



The UNFAIR CONTRACT TERMS Law

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One new development in the Australian Consumer Law (the ACL)¹ is the 'Unfair Contract Terms Law' (the UCTL), contained in Part 2-3 of the ACL,² and Part 2 Division 2 Subdivision BA of the *Australian Securities and Investments Commission Act 2001* (Cth) (ASIC Act).³

The UCTL renders void unfair terms in standard form consumer contracts. The UCTL is based on a similar regime regulating unfair contract terms in the UK, in the Unfair Terms in Consumer Contracts Regulations 1999 (UK) (UTCCR)⁴ and the regime previously in place in Victoria, in Part 2B of the *Fair Trading Act 1999* (Vic). The UCTL is a significant new development in the regulation of consumer contracts because it does not merely consider the conduct of the parties to the contract, as is the case with the prohibitions on misleading and deceptive conduct and unconscionable conduct under the ACL, but to the substantive fairness of the terms of standard form contracts. This article outlines the scope and application of this new regime.

STANDARD FORM CONSUMER CONTRACTS

The UCTL applies only to standard form consumer contracts.⁵ Standard form contracts are not defined in the UCTL. However, the UCTL creates a rebuttable presumption that a contract is a standard form contract in circumstances where a consumer alleges that the contract is of such a kind.⁶ In determining whether a contract is a standard form contract, the UCTL states that a court may take into account such matters as it thinks relevant and that a court must take into account a list of specified factors:

- (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 either to accept or reject the terms of the contract ... in the form in which they were presented;
- (d) whether another party was given an effective opportunity to negotiate the terms of the contract ...;
- (e) whether the terms of the contract ... take into account the specific characteristics of another party or the particular transaction;
- (f) any other matter prescribed by the regulations.⁷

The phrase 'standard form contract' is usually understood to refer to a document prepared by a trader of goods or services and routinely used by the trader in all transactions. The significant feature of standard form contracts is that they are concluded without negotiation. It is commonly said that standard form contracts are contracts presented by a trader to consumers on a 'take it or leave it' basis.⁸ These ideas are apparent in the list of factors that a court is directed to take into account in determining whether a contract is a standard form contract under the UCTL.⁹

Under the ACL, 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'.¹⁰

The definition of a 'consumer contract' under the UCTL differs from the general definition of a 'consumer' under

the ACL.¹¹ The definition of a consumer contract under the UCTL looks to the actual purpose for which the goods, services or interest in land are acquired, not the ordinary purposes for which those of goods or services of that kind are acquired. By contrast, the general definition of a consumer under the ACL looks first to the price of the goods or services and then to whether the goods or services were of a 'kind ordinarily acquired for personal, domestic or household use or consumption'.¹²

THE SCOPE OF THE UCTL

The UCTL does not apply to terms that are 'required, or expressly permitted, by a law of the Commonwealth, a state or a territory' or that define 'the main subject matter of the contract' or set 'the upfront price payable under the contract'.¹³ The upfront price payable under a contract 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;
- but does not include any other consideration that is contingent on the occurrence or non-occurrence of a particular event'.¹⁴

The UCTL also does not apply to certain shipping contracts or to contracts that are constitutions of companies, managed investment schemes or other kinds of bodies.¹⁵ Section 15 >>



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of the *Insurance Contracts Act 1984* (Cth) has the effect that the UCTL will not apply to those terms that are regulated by that Act.

THE TEST OF AN UNFAIR TERM

The UCTL test for an unfair term consists of three elements. Under the UCTL a term will be 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'.¹⁶

Significant imbalance

The first element of the test for an unfair term considers whether the term 'would cause a significant imbalance in the parties' rights and obligations arising under the contract'.¹⁷ There are two matters to be considered: whether the term would cause an imbalance in the rights and obligations of the parties arising under the contract and whether that imbalance is significant.

Whether the term causes an imbalance in the parties' rights and obligations under the contract may be the most straightforward aspect of the test of an unfair term. As explained in *Director General of Fair Trading v First National Bank* [2002] 1 AC 481 by Lord Bingham, in respect of the UTCCR, an imbalance may be found in 'the granting to the trader of a beneficial option or discretion or power, or by the imposing on the consumer of a disadvantageous burden or risk or duty'.¹⁸

The UCTL requires an unfair term to cause a *significant* imbalance in the rights and obligations of the parties under the contract. Accordingly, having identified an imbalance in the rights and obligations of the parties arising under the contract, it must be considered whether that imbalance can be classed as 'significant'. In *Jetstar Airways Pty Ltd v Free Cavanough* [2008] VSC 539, J held that 'in my view, the context of the word "significant" in Part 2B of the FTA (Vic) shows that it means, principally at least, "significant in magnitude", or "sufficiently large to be important", being a meaning not too distant from "substantial"'.¹⁹

Not reasonably necessary

The second element of the test for an unfair term in a standard form consumer contract under the UCTL considers whether the term is 'not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term'.²⁰ The UCTL also provides that, for the purposes of this test, 'a term of a consumer contract is presumed not to be reasonably necessary in order to protect the legitimate interests of [the trader], unless that [trader] proves otherwise'.²¹ Thus, to defend a term that has been challenged as unfair a trader must bring evidence of how or why that term is reasonably necessary, or proportionate, to protect its legitimate interests.

There are two stages to the enquiry into whether a term is reasonably necessary in order to protect the legitimate interests of the trader. First, it must be shown that the term protects a legitimate interest of the trader. Typically, this requirement will be satisfied by showing that the term protects the trader from business risks inherent in the transaction, as opposed to being an opportunistic attempt to appropriate gains not contemplated as part of the original bargain. Second, it must be shown that the term is 'reasonably necessary' to protect the trader's legitimate interests. Typically, a term will be reasonably necessary to protect the legitimate interests of the trader only where the term represents a proportionate response to the risk it seeks to address.²²

Director of Consumer Affairs Victoria v Trainstation Health Clubs Pty Ltd (Civil Claims) [2008] VCAT 2092 concerned a broad termination clause in a contract for membership of a gym. The term allowed the club to terminate the contract with its members for any failure by the members to comply with the club's rules and regulations. Harbison J held that the term was not unfair under Part 2B of the FTA (Vic). The rules and regulations protected the consumer by providing a 'framework for the efficient and safe running' of the club.²³ By contrast, in *Director of Consumer Affairs Victoria v AAPT Ltd* [2006] VCAT 1493,²⁴ a term provided a right for the trader immediately to terminate the contract where the consumer had breached the contract or changed its address or contact details without notifying the trader. President Morris held that the term was unfair under Part 2B of the FTA (Vic), because it was one-sided and too broadly drawn. President Morris noted that:

'A customer may have breached the Agreement in a manner which is inconsequential, yet faces the prospect of having the service terminated. Further, if the customer changes his or her address (which will not necessarily be the address for the receipt of billing information), this will also provide a ground to AAPT to terminate the Agreement'.²⁵

Reliance

The third element of the test of an unfair term considers whether the term 'would cause detriment (whether financial or otherwise) to a consumer if it were to be applied or relied on'.²⁶ The UCTL also does not require a potentially unfair term to actually have been applied or relied on by a trader. It is sufficient if there would be detriment to a consumer if the term were to be invoked.

MATTERS RELEVANT IN DETERMINING WHETHER A TERM IS UNFAIR

The UCTL provides that in determining whether a term of a standard form consumer contract is unfair, a court may take into account 'such matters as it thinks relevant'²⁷ and 'must' take into account:

- (a) the extent to which the term is transparent;
- (b) the contract as a whole'.²⁸

These specified matters are not part of the threshold test for an unfair term, discussed above. They are, rather, merely

matters a court must take into account.

The UCTL provides that a term is transparent if it 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'.²⁹

The requirement of transparency supplements the substantive test of unfairness in the UCTL. Not only must a term in a standard form consumer contract be fair in substance, a fair term must be expressed and presented in a way that makes it accessible to consumers.³⁰

EXAMPLES OF THE KINDS OF TERMS THAT MAY BE UNFAIR

The UCTL sets out a list of 'examples of the kind of terms of a consumer contract that may be unfair'. The examples are expressed in general language and any particular term under review for fairness must still be assessed with regard to the tests specified in the UCTL.

The UCTL provides:

'(1) Without limiting s24, the following are examples of the kinds of terms of a consumer contract that may be unfair:

- (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 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;
- (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, or a term that has an effect of a kind, prescribed by the regulations.'³¹

Consumer Affairs Victoria found that complaints about unfair terms commonly concerned 'unilateral variation terms, terms that limit the liability of the trader and terms that impose penalties'.³² These types of terms may fall into the examples of the kinds of terms that may be unfair and also easily satisfy the test of an unfair term. Indeed, many exclusion clauses will not merely be vulnerable to being challenged under the UCTL, but will also already be void as purporting to exclude or limit liability in respect of the consumer guarantees in the ACL³³ or the terms implied under the ASIC Act.³⁴

A unilateral variation clause that allows the trader to change the subject matter, price or terms of a contract may clearly result in a significant imbalance under the contract to the detriment of consumers. Such a term may also not be regarded as necessary to protect the legitimate interests of the trader if they go so far as allowing the trader to make any changes it wants in any circumstances.³⁵ Variation clauses are more likely to be viewed as fair if the discretion granted by such a clause is in some way constrained. >>



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A valid unilateral variation clause might, for example, specify the circumstances under which the terms may be varied, qualify the types of variations that may be made, provide realistic opportunities for consumers to become aware of the variations and, in some cases, allow consumers to exit the contract if they object to the variations made by the trader.³⁶

Agreed damages clauses that impose a penalty on consumers for breach of a standard form contract may be invalid under the common law rules against penalties³⁷ and also be vulnerable to challenge as an unfair term. A clause stipulating a sum payable on breach will be a penalty where the sum is 'extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach'³⁸ rather than 'a genuine pre-estimate of the damage likely to be caused by the breach'.³⁹ The fairness of a term is similarly likely to depend on whether the sum payable represents a reasonable pre-estimate of the losses to the seller resulting from breach.⁴⁰

EFFECT OF A TERM BEING UNFAIR

The effect of a term in a standard form consumer contract being unfair is that it is void.⁴¹ Where an unfair term is void, the 'contract continues to bind the parties if it is capable of operating without the unfair term'.⁴²

A consumer may rely on the term being void as unfair under the UCTL as a defence in an action to enforce the

term. A consumer or a regulator may take pre-emptive action against an unfair term by seeking a declaration that a term in a standard form consumer contract is unfair and therefore void.⁴³ Once a term in a consumer contract is declared unfair, the term is void. There are a range of remedies potentially available to regulators and consumers in response to the use of that term by traders. These remedies are:

- injunctions;⁴⁴
- compensation orders;⁴⁵ and
- compensation orders for non-parties.⁴⁶

CONCLUSION

The UCTL is broad-ranging in its scope and effect. All standard form contracts used by traders in their dealings with consumers should be reviewed for fairness. Lawyers representing consumers should be alert to the possibility of challenging the terms of standard form contracts not merely for procedural impropriety, such as misleading conduct, but also on the basis of the substantive fairness of the terms of such contracts. ■

Notes: 1 The ACL is contained in Schedule 2 of the *Competition and Consumer Act 2010* (Cth), the new name for the *Trade Practices Act 1974* (Cth) (TPA). The Australian Consumer Law contains provisions based on the TPA dealing with consumer protection and new provisions aimed at improving consumer protection in Australia. 2 CCA s130 provides that the 'Australian Consumer Law' means Schedule 2 as applied under Subdivision A





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of Division 2 of Part XI. **3** Under the CCA s131A, the ACL does not apply to contracts that are financial products or contracts for the supply or possible supply of services that are financial services.

4 SI 1999/2083. **5** ACL s23(1)(b); ASIC Act s12BF(1)(b).

6 ACL s27(1); ASIC Act s12BK(1). See also UTCCR reg 5(4).

7 ACL s27(2); ASIC Act s12BK(2). **8** *A Schroeder Music Publishing Co Ltd v Macaulay* [1974] 3 All ER 616, 624 (Lord Diplock)

(*'Schroeder Music Publishing'*); *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] QB 284, 297, 302 (Lord Denning MR) (*'George Mitchell'*); P S Atiyah, *An Introduction to the Law of Contract* (5th ed, Clarendon Press, Oxford, 1995) pp16-17; Todd Rakoff, 'Contracts of Adhesion: An Essay in Reconstruction' (1983) 96 *Harvard Law Review* 1173. **9** ACL s 27(2); ASIC Act s12BK(2).

10 ACL s23(3). See similarly ASIC Act s12BF(3). **11** A different concept of consumer applies for the purposes of the prohibition on unconscionable conduct under Part 2-2 of the ACL. **12** ACL s3(1).

A different definition of consumer also applies to the prohibition on unconscionable conduct under the ACL pt 2-2 based on whether the goods and services were 'of a kind ordinarily acquired for personal, domestic or household use or consumption': ACL s21(5).

13 ACL s26(1); ASIC Act s12BI(1). **14** ACL s26(2); ASIC Act s12BI(2). **15** ACL s28; ASIC Act s12BL. **16** ACL s24(1); ASIC s12BG(1). **17** ACL s24(1)(a); ASIC s12BG(1)(a). **18** At [17].

19 At [155]. **20** ACL s24(1)(b); ASIC s12BG(1)(b). **21** ACL s24(4); ASIC s12BG(4). **22** See *Director of Consumer Affairs Victoria v AAPT Ltd* [2006] VCAT 1493 (Unreported, Morris P, 2 August 2006) [50]; *Director of Consumer Affairs Victoria v Trainstation Health Clubs Pty Ltd* [2008] VCAT 2092 (Unreported, Harbison V-P, 24 October 2004) [175]; *Director of Consumer Affairs Victoria v Backloads.com Pty Ltd* [2009] VCAT 754 (Unreported, Harbison V-P, 11 May 2009) [248]-[250]. **23** *Ibid*, at [174]. **24** [2006] VCAT 1493.

25 [2006] VCAT 1493, [53] **26** ACL s24(1)(c); ASIC s12BG(1)(c).

27 ACL s24(2); ASIC Act s12BG(2). **28** ACL s24(2); ASIC Act s12BG(2). **29** ACL s24(3); ASIC Act s12BG(3). **30** The relationship between substantive fairness and transparency is discussed

further in 'The Australian Unfair Terms Law: The Rise of Substantive Unfairness as a Ground for Review of Standard Form Consumer Contracts' (2009) 33 *Melbourne University Review* 934-56. **31** ACL s25(1); ASIC Act s12BH. **32** Consumer Affairs Victoria, *Preventing Unfair Terms in Consumer Contracts* (2007) 9. Also Consumer Affairs Victoria, *Preventing Unfair Terms in Health and Fitness Centre Membership Agreements* (2011). **33** ACL s64. **34** ASIC Act s12EB. **35** See, for example, *Director of Consumer Affairs Victoria v AAPT Ltd* [2006] VCAT 1493 (Unreported, Morris P, 2 August 2006) [50]. **36** Australian Competition and Consumer Commission, *A Guide to the Unfair Contract Terms Law* (2010) p20; Office of Fair Trading (UK), *Unfair Contract Terms Guidance: Guidance for the Unfair Terms in Consumer Contracts Regulations* (2008) [10.3]. **37** *Ringrow Pty Ltd v BP Australia Pty Ltd* (2005) 224 CLR 656, 662 (Gleeson CJ, Gummow, Kirby, Hayne, Callinan and Heydon JJ). See also *Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd* [1915] AC 79, 86 (Lord Dunedin).

38 *Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd* [1915] AC 79, 87 (Lord Dunedin), quoted in *Ringrow Pty Ltd v BP Australia Pty Ltd* (2005) 224 CLR 656, 662 (Gleeson CJ, Gummow, Kirby, Hayne, Callinan and Heydon JJ). **39** *Ringrow Pty Ltd v BP Australia Pty Ltd* (2005) 224 CLR 656, 662 (Gleeson CJ, Gummow, Kirby, Hayne, Callinan and Heydon JJ). See also *Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd* [1915] AC 79, 86 (Lord Dunedin). **40** Elizabeth MacDonald, *Exemption Clauses and Unfair Terms* (Tottel Publishing, 2006) p262. **41** ACL s23(1); ASIC Act s12BF(1). **42** ACL s23(2); ASIC Act s12BF(2). **43** ACL s250(1); ASIC Act s12GND(1). **44** ACL Part 5-2, Division 2; ASIC Act s 12GD.

45 ACL Part 5-2, Division 4, Subdivision A; ASIC Act s12GM.

46 ACL Part 5-2, Division 4, Subdivision B; ASIC Act s12 GNB.

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