

TELEVISION EDUCATION NETWORK

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**COMMONWEALTH UNFAIR CONTRACTS LEGISLATION : ITS
EFFECT ON STANDARD FORM CONVEYANCING CONTRACTS**

or perhaps,

**An analysis of the *Trade Practices Amendment (Australian Consumer Law) Bill
2009***

or perhaps,

**When is a “consumer” a purchaser , lessee , licensee, or just about anything
like that ?**

or perhaps

Hercules and the many headed Hydra

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1. This paper consists of mostly verbatim excerpts from and summaries of the House of Representatives and Senate Explanatory Memoranda, with interpolations and analysis.
2. This is because the Bill the subject of this paper, has not yet been enacted, and thus there is no case law regarding it. The best source of shedding light on what Parliament meant, is what Parliament has said in its Explanatory Memoranda.
3. The following abbreviations and acronyms are in the two Explanatory Memoranda.

Abbreviation	Definition
ACCC	Australian Competition and Consumer Commission
Applied ACL	Applied Australian Consumer Law
ACL	Australian Consumer Law
ASIC	Australian Securities and Investments Commission

ASIC Act	Australian Securities and	
	Investments Commission Act	
	2001	
Bill	Trade Practices Amendment	
	(Australian Consumer Law)	
	Bill 2009	
COAG	Council of Australian	
	Governments	
Federal Court	Federal Court of Australia	
FTAs	State and Territory Fair	
	Trading Legislation	
IGA	Intergovernmental Agreement	
MCCA	Ministerial Council on	
	Consumer Affairs	
NPA	National Partnership	
	Agreement to Deliver a	
	Seamless National Economy	
PC	Productivity Commission	
TP Act	Trade Practices Act 1974	

4. The Trade Practices Amendment (Australian Consumer Law) Bill 2009 (the Bill) is a Bill for an Act to amend the *Trade Practices Act 1974* (TP Act) to establish the Australian Consumer Law (ACL) and to introduce new penalties, enforcement powers and consumer redress options.

The Second Reading Speech was moved in the Senate late October 2010 but it appears not as yet to have been promulgated into force.

5. The Amendment will insert a new Part XI to the TPA. Part XI will apply the ACL as a law of the Commonwealth, facilitate its application as a law of each State and Territory and make provision for its administration, enforcement and amendment.
6. Part XI of the TP Act provides that the ACL applies as a law of the Commonwealth to the conduct of corporations, except in relation to financial products and the supply, or possible supply, of services that are financial services.
7. Part XI of the TP Act provides for participating States and participating Territories (collectively called participating jurisdictions) to enact an applied Australian Consumer Law (applied ACL) as part of the law of their respective jurisdictions. A participating jurisdiction is a party to the IGA that has applied the ACL, with or without modification.
8. The Government's aim that the ACL should commence on 1 January 2010, seems to have been optimistic.
9. The States and Territories will be able to implement the ACL from the date of its commencement as a law of the Commonwealth, should they decide to do so.
10. All Australian jurisdictions will be required, in accordance with the National Partnership Agreement to Deliver a Seamless National Economy

(NPA), to apply the full ACL by 1 January 2011.

11. The Speech of the Hon Member for Forde, Mr Raguse , in the House of Representatives, provides a flavour for the policy underpinning of the new legislation .

12.

"I rise to speak in support of the [Trade Practices Amendment \(Australian Consumer Law\) Bill 2009](#), a historic reform to consumer laws across Australia. This bill combines into one system the 13 *different sets of consumer laws* that are in place across Australia. As members would be aware, this national consumer law is to be called the Australian Consumer Law. This is important on the basis that it is a historic reform. It is about having *one national system*. There has been broad consultation with stakeholders, in collaboration with the state and territory governments. This is about balancing effective provisions and business concerns and it is part of the generational overhaul of Australian consumer laws.

A national consumer law system is not a new concept. Incredibly, the last attempt was back in 1983. It took seven years to implement, before each jurisdiction began to make changes and diverge. Clearly, it is no easy task to combine all of the different priorities, issues and concerns that can be found across the country. For this reason, these reforms have been on the way for some time. An inquiry into Australia's consumer policy framework began back in December 2006. The Productivity Commission presented its final report, 'Review of Australia's Consumer Policy Framework', in April 2008. This report was tabled in parliament in May 2008 by the then Minister for Competition Policy and Consumer Affairs. The Council of Australian Governments became involved from March 2008, and detailed recommendations for a new consumer law and enforcement mechanisms were ratified in October 2008.

It provides *certainty, efficiency and lower costs for businesses*, and it provides *certainty, lower costs and simpler resolution of issues for consumers*. I therefore commend the bill to the House."

Another Member of the House of Representatives , the Hon Sharryn Jackson, referred to the 13 pieces of legislation as a "patchwork"

13. The Second Reading Speech of the hon Mr Zappia, Member for Makin, casts yet more light on the proposed legislation :

"Small businesses are themselves frequently the victims of exploitation by other businesses. Many small business operators have neither the expertise nor the resources to scrutinise business contracts. And just as many individuals do, they frequently enter into contracts with other suppliers in good faith and on the face value of the contractual arrangement they believe they are entering into. Making money out of unfair and hidden costs in contracts has regrettably become widespread business practice, even amongst many of Australia's largest and best-known business organisations—practices

which are unfair and which rip off unsuspecting consumers. The individual amounts involved in these rip-offs are often not large sums of money, but collectively, when thousands of customers are affected, they can amount to huge financial windfalls for the businesses using the unfair conditions.

Uniform consumer laws throughout Australia will be welcomed by both businesses and consumers. It is a matter that I and other speakers have talked about in this place on previous occasions. It is a matter that few people in this place would disagree on—that is, having uniform laws throughout Australia on all matters would make the lives of Australians, whether they are individuals or businesses, much easier. For businesses, particularly those working across state jurisdictions, complying with a range of consumer laws from eight state and territory jurisdictions must be a costly administrative nightmare. Likewise for consumers, who today are able to deal with businesses from right across Australia. Having uniformity will provide them with greater confidence and make their choices much easier.

It has been estimated that improved consumer laws throughout Australia will save the Australian economy up to \$4.5 billion per year. That is \$4.5 billion that can either go back into the hands of consumers, enabling them to buy other products or perhaps make ends meet, or be used by businesses to invest in growth and efficiency measures. This \$4.5 billion could certainly be used in better ways than simply to rip off unsuspecting consumers. The provisions of this bill are yet another measure implemented by the Rudd government since coming to office to establish a seamless Australian economy.

The bill will be of particular interest to the legal profession—after all, it deals primarily with legal interpretations and legal matters. I note that the Law Council of Australia in its submission did not support the inclusion of the unfair contracts provisions in this bill. It instead argued that the existing laws on unconscionable conduct in both the Trade Practices Act and the Australian Securities and Investment Commission Act were sufficient. To quote the Law Council of Australia trade practices committee's submission in response to the call for consultation from Treasury:

The Committee is not aware of any significant consumer complaints in relation to standard form contracts that would justify such a prohibition on a cost-benefit analysis to the economy.

The submission goes on to say:

The present unconscionability law under the Trade Practices Act already requires the courts to have regard to all relevant circumstances in determining whether unconscionable conduct has occurred.

The Committee expressed the view that considerations of fairness fall properly within the unconscionable conduct provisions of the Trade Practices Act and that another layer of complexity—in the form of a separate "unfairness" test for contract terms, is unnecessary and impractical.

I will provide some statistics later with respect to the evidence not being there to justify such a prohibition, but I do make three observations now in respect to the Law Council's submission—and I

have read it all. The first is that the submission essentially defends the merits of the existing legislation. It appears to me, on a reading of the submission, that the Law Council is biased towards business. That is an assessment I make, and perhaps the Law Council might disagree with me on that. Secondly, the submission seems to overlook the reality that most consumers will not seek justice in the courts for relatively small sums of money, even if they do feel they have been charged unfairly, and they quite rightly look to the government for the necessary protection. Thirdly, I believe the Law Council is out of touch with consumers. I note that the submission from the Legal Aid Office in Queensland is somewhat different to that of the Law Council and is much more sympathetic to consumers. It is another legal submission yet it seems to be somewhat different to that provided by the Law Council."

14. The Second Reading Speech of the Hon Mr Perrett, MP for Moreton, described the policy underpinning the legislation in these rather colourful terms :

"Like so many of the laws which criss-cross state, territory and federal jurisdictions, consumer protection laws have evolved into an unholy mess in recent years. It is a little bit like the many-headed hydra that Hercules had to fight. I do not want to start my speech by comparing the Hon. Dr Craig Emerson MP to Hercules and I do not want the Minister for Competition Policy and Consumer Affairs to get too excited, but that is what he has been fighting. He pushes down somewhere and then something else pops up. Obviously, companies and consumers move between the states and territories so much more readily so it is important that we have uniformity wherever possible. It makes good business sense and it looks after consumers. The various Commonwealth, state and territory laws have a similar intent. However, there are enough differences between these jurisdictions to create confusion for consumers, unnecessary costs for business and perhaps extra work for lawyers.

This bill is based largely on the recommendations of the Productivity Commission's review and will bring about the biggest change to consumer law and policy since moustaches were compulsory in the public service. It is the biggest change since long socks, short-sleeved shirts and ties were de rigueur, even stylish, or, to put it in more precise terms for those people that follow rugby, it is the biggest change in the 30 years since the St George Football Club won a grand final. This bill amends the Trade Practices Act 1974 to introduce a new national unfair-contract-terms law and new penalties and enforcement powers, as well as redress measures for the Australian Competition and Consumer Commission and the Australian Securities and Investments Commission to help consumers put their situation right in the event of an unlawful contract. It applies only to business-to-consumer contracts, not business-to-business contracts. I take issue with some of the points that the previous speaker made but, rather than waste time on those, I will talk about the positive things given the fact that it is business-to-consumer contracts that we are addressing with this legislation. This bill defines a consumer contract as one entered into by an individual 'for a supply of goods or services' or for 'a sale or grant of an interest in land' in circumstances where the individual acquires the goods, services or interest 'wholly or predominantly for personal, domestic or household use or consumption'.

Because of the level of business and consumer consultation that has gone into the drafting of this legislation, it strikes a healthy balance between protecting the rights of consumers and protecting legitimate business interests and practices. We have arrived at a very healthy balance. The major component of this bill is the introduction of unfair contract terms. Any contract that is deemed unfair will be void under this legislation. Where there is significant imbalance in the parties' rights and obligations under the contract and it is not 'reasonably necessary' to protect a party's legitimate interest, it will be deemed unfair. This is a commonsense approach to what any person in the street or any man on an omnibus would consider to be fair. The onus of proof will be on the business as to a term being not reasonably necessary. Businesses will receive infringement notices for minor breaches. However, for more serious breaches they will be required to substantiate claims. The bill before the House requires a court to consider the extent to which the terms cause detriment to a party who relies on the terms. But the unfair terms test does not apply to terms dealing with the main subject matter of the contract, the upfront price or any term expressly permitted by law."

15. The States and Territories will be able to implement the ACL (which currently includes only the unfair contract terms provisions) from its commencement, should they decide to do so.

Summary of new law

16. The unfair contract terms provisions are included in the ACL (a new Schedule 2, Part 2 of the TP Act).

17. The unfair contract terms provisions apply to consumer contracts only.
A consumer contract excludes business to business contracts.

Interpolation: This, it is submitted is strange, as many of the reading speeches emphasise that small businesses often need protection as well.

18. A consumer contract is defined in the ACL as a contract for a supply of goods or services or **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.**

(emphasis added)

19. The Senate Explanatory Memorandum was at pains to emphasise that the ACL only applies where one party is a corporation (abt p 5 of the austlii print out, towards the top).

20. A term in a consumer contract is void if:

- the term is unfair; and

- the contract is in a standard form contract.

21. A term in a consumer contract is unfair if the term:

- causes a significant imbalance in the parties' rights and obligations under the standard form contract; and
- is not reasonably necessary to protect the legitimate interests of the party who would be advantaged by the term;
- if the term would cause financial or non financial detriment to a party if that term were to be applied or relied on (this last limb was inserted by the Senate, echoing the Victorian FTA)

22. There is a rebuttable presumption that an unfair term is not reasonably necessary to protect the legitimate interests of the party who would be advantaged by the application or reliance on that term, unless that party can prove otherwise.

23. In finding that a term in a consumer contract is unfair, a Court may take into account any matters it considers relevant. However, the Court must take into account the following:

24. the extent to which it would cause detriment, or a:

- substantial likelihood of detriment (whether financial or otherwise) to a party if the term was to be applied or relied on;
- the extent to which a term is transparent; and
- the contract as a whole.

25. Terms that:

- define the main subject matter of the contract;
- set the upfront price payable under the consumer contract;
or
- that are required or expressly permitted by a law of the Commonwealth, State or Territory.

are not subject to the unfair contract terms provisions, except to the extent that they may be a prohibited term.

26. Examples of terms used in consumer contracts that may be unfair are listed. The provision setting out the examples does not prohibit or presume such terms to be unfair.

27. A prohibited term in a consumer contract of a kind prescribed by the regulations is void, and a person must not include, apply or rely on, or purport to include, apply or rely on such a term.
28. Prohibited terms in the ACL may be prescribed by the Minister.
29. The inclusion of or reliance on a prohibited term is a contravention of the TP Act. This means that the applicable penalties and remedies provisions of the TP Act will apply to such contraventions.
30. The unfair contract terms provisions of the ACL Act will apply to new consumer contracts entered into on or after the commencement of the provisions. The provisions will not apply to contracts entered into before the date on which the provisions commence, unless such a contract is renewed or varied after that date, but then only to the extent of that renewal or variation.
31. An interest in relation to land, is taken to mean one of the following:
- a legal or equitable estate or interest in the land; or
 - a right of occupancy of the land or of a building or part of 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
 - a right, power or privilege over, or in connection with, the land. [Schedule 1, Part 1, item 1, section 1]
32. Where a Court finds that a term in a consumer contract is unfair, the contract will continue to bind the affected parties to the extent that the contract is capable of operating without the unfair term. [Schedule 1, Part 1, item 1, section 2(2)] [Schedule 3, Part 1, item 7, subsection 12BF(2)].

First element of the test

33. The first element of the test requires the Court to consider whether the term has caused a significant imbalance in the parties' rights and obligations arising under the contract. This would involve a factual determination of whether any such significant imbalance exists. [Schedule 1, Part 1, item 1, subsection 3(1)(a)] [Schedule 3, Part 1, item 7, paragraph 12BG(1)(a)].

Second element of the test

34. The second element of the test requires the Court to consider whether the term is reasonably necessary to protect the legitimate interests of the party who would be advantaged by the term. [Schedule 1, Part 1, item 1, subsection 3(1)(b)] [Schedule 3, Part 1, item 7, paragraph 12BG(1)(b)]
35. In respect of the second element of the test, a term of a consumer contract is presumed not to be reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term, unless that party can prove otherwise in a Court. [Schedule 1, Part 1, item 1, section 3(4)] [Schedule 3, Part 1, item 7, subsection 12BG(4)].
36. Where a claimant in proceedings has alleged that a term is unfair, it is for the respondent to establish that a term is reasonably necessary to protect its legitimate interests on the balance of probabilities. The respondent may introduce any evidence relevant to this element of the test.
37. While it is ultimately a matter for the Court to determine whether a term is reasonably necessary to protect the legitimate interests of the respondent, the provision would require the respondent to establish, at the very least, that its legitimate interest is sufficiently compelling on the balance of probabilities to overcome any detriment caused to the consumer, or a class of consumers, and that therefore the term was 'reasonably necessary'.

Considerations the Court may take into account

38. In determining whether a term in a consumer contract is unfair, the Court may take into account any matter which it thinks is relevant, but the Court must take into account the following matters:
- . the extent to which it would cause, or there is a substantial likelihood that it would cause, detriment (whether financial or otherwise) to a party if it were relied on;
 - . the extent to which the term is transparent; and
 - . the contract as a whole. [Schedule 1, Part 1, item 1, section 3(2)] [Schedule 3, Part 1, item 7, subsection 12BG(2)].
39. The Senate's Explanatory Memorandum had this, with all due respect, contradictory gloss:
- "The amendments to the Bill relate to the unfair contract terms provisions of the Bill, primarily set out in Schedule 1, Part 1 and Schedule 3, Part 1. Specifically, these amendments:
- . provide that a term in a consumer contract can only be

unfair if it would cause financial or non-financial detriment to a party;

- . remove the consideration of whether a term would cause detriment, or a substantial likelihood thereof, from the considerations that a Court must have regard to in determining whether a term of a consumer contract is unfair."

Transparency

40. The Court must have regard to whether a term is transparent in determining whether that term is 'unfair'. [Schedule 1, Part 1, item 1, subsection 3(2)(b)] [Schedule 3, Part 1, item 7, paragraph 12BG(2)(b)].
41. A term is transparent if the term is:
- . expressed in a reasonably plain language;
 - . legible;
 - . presented clearly; and
 - . readily available to any party affected by the term.
[Schedule 1, Part 1, item 1, section 1 and section 3(3)]
[Schedule 3, Part 1, item 4, subsection 12BA(1), item 7, subsection 12BG(3)]
42. A lack of transparency in the terms of a consumer contract may be a strong indication of the existence of a significant imbalance in the rights and obligations of the parties under the contract.
43. Transparency, on its own account, cannot overcome underlying unfairness in a contract term. Furthermore, the extent to which a term is not transparent is not, of itself, determinative of the unfairness of a term in a consumer contract and the nature and effect of the term will continue to be relevant.
44. The elements set out subsections 3(3)(a)-(c) of the ACL and paragraphs 12BG(3)(a)-(c) of the ASIC Act relate to the way in which a term is presented in a consumer contract. The remaining element covers situations where the term is set out by the party who seeks to rely upon it in a document which is not physically available to the other party at or before the time the parties entered into the contract.

Contract as a whole

45. The Court must have regard to the contract as a whole in determining whether that term is 'unfair'. [Schedule 1, Part 1, item 1, subsection 3(2)(c)] [Schedule 3, Part 1, item 7, paragraph 12BG(2)(c)].

Examples of unfair terms

46. There is a non-exhaustive, indicative list of examples of the types of terms that may be considered 'unfair'. [Schedule 1, Part 1, item 1, section 4] [Schedule 3, Part 1, item 7, section 12BH].
47. Without limiting the meaning of unfair, the following examples are provided:
- a) a term that permits, or has 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 terms 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 in the context of the ACL; or
 - . financial services to be supplied under the contract in the context of the ASIC Act;
 - 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; and
 - m) a term that imposes, or has the effect of imposing, the evidential burden on one party in proceedings relating to the contract. [Schedule 1, Part 1, item 1, subsections 4(a)-(m)] [Schedule 3, Part 1, item 7, paragraphs 12BH(a)-(m)].
48. The Senate removed the provision to permit the Minister to prohibit terms by regulation.
49. The examples provide statutory guidance on the types of terms which may be regarded as being of concern. They do not prohibit the use of those terms, nor do they create a presumption that those terms are unfair.
50. Any consideration of a term of a type listed as an example is subject to the test set out in section 3(1) of the ACL ie there may be circumstances in which the use of such a term is reasonably necessary in order to protect a party's reasonable business interests.

Terms permitting unilateral changes by one party to the contract

51. Paragraphs (a), (b), (d), (e), (f), (g) and (h) are examples of types of terms that allow a party to make changes to key elements of a contract, including terminating it, on a unilateral basis.
52. The inclusion of these examples does not prohibit unilateral variation terms, nor does it create a presumption that such terms are unfair. Indeed, the need for the unilateral variation of contract terms is expressly contemplated by legislation in specific contexts, including for example Parts 4 and 5 of the Uniform Consumer Credit Code (see also Parts 4 and 5, Schedule 1 of the National Consumer Credit Protection Bill 2009).

Terms limiting the rights of parties to a consumer contract

53. Paragraphs (i), (k), (l) and (m) are examples of types of terms that have the effect of limiting the rights of the party to whom the consumer contract is presented.
54. Paragraph (i) specifically deals with limitation of liability clauses. There are many instances in which limitations of liability are expressly permitted by national, State or Territory legislation for legitimate public policy reasons.
55. In this regard, subsection 5(1)(c) of the ACL expressly exclude references to terms that are required, or expressly permitted, by a law of the Commonwealth or a State or Territory from the application of the unfair contract terms provisions. However, this exclusion applies only to the extent that such terms are required or expressly permitted.

Terms which penalise a party for a breach or termination of the contract

56. Paragraph (c) refers to terms that penalise, or have the effect of penalising, one party for a breach or termination of the contract.
57. This provision reflects the common law concept of 'penalties'. To be valid, a penalty imposed by a contract must be a genuine pre-estimate of the loss likely to be suffered by the party as a result of the breach or early termination, and should not be an arbitrary sum. However, under the unfair contract terms provision the relevant consideration is whether the term is unfair, within the meaning given to that term by the provisions.

Terms which permit the assignment of a contract to the detriment of the other party without their consent

58. Paragraph (j) refers to terms that allow for a party to assign the contract to the detriment of the other party, without the other party's consent.
59. This example does not prohibit the use of such clauses. Indeed, assignment of contracts is expressly contemplated by other legislation, for example section 166 of the Uniform Consumer Credit Code (see also Division 2, Part 3-2, Chapter 3 and Parts 3 and 11, Schedule 1 of the National Consumer Credit Protection Bill 2009).

Terms that define the subject matter etc of consumer contracts are unaffected

60. Certain terms of a consumer contract are unaffected by section 2(1) of the ACL a, but only to the extent that the term:

- . defines the main subject matter of a consumer contract;
- . sets the 'upfront price' payable under the contract; or
- . is a term required, or expressly permitted, by a law of the Commonwealth or a State or Territory. [Schedule 1, Part 1, item 1, section 5(1)] [Schedule 3, Part 1, item 7, subsection 12BI(1)]

Upfront price

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

- . provided, or is to be provided, for the supply, sale or grant under the contract; and
- . is disclosed at or before the time the contract is entered into,

but does not include any other consideration that is contingent on the occurrence or non-occurrence of a particular event. [Schedule 1, Part 1, item 1, section 1, subsection 5(1)(b) and section 5(2)] [Schedule 3, Part 1, item 6, subsection 12BA(1)] [Schedule 3, Part 1, item 7, paragraph 12BI(1)(b) and subsection 12BI(2)].

62. Consideration includes any amount or thing provided as consideration for the supply of a grant of land. It would also include any interest payable under a consumer contract.
63. The exclusion of upfront price means that a term concerning the upfront price cannot be challenged on the basis that it is unfair.
64. The upfront price would cover the cash price payable for land at the time the contract is made. It would also cover a future payment or a series of future payments.
65. The definition also requires that the upfront price must be disclosed at or before the time the contract was entered into by the parties. In the case of most transactions this is reasonably straightforward.

Meaning of standard form contract

66. To account for circumstances where a question about whether a contract is in a standard form is the subject of dispute between the parties in proceedings, there is a rebuttable presumption that a contract the subject of proceedings is a standard form contract. The

respondent in those proceedings must then show that, on the balance of probabilities, the contract is not in a standard form. [Schedule 1, Part 1, item 1, sections 7(1) and (2)] [Schedule 3, Part 1, item 7, subsections 12BK(1) and (2)].

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

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

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

- . one of the parties has all or most of the bargaining power relating to the transaction;
- . the contract was prepared by one party before any discussion relating to the transaction commenced;
- . another party was, in effect, required to accept or reject the terms in the contract (other than terms excluded by section 5(1) of the ACL or subsection 12BI(1) of the ASIC Act) in the form in which they were presented (that is, on a 'take-it-or-leave-it' basis);
- . another party was given an effective opportunity to negotiate the terms of the contract that were not terms excluded by section 5(1) of the ACL or subsection 12BI(1) of the ASIC Act;
- . the terms of the contract (other than terms excluded by section 5(1) of the ACL or subsection 12BI(1) of the ASIC Act) take into account the specific characteristics of another party or the particular transaction; and
- . any other matter prescribed by the regulations. [Schedule 1, Part 1, item 1, section 7(2)] [Schedule 3, Part 1, item 7, subsection 12BK(2)].

69. Additional factors may be added to the list of factors by way of regulations made by the relevant Minister. This will permit the

expansion of the list in response to changes in markets and the way in which standard form contracts are constructed and used. The making of such regulations would be subject to the same condition as those which apply to the prescription of prohibited terms (see paragraphs 2.80 and 2.82 of the explanatory memorandum).

70. *Interpolation*: is a contract for the sale of land still on a standard form if there are special conditions?

Would it depend on the number of special conditions?

Enforcement and remedies in relation to a finding that a term is unfair or is a prohibited term

71. A claimant who is a party to a contract covered by the unfair contract terms provisions can seek the remedies available under the Federal Court of Australia Act 1976 (FCA Act).

Injunctions and actions for damages

72. In circumstances where a person has engaged or is proposing to engage in conduct that either constitutes or would constitute a contravention of a provision of the ACL the Court may grant, on the application of the ACCC or any other person:

- . an injunction in such terms as the Court determines to be appropriate (subsection 80(1) of the TP Act); or [Schedule 2, Part 7, items 4 to 42, paragraph 80(1) (a)-(d)]
- . an amount of damages to another party who suffers loss or damage as a result of that conduct (subsection 82(1) of the TP Act) [Schedule 2, Part 7, item 44, subsection 82(1)]

Non-punitive and other orders

73. The Court may make non-punitive orders under subsection 86C(2) of the TP Act in respect of a contraventions. These orders include community service order or a probation order.
74. The Court may also make any other orders as it thinks appropriate against a person who engages in the conduct that either constitutes or would constitute a contravention of a provision of the ACL under subsection 87(1) of the TP Act.

Other specific amendments to the TP Act

75. Subsection 75B(1) of the TP Act is amended to incorporate reference to the ACL in interpreting when a person is involved in a contravention under Part VI of the TP Act. For the purposes of Part VI of the TP Act, a reference to a person who has contravened the ACL is a reference to a person who has:
- . aided, abetted, counselled, or procured the contravention;
 - . induced, where by threats, promises or otherwise, the contravention;
 - . been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention; or
 - . conspired with others to effect the contravention.
[Schedule 2, Part 7, items 33 and 34, subsection 75B(1)].
76. Subparagraph 78(a)(iii) of the TP Act expressly provides that a criminal proceeding cannot be brought against a person by reason only that the person has contravened a provision of the ACL. A civil proceeding must be instituted with respect to a contravention of the ACL. [Schedule 2, Part 7, item 38 and 39, paragraphs 78(a)-(d)].
77. Section 83 of the TP Act includes references to a contravention of a provision of the ACL for the purpose of treating a finding of fact by a Court as evidence in proceedings under section 82 (action for damages) or subsection 87(1A) (other orders) of the TP Act. [Schedule 2, Part 7, item 45, section 83].
78. Section 84 of the TP Act includes references to a contravention of a provision of the ACL for the purposes of establishing the state of mind of a body corporate or a person with respect to conduct engaged in by the body corporate or person. [Schedule 2, Part 7, item 46, paragraphs 84(1)(b) and 84(3)(b)].

Discussion and analysis : Application of the above legislation to Standard Form Conveyancing Contracts

79. *NSW Law Society contract for Sale of Land* : surely this is "standard form" "consumer contract " where the vendor [or possibly even the purchaser] is a corporation.
80. But does it cease to be standard form if there are special conditions ? Is it a matter of fact and degree, ie is it still a standard form if there are only a few special conditions; and vice versa ?
81. The ACL would only apply where the vendor is a corporation , and thus in the run of the mill situation, where one family sells its house to another, there Federal ACL has no application.
82. The ACL might possibly apply where a corporation conveys an interest in land to a "consumer" ie for personal use .

A residence where a family , traditional or modern , live, would undoubtedly be a grant of a interest in land for personal use.

83. Company title transactions are contemplated as well -so long as they are for "personal use."
84. *Return of deposits :*
85. Deposit clauses arguably cause significant imbalances in the rights of parties
86. There is an existing body of law, well travelled by the Supreme Court, as to when a purchaser can seek the return of a deposit in contract for the purchase of land which is terminated.
87. The new legislation [if it applies] will be a fertile forensic battlefield regarding whether clauses regarding deposits ought be struck down, and will throw into a complete muddle the clear state of the law regarding Sec 55 (2A) *Conveyancing Act* , exemplified by cases such as *Havyn v Webster* [2005] NSWCA 182, whose headnote reads [sans citations]:
- " (1) The primary judge erred in exercising the discretion pursuant to **s55 (2A)** of the *Conveyancing Act*, although his decision should be affirmed on other grounds.
- Section 55 (2A)** confers upon a Court a statutory jurisdiction to return a forfeited deposit, which was not previously available at common law or in equity to the same extent;
- (2) It would be wrong to confine the jurisdiction conferred by the plain words of the statute by analogy with principles relating to relief against penalties or forfeiture.
- (3) The jurisdiction conferred by **s55 (2A)** is wide and no limiting gloss should be placed upon its words, which allow a Court to order a deposit to be returned "*if it thinks fit*".
- (4) It is not necessary for an applicant to show special or exceptional circumstances before an order under **s55 (2A)** can be made.
- (5) Although the jurisdiction is wide, it is not unbounded and the Court must consider the context of a deposit and should not take adopt an approach which weakens the proper function of a deposit as an earnest for performance.
- (6) For this reason it is important for a Court when considering the discretion under **s55 (2A)** to consider the terms and conditions of the contract, and the circumstances of its breach which gave rise to the forfeiture of the deposit, and to be careful to avoid characterising a deposit as a windfall merely because it is forfeited."

88. *Project marketing / off the plan sales by large developers*

Are these "standard contracts" ?

Arguably, Yes.

89. *{Open Discussion }*

90. *Leases :*

There are any number of standard Memoranda of Lease that are registered with the LPI.

Some are really archaic , and in clauses regarding repairs and maintenance , contain exception to the exceptions to the exceptions . It is only a matter of time before repairing and maintenance clauses are challenged as being "unfair" on any number of bases . including

-lack of transparency due to exceptions to exceptions;

-unfair allocation of the costs of maintenance to the lessee, especially where there might be heavy equipment , eg lifts and BMU's , involved.

Many law firms have their own standard forms : will these be regarded as standard forms ?

Guarantees : will a guarantee contained in a lease be liable to be struck down if it does not perfectly clear ie is not transparent , as to whether it covers loss of bargain damages (as opposed to merely accrued rentals and outgoings) ?

Covenants against assignment :

Are covenants against assignment required for the legitimate business interests of the lessor ?

Exercise of options : generally speaking, option clauses must be exercised strictly in accordance with their tenor ; and thus if the Notice of Exercise must , according to the Lease, be served on the Lessor , the service on the Lessor's solicitor may well not suffice.

There are numerous cases where an issue is whether there has been sufficient service of a Notice of Exercise of Option ; and it has often struck me that many such clauses are not required for the legitimate interests of the landlord , especially where the landlord's solicitor or other agent is ,with its knowledge . engaged in negotiating the option.

Option clauses may well not be "transparent" within the meaning of the ACL, as they have to be read in conjunction with service provisions , which are often in another part of the lease ; and in any event , often simply say that service may be effected in accordance with the provisions of this Act or that : hardly a nicety an ordinary consumer will be fixated on, as demonstrated by the many cases on this topic.

Use of demised premises : there are many cases where landlords for good reason, do not consent to a change in use ; but there are also many where landlords are simply obdurate

91. *Liability of estate agents / letting agents*

Note the ancillary liability provisions, for aiding and abetting etc

What protection will disclaimers of agents now afford ?

Will disclaimers need to now be in bigger print ?

92. Alice had a conversation with Humpty Dumpty in chapter 6 of Lewis Carroll's *Through the Looking Glass* in which the latter sought to convince Alice that 'un-birthday' presents were better than birthday presents. After pointing out that there were 364 days when you might get un-birthday presents, the conversation continued:

'Certainly,' said Alice.

'And only *one* for birthday presents, you know. There's glory for you!'

'I don't know what you mean by "glory",' Alice said. Humpty Dumpty smiled contemptuously. 'Of course you don't—till I tell you. I meant "there's a nice knock-down argument for you!"'

'But "glory" doesn't mean "a nice knock-down argument",' Alice objected.

'When I use a word', Humpty Dumpty said, in rather a scornful tone, 'it means just what I choose it to mean—neither more nor less.'

'The question is', said Alice, 'whether you *can* make words mean so many different things.'

'The question is', said Humpty Dumpty , 'which is to be master—that's all.'

Constructive criticism or comments welcomed to
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