



MONASH University
Law



Presented by Justin Malbon

Centre for Regulatory Studies

Unfair terms

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Introduction

- Very broadly, what the Productivity Commission found and recommended, particularly in relation to unfair contract terms;
- And will the new law deal with unfairness issues

Commission's terms of reference

- **1. the need to ensure that consumers and businesses, including small businesses, are not burdened by unnecessary regulation or complexity;**
- **2. the need for consumer policy to be based on evidence;**
- **3. the importance of promoting certainty and consistency for businesses and consumers in the operation of Australia's consumer protection laws.**

Overarching objective of consumer law

- **The overarching objective should be to improve consumer wellbeing by fostering effective competition and enabling the confident participation of consumers in markets in which both consumers and suppliers can trade fairly and in good faith.**

When is there an unfair term?

- **the extent of consumer detriment (realised or likely);**
- **the degree to which the contract term reduced transactions costs in its current (and proposed) forms;**
- **any effects (adverse or favourable) on risk allocation and prices; and**
- **whether voiding (or changing) terms for groups of affected consumers could encourage inappropriate behaviour by some consumers to the ultimate detriment of consumers as a whole.**

Consumer Affairs Ministers agreement

- **significant imbalance in the parties' rights and obligations arising under the contract;**
- **a remedy could only be applied where the claimant shows detriment, or a substantial likelihood of detriment, to the consumer (individually or as a class). Detriment is not limited to financial detriment.**
- **It would require all the circumstances of the contract to be considered, taking into account the broader interests of consumers, as well as the particular consumers affected.**

Examples unfair terms

- **The Customer agrees that it is fair and reasonable for the Company to limit and exclude its liability as set out in Part 4, which specifies the entire liability of the Company including liability for negligence.**
- **Purchase of this ticket signifies agreement to the following ... Right to admission is reserved.**

examples

- **... the Seller and this contract shall be subject to any conditions which the Company may from time to time attach to the supply of the vehicle and the accessories to the Seller.**
- **Sky may at any time vary or add to these Conditions as it deems necessary.**

examples

- **The company reserves the right to vary design and/or specification of any installation and/or product used without prior notice to the customer.**