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UNFAIR TERMS IN 'CLICKWRAP' AND OTHER ELECTRONIC CONTRACTS

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This is an author version of an article which was first published in June 2007 in volume 35 of the *Australian Business Law Review* at page 152.

Clickwrap and other electronic contracts are in widespread use in markets for computer software and for many online services. When confronted by a lengthy and incomprehensible contract, the response of many, if not most, consumers is to click "yes" – without reading the contract or giving it careful consideration. We have moved away from the traditional model of negotiated agreement on terms to the unilateral imposition by suppliers of terms, many of which are unfair. This article considers the failure of existing commonwealth and state laws to deal with the problem and concludes that legislative intervention is necessary to protect consumers.

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The authors would like to thank Judith McNamara and the anonymous referee for their helpful comments and suggestions. This research has been supported by a grant from the Australian Research Council.

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I INTRODUCTION

This article argues that current legal doctrines are inadequate to protect consumers in relation to unfair terms in 'clickwrap' and other electronic contracts.

The question of whether unfair terms in consumer contracts should be regulated is a topical one. The Productivity Commission is considering whether there is a need for specific national legislation to regulate unfair terms as a part of its current *Review of Australia's Consumer Policy Framework*. The terms of reference of that review make clear that one of the government's key concerns is 'the need for consumer policy to be based on evidence from the operation of consumer product markets, including the behaviour of market participants'¹ rather than theoretical models based on unrealistic assumptions about consumer behaviour.

As regards the scope of the inquiry, the Productivity Commission is to report on:

ways to improve the consumer policy framework so as to assist and empower consumers, including disadvantaged and vulnerable consumers, to meet current and future challenges, including the information and other challenges posed by an increasing variety of more complex product offerings and methods of transacting.² (Emphasis added)

Many of those who resist the need for regulation in this area do so in reliance upon advocates of the Chicago School of Economics. According to Chicago School views,³ consumers are rational maximisers of their satisfaction. They have well-defined preferences and make decisions to maximise those preferences. If consumers are dissatisfied with the quality of a product relative to its price, or the terms on which a particular product is offered, they will discipline producers by ceasing to purchase the product.⁴ Posner does not accept that standard form contracts (such as clickwrap contracts) disadvantage consumers, asserting that

the purchaser who is offered a printed contract on a take-it-or-leave-it basis does have a real choice: he can refuse to sign, knowing that if better terms are possible another seller will offer them to him.⁵

¹ Productivity Commission Issues Paper, *Consumer Policy Framework* (Productivity Commission) at p 3, <http://www.pc.gov.au/inquiry/consumer/issuespaper/consumer.pdf> viewed 3 April 2007.

² Ibid p 4.

³ See, e.g., Friedman M and R, *Free to Choose* (Penguin Books, Harmondsworth, 1980), Ch 7.

⁴ Posner R, "Rational Choice, Behavioural Economics, and the Law", (1998) 50 *Stanford Law Review* 1551; Posner R, "The Federal Trade Commission", (1969) 37 *University of Chicago Law Review* 47

⁵ Posner R, *Economic Analysis of Law* (Little Brown, Boston, 1977), p 85.

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Behavioural economists, on the other hand, challenge this underlying assumption. They start from the premise that there are limits to rationality.⁶ They are sceptical about the ability of certain categories of consumers to make decisions in their best interest and believe that regulation may be necessary to protect them.⁷

The Productivity Commission in its inquiry will need to consider whether the underlying assumption of the Chicago School is valid in relation to electronic contracts and reflects the observed behaviour of market participants.

There is no clear evidence that consumers faced with unfair terms in electronic contracts cease buying the product; on the contrary, there is evidence that consumers enter into such agreements without reading or comprehending their terms, and that, in some cases, there are no practical alternative software products to turn to if they reject the unfair terms.⁸

The Productivity Commission will also need to consider whether software end-users fall into the category of disadvantaged and vulnerable consumers. A broad definition of consumers falling into this group is those who are incapable of making a judgment about what is in their best interests.⁹ One obvious group traditionally acknowledged by courts as falling into this category is those suffering from some kind of constitutional weakness such as age, infirmity, ill health or some educational or language difficulty affecting their ability to comprehend the contract.¹⁰ However, in relation to certain categories of contract, such as those involving technically sophisticated software products, a much larger group of consumers could be considered to be 'disadvantaged and vulnerable' because of their inability to make an independent judgment as to what is in their best interests.

The Productivity Commission will also need to consider the problems posed by consumers having too little information about the use of Digital Rights Management (DRM) in relation to some software. There is also the problem of the form in which the information is presented. In many cases it does not lend itself to ease of comprehension.

Finally, the Productivity Commission will need to consider the methods used to sell software products, such as on-line purchase, e-commerce, shrinkwrap and clickwrap licences. These methods of sale raise inherent issues of fairness, and undermine the traditional notion of a contract being a freely negotiated bargain between the parties.

⁶ See Jolls C et al., "A Behavioural Approach to Law and Economics", (1998) 50 *Stanford Law Review* 1471, at 1545

⁷ Camerer C et al., "Regulation for Conservatives: Behavioural Economics and the Case for 'Asymmetric Paternalism'" (2003) 151 *University of Pennsylvania Law Review* 1211

⁸ E.g. for most consumers, there are no practical alternatives to the Microsoft Windows operating system. Despite the availability of competing products, the switching costs involved would be prohibitive for most consumers.

⁹ See e.g. Brennan J in *Louth v Diprose* (1992) 175 CLR 621, 626: 'The jurisdiction of equity to set aside gifts procured by unconscionable conduct ordinarily arises from the concatenation of three factors: a relationship between the parties which, to the knowledge of the donee, places the donor at a special disadvantage vis-à-vis the donee; the donee's unconscientious exploitation of the donor's disadvantage; and the consequent overbearing of the will of the donor whereby the donor is unable to make a worthwhile judgment as to what is in his or her best interest.;

¹⁰ *Blomley v Ryan* (1956) 99 CLR 362, 405 (per Fullagan J), 415 (Kitto J); *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447, 462 (Mason J), 474-5 (Deane J); *Louth v Diprose* (1992) 175 CLR 621, 626.

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While in this article we will take no position on the need for national legislation governing unfair terms in contracts generally,¹¹ we believe that a strong case can be made for the regulation of unfair terms in electronic contracts. Many of the factors we identify as supporting such regulation would also apply in the case of standard-form contracts generally, whether formed electronically or otherwise.

Many situations involving electronic contracts raise other issues of consumer protection law, including misleading or deceptive conduct¹² and implied terms;¹³ however, those areas of law will not protect consumers against unfair terms in electronic contracts per se, and this article will not address them.

In Part II we describe the nature of clickwrap and other forms of electronic contracts. In Part III we consider the failure of existing legal doctrines to protect consumers against unfair terms in electronic contracts. In Part IV we analyse a number of unfair terms of the more egregious type found in electronic contracts. Part V suggests that legislation is necessary to solve the problem.

II DEFINITIONS

At the outset, some definitions are necessary: what is 'clickwrap', and what is an 'electronic contract'? To answer these questions, we must digress briefly into the history of software licensing methods.

A *Shrinkwrap*

Software vendors in the early 1980's were constrained to deliver their products in physical form – i.e. on a computer disk, usually in a cardboard box along with manuals and other paperwork. Typically, the 'other paperwork' would include a printed licence agreement, which provided that opening the sealed (shrink-wrapped) package containing the computer disks signified the user's assent to the terms of the licence. Mark Lemley writes that

the theory of the shrinkwrap license is that the user manifests assent to [the license] terms by engaging in a particular course of conduct that the license specifies constitutes acceptance.¹⁴

As technology evolved and allowed the sale and delivery of computer software electronically (ie over the Internet), software vendors required a new licensing model that was not dependent on a physical licence agreement and a physical manifestation of the user's assent.

Because of this need, and probably also because every US court before 1996 to consider the validity of a shrink-wrap licence held it to be unenforceable,¹⁵ 'clickwrap' licences emerged and have largely replaced shrinkwrap licences.¹⁶

¹¹ For a consideration of the issues see the Discussion Paper of the Standing Committee of Officials of Consumer Affairs Unfair Contract Terms Working Party, *Unfair Contract Terms*, (January 2004) available at: <http://tinyurl.com/29clmz>

¹² TPA, ss 52, 53.

¹³ Such as fitness for purpose, merchantable quality, and due care and skill: TPA, Part V Division 2.

¹⁴ Lemley MA, "Terms of Use" (2006) 91 *Minnesota Law Review* 459, 467.

¹⁵ Lemley, n 14 at 468.

¹⁶ Although, in the case of retail software sold in physical form, both forms of licensing can be and sometimes are used.

B Clickwrap

In a 'clickwrap' licence, the terms of the licence are presented to the user electronically, and the user agrees to the terms of the licence by clicking on a button or ticking a box labelled 'I agree' or by some other electronic action. In some cases, the user must scroll to the bottom of the licence, having in theory read the license while so doing, before the software permits them to manifest their assent, but these cases are the exception rather than the rule.

Because the user has 'signed' a clickwrap licence by clicking 'I agree', every US court considering the issue has held them to be enforceable.¹⁷ Issues of contract formation are discussed in Part III of this article, but for the purposes of Part V, we assume that the contracts discussed are validly formed.

The most common form of clickwrap licence is the 'End User License Agreement' (EULA). As the name suggests, an EULA is an agreement of a contractual nature between a software licensor and an end-user regulating the use of the software by the end-user. An EULA confers on the end-user the right to use the software on the payment of a fee and the observance of other terms.

An EULA is typically presented to the user as part of the installation process of the software. The user must signify their assent (in the prescribed manner) to the terms of the EULA before the software can be installed. Clickwrap contracts are ubiquitous in markets for software and digitally distributed copyright content (such as music and movies), and are increasingly used to set terms for access to services such as everyday websites.

While clickwrap licences have become commonplace, their use is not without controversy. By their very nature, they are presented on a 'take it or leave it' basis, with no opportunity for the negotiation of terms. In the case of software already purchased by the customer, they may have little choice but to accept whatever terms are presented to them. Many retail outlets will refuse to give a refund for software if the packaging has been opened, notwithstanding representations in the EULA to the effect that if the consumer declines to agree to the terms of the EULA, the consumer may return the software to the place of purchase for a full refund. Major software vendors have been sued in the US over this very issue.¹⁸

The issue of unfair terms in relation to software EULAs is one of long-standing. In 1998 the Trade Practices Commission (TPC), the predecessor of the Australian Competition and Consumer Commission (ACCC), conducted an extensive investigation into the terms of software licences in Australia. Following its investigation the TPC wrote to some 2200 importers, producers, wholesalers and retailers of software expressing its concern that many software EULAs contained terms which placed their suppliers at risk of contravening the *Trade Practices Act 1974* (Cth) (TPA).

According to the TPC, the EULAs examined by it contained clauses which purported to restrict, modify or exclude the conditions and warranties implied into consumer transactions by Pt V, Div 2 of the TPA. Any attempt to do so is void, although liability can be limited in certain circumstances. Furthermore, such an attempt may place a supplier at risk of contravening ss 52 and 53(g) of the TPA.

¹⁷ Ibid 466.

¹⁸ FN ref <http://www.gripe2ed.com/scoop/story/2004/12/20/8257/4850>

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Although these issues are outside the scope of this article, the authors have analysed many EULAs and other electronic contracts while writing this article, and observe that many EULAs in use today give rise to the same issues as those identified by the TPC in 1998.

C Browsewrap

The most recent evolution of the '-wrap' genus is the 'browsewrap' licence, where the operator of a website purports to make all use of that website subject to a 'terms and conditions' agreement, where the terms of that agreement are never actually presented to the website user, and the user is said to assent by merely using the website.

For the purposes of this article, we define 'electronic contracts' as including clickwrap, browsewrap, and any other method whereby the terms of a contract are presented and purportedly assented to electronically.

III ISSUES OF CONTRACT FORMATION

Before discussing the enforceability of terms contained in electronic contracts, we will briefly discuss whether a valid and binding contract has, in fact, been formed.

Much historical analysis of electronic contracts has been in the context of software products, purchased in physical form from a retail outlet (e.g. computer games). Viewed traditionally, the display of the software product is an invitation to treat, presentation of the product at the point of sale (i.e. checkout) is an offer to purchase the product, and the user's offer is accepted by acceptance of the payment tendered.

A contract for the sale of the product would ordinarily be regarded as formed at this point – but with the retailer, not the software vendor. Can the software vendor, not a party to the contract, then validly condition use of the already-purchased software upon the terms of a separate licence agreement? This seems to be an unresolved problem, at least in Australia.

In cases where the user provides payment for the right to use a piece of software or a service, but the terms upon which they may do so are not available to them at the time they make payment, the key issue is whether a "money now, terms later" approach is permissible.

In cases where no payment is involved, or where payment is required after the terms are agreed to, the user is free to refuse the terms offered and walk away from the transaction. These cases are much less controversial.

A Shrinkwrap

What is the situation, from a contract law perspective, when the user attempts to use the software which they have purchased and are confronted with a previously unseen licence agreement which purports to govern the use of the software?

This issue has been the subject of numerous articles and judicial decisions in the United States.¹⁹ Much of this analysis focuses on the application of the US Uniform Commercial Code – specifically, whether a contract is complete at the time of

¹⁹ See e.g. footnotes 5 & 6 in Lemley above n 14.

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purchase, and whether the terms of the licence can validly modify the terms of that contract. Accordingly, this analysis has little relevance for issues of enforceability in Australia.

As mentioned in Part II, every US court to consider the validity of a shrinkwrap licence before 1996 held it to be unenforceable.²⁰ The tide turned in 1996 with the decision in *ProCD, Inc v Zeidenberg* 86 F 3d 1447, which held that because the licensor could have rejected the licence agreement and returned the software, but failed to do so, that the licensor had accepted the terms of the licence agreement.

Despite serious criticism of the *ProCD* decision on several grounds,²¹ most subsequent US decisions have followed it and held shrinkwrap licences to be enforceable.²²

The correct characterisation of the contractual relationship between a software user and a software vendor, where the customer purchases the software product from a retail outlet, is open to debate. One such characterisation is that the user contracts with the retailer only in relation to the *physical medium* upon which the software is embodied (i.e. the CD-ROM or floppy disk).

The software vendor offers to license the *use of the software*²³ to users who have purchased the physical medium, upon the terms of the shrinkwrap agreement. The user accepts the offer by using the software, or as specified in the shrinkwrap agreement (e.g. by breaking the seal on the envelope containing the software CD).

B Clickwrap

Analysis of electronic contracting in the context of a retail “real-world” purchase is of decreasing significance, primarily because of the increasing amount of software sold and distributed electronically – i.e. over the Internet. Yet, this scenario raises its own unique problems. If a user purchases software online, downloads the software online, and then rejects the terms of the licence agreement, there is no physical product that they can return to obtain a refund.

A licensor who cannot verify that the would-be licensee has deleted and will make no use of the purchased product would be unlikely to give a refund in these circumstances. Yet, if the licensor has no meaningful choice about whether to accept the terms of the licence (because no refund is available, whether they accept the terms or not), this may impeach the validity of the licence itself. “Money now, terms later” in this case, with no possibility of a refund if the terms are rejected, would probably not constitute a valid contract.

Many clickwrap contracts do not involve the licensing of software. A clickwrap contract is required to “sign up” or register for most Internet websites or services. In these cases, the service provider offers to supply services to the user, upon the user agreeing to abide by the relevant terms and conditions in the clickwrap. Acceptance

²⁰ Lemley, above n 14, 468.

²¹ See for example Lemley, above n 14, 469; Michael Madison, “Legal Ware: Contract and Copyright in the Digital Age” 200 *Fordham Law Review* 1025, 1049-54; Apik Minassian, “The Death of Copyright: Enforceability of Shrinkwrap Licensing Agreements” 45 *UCLA Law Review* 569, 583-6. A more comprehensive list is available in footnote 5 of Lemley, above n 14.

²² Lemley, above n 14, 469.

²³ More precisely, a limited licence to exercise the exclusive rights of the copyright holder necessary to utilise the software – typically the right of reproduction.

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of the offer is by signing up or registering and the user will usually explicitly agree to the terms and conditions by ticking a box next to a statement to that effect.

There are arguments as to whether such an explicit assent to the terms of the agreement should be treated as an incorporation by signature or incorporation by notice. If treated as incorporation by signature, the user would be bound by the terms whether the terms were read or not.²⁴ If treated as incorporation by notice, the vendor must have taken reasonable steps to bring the terms to the attention of the customer at or before the time the contract was formed.²⁵ This point is further discussed in the context of browsewrap contracts.

C Browsewrap

'Browsewrap' contracts are more difficult to characterise in contract-law terms, and there are serious concerns about their enforceability, even in the United States.²⁶ As a threshold issue, the act which is said to constitute acceptance of a browsewrap contract is the use of the website;²⁷ but the website must be used in order to read the contract, or even become aware of its existence.

A further issue is whether the terms of the browsewrap have been adequately brought to the attention of the user. Typically, the terms of the browsewrap will not be incorporated into the areas of the website that the user actually accesses, instead there will be a small hyperlink to a separate "Terms & Conditions" page, in the small print at the bottom of the website, along with other seldom-read links to things such as the website's privacy policy, contact information and accessibility information.²⁸

Arguments can be made as to whether this constitutes incorporation by notice or incorporation by reference. In either case, it seems apparent that the website operators have not done all they could reasonably do to bring the terms of the browsewrap to the attention of the user. It may be commercially disadvantageous to website operators if the terms and conditions which purport to bind users of the website were more prominently thrust into the face of those users.

Some users might be unwilling to agree to the terms of the browse-wrap contract, or any contract at all, merely for the 'privilege' of using the website in question. It is perhaps for this reason that most commercial website operators seem content to conceal the browsewrap licences that purport to bind their users behind a hyperlink in the 'fine print' of their website. But, if they have failed to take reasonable steps to bring the terms of the browsewrap to the attention of the user, the user will not be bound by those terms.

²⁴ *L'Estrange v F Graucob Ltd* [1934] 2 KB 394.

²⁵ *Parker v The South Eastern Railway Company* (1877) 2 CPD 416.

²⁶ See generally Lemley, above n 14.

²⁷ E.g. "By using this site, you acknowledge your agreement to be bound by these terms of use"

²⁸ See, for example, <http://www.news.com.au>; <http://www.smh.com.au>; <http://www.dilbert.com>

IV THE ADEQUACY OF THE EXISTING CONSUMER PROTECTION REGIME

A *The Nature of Electronic Contracts and the Form in which They are Presented*

Electronic contracts are typically quite lengthy, often running to several thousand words, and written with little regard for the principles of plain English drafting or concern for comprehension by a lay audience. As an example, the EULA for Microsoft Windows XP Pro SP2 is 5623 words, including a 1013 word limitation of liability written entirely in French, which applies '[s]i vous avez acquis votre produit Microsoft au CANADA'. The longest English sentence in this EULA is 178 words and is written entirely in capital letters.²⁹

Generally, EULAs are displayed in a small window which allows the viewing of only a small portion of the EULA at any one time. Reading the entire EULA may require viewing as much as 120 separate 'pages' of text.³⁰ Some EULAs permit the end-user to print a hard copy of the EULA, or save a copy to their hard drive for later viewing, but many EULAs do not.³¹

If a pen-and-paper contract were presented to a consumer to sign, where the contract was printed in 9-point font, on 120 separate pieces of paper, each piece being approximately 4cm high and 12cm wide, it seems likely that a court would take issue with the method of presentation of the contract and the nature of the customer's purported assent. Yet, in the 'virtual' world of EULAs, presentation which would be exceptional in the 'real' world is the rule rather than the exception.

Many electronic contracts will not contain all the terms that bind the customer, but will instead incorporate the terms of other documents by reference.³² Sometimes the terms of those other documents are not available to the customer at the time they agree to the contract. Sometimes the documents that are incorporated by reference, in turn incorporate other documents by reference, creating a branching 'tree' of agreements to which the customer notionally assents. Some of the agreements so incorporated may be between the customer and third parties to the transaction between the customer and the licensor. By assenting to the first agreement, the customer could be in fact entering into dozens of agreements, with dozens of parties.

²⁹ TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, IN NO EVENT SHALL MICROSOFT OR ITS SUPPLIERS BE LIABLE FOR ANY SPECIAL, INCIDENTAL, PUNITIVE, INDIRECT, OR CONSEQUENTIAL DAMAGES WHATSOEVER (INCLUDING, BUT NOT LIMITED TO, DAMAGES FOR LOSS OF PROFITS OR CONFIDENTIAL OR OTHER INFORMATION, FOR BUSINESS INTERRUPTION, FOR PERSONAL INJURY, FOR LOSS OF PRIVACY, FOR FAILURE TO MEET ANY DUTY INCLUDING OF GOOD FAITH OR OF REASONABLE CARE, FOR NEGLIGENCE, AND FOR ANY OTHER PECUNIARY OR OTHER LOSS WHATSOEVER) ARISING OUT OF OR IN ANY WAY RELATED TO THE USE OF OR INABILITY TO USE THE SOFTWARE, THE PROVISION OF OR FAILURE TO PROVIDE SUPPORT OR OTHER SERVICES, INFORMATION, SOFTWARE, AND RELATED CONTENT THROUGH THE SOFTWARE OR OTHERWISE ARISING OUT OF THE USE OF THE SOFTWARE, OR OTHERWISE UNDER OR IN CONNECTION WITH ANY PROVISION OF THIS EULA, EVEN IN THE EVENT OF THE FAULT, TORT (INCLUDING NEGLIGENCE), MISREPRESENTATION, STRICT LIABILITY, BREACH OF CONTRACT OR BREACH OF WARRANTY OF MICROSOFT OR ANY SUPPLIER, AND EVEN IF MICROSOFT OR ANY SUPPLIER HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.

³⁰ Edelman B, *Grokster and Claria Take License to New Lows, and Congress Lets Them Do It*, <http://www.benedelman.org/news/100904-1.html> viewed 3 April 2007.

³¹ In some cases, it may not be technically possible to print or save a copy of the EULA, such as the EULA presented during the installation of Microsoft Windows on a PC.

³² These other documents can include 'Terms of Service', 'Acceptable Use Policy' documents, 'Terms of Use', 'Privacy Policies', etc.

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Many electronic contracts provide that the licensor may unilaterally change the terms of the licence in any way, at any time, for any reason or for no reason at all, either without notice to the customer, or with 'notice' in a way not likely to come to the attention of the customer.³³ The end-user agrees to be bound by the contents of the agreement as may be amended from time to time.

Faced with such a situation, the response of many if not most end-users is to agree to the electronic contract without reading it. This response is probably a rational one,³⁴ when one considers:

- The length of the EULA and the time that would be required to read it;
- The fact that the EULA is written in highly complex legal language, which the lay customer will have difficulty comprehending;³⁵
- The fact that the EULA can be changed by the supplier at any time;³⁶
- The prohibitive cost of obtaining legal advice on the effect of the EULA;
- The knowledge that practically all software uses an EULA, so an EULA could not be avoided by using a competing product;
- The mistaken belief that all EULAs are 'boilerplate' agreements and contain substantially the same terms;³⁷
- The low probability of a dispute arising under the EULA;
- The low probability that a breach of the EULA by the end-user would be detected by the licensor;
- The perception that even if a breach were detected, the licensor would be unlikely to take action against the end-user;
- A literal reading of the sections of the EULA dealing with exclusion of liability and implied warranties would create a mistaken belief in the mind of the consumer that they had no rights against the licensor, or that the licensor's liability was limited to the cost of the product (or some lesser amount);
- The limited means of the end-user vis-à-vis the licensor would cause the end-user to believe that any legal action against the licensor would be futile;
- For some important software products (e.g. the market for PC operating systems) there is only a single supplier,³⁸ so that there are no competing products that a disgruntled consumer could turn to;³⁹ and
- Network effects and tipping tend to limit effective competition in technology markets, constrain consumer choice, and lead towards monopoly markets as described above.

³³ E.g. by publishing the updated EULA on a web site. This issue is further discussed in Part VIII.

³⁴ Griggs L, "The [Ir]rational Consumer and Why we Need National Legislation Governing Unfair Contract Terms" (2005) 13 Competition and Consumer LJ 51.

³⁵ McAuley I, "But Do We Need the 'Nanny State'?" (2004) 101 Consuming Interest 8, 9.

³⁶ Further discussed in Part VIII.

³⁷ While this may be true for most *commercial* software, *open-source* software is licensed under extremely liberal terms – the software is free of charge and can be freely copied and distributed to any number of people and used on any number of computers. There are open-source equivalents for most commercial software (including Microsoft Windows) for those willing to absorb the significant (non-monetary) switching costs.

³⁸ The authors assume the existence of a market as defined, and the monopoly of the Microsoft Windows products in that market.

³⁹ While the authors acknowledge the existence of alternative products such as the open-source Linux and FreeBSD operating systems, we consider that they are not yet sufficiently mature or user-friendly to compete with Microsoft Windows in the market for PC operating systems generally.

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Many of these reasons would be applicable to electronic contracts generally, and not only EULAs.

Anecdotal evidence strongly suggests that the vast majority of software users do not read EULAs. To test this contention, software vendor PC Pitstop inserted the following clause in the EULA for one of their products:

SPECIAL CONSIDERATION

A special consideration which may include financial compensation will be awarded to a limited number of authorize licensee [sic] to read this section of the license agreement and contact PC Pitstop at consideration@pcpitstop.com.⁴⁰

PC Pitstop was not contacted to claim the 'special consideration' until four months had passed and the software had been downloaded over 3000 times.

If consumers do not read and are not aware of the licensing terms, then licensors have no incentive to compete on the terms offered,⁴¹ and licensors will continue to insist on one-sided licences.⁴² Loren writes that this has lead 'some companies to define themselves, at least in part, by the outlandishness of their [contractual terms].'⁴³

In the following Parts we consider the application of Australia's current consumer protection law regime.

B Commonwealth Legislation: Unconscionable Dealing – s 51AA of the TPA

Section 51AA of the TPA provides that:

- (1) A corporation must not, in trade or commerce, engage in conduct that is unconscionable within the meaning of the unwritten law, from time to time, of the States and Territories.
- (2) This section does not apply to conduct that is prohibited by section 51AB or 51AC.

Although the Explanatory Memorandum to the legislation introducing s 51AA made specific reference to s 51AA as embodying 'the equitable concept of unconscionable conduct as recognised by the High Court in *Blomley v Ryan* and *Commercial Bank of Australia Ltd v Amadio*',⁴⁴ the wording of s 51AA is not phrased consistently with that objective. What is unconscionable within the unwritten law (ie the common law) may not necessarily be limited to the equitable doctrine of unconscionability.⁴⁵

Although the Federal Court initially held in *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd* (2000) 96 FCR 491 that s 51AA 'prohibits conduct in respect of which a judge in equity would have been prepared to

⁴⁰ PC Pitstop, *It Pays to Read License Agreements*, <http://pcpitstop.com/spycheck/eula.asp> viewed 3 April 2007.

⁴¹ Gough T, "Why Current Laws Fail Consumers" (2004) 101 *Consuming Interest* 11.

⁴² Stempel JW, "Arbitration, Unconscionability and Equilibrium: The Return of Unconscionability Analysis as a Counterweight to Arbitration Formalism" (2004) 19 *Ohio St J on Dispute Resolution* 757 at 820.

⁴³ Loren L, "Slaying the Leather-Winged Demons in the Night: Reforming Copyright Owner Contracting with Clickwrap Misuse", (2004) 30 *Ohio Northern University Law Review* 495 at 497.

⁴⁴ Explanatory memorandum, *Trade Practices Legislation Amendment Act 1992* (Cth) (internal citations omitted).

⁴⁵ Dal Pont GE and Chalmers DRC, *Equity and Trusts in Australia* (3rd ed, Lawbook Co., 2004) p 278.

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grant relief,⁴⁶ that decision was reversed on appeal, but without the High Court expressing a concluded view on this point.⁴⁷ Three members of the majority (Gummow, Hayne and Callinan JJ) left open the possibility that s 51AA might have a wider scope than unconscionable dealing under *Amadio*.⁴⁸

Kirby J, in dissent, said:

While the present appeal was substantially argued by reference to the principles of unconscionable dealing as elaborated in cases such as *Blomley* and *Amadio*, the reach of the section, in my view, goes further. Its full scope remains to be elaborated in this and future cases.⁴⁹

Subsequent cases considering the scope of s 51AA have dealt with the issue inconsistently.⁵⁰ If, on its proper construction, the scope of 51AA is limited to the principles of unconscionable conduct as set down by the High Court in *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447,⁵¹ s 51AA may have little if any applicability to electronic contracts.

Under *Amadio*, the elements of unconscionable conduct are:

- A relationship that places one party at a special disadvantage vis-à-vis the other;
- That the stronger party knew or ought reasonably to have known of that special disadvantage; and
- Unconscientious exploitation or taking advantage by the stronger party of the weaker party's special disadvantage.

Importantly, a 'mere' imbalance of bargaining power has not been recognised as a sufficient 'special disadvantage' for *Amadio* type unconscionable conduct.

Even if the end-user were under a 'special disadvantage' of a recognised type,⁵² the licensor would have no knowledge of the disadvantage. An electronic contract is rarely entered into in circumstances where an agent of the licensor has the opportunity to observe the physical or constitutional weaknesses of the end-user.

Statutory prohibitions against unconscionable conduct, especially if restricted to unconscionable conduct under *Amadio*, are of little use when addressing unfair terms in consumer contracts.⁵³ Unconscionable conduct under *Amadio* is focussed on procedural unconscionability – i.e. unconscionable conduct leading to the formation of the contract – rather than substantive unconscionability – i.e. the substantive

⁴⁶ *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd* (2000) 96 FCR 491 at 509; 169 ALR 324; ATPR 41-755; [2000] FCA 2.

⁴⁷ *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd* (2003) 214 CLR 51; 197 ALR 153; ATPR 41-916; [2003] HCA 18.

⁴⁸ *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd* (2003) 214 CLR 51, 72-73, 109; 197 ALR 153; ATPR 41-916; [2003] HCA 18.

⁴⁹ *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd* (2003) 214 CLR 51 at 84; 197 ALR 153; ATPR 41-916; [2003] HCA 18.

⁵⁰ *Trade Practices Commentary* (CCH, subscription service) at ¶20-792, <http://www.cch.com.au> viewed 30 November 2006.

⁵¹ (1983) 151 CLR 447, 46 ALR 402, 57 ALJR 358 ('*Amadio*').

⁵² Including sickness, age, infirmity of body or mind, drunkenness, illiteracy or lack of education, lack of assistance or explanation where assistance or explanation is necessary; *Blomley v Ryan* (1956) 99 CLR 362 at 405.

⁵³ Zumbo F, "Dealing with Unfair Terms in Consumer Contracts: Is Australia Falling Behind?" (2005) 13 TPLJ 70. See also Field C, "The Death of Unfair Contracts" (2004) 29 *Alternative Law Journal* 35.

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unfairness of the terms of the contract, or allegedly unconscionable manner in which these terms are enforced.⁵⁴ Irrespective of how one-sided, harsh or oppressive the contract itself may be, courts will confine themselves strictly to considering the procedural unconscionability of the transaction.⁵⁵

A further complication in seeking to rely on s 51AA is that it does not apply to conduct which is prohibited by ss 51AB or 51AC.⁵⁶ This unnecessarily complicates the operation of Part IVA by requiring a person to determine that the defendant's conduct is not covered by ss 51AB or 51AC before being able to invoke s 51AA, which will not always be an easy task.⁵⁷

C Commonwealth Legislation: Unconscionable Conduct – s 51AB of the TPA

Section 51AB of the TPA provides in part:

- (1) A corporation shall not, in trade or commerce, in connection with the supply or possible supply of goods or services to a person, engage in conduct that is, in all the circumstances, unconscionable.
- (2) Without in any way limiting the matters to which the Court may have regard for the purpose of determining whether a corporation has contravened subsection (1) in connection with the supply or possible supply of goods or services to a person (in this subsection referred to as the consumer), the Court may have regard to:
 - (a) the relative strengths of the bargaining positions of the corporation and the consumer;
 - (b) whether, as a result of conduct engaged in by the corporation, the consumer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the corporation;
 - (c) whether the consumer was able to understand any documents relating to the supply or possible supply of the goods or services;
 - (d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the consumer or a person acting on behalf of the consumer by the corporation or a person acting on behalf of the corporation in relation to the supply or possible supply of the goods or services; and
 - (e) the amount for which, and the circumstances under which, the consumer could have acquired identical or equivalent goods or services from a person other than the corporation.

The scope of this section is both narrower and broader than s 51AA. Section 51AA applies to any conduct 'in trade or commerce', whereas s 51AB applies only to conduct 'in connection with the supply or possible supply of goods or services'.⁵⁸

On one interpretation this phrase suggests that the conduct in question must occur at or before the time of supply. If a supplier engages in unconscionable conduct in their handling of a warranty issue years after the initial supply, this could not be said to occur 'in connection with the supply or possible supply of goods or services'. In the same way, if an online music vendor supplies TPM-protected music to a customer,

⁵⁴ *Tri-Global (Aust) Pty Ltd v Colonial Mutual Life Assurance Society Ltd* (1992) ATPR ¶141-174.

⁵⁵ Zumbo, above n 53 at 71.

⁵⁶ *Trade Practices Act 1974* (Cth) s 51AA(2).

⁵⁷ Corones S & Clarke P, *Consumer Protection and Product Liability Law: Commentary and Materials* (2nd ed, Lawbook Co., 2002) p 342.

⁵⁸ The goods or services must also not be acquired for resale or for transformative or consumptive use in trade or commerce

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and then years later unconscionably uses the TPM to disable access to the music, is this 'in connection with the supply or possible supply', or is the temporal window of s 51AB restricted to events at or before the initial supply?

The better view is that where 'supply' consists of an ongoing licence of intellectual property, it extends for at least the duration of the licence.

Section 51AB is also restricted to goods or services 'of a kind ordinarily acquired for personal, domestic or household use or consumption',⁵⁹ although this definition is almost certain to be satisfied in the examples to be discussed in this article.

The non-exhaustive list of factors in s 51AB(2) encompass issues of both procedural and substantive unconscionability. Nevertheless, the courts have, to date focussed solely upon procedural unconscionability in the application of s 51AB.⁶⁰ The terms of a contract cannot, on their own, form the basis of an action under s 51AB.⁶¹

In *Hurley v McDonald's Australia Ltd* (2000) ATPR 41-741; [1999] FCA 1728 the Full Federal Court held:

There is no allegation of any circumstance that renders reliance upon the terms of the contracts unconscionable. For example, it might be that, having regard to particular circumstances it would be unconscionable for one party to insist upon the strict enforcement of the terms of a contract. One such circumstance might be that an obligation under a contract arises as a result of a mistake by one party. The mistake is an additional circumstance that might render strict reliance upon the terms of the contract unconscionable. Mere reliance on the terms of a contract cannot, without something more, constitute unconscionable conduct.

...

Before sections 51AA, 51AB or 51AC will be applicable, *there must be some circumstance other than the mere terms of the contract itself that would render reliance on the terms of the contract "unfair" or "unreasonable" or "immoral" or "wrong"*.⁶² (Emphasis added).

The Full Court further held, citing *Cameron v Qantas Airways Ltd* (1995) ATPR 41-417 that:

For conduct to be regarded as unconscionable, serious misconduct or something *clearly unfair or unreasonable*, must be demonstrated. Whatever "unconscionable" means in s51AB and s51AC, the term carries the meaning given by the Shorter Oxford English Dictionary, namely, actions *showing no regard for conscience*, or that are *irreconcilable with what is right or reasonable*. The various synonyms used in relation to the term "unconscionable" import a *pejorative moral judgment*.⁶³

Despite the substantive unconscionability or unfairness of a contractual term, it seems that in the absence of some additional element of procedural unconscionability, s 51AB will not apply.

This additional element may take the form of a verbal explanation which misrepresented the effect of a written contract;⁶⁴ a written contract which contains

⁵⁹ *Trade Practices Act 1974* (Cth) s 51AB(5).

⁶⁰ *Zumbo*, above n 53 at 83-4.

⁶¹ *Zumbo*, above n 53 at 83.

⁶² *Hurley v McDonald's Australia Ltd* (2000) ATPR 41-741 at 29-31; [1999] FCA 1728.

⁶³ *Ibid* at [22].

⁶⁴ *George T Collings (Aust) Pty Ltd v HF Stevenson (Aust) Pty Ltd* (1991) ATPR 41-104. (Considering the effect of s 52A, the predecessor to s 51AB).

'fine print' in conflict with the purported effect of the contract;⁶⁵ or that the supplier had knowingly taken advantage of consumers with poor education and financial acumen.⁶⁶ Additional elements such as these could also contravene the prohibition against misleading or deceptive conduct in s 52 of the TPA.

Section 51AB would appear to be of limited utility in addressing objectionable terms in electronic contracts. The authorities indicate that the mere inclusion of unconscionable terms in a contract is insufficient to constitute unconscionable conduct within the meaning of s 51AB.⁶⁷ At a minimum, the licensor would need to seek to rely on the objectionable terms, and do so in circumstances carrying an additional element of procedural unconscionability which renders such reliance unfair, unreasonable, immoral or wrong.

No matter how reprehensible the terms of the contract – for example, concealing in the fine print of an electronic contract a charge over all real and personal property of the customer, the property forfeiting to the licensor for the most trivial breach – such terms will not be open to challenge under s 51AB.⁶⁸

Thus, the courts appear to continue to give effect to underlying notions of freedom of contract, leaving it to the parties to decide on the terms of the contract. The courts appear to be unwilling to extend equitable notions of unconscionability to deal effectively with unfair contractual terms in modern markets. This has led to statutory reforms, which we will now consider.

D Contracts Review Act 1980 (NSW)

The *Contracts Review Act 1980* (NSW) resulted from the 1976 Report on Harsh and Unconscionable Contracts by Prof John Peden.⁶⁹ For the purposes of the Act, 'unjust' is defined as including 'unconscionable, harsh or oppressive', and 'injustice' is to be construed in a corresponding manner.⁷⁰

Where a contract or a provision of a consumer-style contract⁷¹ is found to be unjust in the circumstances relating to the contract at the time it was made, s 7 of the Act gives the court a range of options to avoid an unjust result, including refusing to enforce some or all of the contract, declaring the contract void in whole or part, or varying any provision of the contract.

In determining whether a contract or a provision of a contract is unjust in the circumstances relating to the contract at the time it was made, the court must have regard to the public interest and to all the circumstances of the case, including the consequences of compliance or non-compliance with the provisions of the contract.⁷²

⁶⁵ Ibid.

⁶⁶ *Australian Competition and Consumer Commission v Keshow* (2005) ATPR (Digest) 46-265, [2005] FCA 558.

⁶⁷ *Hurley v McDonald's Australia Ltd* (2000) ATPR 41-741 at [29]-[31]; [1999] FCA 1728; *Australian Competition and Consumer Commission v Lux Pty Ltd* [2004] FCA 926 at [94].

⁶⁸ Such a term would be void at common law as a penalty, and an attempt to *enforce* such a term would probably be unconscionable conduct within the meaning of s 51AB of the TPA.

⁶⁹ *Sales and Fair Trading Commentary* (CCH, subscription service) at [¶4-103], <http://www.cch.com.au> viewed 19 December 2006.

⁷⁰ *Contracts Review Act 1980* (NSW), s 4.

⁷¹ Corporations, and individuals entering into contracts in the course of or for the purposes of a trade, business or profession are precluded from obtaining relief. *Contracts Review Act 1980* (NSW) s 6.

⁷² *Contracts Review Act 1980* (NSW), s 9(1).

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The court must also, to the extent relevant to the circumstances, have regard to a non-exclusive list of factors in s 9(2). Factors which will be of particular relevance in the context of electronic contracts include:

- Inequality of bargaining power between the parties;⁷³
- Whether the terms of the contract were the subject of negotiation;⁷⁴
- Whether it was reasonably practical for the party seeking relief (the licensee) to negotiate for the alteration of or to reject any of the provisions of the contract;⁷⁵ and
- The physical form of the contract, and the intelligibility of the language in which it is expressed.⁷⁶

Other factors which may be relevant in a particular case include:

- Whether provisions of the contract impose conditions which are not reasonably necessary for the protection of the legitimate interests of the parties to the contract;⁷⁷ and
- Whether undue influence, unfair pressure or unfair tactics were exerted on or used against the party seeking relief (the licensee), by any other party to the contract (the licensor), or any other person acting or appearing or purporting to act on their behalf.⁷⁸

The evident intent of the Act is to move beyond the equitable focus upon procedural unconscionability, and to give regard to the public interest and substantive unconscionability. Despite early predictions that the provisions of the Act 'signal the end of much of classical contract theory in New South Wales',⁷⁹ the reality has been less apocalyptic.

While courts are able to consider substantive unconscionability under the Act, they rarely do so without also considering the impact of procedural unconscionability.⁸⁰

Zumbo observes that this residual reliance upon procedural unconscionability severely limits the ability of the Act to deal directly with unfair terms in consumer contracts.⁸¹

E Part 2B of the Fair Trading Act 1999 (Vic)

Part 2B of the Victorian *Fair Trading Act 1999* ("FTA"), enacted in 2003, is targeted squarely at the problem of unfair terms in consumer contracts. An unfair term in a consumer contract is void, but the contract 'will continue to bind the parties if it is capable of existing without the unfair term'.⁸² The FTA defines 'unfair term' in the following way:

⁷³ *Contracts Review Act 1980* (NSW), s 9(2)(a).

⁷⁴ *Contracts Review Act 1980* (NSW), s 9(2)(b).

⁷⁵ *Contracts Review Act 1980* (NSW), s 9(2)(c).

⁷⁶ *Contracts Review Act 1980* (NSW), s 9(2)(g).

⁷⁷ *Contracts Review Act 1980* (NSW), s 9(2)(d).

⁷⁸ *Contracts Review Act 1980* (NSW), s 9(2)(j).

⁷⁹ *West v AGC (Advances) Ltd* (1986) 5 NSWLR 610 at 621 per Kirby J.

⁸⁰ Zumbo, n 53 at 82.

⁸¹ Zumbo, n 53 at 82.

⁸² *Fair Trading Act 1999* (Vic), ss 32Y(1), (3).

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A term in a consumer contract is to be regarded as unfair if, contrary to the requirements of good faith and in all the circumstances, it causes a significant imbalance in the parties' rights and obligations arising under the contract to the detriment of the consumer.⁸³

Section 32X of the FTA provides:

Without limiting section 32W, in determining whether a term of a consumer contract is unfair, a court or the Tribunal may take into account, among other matters, whether the term was individually negotiated, whether the term is a prescribed unfair term and whether the term has the object or effect of:

- (a) permitting the supplier but not the consumer to avoid or limit performance of the contract;
- (b) permitting the supplier but not the consumer to terminate the contract;
- (c) penalising the consumer but not the supplier for a breach or termination of the contract;
- (d) permitting the supplier but not the consumer to vary the terms of the contract;
- (e) permitting the supplier but not the consumer to renew or not renew the contract;
- (f) permitting the supplier to determine the price without the right of the consumer to terminate the contract;
- (g) permitting the supplier unilaterally to vary the characteristics of the goods or services to be supplied under the contract;
- (h) permitting the supplier unilaterally to determine whether the contract had been breached or to interpret its meaning;
- (i) limiting the supplier's vicarious liability for its agents;
- (j) permitting the supplier to assign the contract to the consumer's detriment without the consumer's consent;
- (k) limiting the consumer's right to sue the supplier;
- (l) limiting the evidence the consumer can lead in proceedings on the contract;
- (m) imposing the evidential burden on the consumer in proceedings on the contract.

Many of these factors are likely to apply to electronic contracts, and will be further discussed when examining specific examples of such contracts below.

The FTA also allows for terms in a 'standard form contract' to be prescribed by regulation as unfair terms.⁸⁴ A 'standard form contract' is defined as 'a consumer contract that has been drawn up for general use in a particular industry, whether or not the contract differs from other contracts used in that industry'.⁸⁵ It is an offence to use a standard form contract containing a prescribed unfair term, or attempt to enforce such a term.⁸⁶

These provisions are unlikely to apply to most electronic contracts. Although many electronic contracts have a high degree of uniformity in their substantive content (i.e. most will contain clauses dealing with ownership of intellectual property, exclusion or limitation of liability, etc), they are independent products of each vendor and have not been 'drawn up for general use in a particular industry' in the same sense as a standardised contract for the sale of real property or a used vehicle may have

⁸³ *Fair Trading Act 1999* (Vic), s 32W.

⁸⁴ *Fair Trading Act 1999* (Vic), s 32ZC.

⁸⁵ *Fair Trading Act 1999* (Vic), s 32U.

⁸⁶ *Fair Trading Act 1999* (Vic), s 32Z.

been.⁸⁷ For that reason, they are not 'standard form contracts' and terms within them could not be prescribed as unfair by regulation.

V ANALYSIS OF UNFAIR TERMS IN ELECTRONIC CONTRACTS

A Overview

The existing legislative regime at the Commonwealth level provides some scope for relief in relation to unfair terms in electronic contracts, but only within the limited scope of unconscionability under ss 51AA or 51AB.

This failure of the TPA has led two States, New South Wales and Victoria, to follow international developments,⁸⁸ and to regulate the use of unfair terms in consumer contracts. Unfortunately, barring a licensor being conveniently located in one of these states, or a fortuitous choice of law clause in an electronic contract, these Acts will not assist residents of the other states and territories.

In this part we examine the possible application of the previously discussed laws to some of the unfair terms found in real-world electronic contracts. The authors' methodology for identifying suitable EULAs for analysis has been to identify electronic contracts which:

- Have been the subject of legal action by consumer protection regulators, or the subject of adverse publicity by the media, because of their terms; or
- Relate to products containing or making use of Digital Rights Management (DRM), as unfair terms and misleading or deceptive conduct by licensors of such products poses a serious threat to effective competition in these markets; or
- Relate to products or services in wide-spread use by members of the public.

B Variations to the contract

A significant number of EULAs and electronic contracts provide that the licensor can unilaterally vary the terms of the contract. This is typically accomplished by either the contract specifically allowing for unilateral variation by the licensor, or the licensor amending the EULA by way of a separate EULA included with software patches, updates, or new versions.

1 Specific Provision for Future Variation

Many electronic contracts specifically allow the licensor to vary the terms of the contract. Quite apart from consumer protection law, there is some doubt as to whether an agreement containing such a clause could form an enforceable contract. A contract which leaves essential matters for later determination by one of the contracting parties is incomplete and unenforceable.⁸⁹ An electronic contract which

⁸⁷ Some electronic contracts, especially open-source software licences, are 'boilerplate' agreements which have been 'drawn up for general use in a particular industry', and would be a 'standard form contract' within the meaning of the FTA. However, these licences are, generally speaking, written with greater regard for balancing the rights of the licensor and licensee, and are accordingly less likely to contain unfair terms.

⁸⁸ See e.g. the EC *Directive on Unfair Terms in Consumer Contracts*, and the UK *The Unfair Terms in Consumer Contracts Regulations 1999*.

⁸⁹ *May & Butcher Ltd v R* [1934] 2 KB 17, 20.

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purports to grant the licensor a discretion to unilaterally alter the terms of the contract would also seem to be incomplete for the same reason. The outcome in such a situation – that is, whether the contract could be saved by severing the offending term, or by a court implying a term into the contract to render it complete – is outside the scope of this article, but has great potential for future research, and is seemingly unexplored in previous contract-law analysis of EULAs, which have to date focussed mainly on issues of formation rather than certainty and completeness.

The 'Terms of Service' agreement for the Apple iTunes Music Store state that:

iTunes reserves the right, at any time and from time to time, to update, revise, supplement and otherwise modify this Agreement and to impose new or additional rules, policies, terms or conditions on your use of the Service. Such updates, revisions, supplements, modifications, and additional rules, policies, terms, and conditions (collectively referred to in this Agreement as "Additional Terms") will be effective immediately and incorporated into this Agreement. Your continued use of the iTunes Music Store following will be deemed to constitute your acceptance of any and all such Additional Terms. All Additional Terms are hereby incorporated into this Agreement by this reference.⁹⁰

Similarly, the EULA for the popular computer game World of Warcraft, published by Blizzard software, allows Blizzard to change the EULA; but only when it makes updates to the game software:

Blizzard reserves the right, at its sole discretion, to change, modify, add to, supplement or delete any of the terms and conditions of this License Agreement *when Blizzard upgrades the Game Client*, effective upon prior notice as follows: Blizzard will post notification of any such changes to this License Agreement on the World of Warcraft website and will post the revised version of this License Agreement in this location, and may provide such other notice as Blizzard may elect in its sole discretion. If any future changes to this License Agreement are unacceptable to you or cause you to no longer be in compliance with this License Agreement, you may terminate this License Agreement in accordance with Section 5 herein. Your installation and use of any updates or modifications to the Game or your continued use of the Game following notice of changes to this Agreement will demonstrate your acceptance of any and all such changes.⁹¹ (emphasis added)

However, the EULA permits Blizzard to automatically make updates to the game software installed on the user's computer without the user's knowledge or consent – in effect, giving Blizzard an unconstrained discretion to change the terms of the EULA:

Blizzard may deploy or provide patches, updates and modifications to the Game that *must be installed for the user to continue to play the Game*. Blizzard *may update the Game remotely, including, without limitation, the Game Client* residing on the user's machine, *without the knowledge or consent of the user*, and you hereby grant to Blizzard your consent to deploy and apply such patches, updates and modifications.⁹²

Further, the World of Warcraft EULA incorporates by reference a separate "Terms of Use" document, which allows Blizzard, 'at its sole and absolute discretion, to change,

⁹⁰ Apple Computer Australia Pty Ltd, *iTunes Store – Terms of Service* at cl 20, <http://www.apple.com/legal/itunes/au/service.html> viewed 3 April 2007.

⁹¹ Blizzard Entertainment Inc, *World of Warcraft End User License Agreement* at cl 13, <http://www.worldofwarcraft.com/legal/eula.html> viewed 3 April 2007.

⁹² Blizzard Entertainment Inc, *World of Warcraft End User License Agreement* at cl 8, <http://www.worldofwarcraft.com/legal/eula.html> viewed 3 April 2007.

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modify, add to, supplement or delete any of the terms and conditions of this Agreement at any time'.⁹³

In containing terms to this effect, the World of Warcraft EULA is far from unusual. A 2006 article examining the issue of EULAs in 'virtual world' games such as World of Warcraft found that of the 48 games surveyed, 75% permitted the licensor to amend or modify the EULA (and other applicable agreements) at will, and 39.58% permitted the licensor to do so without notice.⁹⁴

Legislation dealing with unfair terms treat these types of clauses with suspicion. Prima facie, they allow the supplier to alter the terms of an agreed bargain with the consumer,⁹⁵ while still holding the consumer to the terms of the 'new' bargain. As a practical matter, this power gives the supplier the ability to, inter alia, avoid or limit the performance of the contract, terminate the contract, or change the price or characteristics of goods or services to be supplied.⁹⁶

In *Director of Consumer Affairs Victoria v AAPT* [2006] VCAT 1493 ("AAPT"), the Victorian Civil and Administrative Tribunal held that a similar term⁹⁷ in a mobile telephone contract was an unfair term because it had the effect of permitting AAPT, but not the consumer, to avoid or limit the performance of the contract – a relevant factor under s 32X(a) of the FTA.⁹⁸

2 Changes other than by specific provision

In the ever-changing world of computer software, it is common for software to be regularly updated by the software vendor. Microsoft, as an example, release security patches to its software on the second Tuesday of every month.

Each software patch, update, or new version provides an opportunity for the vendor to present an EULA to the licensee for their assent. In the case of new releases of software which only introduce new features or functionality, this may not be terribly controversial. Licensees have a choice – if they do not like the terms of the new EULA, they can continue using the existing version of the software.⁹⁹

However, where a software patch or update is required to address a security problem with the original program, the licensees have little or no choice but to agree to the terms of the new EULA, especially where the update is to an operating system or an important application such as an Internet browser, email client or media player, refusing to install the patch and continuing to use the existing (insecure) program is not a viable option.

⁹³ Blizzard Entertainment Inc, *World of Warcraft Terms of Use Agreement* at cl 9, <http://www.worldofwarcraft.com/legal/termsofuse.html> viewed 3 April 2007.

⁹⁴ Jankowich A, "EULAw: The Complex Web of Corporate Rule-Making in Virtual Worlds" (2006) 8 Tul. J. Tech. & Intell. Prop. 1 at 56.

⁹⁵ *Fair Trading Act 1999* (Vic) s 32X(d).

⁹⁶ *Fair Trading Act 1999* (Vic) ss 32X(a), (b), (f), (g).

⁹⁷ "We may vary any term of this Agreement at any time in writing. To the extent required by any applicable laws or determinations made by the Australian Communications Authority (ACA), we will notify you of any such variation."

⁹⁸ *Director of Consumer Affairs Victoria v AAPT* [2006] VCAT 1493 at [50].

⁹⁹ This choice may, as a practical matter, be illusory, as it presupposes that the consumer reads the EULA of the new version, is in a position to compare it against the EULA for the current version, detect any differences, and recognise the significance of those differences.

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These new EULAs can, and have in the past been used to introduce new contractual terms relating to DRM functionality which did not exist in the original EULA.

In June 2002, Microsoft released a 'cumulative patch' for Windows Media Player, which fixed three serious security flaws with Media Player,¹⁰⁰ the most serious of which would allow an attacker to remotely 'hack into' and take control over a computer without the patch applied.¹⁰¹ Microsoft recommended that "[c]ustomers running affected products should apply the patch immediately."¹⁰²

The patch contained an EULA containing new contractual terms, including:

Digital Rights Management (Security). You agree that in order to protect the integrity of content and software protected by digital rights management ("Secure Content"), Microsoft *may provide security related updates* to the OS Components that will be *automatically downloaded onto your computer*. These security related updates *may disable your ability to copy and/or play Secure Content and use other software on your computer*. If we provide such a security update, we will use reasonable efforts to post notices on a web site explaining the update.¹⁰³ (Emphasis added)

By installing the patch (and agreeing to the new EULA) the licensee permits Microsoft to:

- Automatically make further changes to the operating system of the computer, without prior notice to or consent of the licensee;
- Make significant changes to the functionality of the originally licensed operating system; and
- Disable the licensee's ability to use any other software on the licensee's computer, as Microsoft sees fit.

These changes are a significant departure from the original EULA. An analogy to the situation is this: You buy a new car, and some months later the manufacturer discovers a design flaw in the braking system. The manufacturer recalls the cars and will fix the braking system, but only if you sign a contract agreeing that the manufacturer may make future alterations to the car without your knowledge or permission. Those changes may affect your ability to use the car, or some features of the car. Because of the proprietary nature of the braking system parts, you are unable to have the braking system fixed by anyone other than the manufacturer.

Would the circumstances in which these terms are imposed upon the licensee constitute unconscionable conduct in contravention of s 51AB of the TPA?¹⁰⁴

In such a situation, the consumer would have virtually no bargaining power against the software vendor.¹⁰⁵ There would be a practical compulsion to accept the terms of the new EULA, regardless of their content, as the alternative (not installing the patch) is untenable. At least some of the new terms in the EULA are unlikely to be reasonably necessary for the protection of the legitimate interests of the software

¹⁰⁰ An integrated part of the Microsoft Windows operating system.

¹⁰¹ Microsoft, *Microsoft Security Bulletin MS02-032: 26 June 2002 Cumulative Patch for Windows Media Player (Q320920)* <http://www.microsoft.com/technet/security/bulletin/MS02-032.msp> viewed 4 January 2007.

¹⁰² Ibid.

¹⁰³ BSDvault, *Microsoft's Digital Rights Management – A Little Deeper*, <http://web.archive.org/web/20040916080000/http://bsdvault.net/article.php?sid=527&mode=&order=0> viewed 4 January 2007.

¹⁰⁴ A contract or EULA so formed may also be voidable for common law duress.

¹⁰⁵ *Trade Practices Act 1974* (Cth), s 51AB(2)(a).

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vendor.¹⁰⁶ The consumer would be unlikely to be able to understand the EULA,¹⁰⁷ and the inclusion of these new terms with a vital security patch is almost certain to amount to undue influence or pressure, or unfair tactics.¹⁰⁸

The authors suggest that the imposition of new contractual terms by way of EULAs in vital security updates may be unconscionable within the meaning of s 51AB of the TPA. It may also constitute undue harassment or coercion in contravention of s 60 of the TPA.

These circumstances also exhibit a number of the relevant factors under s 9(2) of the *Contracts Review Act 1980* (NSW)¹⁰⁹ and s 32X of the *Fair Trading Act 1999* (Vic).¹¹⁰ A court considering these circumstances under either Act would be likely to grant relief to the consumer seeking to avoid the additional terms imposed.

C Notice Clauses

Many electronic contracts permit the licensor to give notice – often of significant issues such as amendments to the terms of the contract itself – to the licensee in ways that are not likely to come to the actual notice of the licensor. The usual method for giving notice of a change to the electronic contract is by simply amending the version of the contract published on a web site.

The Apple iTunes Music Store ‘Terms of Sale’ agreement states:

iTunes reserves the right to change the terms and conditions of sale at the iTunes Store at any time. Revised Terms of Sale will be made available on our website. Customers are encouraged to review the Terms of Sale on a periodic basis for modifications.

Similarly, the TPG Internet ‘Standard Terms and Conditions’ provides:

Customers should note that these Standard Terms & Conditions and the additional Package Conditions may be revised at any time by way of update on the TPG Internet web site - www.tpg.com.au. Customers are bound by any revisions as at the date they are displayed and should regularly examine the current Standard Terms & Conditions and the additional Package Conditions displayed on the TPG Internet web site.

These notice provisions assume that customers can or will:

- Read the electronic contract that they first agree to, and understand the effect of the notice provisions;
- Retain a copy of that version of the contract;
- Regularly compare that version of the contract against the contract then published on the licensor’s website; and
- Notice any changes to the contract, and understand the effect of those changes.

¹⁰⁶ *Trade Practices Act 1974* (Cth), s 51AB(2)(b).

¹⁰⁷ *Trade Practices Act 1974* (Cth), s 51AB(2)(c).

¹⁰⁸ *Trade Practices Act 1974* (Cth), s 51AB(2)(d).

¹⁰⁹ Including ss 9(2)(a), (b), (c), (d), (g), (h), (i), (j), (k) and (l).

¹¹⁰ Including ss 32X(d) and (g).

Author version

The authors believe the suggestion that customers will follow these steps to keep abreast of changes to the contract is fanciful and not grounded in reality or in actual consumer behaviour in the market.

In many cases, where the customer has committed to a fixed-term or minimum-term contract – as is common in contracts for the supply of phone or Internet services – the customer would not be able to terminate the contract in response to the change, without incurring a substantial financial penalty.

Some electronic contracts go even further than the types of notice clauses described above. The notice provisions of the ReelTime.tv “Australian Residential Customer Agreement” are:

Any notice required or permitted to be given by us under this Agreement may be provided via the mail, on your billing statement, as a bill insert, *via broadcast on a television channel, through publication on the website* set forth in the first paragraph of this Agreement, by telephone, email, mobile phone short message service (SMS) or by *any other reasonable means*. If we send you notice by mail, on your billing statement or as a bill insert, it will be *considered given when deposited at Australia Post...* If we send you notice via broadcast on a television channel or through publication on the website set forth in the first paragraph of this Agreement, it will be *considered given when first broadcast or published.*¹¹¹ (Emphasis added)

This stands in stark contrast with the provisions purporting to govern how notice must be given by the customer:

Unless otherwise specified in this Agreement, any notice required or permitted to be given by you under this Agreement *shall be in writing and shall be sent by first class mail* addressed to us at the mailing address set forth in the first paragraph of this Agreement, and shall be *deemed given when received by us* at such mailing address.¹¹² (Emphasis added)

Addressing the substance of the clause, it is difficult to conceive of a legitimate business justification for such a fundamentally unbalanced contractual term. This clause is an archetypal unfair term under the *Fair Trading Act 1999* (Vic) – contrary to the requirements of good faith and in all the circumstances, it causes a significant imbalance in the parties’ rights and obligations arising under the contract to the detriment of the consumer.

D Variations to ‘Usage Rules’ for Digital Content

The terms of an EULA are not the only restrictions on the customer which are subject to unilateral variation by the licensor. DRM allows a licensor to change the rules governing how a consumer may use digital content, without changing the contract, and even where the contract makes no provision for the licensor to change the ‘usage rules’.

Section 32X(g) of the *Fair Trading Act 1999* (Vic) provides that when determining whether a term of a consumer contract is an unfair term, a relevant factor is whether the term has the object or effect of ‘permitting the supplier unilaterally to vary the characteristics of the goods or services to be supplied under the contract.’

¹¹¹ Reeltime Infotainment Ltd, *Australian Residential Customer Agreement*, <http://www.reeltime.tv/page.php?name=terms-and-conditions> viewed 3 April 2007.

¹¹² Ibid.

While this factor has yet to be judicially considered, its meaning seems clear enough. A term may be unfair if a consumer contracts to buy X, but the contract permits the supplier to deliver something less than X, while still holding the consumer to the terms of the contract.

While s 32X(g) speaks of unilateral variation of the characteristics of things *to be* supplied, DRM facilitates a far more insidious ability – the unilateral variation of the characteristics of things *which have already been supplied*.

1 Variations effected by contract and DRM

Digital Rights Management (DRM) refers to a class of technologies which allow copyright holders to control the use and copying of material to which DRM is applied, notionally to protect the exclusive rights of the copyright holder from ‘piracy’ facilitated by digital technologies. DRM can also have powerful anti-competitive effects in technology markets.¹¹³

DRM allows extremely fine-grained control over when, how, and by whom DRM-protected material can be used. It can, for example, allow a given piece of material to be copied and used upon up to 10 computers, but no more. Often, it will not permit material to be copied at all. DRM could even be used to ensure that material could only be used on the third Tuesday of every month.

Imagine you purchase DRM-protected music online through a particular vendor. The DRM restricts your ability to use and copy the music. When you purchase the music, the vendor permits you to copy (‘burn’) a ‘playlist’ of music to an audio CD only 10 times. This limit is enforced by the vendor’s DRM system – once you have copied the playlist the permitted 10 times, the DRM prevents you from making further copies.

The vendor then unilaterally changes the number of copies you are permitted to make from 10 to 7. This change affects not only music that you purchase after the change, but the music you purchased before the change (when you were permitted 10 copies).

This scenario is not as far-fetched as it might seem. In April 2004, Apple released a new version of their iTunes music software – the software required to play the DRM-protected music purchased from Apple through the ‘iTunes Music Store’. The new version of iTunes permitted the burning of playlists only 7 times, instead of the 10 times permitted in the previous versions.¹¹⁴ The new version also detected and prevented the burning of playlists which were ‘similar’ to playlists that had been burned the maximum number of times.¹¹⁵

The electronic contracts applicable to the iTunes software and the iTunes Music Store service permit Apple to make such changes even without releasing new versions of the software. The ‘iTunes Music Store Terms of Service’ provide that:

¹¹³ See generally Clapperton D & Corones S, “Locking In Consumers, Locking Out Competitors: Anti-Circumvention Laws in Australia and Their Potential Effect on Competition in High Technology Markets” (2006) 30 MULR 657.

¹¹⁴ Schultz J, *Meet the New iTunes, Less than the Old iTunes?*

http://lawgeek.typepad.com/lawgeek/2004/04/meet_the_new_it.html viewed 5 February 2007.

¹¹⁵ *Ibid.*

Author version

You understand that the Service, and products purchased through the Service, such as sound recordings and related artwork ("Products"), include a security framework using technology that protects digital information and limits your usage of Products to certain usage rules established by iTunes and its licensors ("Usage Rules"). You agree to comply with such Usage Rules, as further outlined below, and you agree not to violate or attempt to violate any security components. You agree not to attempt to, or assist another person to, circumvent, reverse-engineer, decompile, disassemble, or otherwise tamper with any of the security components related to such Usage Rules for any reason whatsoever. Usage Rules may be controlled and monitored by iTunes for compliance purposes, and iTunes reserves the right to enforce the Usage Rules with or without notice to you.¹¹⁶

The 'Terms of Service' then set out the 'usage rules', and continues:

You agree that your purchase of Products constitutes your acceptance of and agreement to use such Products solely in accordance with the Usage Rules, and that any other use of the Products may constitute a copyright infringement. The security technology is an inseparable part of the Products. The Usage Rules shall govern your rights with respect to the Products, in addition to any other terms or rules that may have been established between you and another party. *iTunes reserves the right to modify the Usage Rules at any time.*¹¹⁷ (Emphasis added)

The ability of Apple to change the 'usage rules' for already-purchased content has attracted significant overseas criticism. The Consumer Council of Norway in 2006 filed a complaint with the Norwegian Consumer Ombudsman over several aspects of the iTunes services and contracts.¹¹⁸ The Consumer Council described the iTunes electronic contracts as unreasonable, unbalanced and one-sided.¹¹⁹ The complaint made reference to the EU Council Directive 19/13/EEC on unfair terms in consumer contracts,¹²⁰ and specifically to the Annexe to that directive, which contains 'an indicative and non-exhaustive list of the terms which may be regarded as unfair.'¹²¹

The terms submitted by the Consumer Council to be relevant were those having the object or effect of:

- Enabling the seller or supplier to alter the terms of the contract unilaterally without a valid reason which is specified in the contract; and
- Enabling the seller or supplier to alter unilaterally without a valid reason any characteristics of the product or service to be provided.¹²²

The first of these terms can be closely equated with s 32X(a) of the *Fair Trading Act 1999* (Vic),¹²³ and the second with s 32X(g).

¹¹⁶ Apple Computer Australia Pty Ltd, *iTunes Store – Terms of Service* at cl 8(b) <http://www.apple.com/legal/itunes/au/service.html> viewed 5 February 2007.

¹¹⁷ *Ibid*, cl 9(c).

¹¹⁸ Consumer Council of Norway, *Complaint Against iTunes Music Store* <http://forbrukerportalen.no/filearchive/Complaint%20against%20iTunes%20Music%20Store.pdf> viewed 5 February 2007.

¹¹⁹ Consumer Council of Norway, *iTunes' Questionable Terms and Conditions* <http://forbrukerportalen.no/Artikler/2006/1138119849.71> viewed 5 February 2007.

¹²⁰ *Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts* [1993] OJ L 095, 0029.

¹²¹ *Ibid*, art 3(3).

¹²² *Ibid*, Annexe (j) and (k).

¹²³ *Director of Consumer Affairs Victoria v AAPT* [2006] VCAT 1493 at [50].

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The Norwegian Consumer Ombudsman upheld the complaint, noting in a press release that:

iTunes goes to great lengths to ensure that its standard customer contract protects the company's own interest. The consumers on the other hand are burdened with much responsibility but is given little clarification of what is actually expected of them. "The contracts are both vague and hard to understand for the customers, and they're clearly unbalanced to disfavor the customer. The consumers are clearly the inferior partner in the contract, and this in itself is illegal," says Consumer Ombudsman Thon.¹²⁴

and that:

iTunes' contract also entitles the company to at any time change the terms of the contract without notice, including the selection of players or software that must be used for iTunes-files, and also the number of times a customer can change or copy already purchased files. iTunes claims it is the customers' responsibility to be updated on these changes in the company's policy or contract terms.

"I understand that a company feels the need to protect its products from piracy. However, this should not negatively affect customers who through lawful means have obtained downloaded files. Today, iTunes' use of DRM-technology renders the customers without rights in dealing with a company which on a whim can dictate what kind of access customers will have to products they have already paid for," says Thon.

Consumer groups and ombudsmen in France, Germany and Finland have recently announced they were joining the Norwegian complaint against Apple.¹²⁵

2 Variations effected by DRM alone

The power of a content owner to alter the DRM-enforced usage rules derives, fundamentally, from their control of the DRM system, not from a contract with the consumer. It is open to a content owner to alter unilaterally the usage rules for purchased content, with or without a contractual term permitting them to do so.

How then would consumer protection laws apply? There would be no term of a contract to be declared unfair or unjust. The subjective unfairness of the situation would arise only from the post-contractual conduct of the supplier. It seems that the *Fair Trading Act 1999 (Vic)* and *Contracts Review Act 1980 (NSW)* might not apply, and the consumer's only recourse may be for unconscionable conduct within the meaning of s 51AB of the *TPA* or at common law.

E Attempts to Oust Relevant Consumer Protection Laws

1 Choice of Law and Venue Clauses

¹²⁴ Forbrukerombudet, *iTunes Violates Norwegian Law* <http://www.forbrukerombudet.no/index.gan?id=11032467&subid=0> viewed 5 February 2007.

¹²⁵ Forbrukerombudet, *European Consumer Organisations Join Forces in Legal Dispute over iTunes Music Store* <http://www.forbrukerombudet.no/index.gan?id=11037079&subid=0> viewed 5 February 2007.

Author version

Many electronic contracts and, indeed many standard-form contracts formed otherwise than electronically, contain clauses relating to choice of law and venue. These clauses may be unfair if they would have the effect of ousting consumer protection laws that would otherwise be available to the consumer.

In *Law v MCI Technologies* [2006] VCAT 415, the Victorian Civil and Administrative Tribunal had to consider the effect of a clause of a shrinkwrap software licence agreement which began:

Your acceptance of the terms and conditions of this license agreement is declared by opening this sealed package or by using this product.¹²⁶

and concluded:

Jurisdiction: This license is governed exclusively by the laws of Queensland. The parties irrevocably submit the [sic] exclusive jurisdiction of the courts of Southport, Queensland.¹²⁷

The case also involved a 'Software & Copyright Declaration' signed by the customer providing in part that:

The user hereby acknowledges that this contract of sale is formed exclusively within Southport in the State of Queensland. The parties involved irrevocably submit to the exclusive jurisdiction of Southport in the State of Queensland.¹²⁸

In considering whether the *Fair Trading Act 1999* (Vic) gave VCAT jurisdiction over the dispute, the Tribunal held that

The FTA is a law enacted by the Parliament of Victoria. Section 6 of the FTA provides that the Act applies 'within and outside Victoria'; and that it applies outside Victoria 'to the full extent of the extra-territorial legislative power of the Parliament'. This may mean that the FTA only operates in relation to subject-matter that has a relevant connection with Victoria, although the extent of the connection is to be considered liberally. Thus it is unlikely that the (Victorian) FTA would have application to the supply of goods or services where this is exclusively a Queensland transaction: that is, both the supplier and the purchaser of the goods or services are resident in Queensland and where the supply occurs in Queensland. However where the supply, or possible supply, of goods or services occurs, or is proposed to occur, in Victoria, the (Victorian) FTA applies to any dispute or claim arising in relation to such a supply or possible supply. The Victorian Parliament may pass a law regulating the supply of goods to Victorian purchasers – at least where the goods are supplied in Victoria – whether the supplier is resident in Victoria or not.¹²⁹

The Tribunal also made reference to a similar case in the NSW Supreme Court, involving the same respondent, which also held that clauses of this type did not oust the jurisdiction of the courts and the consumer protection laws of the state in which the consumer resides.¹³⁰

There is yet no clear authority on whether a choice of law or choice of venue clause has the effect of 'limiting the consumer's right to sue the supplier' within the meaning

¹²⁶ *Law v MCI Technologies* [2006] VCAT 415 at [27].

¹²⁷ *Law v MCI Technologies* [2006] VCAT 415 at [27].

¹²⁸ *Law v MCI Technologies* [2006] VCAT 415 at [28].

¹²⁹ *Law v MCI Technologies* [2006] VCAT 415 at [43].

¹³⁰ *Oubani v MCI Technologies Pty Ltd* [2004] NSWSC 733, cited in *Law v MCI Technologies* [2006] VCAT 415 at [45].

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of s 32X(k) of the *Fair Trading Act 1999* (Vic), but given the willingness of courts in the previously discussed cases to apply local consumer protection laws in the face of these types of clauses, this may not be a significant issue.

2 Mandatory Arbitration Clauses

Electronic contracts and EULAs for many products contain mandatory arbitration clauses. As an example, the World of Warcraft EULA provides:

To expedite resolution and control the cost of any dispute, controversy or claim related to this License Agreement ('Dispute'), you and Blizzard agree to first attempt to negotiate any Dispute ... informally for at least 30 days before initiating any arbitration or court proceeding.¹³¹

The EULA further provides:

If you and Blizzard are unable to resolve a Dispute through informal negotiations, either you or Blizzard may elect to have the Dispute (except those Disputes expressly excluded below) finally and exclusively resolved by binding arbitration. Any election to arbitrate by one party shall be final and binding on the other. YOU UNDERSTAND THAT ABSENT THIS PROVISION, YOU WOULD HAVE THE RIGHT TO SUE IN COURT AND HAVE A JURY TRIAL.¹³²

It then provides:

You and Blizzard agree that any arbitration shall be limited to the Dispute between Blizzard and you individually. To the full extent permitted by law, (1) no arbitration shall be joined with any other; (2) there is no right or authority for any Dispute to be arbitrated on a class-action basis or to utilize class action procedures; and (3) there is no right or authority for any Dispute to be brought in a purported representative capacity on behalf of the general public or any other persons.¹³³

Very similar clauses in a clickwrap contract were at issue in the class-action case of *Comb v PayPal Inc* 218 F Supp 2d 1165. In that case, the court held that

By allowing for prohibitive arbitration fees and precluding joinder of claims (which would make each individual customer's participation in arbitration more economical), PayPal appears to be attempting to insulate itself contractually from any meaningful challenge to its alleged practices.¹³⁴

Interestingly, that case involved a previously discussed feature of many electronic contracts – the ability of the licensor to unilaterally vary the contract. Paypal argued that even though the clickwrap licence actually agreed to by one of the class-action plaintiffs *did not contain* an arbitration clause, the contract bound the plaintiff to accept any subsequent revision of the contract – which had been subsequently revised to include such a clause.

¹³¹ Blizzard Entertainment Inc, *World of Warcraft End User License Agreement* at cl 14(a), <http://www.worldofwarcraft.com/legal/eula.html> viewed 3 April 2007.

¹³² Ibid cl 14(b).

¹³³ Ibid cl 14(c)

¹³⁴ *Comb v PayPal Inc*, 218 F Supp 2d 1165, 1176.

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Although the court in *Comb v Paypal Inc* declined to enforce the arbitration clause because of unconscionable conduct on the part of Paypal, previous courts have dismissed litigation against Paypal because of the such a clause.¹³⁵

Though the legislative background of arbitration clauses in Australia is different,¹³⁶ provisions of electronic contracts that require an Australian licensor to submit to binding arbitration in a foreign jurisdiction are likely to be unfair terms within the meaning of the *Fair Trading Act 1999* (Vic).

F Other Unfair Practices

While it is not possible to compile a complete list of the unfair practices that a licensor might engage in in relation to the formation of electronic contracts, our research has identified several examples of such practices.

1 Time Limitations

One such example of an unfair practice is contained in the website of Australian ticket agency Ticketmaster Pty Ltd.¹³⁷ When purchasing tickets through that website, the customer must proceed through a number of screens. When the user begins the process, certain tickets are placed 'on hold' for that user to purchase. The process is timed – at the top of every screen there is a prominent message stating 'Please complete this page within [amount of time]. After [amount of time], the tickets we're holding will be released for others to buy.' The amount of time permitted to proceed through each screen varies between one and three minutes.

The consequences to a user of not completing a screen in the allotted time could be dire, especially in the case of very popular events – the tickets the user had been trying to purchase would be released for others to buy, and the user would have to buy other, potentially less desirable tickets, if indeed there were any tickets left to buy.

It is for this reason surprising that on the third screen of the purchase process, Ticketmaster allows a mere three minutes for the user to type in details including their credit card type, number, expiry date, security code, first and last name, address, city, state and postcode, as well as business, after hours and mobile phone numbers, and agree to a 381 word clickwrap contract at the bottom of the screen.

That contract incorporates by reference two other documents:

By clicking the 'Submit Order' button, you are agreeing to the Ticketmaster [Purchase Policy](#) including the Refund and Exchanges and Cancelled Events section, as well as the [Privacy Policy](#).

The 'Purchase Policy' and 'Privacy Policy' to which the user agrees are 1539 words and 1105 words long, respectively. The Purchase Policy contains a number of terms that may be unfair, including that certain processing fees are non-refundable, clauses limiting liability and excluding refunds for changes in support acts, limiting liability and

¹³⁵ *Manning v Paypal Inc* 2001 U.S. Dist. LEXIS 23410.

¹³⁶ The US has federal legislation to promote the validity and enforceability of arbitration clauses in such contracts: Federal Arbitration Act 9 USC § 1.

¹³⁷ <http://www.ticketmaster.com.au>

Author version

refunds for postponement or cancellation, and a waiver of any claims that may result from a physical search of the purchaser before entry – a search which the Purchase Policy gives consent to.

To purchase tickets through the Ticketmaster website, the purchaser must read and assent to a contract involving three separate documents and 3025 words of text, in three minutes, at a rate of 16.8 words per second – not including the time required to fill in the details for payment, personal information, and shipping. The impossibility of such a requirement seems self-evident.

Contracts formed in circumstances such as these may contravene s 51AB of the TPA. Two of the non-exhaustive list of factors that a court may have regard to in deciding whether a contravention of s 51AB have occurred include:

- whether the consumer was able to understand any documents relating to the supply or possible supply of the goods or services; and
- whether any undue influence or pressure was exerted on, or any unfair tactics were used against the consumer by the supplier.¹³⁸

In a situation such as the Ticketmaster website, Ticketmaster has not allowed the consumer sufficient time to read the applicable contracts, let alone understand them. This may amount to ‘undue pressure’ or ‘unfair tactics’ within the meaning of s 51AB(2).

2 *Penalty clauses*

Some electronic contracts contain terms that could be characterised as penalties, and could for that reason alone be unenforceable. One such example can be found in the TPG Internet ‘Terms and Conditions for TPG ADSL and VoIP Bundle Plans’:

The Customer agrees that their TPG ADSL/ADSL2+ service may not be resold or on-sold, and that it is not available to the following: ISPs, Internet Cafés and Web Hosting Companies. Otherwise charges of \$10,000 per month for a 256K connection, \$15,000 per month for a 512k connection, \$20,000 per month for 1500K or \$30,000 per month for a ADSL2+ connection from the first date of connection will apply.¹³⁹

A business operating an Internet café which purchased an ADSL2+ service from TPG Internet, and used it for six months, would on the face of the contract be liable to pay a \$180,000 penalty for so doing. Although this would be unenforceable as a matter of contract law, including such a term in a contract is not prohibited *per se* by consumer protection laws.¹⁴⁰

3 *Contracting out of exceptions to copyright*

The majority of electronic contracts involving material protected by copyright purport to restrict the uses of that material in ways that conflict with applicable exceptions to copyright, such as fair dealing. In the case of computer software, most EULAs

¹³⁸ *Trade Practices Act 1974* (Cth), ss 51AB(2)(c), (d).

¹³⁹ TPG Internet Pty Ltd, *Terms and Conditions for TPG ADSL and VoIP Bundle Plans* at cl 1.5(e), http://www.tpg.com.au/terms_conditions/adsl.php viewed 3 April 2007.

¹⁴⁰ It may, however, constitute misleading or deceptive conduct in contravention of s 52 of the TPA. The example clause given also contravenes s 6.2(g) of the ACIF Consumer Contracts Code.

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purport to prohibit reverse-engineering, either absolutely or to the greatest extent permissible by law.¹⁴¹ Reverse-engineering is a process essential to develop interoperable computer software, and prohibiting reverse-engineering will prevent or impede the development of competing software products.¹⁴²

In the US, persons can validly contract out of exceptions to copyright.¹⁴³ In Australia, some exceptions to copyright may not be excluded by contract,¹⁴⁴ but a 2002 review by the Copyright Law Review Committee concluded the status of the remaining exceptions was doubtful, and recommended that the government legislate to protect those exceptions.¹⁴⁵ To date, the government has not done so.

Clauses of this type require the consumer to contract out of legislatively established exceptions to the rights of the supplier. In some cases, where such a clause would, in all the circumstances and contrary to the requirements of good faith, cause a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer, the term may be an unfair term within the meaning of the *Fair Trading Act 1999* (Vic).¹⁴⁶

VI THE FORM OF FUTURE REGULATION

The introduction of any scheme capable of addressing the problem of unfair terms in clickwrap and other electronic contracts is likely to face serious opposition.

Criticisms levelled at ss 51AB and 51AC of the TPA – that they are likely to increase civil litigation, decrease certainty of contract, make consistency of decision-making by courts difficult to achieve and, over time, undermine confidence in the judicial system,¹⁴⁷ are likely to be made in relation to unfair terms legislation as well.

Rather than viewing the enumerated 'relevant factors' set out in legislation of this type as 'categories of meaningless reference',¹⁴⁸ we view them as an important guide as to what the parliament intends the scope of this 'extended' unconscionability to cover.

Fundamentally, consumer protection laws which allow for the reopening of contracts because of unconscionable conduct, unjustness or unfairness are recognition by the government that courts ought not only to protect consumers who are drunk, illiterate, or otherwise under a special disadvantage but also those who are unable to make a worthwhile judgment as to what is in their best interest. To do otherwise would be to invite predatory conduct by suppliers, and would enforce against consumers transactions which are 'obviously unfair or harsh, and thus not explicable by ordinary and legitimate motives'.¹⁴⁹

¹⁴¹ A complete exclusion of reverse-engineering is void in Australia: *Copyright Act 1968* s 47H.

¹⁴² Clapperton et al, n 113 at 681-3, 685-6.

¹⁴³ *Davidson & Associates, doing business as Blizzard Entertainment Inc v Jung*, 422 F 3d 630 (8th Cir, 2005).

¹⁴⁴ *Copyright Act 1968*, ss 47B-H.

¹⁴⁵ Copyright Law Review Committee, *Copyright and Contract* at [7.49],

<http://www.ag.gov.au/www/clrHome.nsf/AllDocs/RWP092E76FE8AF2501CCA256C44001FFC28?OpenDocument> viewed 3 April 2007.

¹⁴⁶ *Fair Trading Act 1999* (Vic) s 32W.

¹⁴⁷ Rickett C, "Unconscionability and Commercial Law" (2005) 24 *University of Queensland Law Journal* 73, 89.

¹⁴⁸ Rickett, n 147 at 89.

¹⁴⁹ Rickett, n 147 at 80.

A Is this really a problem?

Many of those who oppose regulation of unfair terms argue that the cure is worse than the disease.

The cure (remedial legislation) is certainly not without its side-effects. Any legislation permitting the re-opening of contracts by a court will affect certainty of contract and impose consequent costs upon suppliers. As a practical matter, those costs will be passed onto consumers, along with compliance costs. Suppliers may also withdraw their products, reducing choice and harming consumer welfare.

These risks must be balanced against the 'disease' – the unfair terms. Given the prevalence of clickwrap and other electronic contracts, and the relative lack of litigation or other controversy involving them – at least in Australia – one might assume that the 'disease' is a benign one, and best left alone. For several reasons, we submit that this assessment is not an accurate one.

First, the terms of clickwrap and other electronic contracts have been the subject of extensive litigation in the United States. Probable unfair terms have been used to insulate suppliers from challenge in the courts,¹⁵⁰ suppress the development of competing products and services,¹⁵¹ sue competitors for 'improperly' using the supplier's website,¹⁵² and restrict the customer's freedom of speech.¹⁵³

The fact that Australia has not seen such litigation in the past does not mean it will not see such litigation in the future. Even in the US, which has the best-developed caselaw in the world on clickwrap and other electronic contracts, one recent commentary described such licenses as 'an epidemic of lawsuits waiting to happen'.¹⁵⁴ Given that US caselaw would likely be raised as persuasive precedents in any similar Australian litigation, the need for domestic consumer protection laws is all the greater if we are to avoid similar outcomes.

Secondly, the mere presence of objectionable unfair terms in electronic contracts has an *in terrorem* effect on consumers.¹⁵⁵ Disgruntled consumers who are not educated as to their rights and the effect of consumer protection law, when confronted with clauses to the effect that IN NO EVENT SHALL THE SUPPLIER BE LIABLE FOR ANY DAMAGES WHATSOEVER, are likely to abandon what might be a viable claim against the supplier.

Thirdly, there is ample evidence that suppliers in certain industries within Australia, especially Internet Service Providers, have abused unfair terms in contracts with their users (including electronic contracts), especially when unilaterally varying the terms of the contract or the price or quality of services supplied.¹⁵⁶ This problem became

¹⁵⁰ *Manning v Paypal Inc* 2001 U.S. Dist. LEXIS 23410.

¹⁵¹ *Davidson & Associates, doing business as Blizzard Entertainment Inc v Jung*, 422 F 3d 630 (8th Cir, 2005).

¹⁵² *Register.com, Inc v Verio, Inc* 356 F 3d 393.

¹⁵³ Slashdot, *MS FrontPage Restricts Free Speech II (It's True!)*, <http://slashdot.org/articles/01/09/21/1438251.shtml> viewed 3 April 2007.

¹⁵⁴ Doctorow C, *Shrinkwrap Licenses: An Epidemic of Lawsuits Waiting to Happen*, <http://www.informationweek.com/news/showArticle.jhtml?articleID=197003052> viewed 3 April 2007.

¹⁵⁵ Loren, n 43.

¹⁵⁶ Telecommunications Industry Ombudsman, *Ombudsman Concerned about Internet Contract Variation*, http://www.tio.com.au/media_statements/RELEASES/2007/2007-02-07%20media%20release.pdf viewed 3 April 2007.

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sufficiently severe that the government moved to regulate unfair terms in the telecommunications industry (as described below).

Lastly, choice of law, choice of venue, and mandatory arbitration clauses are a very effective barrier to Australian consumers seeking to enforce their rights. If an Australian consumer suffers loss or damage because of a faulty software product, but the terms of the EULA require them to sue in courts in the state of Delaware, they are likely to abandon their claim.

On balance, we feel that the cure is not worse than the 'disease'. The only remaining issue is what cure is preferable.

B Forms of regulation

As noted earlier in this article, the authors take no position on the need for a national scheme dealing with unfair terms in consumer contracts. However, subject to jurisdictional issues and other limitations of using consumer-protection legislation against foreign corporations, such a scheme would go a long way towards dealing with the problems we have identified.

In the US, Lydia Loren has suggested that the equitable defence of 'copyright misuse' might be applied against unfair terms in EULAs, or, as she refers to it, 'clickwrap misuse'.¹⁵⁷ While such a novel approach would be promising if successful, it would have no application in countries, such as Australia, whose common law does not recognise the defence of copyright misuse.

The prospects of a national scheme to deal with unfair terms in all consumer contracts are uncertain, and are likely to come down to political issues, and the willingness of the government of the day to cross swords with the business community, who are certain to oppose moves in this direction.

C A sui generis scheme for electronic contracts

It may seem then that a scheme dealing only with electronic contracts might have a better chance of adoption. A national scheme dealing with unfair terms in consumer contracts within a specific industry has some Australian precedent.

Such a scheme exists in the form of the Australian Communications Industry Forum ('ACIF') 'Industry Code ACIF C620:2005 Consumer Contracts' (the 'ACIF Code'). The ACIF Code traces its roots to a report published by the Communications Law Centre ('CLC') in January 2001, entitled 'Unfair Practices and Telecommunications Consumers'. That report led to the production of non-binding guidelines by the ACIF, which were published in December 2002. A further report by the CLC into the level of compliance with the guidelines led the industry regulator to request the development of the ACIF Code.

The ACIF Code draws from Part 2B of the *Fair Trading Act 1999* (Vic), as well as comparable overseas legislation.¹⁵⁸ The ACIF Code defines a consumer as a person who acquired telecommunications products primarily for personal or domestic use, or where a business customer has an estimated annual spending with the supplier of less than \$20,000, and has not had a genuine and reasonable opportunity to

¹⁵⁷ Loren, n 43.

¹⁵⁸ Australian Communications Industry Forum, *Industry Code ACIF C620:2005 Consumer Contracts* at page i, <http://www.acif.org.au/documents/codes/C620> viewed 3 April 2007.

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negotiate the terms of the contract.¹⁵⁹ Persons acquiring telecommunications products for resale are excluded from the ACIF Code.¹⁶⁰

The ACIF Code prohibits the use of unfair terms in contracts to which it applies. It draws heavily from the *Fair Trading Act 1999* (Vic), but seeks to apply the 'relevant factors' from s 32X of that Act in a very telecommunications-specific manner. In doing so, it attempts to create norms of conduct in situations commonly encountered in the supply of telecommunications services. As an example, a 'relevant factor' under the ACIF Code is if the object or effect of a clause is to allow the supplier to unilaterally vary a fixed-term contract without giving written notice at least 21 days beforehand, and giving the consumer 42 days (from the date of the notice) in which the consumer can elect to terminate the contract without penalty.¹⁶¹

The ACIF Code also sets out minimum requirements for the presentation, format, and structure of contracts, and promotes the use of plain language in drafting.¹⁶²

The ACIF Code is registered under s 117 of the *Telecommunications Act 1997* (Cth). If an industry participant is not in compliance with the code, registration enables the Australian Communications and Media Authority to give a written direction to comply with the code.¹⁶³ Failure to comply with such a direction renders the recipient liable to a pecuniary penalty.¹⁶⁴

There are several obstacles to the adoption of such an approach to deal with unfair terms in EULAs. First and most serious, the ACIF Code is built within a pre-existing legislative and regulatory structure that provides for the development and enforcement of such codes within the Telecommunications industry.

No such structure exists for the software industry; however, there are general-purpose provisions for industry codes of conduct within Part IVB of the TPA. These provisions are used with some success with codes such as the Franchising Code of Conduct and the Oilcode. Should a mandatory industry code of conduct in relation to EULAs be declared under Part IVB, this may still provide a less comprehensive solution than the Part 2B of the *Fair Trading Act 1999* (Vic) for a number of reasons, including:

- Unfair terms in contracts would not be void; instead the consumer would have to seek this relief as an ancillary order under s 87 of the TPA, and such relief would be at the discretion of the court;
- Consumers would have to bring proceedings in a court with jurisdiction over actions under the TPA. Actions under Part 2B of the *Fair Trading Act 1999* (Vic) may be brought in the Victorian Civil and Administrative Tribunal, which is a much simpler and cheaper process; and
- There would be no ability to prescribe (declare) unfair terms in standard-form contracts or EULAs.

Lastly, the software industry is likely to strenuously oppose any moves to subject their licensing terms to a specific regulatory regime, whereas their opposition may be less vehement if a scheme dealing with unfair terms in consumer contracts generally

¹⁵⁹ *Ibid*, s 4.2.

¹⁶⁰ *Ibid*.

¹⁶¹ *Ibid*, s 6.2(j)

¹⁶² *Ibid*, s 7.

¹⁶³ *Telecommunications Act 1997* (Cth) s 121(1).

¹⁶⁴ *Telecommunications Act 1997* (Cth) ss 121(2), 121(4), 570.

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were under consideration. Moves to regulate the conduct of multinational software companies have in the past caused those companies to threaten to withdraw from the markets in question.¹⁶⁵ More recently, Apple Computer Inc engaged in an elaborate exercise of brinkmanship with the French government, denouncing proposed regulation as 'state-sponsored piracy', while industry analysts suggested that Apple would withdraw its products from France if the changes became law.¹⁶⁶

D Conclusion

The relative prospects of adoption of a national scheme dealing with unfair terms in consumer contracts generally, versus a sui generis scheme dealing only with unfair terms in EULAs, are debatable and opinions will differ. Certainly, the former would go a long way to dealing with the problem of unfair terms in electronic contracts.

Notwithstanding the current Productivity Commission review into consumer protection laws, early indications are that there is a lack of political will to introduce a scheme along the lines of Part 2B of the *Fair Trading Act 1999* (Vic) at the Commonwealth level.

In the end, this may not be necessary. The NSW Standing Committee on Law and Justice recently recommended that NSW should establish 'a scheme for the protection of consumers in relation to unfair terms in consumer contracts', and that the scheme should be modelled on Part 2B of the *Fair Trading Act 1999* (Vic).¹⁶⁷

Should this recommendation be followed, the two most populous states in Australia would have legislation dealing with unfair terms, and the remaining states and territories may be likely to follow suit.

The authors believe that a compelling case exists for legislation to regulate, at least, unfair terms in electronic contracts. While in this paper we take no position on the necessity for regulation of unfair terms in consumer contracts generally, we observe that:

- Regulation of unfair terms in all consumer contracts is likely to face less opposition from the software industry; and
- Many of the issues we have identified in relation to clickwrap and electronic contracts can be generalised to apply to standard-form contracts generally.

For these reasons, regulation of unfair terms in all consumer contracts may be the preferable solution.

¹⁶⁵ According to M. A. P. Saunders and J.W.K. Burnside ('Use of American Computer Contracts in Australia, Part 2-The Problem of Exemption Clauses', 1986, 2 *International Review of Computer Technology and the Law* 91, 92), IBM threatened to cease carrying on business in Australia 'unless some amelioration of trade practices provisions were incorporated into [the TPA]'. Microsoft also threatened to withdraw its Windows operating system from South Korea if that country's Fair Trade Commission ordered them to unbundle Microsoft Instant Messenger and Media Player from the operating system: <http://www.crn.com.au/story.aspx?CIID=25441>

¹⁶⁶ [CNET news.com](http://news.com.com/2100-1025_3-6052754.html), *Apple calls French law 'state-sponsored piracy'*, http://news.com.com/2100-1025_3-6052754.html viewed 3 April 2007.

¹⁶⁷ NSW Legislative Council Standing Committee on Law and Justice, <http://tinyurl.com/2w97kz> viewed 3 April 2007.