;

(i) A term that limits, or has the effect of limiting, one party's ***vicarious liability for its agents***;

(j) A term that permits, or has the effect of permitting, one party to ***assign*** the contract to the detriment of another party without that other party's consent;

(k) A term that limits, or has the effect of limiting, one party's ***right to sue*** another party;

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

(m) A term that imposes, or has the effect of imposing, the ***evidential burden*** on one party in proceedings relating to the contract;

(n) A term of a kind prescribed by the regulations.

26. Whilst no judgments on the unfair contract provisions have been handed down at the time of writing, there are several decisions under the former Victorian provisions. These decisions help to highlight the types of terms that may breach the ACL.

27. The former Victorian provisions are not, however, identical to the ACL provisions. One of the key differences is that the Victorian provisions contained a "good faith" requirement that is not present in the ACL. The cases dealing with those provisions must therefore be treated with caution.

28. There were similar examples to those in s 25 of the ACL in the former Victorian provisions. In *Jetstar Airways Pty Ltd v Free* [2008] VSC 539, Cavanough J commented that those examples had a common theme, namely that they were terms "which may not only be described as one-sided but which also tends to derogate from the enforceability or value of a promise made by the supplier (or of a right conferred on the consumer) by another express or implied term of the contract." Cavanough J described the problem of such terms being that they can create unfair surprise to consumers, particularly if not drawn to the consumer's attention before the contract is entered into.

29. The examples in s 25 of the ACL are aimed at similar situations where a term is imbalanced in that only one party benefits, or is subject to obligations, arising from that term.

30. This paper will consider several examples of cases of unfair terms under the Victorian legislation that may also constitute unfair terms under the ACL.

31. *Director of Consumer Affairs Victoria v AAPT Limited* [2006] VCAT 1493 involved mobile and prepaid mobile services. AAPT onsold those services from other telecommunications providers to consumers. There were terms and conditions on its website that governed the provision of those mobile services.

32. One of those terms read as follows:

We may vary any term of this Agreement at any time in writing. To the extent required by any applicable laws or determinations made by the Australian Communications Authority (ACA), we will notify you of any such variation.

33. The term effectively allowed a unilateral variation of the contract by AAPT. The Tribunal held that the term was unfair because it permitted only AAPT, but not the customer, to change the contract unilaterally. AAPT only, but not the customer, could therefore avoid or limit the performance of the contract using this term.

34. It is likely that such a term would also be "unfair" under the ACL. The term fits within the example in s 25(d) of the ACL, that is, the term permits one party, but not the other, to vary the terms of the contract.

35. There are a number of cases decided under the Victorian provisions dealing with fitness centres. One wonders what it is about fitness centres that has prompted such a large amount of litigation. Some of these cases are as follows:

- *Director of Consumer Affairs Victoria v Craig Langley Pty Ltd & Matrix Pilates & Yoga Pty Ltd* [2008] VCAT 482;

- *Director of Consumer Affairs Victoria v Trainstation Health Clubs Pty Ltd* [2008] VCAT 2092;

- *Braithwaite v GH Operations Pty Ltd* [2007] VCAT 415.

36. The following examples of unfair terms are drawn from these cases.

<u>Exclusion of liability</u>

37. Clauses that attempt to exclude all liability of one party to the agreement are likely to be unfair under the ACL.

38. The following clause in the *Craig Langley* case was held to be unfair:

Acknowledgement Release and Assumption of Risk:

... As a member I specifically release, indemnify and hold harmless the club, its management and employees, in consideration of the acceptance of my payment for participating in the activity (and except that the same may be precluded by statute), with respect to any and all events resulting in injury, loss, damage or death to me or my property, whether by negligence, breach of contract, in any way whatsoever, which might otherwise have given rise to action against the club by myself or on my behalf or by other parties. I also understand that in the event that I am injured or my property is damaged, that I will bring no claim, legal or otherwise against Matrix Pilates and Yoga, its owners, servants or agents.' –

39. The term was unfair because, amongst other things:

(a) It was broad and unqualified;

(b) It exempted the supplier for all liability without any reciprocal rights to the consumer;

(c) It permitted the supplier, but not the consumer, to avoid or limit performance of the contract.

40. For those reasons, there was a significant imbalance between the rights and obligations of the parties.

41. A clause which penalises one party for termination, but not the other party, will likely be unfair. This reflects common law concepts of penalty clauses. Accordingly, as with the common law, it will be important when drafting a termination clause to ensure that any termination payment is a genuine pre-estimate of the loss suffered by termination.

42. The following clause in the *Craig Langley* case was held to be an unfair term that constituted a penalty:

If I wish to cancel this agreement with the club before the expiration of the agreed minimum term, I understand proof of relocation or medical information is required as

well as a cancellation fee totalling 50% (or to the discretion of the directors) of the balance outstanding.

43. The 50% cancellation fee was held to be unfair because it was not a genuine pre-estimate of loss. In addition, the term, amongst other things:

(a) Was unqualified so could apply even where the termination was due to an act or omission of the supplier;

(b) Only penalised the customer for termination, but not the supplier;

(c) Effectively permitted the supplier to unilaterally determine if the contract was breached.

44. A term which limits one party's right to sue, but not the other party's rights, would likely be unfair: see example in s 25(k), ACL.

45. In *Director of Consumer Affairs Victoria v Backloads.com Pty Ltd* [2009] VCAT 754, the following clause was included in the standard contract of a removalist company:

2(e) This agreement shall be governed by and interpreted and enforced in accordance with the laws applicable in the Australian Capital Territory. This agreement shall be deemed to have been entered into in the Australian Capital Territory.

46. The above term was held to be unfair because:

(a) The term artificially required all contracts to have been made in Victoria, thus restricting the rights of a Victorian customer from relying on the Victorian unfair contract provisions;

(b) The object of the term was to limit, or deter, non-ACT customers from enforcing the contract.

47. As a consequence, the term resulted in a significant imbalance in the rights and obligations of the parties and was unfair. A similar result would likely flow under the

ACL if a party to a contract attempted to exclude the application of the ACL by using a clause to make the law of a foreign jurisdiction the exclusive governing law of the contract.

48. The above are a few examples of terms that have been found to be unfair under the former Victorian provisions. Although those provisions are different from the ACL, the examples of unfair terms in the Victorian case law would also likely be unfair terms under the ACL.

A.3.2. Consideration of the contract as a whole

49. In determining whether a contract is unfair under the conditions in s 24(1), a court can take into account any matter it considers relevant. There are, however, two matters that ***must*** be considered:

(a) the contract as a whole; and

(b) the extent to which the term is transparent.

50. *Jetstar Airways Pty Ltd v Free* [2008] VSC 539 provides an excellent example of a term which may prima facie seem unfair, but would not be unfair when considered in light of the contract as a whole.

51. The applicant in the *Jetstar* case booked 2 "Jetsaver" fares to Hawaii for herself and her sister. The conditions governing those fares were set out on the company's website. At a later date, the sister was no longer able to attend and the applicant attempted to rebook the fare in another person's name.

52. Jetstar charged a change fee to change the booking name, and also charged the difference between Jetstar's price of the flight at that date and the original price of the flight. This amounted to a substantial increase in the fare. The applicant alleged that the terms governing these additional fees were unfair.

53. The court found that, in light of the contract as a whole, the term was not "unfair". It was relevant to consider whether the contract contained any countervailing terms which would balance the rights and obligations of the parties. The contract in this case did

give a countervailing benefit to the consumer, namely a significantly lower price for the fare than was generally charged on other Jetstar fares. There was therefore no significant imbalance between the rights and obligations of the parties.

54. Another interesting question is whether courts will approach the ACL by interpreting the unfairness of a term in light of standard industry practices. For example, whether courts will consider it relevant that terms are used in standard contracts in a particular industry (eg standard contracts in the real estate industry).

55. In *Jetstar*, the court referred to evidence of a normal practice in the airline industry of fares being non-transferable, but it is unclear how important that was in making its decision.

56. *Zhang v Kilmore International School Ltd* [2007] VCAT 1977 is another example of a decision where common practice was considered. The case involved a student from China who had enrolled at an international school in Australia. The student performed poorly and was put back a grade. His parents paid school fees for the following school year at the end of the calendar year. A few weeks later the school cancelled the student's enrolment on the basis of poor academic performance. The school refunded some of his school fees for the following school year, but kept a significant amount of those fees.

57. The school had a refund policy which permitted it to keep a portion of those school fees where a student's enrolment had been cancelled because of poor academic performance. The student's parents had read and signed an application form containing that policy.

58. The Tribunal held that the refund policy was not unfair. In coming to that conclusion, the Tribunal considered that the parents were given the opportunity to read the refund policy before signing the application. The Tribunal also accepted that independent schools commonly had such a clause in their contracts with parents, suggesting that industry practice is a relevant factor in determining if a clause is unfair. It is not clear, however, the extent to which this was determinative in the Tribunal's decision.

59. The extent to which standard industry practice is relevant to determining whether a term is unfair will be an interesting question for courts to consider when interpreting the ACL.

A.3.3. Transparent terms

60. A term is transparent if the term is:

(a) Expressed in reasonably plain language; and

(b) Legible; and

(c) Presented clearly; and

(d) Readily available to any party affected by the term: s 24(3), ACL.

61. The aim of this requirement is to ensure that the consumer is fully aware of the term and its meaning. Matters such as the font in which the term is presented, and whether it is included in the same document as other terms are likely to be relevant in determining whether a term is presented clearly and readily available.

A.4. Excluded terms

62. Not all terms can be voided under the unfair contract provisions. A term will not be subject to those provisions to the extent that the term:

(a) Defines the main subject matter of the contract; or

(b) Sets the upfront price payable under the contract; or

(c) Is a term required, or expressly permitted, by a law of the Commonwealth, a State or a Territory: s 26(1), ACL.

63. The main subject matter would, for example, include the type of goods supplied. This would also include things relevant to facilitating that supply. The rationale is that this is the very basis on which the contract is made and should not be subject to challenge.

64. If a draftsperson can tie key terms of the contract to the main subject matter, then it may be possible to fit a term within these exclusions. It is important to note, however, that

the exclusion only applies to terms that "define" the main subject matter, not simply terms that have any form of connection with that subject matter.

65. The "upfront price" payable is the consideration that

(a) Is provided, or is to be provided, for the supply, sale or grant under the contract; and

(b) Is disclosed at or before the time the contract is entered into: s 26(2), ACL.

66. The upfront price can therefore include not just payments at the time of making the contract, but also future payments. Future payments that are contingent in nature will not be covered by the exclusion. The reason being that such terms are not necessary for the basic supply of the goods or services under the contract. They provide for something in addition to the basic terms of the contract.

B. Other Litigation

B.1. ACCC v Singtel Optus Pty Ltd

67. *ACCC* v *Singtel Optus Pty Ltd (No 4)* [2011] FCA 761 involved an advertising campaign by Singtel Optus relating to certain broadband internet plans. The advertisements made representations that the plans gave subscribers 2 different data allowances, one for peak times and one for off peak times.

68. In fact, no such distinction existed. If a subscriber exceeded their data allowance for the peak time, their internet speed would be slowed. This slower speed would applied to both peak and off peak times.

69. The ACCC alleged that Singtel Optus had engaged in misleading and deceptive conduct under the ACL. That contravention was established and the court imposed a civil penalty under s 224 of the ACL. Section 224 sets out some mandatory matters for the court to consider in determining an appropriate penalty:

(a) The nature and extent of the act or omission and of any loss or damage suffered as a result of the act or omission; and

(b) The circumstances in which the act or omission took place; and

(c) Whether the person had previously been found to have in engaged in any similar conduct.

70. In the *Singtel Optus* case, Perram J also outlined a number of non-mandatory factors that have arisen in applying penalties to competition law cases, that were also relevant to imposing penalties under the ACL. These factors include, for example, the size of the contravener and its financial position.

71. The court found 11 contraventions and imposed a total penalty of $5.26m. The size of the penalty is large compared to the total maximum that could have been imposed ($1.1m maximum for each contravention). The case highlights that the court will not take a lenient approach to contraventions of the ACL.

72. In imposing the penalty, the court considered in particular:

(a) The size and financial position of Singtel Optus;

(b) The conduct was widespread;

(c) Singtel Optus had already been held to have engaged in misleading and deceptive conduct in advertising;

(d) The need for a powerful deterrent to Singtel Optus and others engaging in misleading and deceptive conduct in advertising.

73. In addition, the court considered Singtel Optus' regulatory compliance systems and processes. The court was highly critical of Singtel Optus' compliance system and commented on its "failure to take compliance seriously". This was another factor in the court imposing a large penalty.

74. The case highlights the need for companies to ensure that they have appropriate processes and systems in place to comply with the provisions of the ACL.

B.2. ACCC v Harvey Norman Holdings Ltd

75. *ACCC v Harvey Norman Holdings Ltd* [2011] FCA 1407 involved certain advertisements by Harvey Norman. The first set involved advertisements of 3D television sets. Harvey Norman advertised that customers could view the AFL and NRL grand finals in 3D on these televisions. These advertisements were aimed at people in both metropolitan and regional areas. The AFL and NRL broadcasts in 3D were, however, limited to certain capital cities.

76. The second set of advertising related to catalogues which contained promotional offers for certain goods, but those offers were only available in 1 store in each State and Territory.

77. Both sets of advertising constituted misleading and deceptive conduct. A civil penalty of $1.25m was imposed. In imposing this penalty, the court referred to *Singtel Optus* and the factors that Perram J outlined in that case in deciding the appropriate penalty to impose. The court found that Harvey Norman had been involved in a sizeable advertising campaign "characterised by blatant and deliberate disregard of the truth".

78. As with *Singtel Optus*, the court found that Harvey Norman's compliance system was "woefully inadequate". This was a factor in determining the appropriate penalty. Companies need to be wary of the two decisions and ensure that appropriate compliance systems are in place to comply with the ACL. The cases are a strong warning about the quantum of penalties that courts are now willing to impose where a company has failed to maintain proper compliance systems.

B.3. ACCC v Sensaslim Australia Pty Ltd

79. *ACCC v Sensalim Australia Pty Ltd (No 1)* [2011] FCA 1012 is an interesting recent case that deals with the extra-territorial operation of the ACL. The case involved an injunction granted in respect of certain conduct involving the Sensaslim product.

80. One of the respondents in the case argued that the injunction would cover his conduct in relation to the Sensaslim product where there was no nexus with Australia other than that he was an Australian citizen, or person ordinarily resident with Australia. That respondent argued that the injunction should be limited to conduct concerning commerce within Australia, or between Australia and other places.

81. The respondent relied on subsections 6(2)(a) and (h) of the *Competition and Consumer Act 2010*. Section 6(2)(a) and (h) limits the operation of that Act to individuals where there is conduct in trade or commerce, amongst other things, between Australia and places outside Australia.

82. Section 5(1) of the Act, however, gives the Act extra-territorial operation. That section extends the ACL's operation to conduct engaged in by:

(a) Bodies corporate incorporated or carrying on business within Australia;

(b) Australian citizens; or

(c) Persons ordinarily resident within Australia.

83. Section 6(3) of the Act also extends its operation to "a person not being a corporation" where the ACL's provisions are confined to conduct of such a person that involves the use of postal, telegraphic or telephonic services or takes place in a radio or television broadcast. Conduct involving the use of the Internet would fall within the extended operation of the ACL because of this provision. This provision is not confined to "the stream of commerce within Australia or between Australia other places".

84. As a consequence of the operation of s 6(3) and s 5(1), the court held that the injunction was validly granted and the Act could operate extra-territorially in that manner.

C. Conclusions

85. There is yet to be a judgment handed down on the unfair contract provisions in the ACL. There are, however, many Victorian cases which may provide guidance to practitioners on the types of terms that may be unfair terms. Time will tell as to whether courts will interpret the ACL in a similar manner. Practitioners need to be cognisant of the unfair contract provisions whenever dealing with standard form contracts, and should draft such contracts with the ACL in mind.