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EDITORIAL 69

ARTICLES

Dealing with unfair terms in consumer contracts: Is Australia falling behind? – *Frank Zumbo*

As the modern corporation has grown in size and power so has its use of standard form contracts in consumer transactions. While defended by the modern corporation on economic efficiency grounds such as reducing transaction costs, these standard form contracts are not drafted for the ultimate benefit of the consumer. While standard form contracts may spare the parties the cost and time of drafting contracts for each and every consumer purchase or borrowing, that saving comes at a price. For the consumer it means a loss of control over the contents of the contract. Given that a standard form contract is drafted on the corporation's behalf, there can be little doubt that its contents will always tend to favour the corporation. Equally certain is that in the absence of any check on the corporation there is nothing stopping it from having the contract drafted in a way that goes beyond what is reasonably necessary to protect its legitimate commercial interests. Indeed, without an effective mechanism for dealing with unfair terms, consumers have no choice but to sign standard form contracts no matter how one-sided or unfair they may be in their operation. Statutory prohibitions against unconscionable conduct are of little use, as they are difficult to enforce and deal only with individual examples of offending conduct. Significantly, a finding of unconscionable conduct in one relationship may not necessarily promote better conduct in another relationship. What is needed is a new statutory framework giving the relevant government consumer protection agency broader powers to proactively deal with unfair terms in consumer contracts. With such a statutory framework having been implemented in the United Kingdom several years ago, and more recently adopted in Victoria, the article addresses both the operation of the relevant legislation and the clear benefits to consumers from having such new legislation. In doing so, the article argues that by refraining from enacting such new legislation other Australian jurisdictions are falling behind in this increasingly important area of consumer protection. 70

Quantitative analysis again up in lights – *Alexandra Merrett*

AGL v ACCC was an intriguing case for many reasons, not least due to its focus upon quantitative analysis. While initially many were sceptical as to its utility (and admissibility), quantitative analysis has increasingly been accepted as a critical tool for competition investigations. In Australia, however, courts have demonstrated a lack of willingness to engage with detailed and often complex economic evidence. In *AGL v ACCC*, the ACCC presented extremely sophisticated quantitative analysis to the Federal

Court, but while this evidence was more thoroughly considered than has previously been the case, it was resoundingly rejected in favour of "commercial reality". The value of quantitative analysis was accordingly called into question again. Nonetheless, the ACCC's reliance on such evidence creates an interesting precedent for those seeking to parley with the regulator. It also provides further basis for the view that the ACCC and the courts are increasingly diverging in their approach to competition law. 90

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