

## Session: Teaching Period Two

| <u>Course</u> |      | <u>Title</u>               | <u>Attempted</u> | <u>Passed</u> | <u>Mark</u> | <u>Grade</u> |
|---------------|------|----------------------------|------------------|---------------|-------------|--------------|
| LAWS          | 3135 | Land Dealings              | 6.00             | 6.00          | 85          | HD           |
| LAWS          | 3147 | Elements of Income Tax Law | 6.00             | 6.00          | 83          | DN           |
| LAWS          | 3173 | Unfair Contracts           | 6.00             | 6.00          | 88          | HD           |

## UNFAIR CONTRACT TERMS LAW (UCTL)

### Threshold requirements

#### Consumer contract?

##### **Section 23 – Unfair terms of [consumer](#) contracts**

(3) 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.

#### Standard form contract?

##### **Section 23 – Unfair terms of [consumer](#) contracts**

(1) A term of a [consumer](#) contract is void if:

- (a) the term is unfair; and
- (b) the contract is a standard form contract.

##### **Section 27 – Standard form contracts**

- (1) If a [party](#) to a proceeding alleges that a contract is a standard form contract, it is presumed to be a standard form contract unless another [party](#) to the proceeding proves otherwise.
- (2) In determining whether a contract is a standard form contract, a court may take into account such matters as it thinks relevant, but must take into account the following:
  - (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; → *prepared by one party to the contract*
  - (c) whether another [party](#) was, in effect, [required](#) either to accept or reject the terms of the contract (other than the terms referred to in [section 26\(1\)](#)) in the form in which they were presented; → *offered on a 'take it or leave it basis'*
  - (d) whether another [party](#) was given an effective opportunity to negotiate the terms of the contract that were not the terms referred to in [section 26\(1\)](#); → *not subject to negotiation between the parties*
  - (e) whether the terms of the contract (other than the terms referred to in [section 26\(1\)](#)) take into account the specific characteristics of another [party](#) or the particular transaction;
  - (f) any other matter prescribed by the regulations.

### Exemptions

#### Exempt consumer contracts

##### **Section 28 – Contracts to which this Part does not [apply](#)**

- (1) This Part does not [apply](#) to:
  - (a) a contract of marine salvage or towage; or
  - (b) a charterparty of a ship; or
  - (c) a contract for the carriage of [goods](#) by ship.
- (2) Without limiting subsection (1)(c), the reference in that subsection to a contract for the carriage of [goods](#) by ship includes a reference to any contract covered by a sea carriage [document](#) within the meaning of the amended Hague Rules referred to in [section 7\(1\)](#) of the *Carriage of Goods by Sea Act 1991*.
- (3) This Part does not [apply](#) to a contract that is the constitution (within the meaning of [section 9](#) of the *Corporations Act 2001*) of a company, managed investment scheme or other kind of [body](#).

#### Core terms

##### **Section 26 – Terms that define main subject matter of [consumer](#) contracts etc. are unaffected**

- (1) Section 23 does not [apply](#) to a term of a [consumer](#) contract to the extent, but only to the extent, that the term:
  - (a) defines the main subject matter of the contract;
  - (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](#).
- (2) The **upfront price** payable under a [consumer](#) 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.

**(a) Main subject matter of the contract**

- Includes goods or services acquired (e.g. cannot allege term unfair because changed mind about purchase)
- Includes term necessary to give effect to the supply such as delivery by post
- **Director of Consumer Affairs Victoria v Craig Langley**
  - Terms defining main subject matter will invariably be the subject of genuine negotiation and so are excluded from the UCTL

**(b) Upfront price payable**

- The amount the consumer agrees to pay for the acquisition
  - Includes cash price, future payment, future instalments
  - Would not include fees or charges levied as a consequence of something happening during contract
- Must have been disclosed before the contract was entered into

## Unfair term

Section 25 provides guidance as to what terms *may* be unfair (i.e. still need to apply section 24 test)

**Section 23 – Unfair terms of [consumer](#) contracts**

- (1) A term of a [consumer](#) contract is void if:
- (a) the term is unfair; and
  - (b) the contract is a standard form contract.

**Section 25 – Examples of unfair terms**

- (1) Without limiting section 24, 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; → **Exclusion clause, AAPT case – variation of agreement clause**
  - (b) a term that permits, or has the effect of permitting, one [party](#) (but not another [party](#)) to terminate the contract; → **AAPT case - immediate termination clause**
  - (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; → **Penalty for trivial breaches, arbitrary penalty with no reasonable relationship to loss likely to be suffered by the business, penalty for termination by consumer because business has not complied with its obligations**
  - (d) a term that permits, or has the effect of permitting, one [party](#) (but not another [party](#)) to [vary](#) the terms of the contract; → **Director of Consumer Affairs Victoria v Trainstation Health Clubs – term allowing club to unilaterally change location with 12 km of original location was unfair; term less likely to be unfair if drawn to consumer's attention, unilateral change for a legitimate interest, and consumer can cancel if change is detrimental, ACCC v Bytedcard – unilateral variation of price**
  - (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; → **less likely to be unfair if consumers are genuinely free to end the contract if they do not agree to the variation**
  - (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; → **AAPT case – clause allowing AAPT to vary Supplier, or products, or charges**
  - (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; → **Director of Consumer Affairs Victoria v Backloads.com –**

*term allowing removalist company to assign rights to Contractor was unfair because it created uncertainty as the 'Contractor' was not a party to the removalist services contract*

(k) a term that limits, or has the effect of limiting, one [party's](#) right to sue another [party](#); → *Term requiring consumer to bring legal proceedings in a foreign court may be unfair*

(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.

(2) Before the Governor-General makes a regulation for the purposes of subsection (1)(n) prescribing a kind of term, or a kind of effect that a term has, the Minister must take into consideration:

(a) the detriment that a term of that kind would cause to [consumers](#); and

(b) the impact on [business](#) generally of prescribing that kind of term or effect; and (c) the public interest.

#### **Section 24 – Meaning of unfair – 3-limbed test**

(1) A term of a [consumer](#) contract 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.

(2) In determining whether a term of a [consumer](#) contract is unfair under subsection (1), a court may take into account such matters as it thinks relevant, but must take into account the following:

(a) the extent to which the term is transparent;

(b) the contract as a whole.

(3) 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.

(4) For the purposes of subsection (1)(b), 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](#) proves otherwise.

#### **(a) Significant imbalance**

- Requires factual assessment of evidence

- Proven on the balance of probabilities

- Can mean 'substantial', covers spectrum from 'not trivial' to 'appreciable' and 'important' (Jetstar)

#### **(b) Not reasonably necessary to protect legitimate interest**

- Section 24(4) – onus is on party advantaged by term to prove it is reasonably necessary

- Evidence might relate to business's costs, structure, mitigation of risks

▪ Term may not be reasonably necessary to protect a valid legitimate interest if too broad (AAPT)

- Legitimate interest that contract be flexible because a reseller BUT variation of 'any term' too broad

#### **(c) Detriment**

- Section 24(1)(c) – not limited to financial detriment (e.g. delay, distress)

▪ Loss of internet services (ACCC v Bytecard)

#### **Transparent**

- Relevant factor, not sufficient to render term unfair on its own

#### **- Abbey's Case**

▪ UTCCR uses 'plain and intelligible language' rather than 'transparent'

▪ Despite difference case provides some guidance

▪ 'Requires not only the actual wording of individual clauses or conditions be comprehensible to consumers, but that the typical consumer can understand how the term affects the rights and obligations that he and the seller or supplier have under the contract'

#### **Contract as a whole**

- Unfair term may be counterbalanced by terms advantaging consumer elsewhere in the contract (Jetstar)

▪ Favourable terms to the consumer will not counterbalance if it is unlikely that the consumer is aware of them

## Case law: unfair terms

### Director of Consumer Affairs v AAPT

- Facts: AAPT was a provider of mobile phone services to consumers
- Held: Various clauses were unfair terms

#### (1) Consumer contract?

- Terms of the agreement reflected that the supply of mobile phone services was for personal use

#### (2) Unfair terms?

- Clause 1.3 – variations to agreement
  - ‘We may vary any term of this Agreement at any time in writing’
  - Example of section 25(1)(a) term – permitting one party to avoid or limit performance of the contract
  - AAPT tried to argue it was commercially necessary because it was a reseller of mobile services
  - Term was unjustifiably broad
- Clause 1.3 – variations to mobile service
  - ‘AAPT may change a Supplier or its products, or vary out charges from time to time without notice to you’
  - Term was too broad
- Clause 3.10 – suspension of service
  - ‘If we suspend or terminate the Services for unpaid charges or any other reason, subsequent reconnection may incur a reconnection fee’
  - Unfair because can charge for circumstances that do not involve customer’s breach
- Clause 9.2 – suspension of service
  - ‘Notwithstanding any suspension of the Services under this clause you shall remain liable for all charges due hereunder throughout the period of suspension ... unless we in our sole discretion determine otherwise’
  - Unfair because service may be suspended by 3<sup>rd</sup> parties, in which case AAPT not out of pocket, but customer charged anyway
- Clause 10 – immediate termination
  - ‘We may terminate this Agreement immediately by notice to you if ... you change your address’
  - Unfair because extremely one-sided
- AAPT’s defence – implied duty of good faith
  - Contract subject to implied duty of good faith, hence, the terms could not be unfair because AAPT had to act fairly in exercising contractual terms
  - No implied term of good faith
- Relief
  - No relief awarded because new terms and conditions introduced which applied to all existing consumers and gave consumers the benefit of the terms retrospectively

### Jetstar Airway v Free

- Facts: Free purchased two return tickets of \$437 per person, sought to change name, charged change fee of \$75 and difference between original and current ticket price of \$600
- Held: Term imposing charges not unfair
  - ‘Significant’ can mean substantial and covers a spectrum ranging from not trivial through to appreciable and important
  - Must look at term in context of the whole contract
  - Charges counterbalanced by the fact that the original fare was a special fare at a much cheaper price

### ACCC v Bytecard

- Facts: Bytecard was an internet service provider
- Held: Various clauses were unfair terms
- Unfair terms were:
  - Unilateral variation of price
  - Indemnification of Bytecard even where customer not at fault
  - Unilateral termination at any time with or without cause or reason
    - Detriment due to sudden loss of important internet services