

TRADE PRACTICES LAW JOURNAL

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EDITORIAL 73

ARTICLES

The baffling intruder: Section 82(1B) of the Trade Practices Act – Part I – Danielle Gatehouse

Section 82(1B) was introduced into the *Trade Practices Act 1974* (Cth) in July 2004 by the *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004* (Cth). The amendment introduced previously irrelevant concepts into misleading or deceptive conduct jurisprudence such as “reasonable care”, “intent”, and “fraud”. In two parts, this article will explore the reasons and aims of this change, its elements and possible application, and comment on the suitability of these changes to the goals of s 52 and of the *Trade Practices Act* itself. This article does not provide a definitive answer to the interpretation of s 82(1B); indeed this section has introduced complexities into this area of law that will require much High Court guidance. However, the article suggests that, on its proper interpretation, the impact of s 82(1B) could be very minimal. If this is correct, it is submitted that this is because the amendment reveals an inherent misunderstanding of the history and rationale of s 52 and the *Trade Practices Act*, and the conduct it was brought in to address.

74

Promoting fairer consumer contracts: Lessons from the United Kingdom and Victoria – Frank Zumbo

As jurisdictions around Australia move towards implementing a uniform legislative framework for dealing with unfair terms in consumer contracts, the United Kingdom and Victoria have not only implemented such a framework, but consumers in those jurisdictions are already benefiting from its operation. Significantly, it is the involvement of the relevant regulatory agency in those jurisdictions that has maximised the benefits for consumers. In contrast to the existing concepts of unconscionability where the impact of any successful litigation is essentially restricted to individual consumers or contractual arrangements affected by the conduct, the United Kingdom and Victorian frameworks dealing with unfair terms in consumer contracts allow the relevant regulatory agency in the jurisdiction to secure fairer consumer contracts across a whole industry. Indeed, where a term is considered to be unfair under such frameworks, the regulatory agency can seek to prevent the term’s continued use across all consumer contracts in which the term is found. In this regard, these frameworks operate quite effectively to prevent the industry-wide use of an unfair term without the need for each and every consumer to individually challenge each use of the particular term. Within this context, this article will assess the experiences of the United Kingdom and Victoria with their frameworks for dealing with unfair contract terms, and identify the key factors contributing to the effectiveness of those frameworks.

84

ACCESS TO SERVICES

Sydney Airport Corp Ltd v ACT: Are we coming or going? – <i>Liana Crowne</i>	96
---	----

CONSUMER PROTECTION

Of Butcher and Brokers: The liability of agents passing on misleading information – <i>Bernard McCabe</i>	103
--	-----

CASE NOTES

Is all fair in your Victorian consumer contract? – <i>Mandy Bodger</i> and <i>Anthony Haly</i>	106
--	-----

Damages for misleading or deceptive conduct: Principles of assessment – <i>Warren Pengilley</i>	109
--	-----

COUNCIL CONSIDERATIONS – <i>David Owens</i>	113
---	-----

SNAPSHOTS – <i>Damien O’Brien</i> and <i>Douglas Shirrefs</i>	119
---	-----

REPORT FROM EUROPE

New guidelines on the method of setting fines – <i>Sonja Eibl</i>	123
--	-----

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