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**SUBMISSION TO THE REVIEW OF THE AUSTRALIAN CONSUMER LAW BY CONSUMER AFFAIRS  
AUSTRALIA AND NEW ZEALAND\***

Dear sir/madam

**Introduction and summary**

1. This submission addresses two aspects of the provisions regarding unfair contract terms found in Part 2-3 of the *Australian Consumer Law (UCT Provisions)*. It also addresses the prescribed requirements for warranties against defects found in s 102 of the *Australian Consumer Law (ACL)*.

UCT Provisions

2. The two aspects of the UCT Provisions to be addressed are the concepts of 'transparency' and 'upfront price'.
3. The UCT Provisions *require* a court to consider 'transparency' when determining whether a term is 'unfair'. It is submitted that 'transparency' should not be a mandatory consideration because:
  - (a) 'transparency' is of little to no relevance to the test for 'unfairness', as stated in s 24(1) of the ACL, and hence may lead to the incorrect application of that test; and
  - (b) it was not proposed as an element of the UCT Provisions in the Productivity Commission's report, 'Review of Australia's Consumer Policy Framework' (**Productivity Commission Report**),<sup>1</sup> which was the basis for the introduction of the UCT Provisions.
4. As an alternative to 'transparency' being a mandatory consideration when determining whether a term is 'unfair', the ACL could perhaps include a provision specifically addressing unclear terms similar to that currently found in the *Consumer Rights Act 2015 (UK)*.
5. The concept of 'upfront price', as defined by s 26(2) of the ACL, is relevant to the application of the UCT Provisions to 'consumer contracts'. Later this year, the UCT provisions will be extended by the *Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Act 2015 (Cth) (Treasury Act)* to transactions involving small businesses. Once this occurs, 'upfront price' will take on a new and more important role in relation to 'small business contracts'. Although 'upfront price' will play a different role for 'small business contracts', it will be defined in the same way as for 'consumer

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\*Except where otherwise stated, the opinions in this submission are those of the author and should not be taken as the opinions of anyone else.

<sup>1</sup> Productivity Commission, *Review of Australia's Consumer Policy Framework*, Report No. 45 (2008).

contracts'. It is submitted that the Review should consider whether the definition of 'upfront price' should be altered in light of its new role.

#### Warranties against defects

6. It is submitted that the requirements for a document evidencing a warranty against defects place an undue burden on business and are unnecessary in an age of smart phones and Wi-Fi where consumers can access information about warranties against defects via the internet.

#### **UCT Provisions: 'Transparent'**

#### The definition of 'unfair' and 'transparent'

7. Section 24(1) of the ACL states when a term is 'unfair'. It provide as follows:

(1) *A term of a consumer contract is **unfair** if:*

- (a) *it would cause a significant imbalance in the parties' rights and obligations arising under the contract; and*
- (b) *it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and*
- (c) *it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.*

8. The test for whether a term is 'unfair' is quite specific. A term is only 'unfair' if it fulfils each of the three elements in s 24(1). The test is not cast in wide terms, such as a 'term will be unfair if it is unfair in all the circumstances'. This can be contrasted with the prohibition on unconscionable conduct in relation to the supply of goods and services in s 21 of the ACL, which provides that a person must not 'engage in conduct that is, in all the circumstances, unconscionable.' Such a wide-ranging test has perhaps not been used in s 24(1) due to concerns that whether something is unfair is too subjective and hence a wide-ranging test may create a risk of idiosyncratic decisions and uncertainty for contracting parties. It is worth noting that the common law will not invalidate a term simply because it is unfair.<sup>2</sup> Hence, a wide-ranging test for 'unfairness' in the ACL would perhaps have been a significant departure from common law principles which policy-makers were unwilling to take. By contrast, unconscionability is well-known to equity and confined by requirements such as the plaintiff having to suffer from a special disadvantage.

9. Section 24(2) of the ACL provides that a court may take into account such matters as it thinks relevant when determining whether a term is 'unfair' but *must* take into account 'the extent to which the term is transparent' and the 'contract as a whole'. The second of these two mandatory considerations is unlikely to result in a court considering anything which it would not have considered in the absence of s 24(2). The effect of s 24(1)(a) is that a term will not be 'unfair' unless 'it would cause a significant

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<sup>2</sup> *ACCC v CLA Trading Pty Ltd* [2016] FCA 377, [47], citing *Biotechnology Australia Pty Ltd v Pace* (1988) 15 NSWLR 130, 132-3 (per Kirby P); *Woolworths Ltd v Kelly* (1991) 22 NSWLR 189, 193-4; Elizabeth V Lanyon, 'Equity and the Doctrine of Penalties' (1996) 9 *Journal of Contract Law* 234, 250.

imbalance in the parties' rights and obligations arising *under the contract*. In order to determine whether this requirement is fulfilled, a court must surely consider the 'contract as a whole' since s 24(1)(a) is not limited to a consideration of the rights and obligations arising under the impugned term or some other discrete part of the contract.

10. Section 24(3) of the ACL defines the concept of 'transparency' as follows:

- (3) A term is **transparent** if the term is:
- (a) expressed in reasonably plain language; and
  - (b) legible; and
  - (c) presented clearly; and
  - (d) readily available to any party affected by the term.

#### The relevance of 'transparent' to the test for 'unfairness'

11. The first three elements of the definition of 'transparent' address the clarity of a term's expression. The fourth and final element addresses the availability of a term to a party affected by the term.
12. It is submitted that none of these four elements are relevant to the second and third elements of the test for 'unfairness' and of limited relevance to the first element of the test.
13. This submission will first address the second element of the test for 'unfairness': whether the term is 'reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term'. It is submitted that this element cannot be influenced by the clarity of a term or its availability to another party. What amounts to a 'legitimate interest' of a party depends on matters such as the environment in which it operates and the risks it is exposed to. Whether a term is 'reasonably necessary in order to protect' a 'legitimate interest' depends on the rights and obligations the term allocates to the parties. This view is supported by the recent decision of *Chanel v Tiger Airways Australia Pty Ltd ('Tiger Airways')*<sup>3</sup> and ACCC guidance.
14. In *Tiger Airways*, Member Davies considered a term that limited the remedies of an airline passenger in the event that the airline rescheduled or cancelled a flight.<sup>4</sup> Member Davies concluded that the term was reasonably necessary to protect the legitimate interests of the airline based on evidence that the airline industry would be unlikely to operate efficiently without such a term, the airline would be exposed to 'unknown, unavoidable and unquantifiable risks and consequences and claims' without such a term, and the term was commonly used by other Australian airlines.<sup>5</sup> The 'transparency' of the term was not considered in relation to this issue.
15. On 8 February 2011, the ACCC issued 'A guide to the unfair contract terms law'.<sup>6</sup> The guide states that evidence relevant to the protection of a legitimate interest 'might include material relating to the

<sup>3</sup> [2016] VCAT 84.

<sup>4</sup> *Tiger Airways* [2016] VCAT 84, [2].

<sup>5</sup> *Ibid* [8].

<sup>6</sup> 'A guide to the unfair contract terms law' (Commonwealth Attorney General's Department, 2010) (ISBN 978 1 921 887 291).

business's costs and business structure, the need for the mitigation of risks or particular industry practices to the extent that such material is relevant.<sup>7</sup> 'Transparency' is not mentioned.

16. Transparency may have some *connection* to whether a term is reasonably necessary to protect a 'legitimate interest' of a party but is not *relevant* to determining whether the term is reasonably necessary to protect that interest. If a defendant operates in a complex environment, a term that protects its 'legitimate interests' may need to be so complex as to make it difficult or impossible to express 'in reasonably plain language'. In those circumstances, the lack of 'transparency' is not relevant to whether the term is reasonable necessary to protect a 'legitimate interest'; rather, the party's aim of protecting its 'legitimate interests' in a complex environment *explains* the lack of transparency.
17. This submission will now address the third element of the test for 'unfairness': whether the term 'would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on'. It is submitted that the clarity with which a term is expressed and its availability to a party are irrelevant to this third element. Whether a party will suffer detriment depends on the practical effect of the term. This will remain the same regardless of how clearly the term is expressed or whether it was made available to a party.
18. This submission will now address the first element of the test for 'unfairness': whether the term 'would cause a significant imbalance in the parties' rights and obligations arising under the contract.' Dr Sirko Harder examined the role of 'transparency' in his article 'Problems in interpreting the unfair contract terms provisions of the Australian Consumer Law'.<sup>8</sup> Dr Harder concluded:

*[T]here is only one situation in which the requirements of unfairness set out in s 24(1) can easily accommodate considerations of transparency, and that is where the parties' rights and obligations directly depend upon ... [one party] being aware of the term. In other cases, none of the requirements of unfairness lends itself easily to considerations of transparency.*<sup>9</sup>  
[underlining added]

19. According to Dr Harder, the situation 'where the parties' rights and obligations directly depend upon the ... [one party] being aware of the term' may arise where, for example, 'a contract for architect work deprives the customer of all claims relating to a defect in the building unless the customer notifies the architect of the defect within a certain period.'<sup>10</sup> Such a term limits the ability of a party to enforce a right. In the example given by Dr Harder, the term limits the ability to bring a claim for defective work. Such a term will be referred to as a '**Limiting Term**' for the remainder of this submission.
20. It is submitted that Dr Harder is correct: the 'transparency' of a term will only be relevant to the test for 'unfairness' if that term is a Limiting Term. Further, 'transparency' will only be relevant to the first element of the test for 'unfairness'. In all other cases, it is irrelevant. The relevance of 'transparency'

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<sup>7</sup> Ibid 12.

<sup>8</sup> Dr Sirko Harder, 'Problems in interpreting the unfair contract terms provisions of the Australian Consumer Law' (2011) 34 *Australian Bar Review* 306.

<sup>9</sup> Ibid 319.

<sup>10</sup> Ibid 318.

to a Limiting Terms can be seen as follows. If a Limiting Term lacks 'transparency', a party may be unaware of the limitation it imposes on their rights. As a result, they may lose the opportunity to exercise a right. Depending on other circumstances, this could create a significant imbalance in the parties' rights and obligations arising under the contract.

21. The potential relevance of 'transparency' to a Limiting Term has been noted by other commentators.<sup>11</sup> It is arguable that 'transparency' is *not* relevant to whether a Limiting Term causes 'a significant imbalance in the parties' rights and obligations arising under the contract'. On one view, the parties' rights and obligations do *not* 'directly depend upon ... [one party] being aware of the term', contrary to Dr Harder's argument. A party's *ability* to exercise its rights may depend on their awareness of those rights but the *existence* of those rights does not depend on the party being aware of them. Their rights will exist whether the party is aware of them or not. 'Transparency' is only relevant to whether a Limiting Term causes a significant imbalance in rights and obligation if we interpret s 24(1)(a) of the ACL as embracing an imbalance in the *ability* of the parties to exercise rights rather than an imbalance in those *actual* rights. If s 24(1)(a) is only concerned with an imbalance in the *actual* rights, transparency is irrelevant. This is because the rights and obligations of the parties arising under the contract are determined by a proper interpretation of the provisions of the contract and are unaffected by the parties' knowledge of those provisions or how clearly they are expressed, although clarity of expression may result in the proper interpretation being arrived at with greater ease. If s 24(1)(a) is concerned with the *ability* of the parties to exercise their rights, the transparency of a Limiting Term is relevant. This is because an obscure Limiting Term could result in a party being unable to exercise a right. The practical inability to exercise that right may significantly alter the balance in rights and obligations arising under the contract.
22. This begs the question of whether the 'significant imbalance' test in s 24(1)(a) of the ACL is only concerned with the *existence* of the rights and obligations of the parties or embraces their *ability* to exercise those rights. In the author's view, 'a significant imbalance in the parties' rights and obligations arising under the contract' embraces the *ability* of the parties to exercise rights. It would be impossible to comprehensively assess whether a term would cause a significant imbalance in the rights and obligations of the parties unless one considers the effect of those rights and obligations. Whether there is a significant imbalance will depend on the number of rights and obligations each party has, but more importantly, on the *value* of those rights and obligations. Their *value* can only be assessed by considering their actual effect. If the actual effect is not considered, the determination of whether there is a significant imbalance would be reduced to an arithmetic exercise where the number of rights and obligations of each party is simply tallied. This would be a triumph of form over substance and would not give an accurate indication of whether there is a significant imbalance in rights and obligations.
23. In summary, the concept of 'transparency' is irrelevant to the second and third elements of the test of 'unfairness' and will only be relevant to the first element for a specific category of terms, being Limiting Terms. If a wide-ranging test for 'unfairness' existed in the ACL, such as that referred to in paragraph

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<sup>11</sup> See Chris Willett, 'The Functions of Transparency in Regulating Contract Terms: UK and Australian Approaches' (2011) 60 *International and Comparative Law Quarterly* 355, 377.

8 above, 'transparency' might have greater relevance, but such a test has not been used. Given the limited relevance of 'transparency, why was 'transparency' made a mandatory consideration for determining 'unfairness'?

Why was 'transparency' made a mandatory consideration for determining 'unfairness'?

24. It is not entirely clear why 'transparency' was made a mandatory consideration for determining 'unfairness'.
25. The Explanatory Memorandum for the bill that introduced the ACL<sup>12</sup> states that the UCT Provisions are based on the recommendations made by the Productivity Commission Report.<sup>13</sup> The Productivity Commission Report recommended that a term in a standard-form contract should be declared 'unfair' if (i) contrary to the requirements of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract and (ii) it would cause material detriment to consumers either individually or as a class.<sup>14</sup> The Productivity Commission Report recommended that when deciding whether a term is 'unfair', a court should consider 'all of the circumstances of the contract' and take into account 'the broader interested of consumers, as well as the particular consumers affected.'<sup>15</sup> It did not mention 'transparency' or a similar concept in its recommendations. Despite this, Parliament added 'transparency' to the UCT Provisions and elevated it to the status of a mandatory consideration when determining whether a term is 'unfair'. It is not entirely clear why this occurred. The Explanatory Memorandum gives some indication. It says:

*A lack of transparency in the terms of a consumer contract may be a strong indication of the existence of a significant imbalance in the rights and obligations of the parties under the contract.*<sup>16</sup>

26. The logic underlying the above quote is not apparent. Perhaps the logic is that if a term is 'unfair', a party may try to hide the term from its counterparty by not making it readily available to them or obscuring it with unclear drafting. It is submitted that this does not make 'transparency' relevant to whether a term is 'unfair'. This logic appears to assume the following.
- (a) The party, who would be advantaged by the term, applied the 'significant imbalance' test themselves and correctly concluded that the term created a 'significant imbalance'.
  - (b) As a result of this conclusion, the party decided to obscure the term so that its counterparty would not become aware of it.
  - (c) In light of the party's conduct, a court should feel greater comfort in concluding that the term gives rise to a 'significant imbalance'.

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<sup>12</sup> Explanatory Memorandum for the Trade Practices Amendment (Australian Consumer Law) Bill 2010 (No.2) (Cth) (**Explanatory Memorandum**).

<sup>13</sup> Explanatory Memorandum, [5.3].

<sup>14</sup> Productivity Commission Report vol 2, 168.

<sup>15</sup> Ibid.

<sup>16</sup> Explanatory Memorandum, [5.38].

27. There are several problems with this process of reasoning.
28. First, it assumes that a contracting party is capable of performing a process of legal reasoning concerning whether a term creates a 'significant imbalance' with such a level of precision that the court ought to give weight to it when performing its own legal reasoning. There is no basis for this assumption. In some circumstances, deliberate conduct by a party may be a reliable indication of whether a particular legal test has been fulfilled but not in the present case. For example, a court may more readily conclude that conduct was misleading or deceptive in breach of s 18 of the ACL if a party intended to mislead another party.<sup>17</sup> For misleading or deceptive conduct, there is a clear connection between someone intending to mislead and actually achieving that end, but there is no similar connection between concealing a term and that term fulfilling the test for 'unfairness' in s 24(1) of the ACL.
29. Second, it assumes that the party has deliberately deprived the term of 'transparency'. The term may lack 'transparency' due to careless drafting, the party simply forgetting to make it available to the other party or it being impossible to draft the term 'in reasonably plain language' due to the complexity of the subject matter it addresses.

Should 'transparency' continue being a mandatory consideration?

30. It is submitted that 'transparency' should not continue to be a mandatory consideration for determining whether a term is 'unfair'. This is for four reasons.
31. First, the Productivity Commission Report did not mention 'transparency' as a requirement for the UCT Provisions. The Productivity Commission Report is a comprehensive document devoting approximately 60 pages to the consideration of unfair contract terms. It was the culmination of over 16-months of work from the release of the terms of reference on 11 December 2006 to the release of the report on 30 April 2008. In preparing the report, the Productivity Commission released a draft report for consultation, received over 250 written submissions, met with over 70 individuals and organisations within Australia, and met with governments, consumers and businesses in several other countries.<sup>18</sup> Until another comprehensive review of consumer protection policy is conducted, one should be slow to depart from its recommendations.
32. Second, it is logically unsatisfactory to require a court to consider a factor which is likely to be irrelevant to the matter at hand.
33. Third, it is an inefficient allocation of a court's and parties' resources to address a consideration that is likely to be irrelevant.
34. Fourthly and most importantly, there is a risk that this mandatory consideration could lead to incorrect outcomes when the test of 'unfairness' is applied. The Explanatory Memorandum states that 'transparency' is not determinative of 'unfairness'. It says:

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<sup>17</sup> See *Campomar Sociedad, Limitada v Nike International Ltd* (2000) 202 CLR 45, 63 [33].

<sup>18</sup> Productivity Commission Report vol 2, 14.

*Transparency, on its own account, cannot overcome underlying unfairness in a contract term. Furthermore, the extent to which a term is not transparent is not, of itself, determinative of the unfairness of a term in a consumer contract and the nature and effect of the term will continue to be relevant.*<sup>19</sup>

35. This was accepted in the recent Federal Court decision of *ACCC v Chrisco Hampers Australia Limited (Chrisco)*.<sup>20</sup> However, there remains a real risk that the test for 'unfairness' may be distorted by the inclusion of a largely irrelevant consideration. This is for three reasons.
36. First, compelling a court to consider a factor which is irrelevant to a particular test is likely to distort the outcomes produced by applying that test.
37. Second, 'transparency' is given great weight in the ACL due to it being one of only two mandatory considerations. This is particularly so when the other mandatory consideration, being the requirement that a court consider the contract as a whole, is so trite that it adds little. Further, as noted in paragraph 25 above, the Explanatory Memorandum says that a 'lack transparency may be a *strong indication* of the existence of a significant imbalance in the rights and obligations of the parties under the contract.' This statement in the Explanatory Memorandum was noted in *Chrisco*<sup>21</sup> and gives a court further encouragement to rely on 'transparency'.
38. Third, the test for 'transparency' is more easily applied than the test for 'unfairness' and hence it is tempting for a court to rely upon it heavily when determining 'unfairness'. One of the requirements of the test for 'unfairness' is whether the term 'would cause a significant imbalance in the parties' rights and obligations arising under the contract'. Fair minds may easily differ on what amounts to a *significant* imbalance. There is less likely to be a difference of views about 'transparency' since it turns upon matters which are more objective, such as plainness of expression and the availability of the term. Hence, a conclusion regarding 'unfairness' that is based largely on 'transparency' is less likely to appear idiosyncratic.
39. The risk of misplaced reliance on 'transparency' perhaps eventuated in *Chrisco*. In that case, Edelman J said his conclusion that the impugned term caused detriment to consumers, as required by s 24(1)(c) of the ACL, was 'fortified by the considerations concerning transparency'.<sup>22</sup> With the greatest respect, it is not readily apparent how these considerations fortified his Honour's conclusion.

#### Alternatives to 'transparency' being a mandatory consideration

40. If 'transparency' should not continue as a mandatory consideration for determining whether a term is 'unfair', what should become of it?
41. One alternative is to add 'transparency' to the test for 'unfairness' as a fourth requirement. The test for 'unfairness' in s 24(1) of the ACL would then look as follows:

<sup>19</sup> Explanatory Memorandum, [5.39].

<sup>20</sup> [2015] FCA 1204, [43(5)].

<sup>21</sup> *Ibid* [72].

<sup>22</sup> *Ibid* [100].



- (1) A term of a consumer contract is **unfair** if:
- (a) it would cause a significant imbalance in the parties' rights and obligations arising under the contract; and
  - (b) it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term;
  - (c) it is not transparent; and**
  - ~~(d)~~ **(d)** it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.

42. It is submitted that this alternative should not be adopted for two reasons. First, the Productivity Commission Report did not recommend a test for 'unfairness' that included the concept of 'transparency'.<sup>23</sup> Second, the utility of the UCT Provisions may be significantly inhibited if this additional requirement were added. The UCT Provisions would no longer protect consumers from conduct, which only entails *substantive* unfairness, because the requirement that a term lack 'transparency' would introduce a requirement of *procedural* unfairness. This requires further explanation.
43. The requirement that a term lack 'transparency' can be viewed as a proxy for conduct that is 'likely to mislead or deceive'. Such conduct amounts to procedural unfairness and is already prohibited by s 18 of the ACL. Conduct is 'likely' to mislead if there is a 'real or not remote chance or possibility' of it being misleading.<sup>24</sup> The conduct does not have to be more likely than not to mislead. If a term is not 'transparent', it is 'likely' to mislead a consumer about their rights and obligations under the contract at least on some occasions. The UCT Provisions are intended to protect consumers from substantive unfairness.<sup>25</sup> Adding a requirement of procedural unfairness will prevent this in some cases. For example, a term, which creates a very significant imbalance in the rights and obligations of the parties, may avoid being 'unfair' because it was clearly disclosed to the consumer.
44. A second alternative is to refer to 'transparency' as a *discretionary* consideration for determining 'unfairness'. If this alternative is adopted, a court can consider 'transparency' as and when appropriate. It is submitted that this alternative should not be adopted for two reasons. First, there seems to be little point in giving 'transparency' specific mention since it will seldom be relevant to determining 'unfairness'. If it is specifically mentioned, one might as well refer to other matters that might be relevant on some occasion. Second, the list of contractual terms in s 25 of the ACL, which are potentially 'unfair', already gives a court sufficient guidance on what may be 'unfair'.
45. A third alternative is to create a new provision in the ACL specifically addressing unclear terms in 'consumer contracts'. It is submitted that this alternative is preferable to the other two options. Such a provision is not unprecedented. One previously existed in the now-repealed *Fair Trading Act 1999*

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<sup>23</sup> See recommendation 7.1 of the Productivity Commission Report.

<sup>24</sup> *ACCC v CLA Trading Pty Ltd* [2016] FCA 377, [87] citing *Global Sportsman Pty Ltd v Mirror Newspapers Ltd* (1984) 2 FCR 82, 87 per Bowen CJ, Lockhart and Fitzgerald JJ.

<sup>25</sup> *ACCC v CLA Trading Pty Ltd* [2016] FCA 377, [38]. Also, as noted in paragraph 34 above, the Explanatory Memorandum says, 'Transparency, on its own account, cannot overcome underlying unfairness in a contract term.'

(Vic) (*Fair Trading Act*) and another currently exists in the *Consumer Rights Act 2015* (UK) (*Consumer Rights Act*).

46. Section 163 of the *Fair Trading Act* specified minimum requirements regarding clarity for a 'consumer contract'. It required a 'consumer contract' to be 'easily legible', use a font of no less than point 10 if it is printed or typed, and be 'clearly expressed'. Section 163(4) permitted the Director of Consumer Affairs Victoria to apply to the Victorian Civil and Administrative Tribunal or a court for an order that a provision did not comply with s 163(3).<sup>26</sup> If the Tribunal or court was satisfied that it did not comply, it could order that a supplier not use the provision in the same or similar terms in 'consumer contracts'. There was no right for a person other than the Director to seek such an order.
47. Section 163 existed from 27 May 2003 until 19 October 2010.<sup>27</sup> In that 7-year period, it appears to have only been relied on three times.<sup>28</sup>
48. Section 68 of the *Consumer Rights Act* requires a term in a consumer contract to be 'transparent', which is defined as 'expressed in plain and intelligible language' and 'legible'. If a term is not 'transparent', the regulator may apply for an injunction in relation to it.<sup>29</sup> Section 68 is clearly comparable to s 163 of the *Fair Trading Act*. However, the *Consumer Rights Act* contains another provision which does not have an equivalent in the *Fair Trading Act*. Section 69 of the *Consumer Rights Act* provides that if a term in a consumer contract 'could have different meanings, the meaning that is most favourable to the consumer is to prevail.'
49. It is submitted that provisions similar to ss 68 and 69 of the *Consumer Rights Act* should be included in the ACL and that references to 'transparency' should be removed from the UCT Provisions. This will create a prohibition on terms lacking 'transparency' which is not dependent on a term being 'unfair'. Sections 68 and 69 work well together. Both sections encourage contracting parties to prepare terms which can be clearly understood. This assists consumers to understand their rights and obligations. The test for 'unfairness' in the UCT Provisions does not specifically target unclear drafting; rather, it refers to it as a mandatory consideration despite its limited relevance. It would be more satisfactory to have a provision that is focused on the substantive unfairness of terms and another focused on unclear terms.
50. There are three additional matters to consider if provisions similar to ss 68 and 69 of the *Consumer Rights Act* are added to the ACL. First, should the provisions be limited to standard form contracts? None of s 68 or s 69 of the *Consumer Rights Act* or s 163 of the *Fair Trading Act* are (or were) limited to standard form contracts, unlike the UCT Provisions. It is submitted that equivalent provisions to ss 68 and 69 in the ACL should be limited to standard form contracts. If a consumer negotiates a

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<sup>26</sup> Originally, the application could only be made to the Tribunal but this was altered with effect from 30 May 2007 to include a court by the *Fair Trading and Consumer Acts Amendment Act 2007* (Vic).

<sup>27</sup> It was introduced by the *Fair Trading (Amendment) Act 2003* which also introduced provisions addressing unfair contract terms into the *Fair Trading Act*. It was repealed by the *Fair Trading Amendment (Australian Consumer Law) Act 2010*.

<sup>28</sup> See *Director of Consumer Affairs Victoria v Australian Tourism Centre Pty Ltd* [2010] VSC 571, *Director of Consumer Affairs v Parking Patrols Vic Pty Ltd* [2012] VSC 137 and *Director of Consumer Affairs v Palamara* [2012] VSC 311.

<sup>29</sup> *Consumer Rights Act* sch 3 cl 3.

contract, they are likely to be able to challenge a term which they believe is ambiguous or unclear while they cannot do the same for a standard form contract.

51. Second, should only a regulator (and not a consumer) be able to rely on an equivalent to s 68 of the *Consumer Rights Act* in the ACL? As noted above, s 68 may only be used by a regulator. This was the case for s 163 of the *Fair Trading Act* as well. It is submitted that only a regulator should be able to use such a provision in the ACL for two reasons. First, consumers would receive adequate protection from unclear terms due to other provisions of the ACL. If a term is unclear, it is likely to be open to different interpretations, in which case an equivalent to s 69 would allow the interpretation that is most beneficial to the consumer to prevail. If a term was so unclear as to be misleading or deceptive, s 18 of the ACL may assist a consumer while if a term is unclear as well as 'unfair', the UCT Provisions may assist. Second, an equivalent to s 68 would allow an applicant to challenge a vague term even if it caused no loss to them. This could lead to abuse by vexatious litigants. Hence, it is preferable to restrict the use of the provision to a regulator who can be trusted to act responsibly. The same problem does not exist for an equivalent to s 69 since it does not create a right to seek an order in relation to a term that is open to multiple interpretations. Instead, it creates a rule of contractual interpretation which a consumer may avail themselves of in a contractual dispute. Hence, the provisions cannot by itself be used to generate a controversy.
52. Third, should the definition of 'transparency' in the *Consumer Rights Act* or the ACL be adopted if an equivalent to s 68 of the *Consumer Rights Act* is added to the ACL? It is submitted that neither should be used and instead, a modified form of the definition in the ACL should be adopted. Presently, the definition of 'transparency' in the ACL requires a term to be 'expressed in reasonably plain language', be 'legible', be 'presented clearly' and be 'readily available to any party affected by the term'. The first three of these requirements concern clarity while the final requirement concerns disclosure. It is submitted that a fifth requirement should be added, being that the term contains all information that is essential for the consumer to understand the rights and obligations created by the term. This will give consumers a better understanding of their rights and obligations. At present, a term may lack essential information but still be 'transparent' because it is 'expressed in reasonably plain language', is 'legible', is 'presented clearly' and is 'readily available to any party affected by the term'.
53. There is a risk that this fifth requirement could lead to contracts being overly long. However, this is unlikely because only *essential* information must be included rather than information which is reasonably necessary, desirable or of some other nature. Arguably, this fifth requirement is unnecessary since a term which does not contain information that is essential for a party to understand the term may be so vague as to be unenforceable. That may be so, but including the fifth requirement in a well-known piece of legislation such as the ACL will lead to greater awareness of the need to include essential information. This will have the flow-on benefit of consumers being better informed of their rights and obligations. The fact that a regulator may apply for an order in relation to unclear terms may also encourage greater clarity of drafting. The fact that the provision may seldom be used by a regulator, as was the case for s 163 of the *Fair Trading Act*, does not deny the benefits the existence of the provision may create.

## Changing the definition of 'transparency'

54. Contrary to this submission, if 'transparency' is to be retained as a mandatory consideration for determining 'unfairness' and an equivalent to s 68 of the *Consumer Rights Act* is not added to the ACL, the definition of 'transparent' should be altered.
55. The current definition of 'transparent' is set out in paragraph 10 above. 'Transparency' is defined in absolute terms. A term is 'transparent' if it fulfils the four requirements listed in s 24(3) of the ACL. If it does not fulfil all of these requirements, it is not 'transparent'. There are no degrees of 'transparency'. Despite this, s 24(2) of the ACL requires a court to consider the 'the extent to which the term is transparent'.
56. Decisions concerning the UCT Provisions show that the courts have determined the 'extent' of a term's 'transparency' despite 'transparency' being defined in absolute terms. The decisions do not comment on this issue.
57. Presently, there are three Federal Court decisions concerning the UCT Provisions: *Chrisco, ACCC v CLA Trading Pty Ltd (Europcar)*<sup>30</sup> and *ACCC v ACN 117 372 915 Pty Limited (in liq) (formerly Advanced Medical Institute Pty Limited (Advanced Medical Institute))*.<sup>31</sup> There is a further decision, *ACCC v Bytecard Pty Ltd*,<sup>32</sup> but it has no published reasons as the matter was settled by consent orders. Similarly, *Europcar* was resolved by the parties submitting an agreed statement of facts and admissions whereby the respondent (which traded as 'Europcar') substantially admitted the allegations made by the ACCC against it. None the less, his Honour considered the law regarding UCT provisions in detail so as to be satisfied that he had the power to make the orders and declarations sought and that they were appropriate.<sup>33</sup> As a result, his Honour published detailed reasons.
58. In *Chrisco*, Edelman J concluded that the impugned term was not 'wholly lacking in transparency' but there were 'matters that ... reduce[d] its transparency.'<sup>34</sup> These comments indicate that his Honour considered the 'extent' of 'transparency' as required by s 24(2) of the ACL. His Honour said that the four matters listed in s 24(3) concerning 'transparency' are 'considerations relevant to assess[ing] the extent of transparency'.<sup>35</sup> Although s 24(3) clearly does not define these four matters as 'considerations', it is submitted that it is only possible to consider the extent of 'transparency' if they are treated as 'considerations' as his Honour did.
59. In *Advanced Medical Institute*, North J concluded that the impugned term 'lacked transparency to a significant extent'.<sup>36</sup>
60. In *Europcar*, Gilmour J did not consider 'transparency' when concluding that several terms were 'unfair' under the UCT Provisions contained in the *Australian Securities and Investments Act 2001* (Cth)

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<sup>30</sup> [2016] FCA 377.

<sup>31</sup> [2015] FCA 368.

<sup>32</sup> Proceeding number VID301 of 2013. See the orders made on 24 July 2013.

<sup>33</sup> *Europcar* [2016] FCA 377, [8]-[10].

<sup>34</sup> *Chrisco* [2015] FCA 1204, [78]-[79].

<sup>35</sup> *Ibid* [75].

<sup>36</sup> *Advanced Medical Institute* [2015] FCA 368, [953].

(ASIC Act). Interestingly, his Honour said that the definition of 'transparency' in s 12BG(3) of the ASIC Act, which is the same as that in the ACL, 'provides guidance on the meaning of "transparency"'.<sup>37</sup> Section 24(3) would be more workable if it did provide 'guidance' on the meaning of 'transparency' but this is not the case.

61. It is submitted that the definition of 'transparency' should be altered so that the four existing elements are simply considerations for determining whether a term is 'transparent'. Also, an additional consideration should be added, being whether the term contains all information that is essential for a consumer to understand the rights and obligations under the term (see paragraph 52 above).

### UCT Provisions: Upfront Price

62. The concept of 'upfront price' is relevant to s 26(1)(b) of the ACL which provides that a term cannot be 'unfair' to the extent that it sets the 'upfront price' under a 'consumer contract'.

63. Section 26(2) of the ACL defines 'upfront price' as follows:

*(2) The **upfront price** payable under a consumer contract is the consideration that:*  
*(a) is provided, or is to be provided, for the supply, sale or grant under the contract; and*  
*(b) is disclosed at or before the time the contract is entered into;*  
*but does not include any other consideration that is contingent on the occurrence or non-occurrence of a particular event.*

64. With effect from 13 November 2016, the *Treasury Act* will extend the UCT Provisions to 'small business contracts'. One of the components of the definition of 'small business contract' is a cap on the value of the contract. After the amendments contained in the *Treasury Act* take effect, s 23 of the ACL will provide that a contract is not a 'small business contract' unless the 'upfront price payable under the contract' does not exceed:

- (a) \$300,000 if the contract is 12 months or less in duration; and  
(b) \$1,000,000 if the contract is more than 12 months in duration.

65. The *Treasury Act* will not amend the definition of 'upfront price' in the ACL but will make a small amendment to the definition found in the equivalent to the UCT Provisions in the *ASIC Act*. The *Treasury Act* will insert a new s 12BF(6) into the *ASIC Act* which will provide that for determining whether a contract is a 'small business contract', any interest payable under a contract for credit is to be disregarded when determining the 'upfront price'.

66. The concept of 'upfront price' has played a role in the UCT Provisions since their inception. Section s 26(1)(b) of the ACL provides that a term may not be declared void on the basis that it is 'unfair' if that term 'sets the upfront price payable under the contract'. Prior to the *Treasury Act* taking effect, this section will only apply to 'consumer contracts'. After the *Treasury Act* takes effect, this section will

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<sup>37</sup> *Europcar* [2016] FCA 377, [43].

apply to both 'consumer contracts' and 'small business contracts'. Hence, the concept of 'upfront price' will be relevant to both 'consumer contracts' and 'small business contracts' but for 'small business contracts', it is relevant for two purposes while for 'consumer contracts' it is relevant for only one purpose. The first purpose is determining whether a contract is a 'small business contract'. This is a quantitative inquiry that determines whether the amount of the 'upfront price' is beneath the relevant cap. Depending on the outcome of this quantitative inquiry, the contract may not be a 'small business contract' at all and hence not subject to the UCT Provisions. This quantitative inquiry is irrelevant to determining whether a contract is a 'consumer contract'.

67. The second purpose for which 'upfront price' is relevant is determining whether a particular term may be declared void on the basis it is 'unfair'. This is purely a qualitative inquiry since the question is whether or not a term sets the 'upfront price' and *not* how much the 'upfront price' is. This qualitative inquiry arises for both 'consumer contracts' and 'small business contracts'.
68. The concept of 'upfront price' plays a more significant role for 'small business contracts' since it is relevant to determining whether the UCT Provisions apply to that contract as a whole. By contrast, for a 'consumer contract', 'upfront price' is irrelevant to whether the UCT Provisions apply to the contract as a whole but is relevant to whether they apply to a particular term. For this reason, 'upfront price' is a threshold issue for 'small business contracts' and hence more significant. A simple example illustrates the difference in significance. Consider a plaintiff who alleges that an indemnity in a contract with a term of 2 years is 'unfair'. If the contract is a 'consumer contract', the plaintiff is not required to address 'upfront price' at all because the indemnity does not set 'the upfront price payable under the contract'. If the contract is a 'small business contract', the plaintiff must prove that the 'upfront price' does not exceed \$1,000,000 before it can address whether the indemnity is 'unfair'.
69. Although 'upfront price' will take on a new and more significant role for 'small business contracts', the *Treasury Act* makes no amendments to the definition of 'upfront price' as contained in the ACL, but makes the small amendment to the definition in the ASIC Act referred to in paragraph 65 above. It is perhaps premature for the Review to make recommendations concerning the application of the UCT Provisions to 'small business contracts' since the provisions do not apply to such contracts until November 2016. However, it is submitted that there is some benefit in the Review considering the issue now, even without making any recommendations, as its thinking could assist legislators in the future.
70. The current definition of 'upfront price' leaves the following questions unanswered.
71. First, it is unclear how 'upfront price' is determined if payments are to be made after the contract is entered into and depend on unknown variables (**Future Payments**). Must a Future Payment be calculably with a certain degree of precision to be treated as 'disclosed' for the purposes of the definition of 'upfront price'? As noted in paragraph 63 above, 'upfront price' is defined as 'the consideration that is ... disclosed at or before the time the contract is entered into'. The definition of 'upfront price' does not indicate that a component of the 'consideration' must be calculable at or before the time of entry into the contract, just that it be 'disclosed'. It does not specify any level of disclosure;

for example, that the 'consideration' be disclosed with sufficient detail that the precise value is known at the time of entry into the contract. It may be impossible to disclose sufficient detail for the precise value to be known at that time.

72. The difficulties with determining the 'upfront price' for Future Payments can be illustrated by the following example. Consider a retail lease for 10 years where the rent consists of a fixed base amount as well as a proportion of the value of sales made by the tenant each year. Further, the base rent is adjusted for inflation each year. Until the period of the lease has run, no-one will know what the total amount of rent will be. Does the 'upfront price' only include the fixed base rent since the total value of sales is unknown when the lease is entered into and hence not 'disclosed'? Alternatively, is the portion of rent attributable to sales included in the 'upfront price' and a court must simply do its best to determine what that might be?
73. The definition of 'upfront price' contained in the ASIC Act partly addresses Future Payments but only in very specific circumstances. As noted in paragraph 65 above, the *Treasury Act* will amend the ASIC Act so that any interest payable under a contract for credit is to be disregarded when determining 'upfront price'. The precise amount of interest is unlikely to be known at the time the contract of credit is entered into because of variable interest rates and the speed with which the customer repays the loan.
74. Second, it is unclear whether the amount of the 'upfront price' is judged at the time the contract is entered into or at some later date. The 'upfront price' may change over the term of the contract. Returning to the example of the retail lease referred to above, if the portion of rent attributable to sales is included in the 'upfront price', a court will have to determine that amount on the balance of probabilities. Does the court make that decision based on information that was available at the time the lease was entered into or does it consider information that has become available subsequently?
75. Third, when determining the 'upfront price', must Future Payments be adjusted to determine their present-day value? If so, is the 'present-day' the day the contract was entered into or some later date?
76. It is submitted that the definition of 'upfront price' should be made more precise since it will play a quantitative role for 'small business contracts' as opposed to the qualitative role which it currently plays for 'consumer contracts'. Greater clarity is required for quantitative analysis than qualitative analysis. Further, greater clarity is warranted due to the more significant role 'upfront price' will play in relation to 'small business contracts'.

### **Warranties Against Defects**

77. Section 102 of the ACL addresses 'Prescribed requirements for warranties against defects'. Section 102(2)(a) provides that a person must not, in connection with the supply goods or services to a consumer, give the consumer 'a document that evidences a warranty against defects' that does not comply with the regulations made under s 102(1).

78. Section 102(3) defines a 'warranty against defects' as follows:

*(3) A **warranty against defects** is a representation communicated to a consumer in connection with the supply of goods or services, at or about the time of supply, to the effect that a person will (unconditionally or on specified conditions):*

*(a) repair or replace the goods or part of them; or*

*(b) provide again or rectify the services or part of them; or*

*(c) wholly or partly recompense the consumer;*

*if the goods or services or part of them are defective, and includes any document by which such a representation is evidenced.*

79. Regulation 90 of the *Competition and Consumer Regulations 2010* (Cth) provides that a 'warranty against defects' must contain the following information:

(a) what the person who gives the warranty must do so that the warranty may be honoured;

(b) what the consumer must do to entitle the consumer to claim the warranty;

(c) the name of the person giving the warranty plus their business address, telephone number and email address (if any);

(d) the period within which a defect in the goods or services must appear if the consumer is to be entitled to claim the warranty;

(e) the procedure for the consumer to claim the warranty including the address to which a claim may be sent;

(f) who will bear the expense of claiming the warranty and if the expense is to be borne by the person who gives the warranty, how the consumer can claim expenses incurred in making the claim;

(g) that the benefits to the consumer given by the warranty are in addition to other rights and remedies of the consumer under a law in relation to the goods or services to which the warranty relates; and

(h) the following text:

*Our goods come with guarantees that cannot be excluded under the Australian Consumer Law. You are entitled to a replacement or refund for a major failure and compensation for any other reasonably foreseeable loss or damage. You are also entitled to have the goods repaired or replaced if the goods fail to be of acceptable quality and the failure does not amount to a major failure.*



80. The ACCC takes the view that the information referred to in the previous paragraph *cannot* be provided to a consumer by referring them to a website and must be provided to them in hard copy.<sup>38</sup> Based on s 102 of the ACL and reg 90, this view appears to be open.
81. It is submitted that s 102 of the ACL and reg 90 should be amended so that a person may provide the information referred to in paragraph 79 above by referring a consumer to a website containing that information. The internet address should be included with the goods so that the consumer is aware of it before purchasing the goods. This approach should be taken because:
- (a) it may be impractical to provide the large amount of information required by reg 90 in hard copy if a good is particularly small;
  - (b) it may be wasteful and costly to provide the information in hard copy, depending on whether the good would otherwise be provided with detailed hard copy information; and
  - (c) in an age of ubiquitous smart phones and Wi-Fi, it is acceptable to provide a consumer with information via the internet.
82. In relation to the final point, if a consumer does not have internet access at the store where they are contemplating buying the goods, they can make their own decision about whether they need further information about a warranty before purchasing the goods. If the consumer is not interested in having this further information, they can simply purchase the goods. If they are interested, they will have to move to a place where they can access the internet. This is unlikely to cause significant inconvenience to a consumer. If the goods are expensive, it is likely that a consumer has already researched them online and accessed the information regarding warranties. This is particularly likely given the growing popularity of online shopping. If the goods are inexpensive, the consumer is unlikely to be concerned by the warranty information. What inconvenience there may be for a consumer should also be considered in light of the inconvenience caused to business by providing the information in hard copy.
83. I would like to thank Consumer Affairs Australia and New Zealand for the opportunity to make a submission. Please do not hesitate to contact me if you wish to discuss any of the matters in this submission.

Yours sincerely

Peter Sise

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<sup>38</sup> See ACCC, *Examples of Warranties Against Defects* (undated) <<https://www.accc.gov.au/business/treating-customers-fairly/offering-warranties/warranties-against-defects/examples-for-warranties>>.