

by Publication in *Attorney-General for the State of New South Wales v X* (2001) 23 *Sydney Law Review* 261 at 262

⁴ S. Walker 'Freedom of Speech and Contempt of Court' at 585

⁵ *Ibid* at 583

⁶ F. Robinson "'No, No! Sentence First' Verdict Afterwards" at 263

⁷ *Ibid* at 264

⁸ *Ex parte Bread Manufacturers Ltd; Re Truth and Sportsman Ltd* 91937) SR(NSW) 242 at 249. Cited in *Ibid* at 263

⁹ *Ibid* at 264

¹⁰ *Ibid*

¹¹ *Hinch v Attorney General (Victoria)* (1987) 164 CLR 15. Per Wilson and Deane JJ at 34; Tohey J at 70. Cited in *Ibid* at 262

¹² (1987) 164 CLR 15 at 27-28. Cited in M. Chesterman 'Media Prejudice During a Criminal Jury Trial: Stop the Trial, Fine the Media, Or Why Not Both?' (1999) 1 *UTS Law Review* 71 at 81

¹³ (1987) 164 CLR 15 Per Mason CJ at 26

¹⁴ F. Robinson "'No, No! Sentence First' Verdict Afterwards" at 265

¹⁵ D. Williams 'The Courts and the Media: What Reforms Are Needed and Why?' (1999) 1 *UTS Law Review* 13 at 15

¹⁶ *Ibid*

¹⁷ (2000) 49 NSWLR 653

¹⁸ F. Robinson "'No, No! Sentence First' Verdict

Afterwards" at 261

¹⁹ Mason CJ's reference to 'major constitutional crisis' or 'imminent threat of nuclear disaster' at 26 is the only guidance that has been developed by the High Court to date.

²⁰ F. Robinson "'No, No! Sentence First' Verdict Afterwards" at 276

²¹ D. Flint 'The Courts and the Media: What Reforms are Needed and Why?' (1999) 1 *UTS Law Review* 30 at 31

²² M. Chesterman 'Media Prejudice During a Criminal Jury Trial: Stop the Trial, Fine the Media, Or Why Not Both?' (1999) 1 *UTS Law Review* 71 at 72

²³ DP 43 Proposal 1

²⁴ S. Walker 'Freedom of Speech and Contempt of Court: The Australian and English Approaches Compared' (1991) 40 *ILCQ* 583 at 606

²⁵ S. Walker 'Freedom of Speech and Contempt of Court' at 588

²⁶ *Hinch v Attorney General (Victoria)* (1987) 164 CLR 15. Per Wilson and Deane JJ at 34; Tohey J at 70. Cited in F. Robinson "'No, No! Sentence First' Verdict Afterwards" at 262

²⁷ DP 43 para 2.42

²⁸ DP 43 para 2.56

²⁹ DP 43 para 4.22

³⁰ M. Chesterman 'Media Prejudice During a Criminal Jury Trial: Stop the Trial, Fine the Media, Or Why Not Both?' (1999) 1 *UTS Law Review* 71 at 81

³¹ DP 43 Proposal 3

³² DP 43 Paras 2.55 & 2.67

³³ *Attorney General (NSW) v John Fairfax Publications* [1999] NSWSC 318 at para 95 per Barr J

³⁴ See *Hinch* (1987)

³⁵ See *DPP v Wran* (1986)

³⁶ DP 43 para 5.8

³⁷ DP 43 para 5.14

³⁸ S. Walker 'Freedom of Speech and Contempt of Court' at 606

³⁹ DP 43 para 2.36

⁴⁰ DP 43 para 1.45

⁴¹ D. Flint 'The Courts and the Media: What Reforms are Needed and Why?' (1999) 1 *UTS Law Review* 30 at 33

⁴² DP 43 para 2.94

⁴³ S. Walker 'Freedom of Speech and Contempt of Court' at 585

⁴⁴ *Ibid*

⁴⁵ DP 43 para 1.46

⁴⁶ DP 43 para 1.46. DP 43 also recognised that '... the Standing Committee of Attorneys General considered, during the early 1990s, a uniform law on contempt of court or partially uniform contempt laws dealing only with publication, but it appears that there was little enthusiasm at that time for a common statutory approach by the States and Territories.' DP 43 para 1.46

Unfair Terms in Consumer Contracts - The New Benchmark

Robert Neely and Olivia Kwok take a more detailed look at new Victorian requirements

Introduction

The 'unfair terms' provisions in Victoria's *Fair Trading Act 1999* (Vic) (**FTA**) now set the benchmark in terms of consumer-friendly contracts in Australia.

The FTA provisions have particular relevance to suppliers who use standard form contracts across Australia, such as those commonly offered online by banks, telecommunications companies and internet service providers. Although the provisions have been in force since 9 October 2003, and some industry sectors have led the way in ensuring their consumer contracts comply, the implications of the provisions for suppliers generally is yet to be properly appreciated.

It is suggested that it would be pragmatic for companies supplying goods and services to consumers in Australia to adopt the FTA provisions as a standard when formulating end-user contracts and sign-up pro-

cedures. The reasons are threefold: compliance with the FTA will generally ensure compliance with other existing regulations concerning the 'fairness' of consumer contracts; it is quite likely that other States and Territories will follow Victoria and introduce similar legislation;¹ and it is generally not practicable to have different contracts and procedures for different Australian jurisdictions.

The good news for telecommunications and internet service providers is that compliance with the Australian Communications Industry Forum (**ACIF**) Consumer Contracts Code, which sets minimum standards for consumer contracts in the telecommunications industry,² is likely to mean compliance with the FTA provisions.

Background

The unfair contracts provisions in the FTA are based on equivalent UK regulations, the *Unfair Terms in Consumer Contracts*

Regulations 1999 (UK) (**UK Regulations**), which in turn are drawn from a 1993 European Union directive. The provisions are aimed at addressing substantive, as opposed to procedural, unfairness in consumer contracts.

The provisions have obvious application to telecommunications, pay TV and internet services. When the legislation was introduced, Consumer Affairs Victoria (**CAV**) identified telecommunications contracts as one of its initial targets. After significant compliance activity in 2004, in December 2004, CAV commenced proceedings against AAPT in relation to AAPT's mobile and pre-paid mobile phone contracts. A decision by the Victorian Civil and Administrative Tribunal (**VCAT**) in that matter has been reserved (the action is discussed below). CAV recently announced that priorities for 2005/06 will include pay TV and Internet service providers' contracts.³

It is notable that the 2005 ACIF Consumer Contracts Code⁴ (**CC Code**) drew heavily from the UK Regulations and the amendments to the FTA. Its central requirement mirrors section 32W of the FTA and prohibits unfair terms in consumer contracts.

Moreover, the CC Code provides specific examples and rules identifying contract terms which are likely to be unfair in the context of the telecommunications industry.

What constitutes an unfair term?

The FTA provisions provide that a term in a consumer contract will be unfair if:

"contrary to the requirements of good faith and in all the circumstances, it causes a significant imbalance in the parties' rights and obligations arising under the contract to the detriment of the consumer."

The FTA defines a "consumer contract" to mean

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

(picking up similar language in the consumer warranties provisions of the *Trade Practices Act*).

The elements to be made out are that:

- the term is contrary to the requirements of good faith;
- in all the circumstances the presence of the term causes a significant imbalance in rights and obligations between the parties; and
- that imbalance is likely to cause detriment to the consumer.

No definition for "good faith" is given in the FTA. The guideline released by CAV "*Preventing unfair terms in consumer contracts - Preliminary guidelines for suppliers* (November 2003)"⁵ suggests the following definition for "good faith":

*"A principal of fair and open dealing; that is "playing fair", especially when one party is in a position of dominance over a consumer who is vulnerable relative to that dominance or power."*⁶

Unfortunately, this definition does not provide much practical assistance to suppliers in understanding what "good faith" means in the context of section 32W, although it does suggest that "good faith" is to be interpreted broadly.

The meaning of "good faith" under the UK Regulations was clarified by the House of Lords in the leading case *Director General of Fair Trading v First National Bank plc*.⁷ The House of Lords considered that

the requirement of good faith was to be assessed on the substance and form⁸ of the agreement:

*"The requirement of good faith in this context is one of fair and open dealing. Openness requires that the terms should be expressed fully, clearly and legibly, containing no concealed pitfalls or traps. Appropriate prominence should be given to terms which might operate disadvantageously to the customer. Fair dealing requires that a supplier should not, whether deliberately or unconsciously, take advantage of the consumer's necessity, indigence, lack of experience, unfamiliarity with the subject matter of the contract, weak bargaining position or any other factor listed in or analogous to those listed in...the regulations."*⁹

As to the element of section 32W that the term "causes a significant imbalance in the party's rights and obligations arising under the contract to the detriment of the consumer", this expression was commented on in a UK decision applying the former version of the UK Regulations:

*"The requirement of significant imbalance is met if a term is so weighted in favour of the supplier as to tilt the parties' rights and obligations under the contract significantly in his favour. This may be by the granting to the supplier of a beneficial option or discretion or power, or by the imposing on the consumer of a disadvantageous burden or risk or duty."*¹⁰

Section 32X of the FTA sets out a non-exhaustive list of matters that a tribunal may have regard to in determining if a term is unfair. The tribunal may consider the context of the contract (in particular, whether or not a term was individually negotiated) and the object or effect of the term itself. In relation to the latter, section 32X identifies terms which have the object or effect of:

- not giving reciprocal rights or obligations between the parties. For example *"this contract is not subject to cancellation by the customer ... the company reserves the right to cancel or refuse acceptance of any order at any time by refunding all monies paid less an administrative charge"*,¹¹
- not giving the consumer the right of response in circumstances where the supplier may exercise some discretion on how it fulfils its obligations under the contract. For example *"any dispute or difference which may arise in regard to the interpretation of the rules shall be determined by the management, whose decision shall be final"*;¹² or
- winds back the consumers' right to

hold the supplier liable under the contract. For example *"times quoted are estimated times only and shall not be binding on the company and the company shall not accept any loss or liability whatsoever arising out of any failure to adhere to the times and dates quoted and nor shall any failure be deemed to be a breach of this contract"*.¹³

If a term of a contract is in breach of the unfair contracts provisions then that term will be void.¹⁴ If the contract can continue although the unfair term is excluded then the contract will still bind the parties.¹⁵ In other words, a supplier may be contractually bound to continue supplying its goods or services without the benefit of the excluded term.

Furthermore, the provisions give the Director of CAV the power to apply to VCAT for an injunction against a supplier who uses or recommends the use of an unfair term.¹⁶ The injunction can cover not just that specific term but apply to stop the use by the supplier of any similar term or term which has the effect of the unfair term.¹⁷ Section 32Z creates a number of offences, although these offences only relate to use of terms which have been prescribed as unfair by regulation.

Relevancy to Standard Form Contracts

In addition to the general prohibition against unfair terms in consumer contracts, the unfair contracts provisions deal specifically with the use of "prescribed unfair terms" (terms identified in regulations under the FTA as unfair) in standard form contracts.

A "standard form contract" is defined in the unfair contracts provisions to mean a consumer contract which is intended to be used for "general use in a particular industry, whether or not the contract differs from other contracts used in that industry".

A prescribed unfair term in a standard form contract is void.¹⁸ The Director of CAV has the power to apply to VCAT for an injunction against a supplier who uses or recommends the use of a prescribed unfair term.¹⁹ Moreover, it is an offence for a person to attempt to enforce a prescribed unfair term in a standard form contract irrespective of whether the term became a prescribed term before or after the contract was entered into.²⁰

At present, no terms have been "prescribed". However, given the serious consequences of using such a term in a standard form contract, suppliers would do well to monitor developments in this area.

The action against AAPT

The stated approach of CAV to compliance with the unfair contracts provisions is to first seek the co-operation of suppliers before exercising its enforcement powers under the FTA.

This was the approach taken by CAV prior to it taking action against AAPT. In August 2004, CAV wrote to AAPT, Telstra, Optus, Voda phone, 3, Orange, Virgin and SIM-PLUS requesting that they review their mobile phone contracts, remove any unfair terms or seek to discuss their compliance with the FTA with CAV. These companies were given until the end of 2004 to notify the Government of progress in ensuring that their contracts complied with the FTA.²¹ All the organisations, but for AAPT agreed to review the terms of their mobile phone contracts or engage in discussions with CAV. CAV considered AAPT's response as a refusal to co-operate with its request, and therefore decided in December 2004 to take enforcement action.

The action against AAPT claims that 11 clauses in AAPT's mobile phone service Standard Form of Agreement and 7 clauses in its pre-paid SFOA are unfair. The terms alleged to be unfair include those which:

- permit AAPT to unilaterally change the contract;
- permit AAPT to suspend services without notice but later charge a reconnection fee;
- impose a confidentiality clause on the customer preventing the customer from discussing AAPT's charges or discounts;
- permit AAPT to assign the contract to another mobile phone services supplier without the customer's consent and irrespective of the quality or adequacy of services offered by the other supplier;
- permit AAPT to charge interest on outstanding amounts without clearly informing the customer of the interest rate that will be applied in respect of that;
- permit AAPT to refuse to give a pre-paid mobile phone customer a refund of the call credits under any circumstances including even if the good or service is not fit for purpose; and
- limit AAPT's potential liability to the customer to an unreasonably excessive degree and in a way not permitted by law.

CAV is seeking a declaration from VCAT that the clauses are void and an injunction which prevents AAPT from using those clauses or similar ones in its customer contracts.

VCAT is yet to issue its decision. The action has been held out by commentators and interest groups as likely to provide important guidance on the practical application of the unfair contracts provisions.

ACIF Consumer Contracts Code

The CC Code (registered under section 117 of the *Telecommunications Act, 1997* in May 2005) provides some industry specific guidance on what might be considered an unfair contract term. As noted above, the central requirement of the CC Code is in virtually identical terms to section 32W of the FTA and was consciously modelled on it. It is likely that decisions on the legislation will inform decisions on the code and vice versa.

The stated objective of the CC Code is to address aspects of consumer detriment arising from the imbalance in bargaining power between service providers and their residential and small business customers. The code covers mass-market contracts used by residential and small business users, including Standard Forms of Agreement (SFOAs) registered under Part 23 of the *Telecommunications Act, 1997*.

The CC Code is binding on industry participants, however a breach does create any right of action by the customer, nor is a contract term which is in breach of the code made void. ACMA or the ACCC can bring penalty proceedings in the Federal Court, with penalties up to \$250,000 for each contravention. ACMA can also accept undertakings from suppliers which may be enforced in the Federal Court.

The Code promotes itself as providing industry specific examples and rules to identify when contract terms would be considered unfair.²²

Relevant to whether or not a contract would be considered unfair under the Code includes consideration of the circumstances in respect of which the supplier and customer entered into the contract including whether the term was individually negotiated. The Code also deems as relevant whether or not the parties have acted in good faith. All of the above are consistent with the provisions in the FTA.

The Code provides assistance to applying the unfair contracts provisions by it

specifying the types of terms which may be considered unfair and certain specific exceptions to that. For example, the Code identifies that a term may permit the supplier to avoid or limit its performance of certain obligations under the contract to the detriment of the consumer but may not be an unfair term if it relates to the suspension of the services or goods for a reasonable period of time due to maintenance or repair reasons.²³

Implications

Clearly, suppliers of telecommunications, media and internet services are transacting in a regulatory environment which increasingly seeks to protect consumers from both procedural and substantive unfairness.

The unfair contracts provisions in the FTA are the current high water mark in terms of fairness in consumer contracts. The CC Code applies the same general rules but also provides greater guidance in the context of telecommunications and internet services.

Evident from the AAPT case, CAV has been active in ensuring that suppliers of telephony services are in compliance with the FTA. Internet service providers are one current focus of CAV and compliance action can be expected in that quarter as well.

Although it has been more than two years since the amendments to the FTA, there is not perhaps the degree of awareness that might be expected of the provisions and their effect on contracts entered into with Victorian consumers. Companies, including telcos and ISPs, which use standard form agreements across the various States and Territories, need to be aware of the provisions and ensure that their customer agreements comply. Suppliers may find themselves bound to contracts which lack necessary protections if an offending term is made void and this can have serious financial consequences.

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¹In April 2005, the Ministerial Council on Consumer Affairs agreed to further as a matter of urgency a national regulatory response to unfair contract terms with its preference being a response which is consistent for each State and Territory and corresponds to the unfair contracts provisions. See http://www.consumer.gov.au/html/joint_communique/jointcommunique_April2005.htm.

² http://www.acif.org.au/documents_and_lists/codes/C620.

³ Fair Trading Compliance Conference "Changed

Fair Trading Laws in Victoria" held on 13 May 2005 with the speaker being Dr Elizabeth Lanyon and presentation notes accessible from www.consumer.vic.gov.au.

⁴ Registered under the *Telecommunications Act* in May 2005; it can be located at http://www.acif.org.au/documents_and_lists/codes/C620.

⁵ <http://www.consumer.vic.gov.au/CA256F2B00224F55/page/Publications-Reports+%26+Guidelines?OpenDocument&1=80-Publications~&2=955-Reports+%26+Guideline s~&3=~>.

⁶ "Preventing unfair terms in consumer contracts - Preliminary guidelines for suppliers (November 2003), page 4, accessible at <http://www.consumer.vic.gov.au/CA256F2B00224F55/page/Publications-Reports+%26+Guidelines?OpenDocument&1=80-Publications~&2=955-Reports+%26+Guidelines~&3=~>.

⁷ *Director General of Fair Trading v First National Bank plc* [2002] 1 AC 481.

⁸ According to this decision "good faith" includes an assessment of the form of a contract. The relevancy of the presentation of the contract with respect to what is an unfair term is reflected in section 163(3) of the FTA which provides that a consumer document must be easily legible, a minimum of 10 point font generally and clearly expressed. Section 163(3) is not part of the unfair contracts provisions but nonetheless it was introduced as another relevant aspect in protecting consumers with respect to fair contractual terms.

⁹ Footnote 7 at [17].

¹⁰ Footnote 7 at [17].

¹¹ Footnote 6 at page 17.

¹² Footnote 6 at page 20.

¹³ Footnote 6 at page 14.

¹⁴ Section 32Y(1) of the Fair Trading Act 1999 (Vic) (FTA).

¹⁵ Section 32Y(3) of the FTA.

¹⁶ Section 32ZA(1) of the FTA.

¹⁷ Section 32ZA(4) of the FTA.

¹⁸ Section 32Y(2) of the FTA.

¹⁹ Section 32Z(1) of the FTA.

²⁰ section 32Z(2) of the FTA.

²¹ Media release dated 14 December 2004 "AAPT taken to court on mobile phone contracts" accessible at www.dpc.seek.gov.au.

²² ACIF C620:2005 Consumer Contracts accessible at www.acif.org.au/documents_and_lists/Codes/C620 (Code)

²³ The Code at 6.2(b)(i). Specific exceptions can be found at 6.3.

E-Commerce Developments

Shane Barber and Bridget Edghill review the current trends and developments in relation to regulation of e-commerce in Australia.

Introduction

This article briefly canvasses the existing law regulating e-commerce in Australia and looks at the current trends and legislative developments occurring in this field of law. The article coincides with the new E-Commerce guidelines issued in March 2006 by the Australian Government.

As recently as the late 1990s much of the law described below was in its embryonic state, with legislatures and regulatory bodies around the world scrambling to keep up with emerging technologies for communication and doing business. While the last 5 years has seen many of the gaps and uncertainties filled and addressed, e-commerce law is ever evolving to match the continuing change in technology.

This article updates activities in Australia over the last 18 months in 4 areas of law in particular which relate to e-commerce as follows:

- electronic contracts;
- jurisdiction issues;
- cybercrime; and
- spam.

Current Trends

In a little over a decade, use of the Internet has increased significantly.

In 1993 there were about 15 million Internet users. Ten years later, in 2003, there were 723 million. Six months ago there were 840

million. Today there are approximately one billion online users, three times as many as at the beginning of the decade.

What's significant is the remarkable potential for still further expansion as although the Internet's global reach is immense, only about 15% of the world's population is online.

On 12 August 2005, The Australian Bureau of Statistics released its latest *Internet Activity Survey (IAS)*. The IAS is a census which collects details on aspects of Internet access services provided by internet service providers (ISPs) in Australia. The IAS contains results from all identified ISPs operating in Australia as at 31 March 2005. The next survey is currently underway.

The IAS identified, among other things, the following:

- While the total Internet subscribers in Australia increased during the period September 2004 to March 2005 by 4%, growth had slowed following a 10% increase recorded for the six months to the end of September 2004.
- The increase in overall subscriber numbers was again driven by growth in non dial-up subscribers with non dial-up subscribers representing 30% of total Internet subscribers in Australia at the end of March 2005 compared with almost 23% at the end of September 2004.

- Most of the growth for non dial-up was in the household subscriber sector with an increase of 42% in household non dial-up subscribers from the number recorded at the end of September 2004.

The platform for e-commerce then, continues to expand, demanding constant legal and regulatory attention.

What is E-Commerce?

E-commerce simply refers to use of the expanding infrastructure referred to above to conduct business. Electronic communications networks are no longer limited to the internet but may include other third generation technologies typically operated by mobile telecommunications companies.

Typically, e-commerce transactions are categorised in four ways being:

- consumer to consumer transactions;
- business to consumer transactions;
- business to business transactions; and
- many to many transactions (e-markets or exchanges).

In the early 2000s, there was a rapid appreciation of the potential of e-commerce transactions to create efficiencies for business, resulting in a frenzy of activity in all of the above areas, but particularly in relation to e-markets. As many anticipated at that time, there has been a rapid rationalisation with many e-markets, often promoted by third parties, simply not getting off the ground. While many e-markets still exist, they have not replaced the bilateral transactions referred to in (a) to (c) above to the extent anticipated.

At the height of the frenzy, third party pro-