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**Sharpening the Blue Pencil in Australian  
Consumer Law : The Striking Out of Unfair  
Contract Terms in Land Transactions**

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# SHARPENING THE BLUE PENCIL IN AUSTRALIAN CONSUMER LAW: THE STRIKING OUT OF UNFAIR CONTRACT TERMS IN LAND TRANSACTIONS

ANNETTE GREENHOW\*

## ABSTRACT:

In Australia, like many other jurisdictions, principles of fairness and transparency underpin modern consumer protection laws applying to traditional consumer transactions. These laws had, until recently, focused on those transactions involving the supply of goods or services for personal, domestic or household use, and in the case of the supply of goods, to personal property transactions. An overriding objective of consumer protection law is to shore up the bargaining position so that the perceived weaker party has access to greater rights of redress should the stronger party seek to exploit that weakness.

The commencement of the new Australian Consumer Law (ACL) on 1 July 2010 has introduced a single generic consumer law applying across Australia and has extended the blue pencil principle to Unfair Contract Terms (UCT) in land transactions. The ACL interferes with the contractual terms between the parties involved in a standard form consumer contract by declaring void those terms that fail to meet the 'fairness test', severing the unfair term from the contract.

This paper questions whether such an extension is justified in circumstances where existing protection is already provided under the common law, in equity and transparency principles integrated in real property laws supporting those 'consumers' involved in land transactions. It also questions whether the new UCT provisions could be open to abuse by unmeritorious parties seeking to avoid otherwise binding contractual obligations.

A comparative study is undertaken of the current consumer protection and real property laws of Singapore and whether the standard form consumer land contracts in those jurisdictions would meet the UCT 'fairness test' under the ACL.

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## I. INTRODUCTION

The Australian Consumer Law (ACL)<sup>1</sup> commenced operation on 1 July 2010 after being promoted as the most far-reaching consumer law reform in a generation<sup>2</sup>, representing a significant milestone in Australia's consumer protection policy.<sup>3</sup> Although not a uniquely Australian phenomenon<sup>4</sup>, unfair contract terms had been identified in Australia as a widespread occurrence throughout a diverse range of industries.<sup>5</sup> Only radical steps would lead to a systemic change in behavior of suppliers taking advantage of their stronger position – hence the codification of the blue pencil doctrine<sup>6</sup> and the incorporation of unfair terms provisions into standard consumer contracts.

Economic and efficiency considerations were policy reasons advanced as justifying the introduction of the ACL - by harmonising the consumer protection laws into one generic regime, reflective of the national marketplace that Australia had become.<sup>7</sup> The perceived deficiency of the doctrine of unconscionability was another reason advanced by the promoters of the ACL to justify the statutory umbrella of unfair contract terms.<sup>8</sup> Many

<sup>1</sup> *Competition and Consumer Act 2010* (Cth.), Schedule 2, ss. 23-28 [ACL].

<sup>2</sup> Austl., Commonwealth, House of Representatives, *Parliamentary Debates* (26 October 2009) at 7073 (The Hon. Penny Wong).

<sup>3</sup> Austl., Commonwealth, Senate, *Parliamentary Debates* (16 March 2010) at 1953 (The Hon. Sen. Kim Carr).

<sup>4</sup> In Israel: *Standard Contracts Law 1984* >; Sweden: an *Act Prohibiting Improper Contract Terms* (1971); Germany: *Standard Terms and Conditions Act* (1977), . incorporated into the German Civil Code in 2002, under ss. 307-310. See Marco Ardizzoni, *German Tax and Business Law* (London: Sweet & Maxwell, 2005) at 1065; United Kingdom (UK): *Unfair Contract Terms Act 1977*, c. 50 [UCTA]; Ireland: *Sale of Goods and Supply of Services Act* (1980); European Union (EU): *Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts*, [1993] O.J. L 95/23 [EU Directive 93/13]; Thailand: *Unfair Contract Terms Act B.E. 2540* (1997).

<sup>5</sup> The overwhelming majority of cases occurring in the mobile phone services industry, car rental industry, software sales industry and package holiday industry. The common theme in these transactions involved a widening of the gap between the knowledge of the supplier and the consumer in terms of the product or services being delivered, and the opportunity for abuse.

<sup>6</sup> The blue pencil test was developed by the House of Lords in *Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co Ltd* [1894] A.C. 535 where the Court found a restraint of trade to be unreasonable but severable from the contract. The remaining provisions of the contract continued to be capable of enforcement.

<sup>7</sup> Austl., Commonwealth, Productivity Commission, *Review of Australia's Consumer Policy Framework*, vol. 1 (Report No. 45) by Presiding Commissioner Robert Fitzgerald, Commissioner Gary Potts & Commissioner Philip Weickhardt (Canberra: Australian Government Publishing Service, 2008) (Final Report) [*Productivity Commission Report*]. Prior to the ACL, responsibility for consumer protection in Australia was shared between the Commonwealth and the State and Territory governments, resulting in some 13 consumer laws applying to both suppliers and consumers, with more than 100 consumer administrators and over 20 consumer ombudsman.

<sup>8</sup> Austl., Commonwealth, Standing Committee of Officials of Consumer Affairs Unfair Contract Terms Working Party, *Unfair Contract Terms: A Discussion Paper* (2004) (Chaired by: Victoria & Queensland, January 2004) online: Consumer Affairs Victoria – Resources and education - Research <[http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV\\_Publications\\_Reports\\_and\\_Guidelines/\\$file/Unfair\\_Contract\\_Terms\\_body.pdf](http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV_Publications_Reports_and_Guidelines/$file/Unfair_Contract_Terms_body.pdf)> at 21 – 23 [*Unfair Contract Terms Discussion Paper*] identified gaps in the protection afforded by the existing consumer protection provisions under the unconscionability both at common law and under the *Trade Practices Act 1974* (the former name of what is now called the *Competition and Consumer Act 2010*, *supra* note **Error! Bookmark not defined.**) – specifically, problems with the application of the doctrine of unconscionability in finding

commentators in Australia had been calling for reform in this area to keep pace with other jurisdictions<sup>9</sup>, notably Member States of the EU implementing the principles under the *Unfair Terms in Consumer Contracts Directive* of 1993.<sup>10</sup>

The consolidation into one generic consumer protection law is, without doubt, a commendable outcome, achieving support both in the consultation process<sup>11</sup> and in the parliamentary process.<sup>12</sup> However, the extension of the definition of “consumer contract” to include consumer contracts granting “interests in land” has broadened the application of traditional consumer laws with the result that this could lead to unintended consequences, including reliance by unmeritorious parties to avoid or advance a better position under otherwise binding contractual obligations.<sup>13</sup>

For the purposes of this review, “interests in land” will focus on contracts for the sale of residential immovable land (“land contracts”). This paper concludes that there was little evidence of widespread abuse by way of unfair terms in land contracts in Australia to justify the broad extension of the definition of “consumer contract to include interests in land. It is argued that consumers in land contracts are usually adequately protected by inbuilt procedural fairness measures such as the prescription of pre-contract disclosure and cooling off periods, as well as established common law, equitable and statutory remedies protecting the weaker party from any exploitation by the stronger party.

It is also argued that the *EU Directive 93/13*, referenced in the consultation process leading up to the ACL, was never intended to apply to land contracts. This has emerged as a result of the current review of the *EU Directive 93/13*.<sup>14</sup> So what led the Australian regulator to extend the definition to “interests in land” without any supporting evidence of systemic misbehavior by the stronger party? One could suggest that the policy making agenda was

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both procedural unfairness and substantial unfairness. The remedy was personal to the aggrieved party and did not bring about systemic changes in behaviour.

<sup>9</sup> See for example, S. Christensen & W.D. Duncan, “Regulating Unfair Terms in Land Contracts – Is there a New Contractual Equilibrium between Buyers and Sellers?” [forthcoming].

<sup>10</sup> *EU Directive 93/13*, *supra* note 4.

<sup>11</sup> See *Productivity Commission Report*, *supra* note 7. 110 submissions were received.

<sup>12</sup> Austl., Commonwealth, Senate, *Parliamentary Debates* (16 March 2010) at 1881 (The Hon. Sen Barnaby Joyce).

<sup>13</sup> In 2001, the Queensland Parliament enacted the *Property Agents and Motor Dealers Act 2000* (Qld.). Part of this Act regulated the process of entering into contracts for the sale of residential land in Queensland. The object was consumer protection - by giving proposed buyers a cooling off period and prescribing the giving of a warning statement, and alerting the buyer to obtain independent legal advice. The Act also prescribing the order of contract documents to be given to a buyer and gave rights of termination for technical breaches of the Act. The majority of cases from 2002 to 2010 involved buyer corporations seeking to exit otherwise binding contracts by relying on technical breaches of the Act. In *MNM Developments Pty Ltd v. Gerard* [2005] QCA 230 De Jersey CJ, at ¶ 16, referred to the consumer protection object stated in the preamble to the Act and extended its application to giving a buyer the right to terminate a contract even for “quite technical contraventions...regardless of whether there had been any material disadvantaged suffered”.

<sup>14</sup> See EC, Press Release, MEMO/08/609, “Frequently Asked Questions on the Proposed Consumer Rights Directive” (Brussels: 8 October 2008). The EU is reviewing four Consumer Protection Directives with a view to consolidating them into one directive dealing with consumer protection principles within the EU. As part of that process, the sale of immovable property is stated as being about rules on ownership and outside the scope of the Treaty (at 11). See also art. 295 of the EC, *Consolidated Versions of the Treaty Establishing the European Community*, [2006] O.J. C 321/E/1 at E/173, which states that “[t]his Treaty shall in no way prejudice the rules in Member States governing the system of property ownership” [*Treaty Establishing the European Union*].

so focused on a broad and liberal approach to consumer protection that little or no regard was given to the possible consequences of the ACL application in land contracts.

The paper also considers the position of unfair contract terms in Singapore<sup>15</sup> and compares the consumer protection regimes in respect of land contracts. Applying the ACL principles to some of the commonly used standard conditions in land contracts in Singapore, it is likely that the blue pencil will remain locked away in the pencil case given the existing regulatory mechanisms prescribing contractual terms for the majority of residential property transacted in Singapore.

## II. BACKGROUND TO THE AUSTRALIAN CONSUMER LAW

In 2002, the Ministerial Council on Consumer Affairs, a collective of the Commonwealth, State Territory, and New Zealand Ministers responsible for consumer protection laws, directed the Standing Committee of Officials of Consumer Affairs<sup>16</sup> (SCOCA) to establish a national working party to investigate the increasing number of complaints of unfair contract terms in consumer contracts and to consider the merits of adopting a national consumer protection regime. The Discussion Paper issued by the SCOCA Working Party identified that the use of unfair contracts terms<sup>17</sup> was widespread, crossing a diverse range of industries and recommended changes to the fair trading regimes of each of the States and Territories to achieve an effective Australia-wide mechanism to promote systemic change in the marketplace.<sup>18</sup>

Following on from the SCOCA Working Party Discussion Paper, the Australian Productivity Commission<sup>19</sup> was engaged in 2006 to enquire into Australia's consumer policy framework. The report recommended that all Australian governments implement a new national consumer protection law to apply in all jurisdictions – effectively to provide an umbrella approach to unfair contract terms – the Australian Consumer Law. The ACL is a schedule to the *Competition and Consumer Act 2010*<sup>20</sup> and includes provisions addressing unfair contract terms, introduces a new penalties regime and regulatory intervention for breaches and additional rights similar to class action rights for non-party consumers.

## III. APPLICATION OF THE ACL

The ACL has now provided a statutory framework rendering unfair terms void within a broad range of consumer contracts and applies the blue pencil principle to the remaining 'fair' terms. Three elements must be satisfied for the ACL to apply – a “consumer

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<sup>15</sup> *Unfair Contract Terms Act* (Cap. 396, 1994 Rev. Ed. Sing.) and *Consumer Protection (Fair Trading) Act* (Cap. 52A, 2009 Rev. Ed. Sing.) [*CPFTA*].

<sup>16</sup> Comprising all State and Territory fair trading agencies and nominees from the Commonwealth Treasury, Australian Competition and Consumer Commission and Australian Securities and Investment Commission.

<sup>17</sup> Unfair Terms were those terms that disadvantaged one party without being reasonably necessary for the protection of the legitimate interests of the other party. See *Unfair Contract Terms Discussion Paper*, *supra* note 8 cited in *Productivity Commission Report*, *supra* note 7 at 8.

<sup>18</sup> *Ibid.* at 9.

<sup>19</sup> The Productivity Commission is the Australian Government's independent research and advisory body on economic, social and environmental issues. See *Productivity Commission*, online: Productivity Commission <<http://www.pc.gov.au>>.

<sup>20</sup> ACL, *supra* note 1 at Chapter 2, Part 2-3 Unfair Contract Terms, ss. 23-28.

contract” in a ‘standard form’ for the “supply of goods or services or the grant of an interest in land, wholly or predominately for personal, domestic or household use to an individual.”

### A. Notion of Consumer

The ACL does not define “consumer” in the context of acquiring an interest in land. In determining whether one is a consumer for the supply of goods or services (as opposed to acquiring an interest in land), the ACL defines consumer in the context of acquiring goods or services by reference to the monetary value of goods supplied or services acquired.<sup>21</sup> For ACL purposes however, the monetary value is of no consequence. The notion of consumer only requires that an individual be a party to the transaction and the purpose of the acquisition be ascertained by reference to the nature goods, services or interest in land acquired and the subjective intention of the acquirer’s purpose (being a wholly or predominant purpose).<sup>22</sup> Unlike the ACL, the UK and other European Member States tend to focus on a definition of “consumer” as being a natural person acting for purposes which are outside that person’s trade, business or profession.<sup>23</sup>

### B. Notion of Supplier

The ACL does not define “supplier”. As indicated above, the focus of the ACL is on the nature and purpose of the acquisition, regardless of the legal status of the supplier or the value of the contract. At the heart of consumer protection law is the need for fairness, balance and transparency in supplier/consumer relations. The most obvious imbalances emanate from the very fact that most suppliers are in the business of supply – experienced and well-versed in common issues that can arise within the framework of the transaction, and mechanisms in standard term contract provisions to protect the supplier or shift the risk to the consumer. It is surprising, therefore, that the ACL does not have a definition of ‘supplier’ similar to the *EU Directive 93/13*<sup>24</sup> and the UK<sup>25</sup> provisions. It is clear that the intention of the ACL is to have a broad interpretation when it comes to determining the

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<sup>21</sup> *Ibid.*, s. 3. The monetary value is currently \$40 000.

<sup>22</sup> There is no guidance in the *ACL* on mixed purpose contracts – those that serve both a private and business purpose. Perhaps the threshold of fifty percent predominate purpose test under the s. 5(4) of National Credit Code, Schedule 1 of the *National Consumer Protection Act 2009* (Cth.) might similarly apply to the issue.

<sup>23</sup> Under s. 3 (1) of the UK’s *Unfair Terms in Consumer Contract Regulations 1999*, S.I. 1999/2083 [UTCCR], “consumer” is defined as “any natural person who, in contracts covered by the Regulations, is acting for purposes which are outside his trade, business or profession”. But contrast this to Art. 2(b) of the *EU Directive 93/13*, *supra* note 4, which is broad enough to allow a business consumer to rely upon the unfair term provisions in cases where the goods are supplied to a sole trader but are unrelated to the sole trader’s main business activities and only incidental to the business activity. This is illustrated in *R & B Customs Brokers Ltd v. United Dominions Trust Ltd* [1988] 1 All E.R. 847 (C.A.) cited in *Consumer Law Compendium Comparative Analysis*, online: <[http://www.eu-consumer-law.org/consumerstudy\\_part3a\\_en.pdf](http://www.eu-consumer-law.org/consumerstudy_part3a_en.pdf)> at 723.

<sup>24</sup> Art. 2(c) of the *EU Directive 93/13*, *supra* note 4, states that a “seller or supplier” means “any natural or legal person who, in contracts covered by this Directive, is acting for purposes relating to his trade, business or profession, whether publicly owned or privately owned”.

<sup>25</sup> S. 3(1) of the *UTCCR*, *supra* note 23, states that a “seller or supplier” means “any natural or legal person who, in contracts covered by the Regulations, is acting for purposes relating to his trade, business or profession, whether publicly owned or privately owned”.

issue of who is a ‘supplier’. The applying Acts of each state and territory are expressly permitted to legislate to regulate the conduct of both corporations and individuals.<sup>26</sup>

The profit motive of the supplier is irrelevant under the ACL.<sup>27</sup> The practical effect of this is that contracts between individuals (as supplier/seller and consumer) fall under the ACL and the same fairness test will apply in those contracts. Taking this one step further, a standard form contract between Mr and Mrs X selling their residential property to Mr and Mrs Y will be subject to ACL – is this truly a consumer contract? This is diametrically opposed to the intention of the *EU Directive 93/13* where a consumer is not protected when his or her contractual counterpart is another private person.<sup>28</sup>

As indicated above, many jurisdictions adopt a definition of “supplier”. In the writer’s view, this is a step toward implementing true consumer protection - by clarifying the notion of supplier as limited to goods or services supplied by corporations or individuals *in business*. Recent academic writing on consumer contracts and unfair terms in the UK focuses on this presumption – that the supplier is operating in a business capacity and supplying to a consumer in a private capacity.<sup>29</sup> With the supplier being in the business of supplying, the fairness-oriented approach to consumer contracts makes great sense.<sup>30</sup> Whether the same can be said for contracts between individuals, regardless of the status of the supplier may not be as clear.

### C. The Subject Matter of the Contract

Until the ACL, most consumer protection laws in Australia, like many other jurisdictions focused the more typical consumer contracts – those that were for more domestic or personal uses rather than for use in a commercial sense.<sup>31</sup> Holiday package contracts, car hire contracts, phone contracts, gym membership contracts were the more typical contracts

<sup>26</sup> In s. 135(2) of the *Trade Practices Amendment (Australian Consumer Law) Act 2009* (Cth.), specific reference is made to the applying Acts ability to refer to persons in regard to the regulation of activities under the respective State and Territories fair trading regimes adopting the ACL.

<sup>27</sup> This appears consistent with the EU position where Martin Elbers concludes that the intention to make a profit relates to an internal business factor. In the case of the *EU Directive 93/13*, *supra* note 4, this is further supported by the fact that public bodies are included under the UCT directive (Hans Schulte-Nölke, Christian Twigg-Flesner & Martin Ebers, eds., *EC Consumer Law Compendium*, (Munich: Sellier European Law Publishers, 2008) at 734 [*Consumer Law Compendium*]). However, it could be argued that the distinguishing feature between the EU position and the ACL position is that the *EU Directive 93/13* goes some way to defining “seller or supplier” and this is the basis upon which the profit motive is viewed. Under the ACL, however, there is no definition of “supplier”.

<sup>28</sup> Hans-W. Micklitz, Jules Stuyck & Evelyne Terryn, eds., *Cases, Materials and Text on Consumer Law* (Oregon: Hart Publishing, 2010) ¶ 1.22 [Micklitz, Stuyck & Terryn].

<sup>29</sup> For example, Chris Willett in *Fairness in Consumer Contracts: The Case of Unfair Terms* (Aldershot: Ashgate Publishing, 2007) at 3 [Willet] assumes that consumer contracts are those where the “goods or services are supplied by a party operating in a business capacity to a party (the consumer) acting in a private capacity”. The *EU Directive 93/13*, *supra* note 4, review suggests that the definition of ‘seller’ or ‘supplier’ be adapted to provide a coherent definition of business. See *Consumer Law Compendium* at 794, *supra* note 27.

<sup>30</sup> When examining what attitude to take to particular terms in consumer contracts, Willet, *ibid.* at 17, suggests a choice between freedom oriented and fairness oriented philosophies of consumer contract. He correctly concludes that the rules regarding unfair contract terms were more freedom-oriented until the introduction of UK’s *UCTA*, *supra* note 4, and *UTCCR*, *supra* note 23. These have clearly taken a fairness-oriented approach to consumer contracting.

<sup>31</sup> With the exception of the *Contracts Review Act (1980)* (N.S.W.) and the *Fair Trading Act 1999* (Vic.).



where greater incidences of procedural and substantial unfairness were identified.<sup>32</sup> In these typical consumer contracts, standard form terms were commonly used as a means of reducing transaction costs and ultimately, the price paid by consumers. However, the downside was that these contracts were rarely, if ever, read by the consumer, and rarely, if ever, negotiated, leading to greater imbalance and unfairness.

The subject matter of the consumer contract under the ACL is restricted to personal, domestic or household goods, services or interests in land. “Interest in land” is broadly defined<sup>33</sup> and includes any legal or equitable interest in land or a right, power or privilege over or in connection with the land. This includes sales of both completed and proposed developments. The definition goes further to include occupancy right in a company title scheme involving the ownership of land.

As the ACL consultation process evolved, other problem areas were identified to include credit contracts<sup>34</sup> and consumer software contracts where there was clearly an imbalance and need for systemic behavioral changes on the part of the stronger supplier.<sup>35</sup> There was little doubt that changes were needed in these market sectors. However, there was no reference in any of the material supporting a conclusion of widespread consumer detriment in land contracts. From consultation to implementation, the focus had been on these typical consumer contracts in the sectors identified above.

The *EU Directive 93/13* and the UK regulations<sup>36</sup> are silent on the subject matter of the contract but as indicated above, rest on the notion of consumer acquiring for non-business purposes and supplier making the supply in business.

#### **D. Standard Form**

The ACL does not define what is a ‘standard form’ consumer contract but rather leaves it to the Court to decide, prescribing factors that a Court must take into account.<sup>37</sup> These factors are wide and cover not only standard terms but all terms that have not been individually

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<sup>32</sup> See *Unfair Contract Terms Discussion Paper*, *supra* note 8 at 14-15.

<sup>33</sup> ACL, *supra* note 1, s. 1.

<sup>34</sup> Financial service contracts are now subject to unfair contract terms provisions as a result of amendments to the *Australian Securities and Investment Commission Act 2001* (Cth.) under ss. 12BF to 12 BM, which came into effect on 1 July 2010.

<sup>35</sup> See *Productivity Commission Report*, *supra* note 7 at 34 where the biggest concern was identified arising in standard form non negotiated goods or services in these industries.

<sup>36</sup> *EU Directive 93/13*, *supra* note 4, and *UTCCR*, *supra* note 23.

<sup>37</sup> ACL, *supra* note 1, s. 27(2) lists the following factors:

- (a) Bargaining power – whether one party has all or most of the bargaining power relating to the transaction;
- (b) Contract Preparation – whether one party prepared the contract before any discussion occurred between the parties;
- (c) “Take it or leave it” – whether one party was, in effect, required to either accept or reject the terms of the contract (excluding those terms that defined the main subject matter or upfront price);
- (d) Opportunity to Negotiate – whether one party was given an effective opportunity to negotiate the terms of the contract (excluding those terms that defined the main subject matter or upfront price);
- (e) Specific Characteristics – whether the terms (excluding those terms that defined the main subject matter or upfront price) take into account the specific characteristics of another party or the particular transaction; and
- (f) Prescribed – any matters prescribed by Regulation.

negotiated.<sup>38</sup> For example, a seller may rely upon an industry standard contract for the sale of residential property. The industry standard contract contains standard terms and conditions, but provides also for special conditions. If the seller includes special conditions required by it for the sale of the property, these special conditions will be captured under the broad application of the “standard form contract” considerations and subject to the fairness test.

### E. The Concept of Fairness

The ACL provides a broad review of contract terms from both a procedural and substantive fairness perspective. An unfair term will be void and severed from the contract if it would cause significant imbalance in the parties’ rights and obligations under the contract; if it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term<sup>39</sup>; if the term would cause detriment (whether financial or otherwise)<sup>40</sup> to a party if it were to be applied or relied upon. Certain terms are excluded from the fairness principles under the ACL as being those terms that set the upfront price, define the subject matter or are required or expressly permitted by a law of the Commonwealth or a State or Territory.

The ACL has chosen to impose a lighter shade when considering whether a term is unfair. Instead of following the UK ‘black list’ examples of unfair terms, the ACL identifies a ‘grey’ list,<sup>41</sup> and includes those terms that permit one party to unilaterally avoid or limit performance of the contract, terminate the contract, vary the terms of the contract or upfront price payable under the contract with the other party having no right to terminate; renew or not renew the contract; or vary the characteristics of the interest in land to be sold or granted under the contract.

The fairness benchmark in the ACL is designed to provide some focus and certainty and rectify a perceived shortcoming of the application of the doctrine of unconscionable conduct by the Australian courts.<sup>42</sup> At the same time, by providing a fluid test of fairness the legislators have deliberately allowed for both existing and future mischief’s to be captured. As suggested by Willett when examining unfair contract terms from a market perspective, the intention is not to follow the market practice in relation to fairness but to set independent and high standards of fairness that reflect the morality of the community as a whole.<sup>43</sup>

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<sup>38</sup> When considering the same principle in the *EU Directive 93/13*, *supra* note 4, Paolisa Nebbia & Tony Askham, *EU Consumer Law*, (Richmond: Richmond Law & Tax, 2004) at 257 [Nebbia & Askham] conclude that a term will always be regarded as not individually negotiated where it has been drafted in advance and the consumer has not be able to influence the substance of the term.

<sup>39</sup> Note that the presumption is that the term is not required to protect the legitimate interests of parties unless the party seeking to rely upon it proves otherwise.

<sup>40</sup> There is no materiality test in regard to detriment.

<sup>41</sup> ACL, *supra* note 1, s. 4.

<sup>42</sup> In *Hurley v. McDonald’s Australia* [1999] FCA 1728 which required both procedural and substantive unfairness in breaches of s. 51AB of *Trade Practices Act 1974* (presently known as *Competition and Consumer Act 2010* (Cth.) section 21), *supra* note 1 >. See *Unfair Contract Terms Discussion Paper*, *supra* note 8 at 23.

<sup>43</sup> Willett, *supra* note 29 at 395.

## F. Consequences

If the particular term does not pass the fairness test, that term is void and severed from the contract. The remaining provisions of the contract will continue to bind the parties if those remaining provisions are capable of operating without the unfair term – hence the blue pencil principle.<sup>44</sup> Additional statutory consequences may follow including injunctive relief,<sup>45</sup> compensation orders<sup>46</sup> and orders to redress loss or damage suffered by a group of non-party consumers (class action style remedies).<sup>47</sup> Action can also be taken by the Competition regulator, the Australian Competition and Consumer Commission seeking a declaration that the term is unfair, or issuing a public warning notice.<sup>48</sup>

## IV. DISTINGUISHING FEATURES OF LAND CONTRACTS

### A. Care and Consideration

Should land contracts fall into the same category as the other typical consumer contracts referred to above? Is the buyer always at a greater disadvantage than the seller? Was there any evidence to support the inclusion under the consumer contract definition?

Clicking ‘I Accept’ when purchasing software online; recklessly signing on the dotted line when presented with a car hire contract at the time of collecting the hire car. These pre-contract considerations are usually made on the spot with little regard to the contractual obligations and rights that follow. However, in the negotiations leading up to entry into a land contract, the parties usually exercise a greater degree of care and consideration before committing to the contract.

The contract price under a land contract is usually significantly higher in value<sup>49</sup>; the consumer usually takes a more considered approach to contract formation by engaging in a form of due diligence with consultants advising on aspects of the proposed transaction<sup>50</sup>; there are industry standard contracts prepared by professional bodies in most Australian states leading to a more balanced contract.<sup>51</sup> Perhaps of most significance, in addition to the safety net of the common law and equity, the mandatory statutory regimes impose procedural fairness principles with buyers getting the benefit of upfront disclosure and access to cooling off periods<sup>52</sup> – much more than simply clicking ‘I Accept’ or falling into the trap of acting in haste and regretting at leisure.

<sup>44</sup> ACL, *supra* note 1, s. 23(2).

<sup>45</sup> *Ibid.*, s. 232.

<sup>46</sup> *Ibid.*, s. 237.

<sup>47</sup> *Ibid.*, s. 239.

<sup>48</sup> *Ibid.*, s. 223.

<sup>49</sup> In RP Data, Press Release, “Aussie dwelling values tread water in December: RP Data – Rismark Home Value Index Release” (31 January 2011), online: <[http://www.rpdata.com/press\\_releases/aussie\\_dwelling\\_values\\_tread\\_water\\_in\\_december.html](http://www.rpdata.com/press_releases/aussie_dwelling_values_tread_water_in_december.html)>, the median house price in Australia as at December 2010 was indicated to be AU\$420,000.

<sup>50</sup> Such consultants include financial, legal and other consultants.

<sup>51</sup> In Queensland, the Real Estate Institute and Queensland Law Society have jointly approved the Contract for the Sale of Houses and Land – 8<sup>th</sup> ed; and the Contract for the Sale of Lots in a Community Title Scheme – 5<sup>th</sup> ed; In New South Wales, the Contract for Sale of Land is jointly copyrighted to the Law Society of New South Wales and the Real Estate of New South Wales

<sup>52</sup> In 7 of the 8 Australian States and Territories, there is a mandatory cooling off period ranging from 2 to 5 days; in 5 of the 8 Australian States and Territories, there is a statutory contract warning statement required to accompany the contract.

## B. Evidence Based Policy?

One could argue that the policy makers have departed from the fundamentals of the policy decision-making tree<sup>53</sup> by failing to identify evidence of problems in the real estate sector, particularly involving land contracts, as the basis for the application of the ACL.

The only Australian study disclosed in the consultation process referred to the research conducted by Tyrone Carlin in 2001 tracing the 20 year history of the *Contract Reviews Act* in New South Wales<sup>54</sup>. As part of that project, Carlin identified 4 cases out of his sample of 60 involving Contracts for the Sale of Land, but warned that the data should be interpreted with caution.<sup>55</sup>

A deeper body of research was drawn from the European experience with references in the consultation process<sup>56</sup> to the European Database on Case Law about Unfair Contract Terms – also known as the CLAB Europe database.<sup>57</sup> The CLAB database was set up to monitor the decisions involving regulatory bodies in Member States and record unfair contract terms jurisprudence<sup>58</sup> between 1993 and 2000. Some emphasis is made in the consultation documents that 7,679 cases were recorded during that period.<sup>59</sup> What is not recorded, however, is that of those 7,679 cases, 1,336 were from the real estate sector. Of those, only 214 involved land contracts - in effect, 30 cases<sup>60</sup> per year over a 7 year period spread across the 17 Member States - hardly compelling evidence of systemic misbehavior in land contracts. Further, the value of the material on the CLAB database has been questioned by the Court when considering the evidence of the use of unfair contract terms.<sup>61</sup>

<sup>53</sup> See Figure 3 “A policy decision-making tree” of *Productivity Commission Report*, *supra* note 7 at 14.

<sup>54</sup> Tyrone M. Carlin, “The *Contracts Review Act 1980* (NSW) – 20 Years On” (2001) 23 Sydney L. Rev. 125 [Carlin] cited in *Unfair Contract Terms Discussion Paper*, *supra* note 8 at 26. In three of the cases, relief was granted. Carlin warns that the data should be interpreted with caution at 132.

<sup>55</sup> Carlin, *ibid.* ¶ 65 at 131.

<sup>56</sup> See *Unfair Contract Terms Discussion Paper*, *supra* note 8 at 18.

<sup>57</sup> CLAB refers to the French term “clauses abusive”.

<sup>58</sup> The European Commission made this information available to the public as a central repository detailing claims, cases and settlements where contractual terms have been deemed to be unfair in the various countries of the EU. Each file contains relevant information on the case, such as the type of contract, the type of clause and the economic sector (EC, Press Release, IP/97/631, “CLAB Europa: a European database on unfair terms in consumer contracts” (10 July 1997). Please note that this ceased to be updated in 2001. No further updates have been provided following this date. .

<sup>59</sup> See *Unfair Contract Terms Discussion Paper* cited in *Productivity Commission Report*, *supra* note 7 at 18.

<sup>60</sup> It is likely that this cluster included the major scandals in Europe involving timeshare sales, which lead to the promulgation of EC, *Directive 94/47/EC of the European Parliament and the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis*, [1994] O.J. L 280/83 [*EU Directive 94/47*]. >

<sup>61</sup> At first instance, in *Khatun v. London Borough of Newham and OFT* [2003] EWHC (Admin) 2326 ¶ 65 [*Khatun* EWHC decision].

## V. THE STATE OF THE EUROPEAN DIRECTIVE AND THE UK POSITION

The EU Directive has been in place for 18 years and, as indicated above, is currently under review. It was originally adopted pursuant to Article 95 of the *Treaty Establishing the European Union*<sup>62</sup>. The CLAB database was discontinued in 2000.

Consumer protection reform in the EU adopted a two-pronged attack in order to achieve reform – ensuring market transparency and prescribing substantive fairness. The first measure was designed to enhance market transparency by imposing obligations on suppliers to provide upfront disclosure and prescribing cooling off periods.<sup>63</sup> The second approach was designed to harmonise the inconsistencies in EU consumer contract law and to control the substance of the consumer transaction. This was achieved by enacting a number of directives, including the directive on unfair contract terms.<sup>64</sup>

The EU directive was designed to set a ‘common platform to remove unfair terms from contracts between retailers and consumers’<sup>65</sup> - in essence, the consolidation into a single generic consumer law providing consumer empowerment and protection.<sup>66</sup> Unlike the implementation of the ACL, the EU policy took into account the existence of measures already in place to ensure market transparency and prescribe substantive fairness.

The recitals in the Directives preamble did not expressly refer to interests in land as being included within the ambit of the Directive, but rather refers to goods or services.<sup>67</sup> The extension of the intent of the EU Directive to cover interests in land was considered both at first instance<sup>68</sup> and on appeal in *Khatun v. London Borough of Newham*.<sup>69</sup> The case involved issues of procedural fairness in relation to a residential tenancy agreement between a local authority and a number of tenants. The threshold issue was whether the *UTCCR* applied to interests in land, and if so, whether Council’s policy of imposing strict time restrictions on the acceptance of Council owned properties and requiring the prospective tenant to sign ‘then and there’, without an opportunity to inspect the premises, was unfair. On appeal, the Court upheld the original decision, finding that that the *UTCCR* did apply to the granting of interests in land.<sup>70</sup>

<sup>62</sup> Originally art. 100a, but now art. 95(3) of the *Treaty Establishing the European Union*, *supra* note 14, establishes the policy on consumer protection as adopting a high level of protection.

<sup>63</sup> See Micklitz, Stuyck & Terry, *supra* note 28 at 238. *EU Directive 94/47* prescribed disclosure information and cooling off periods on timeshare property.

<sup>64</sup> See Nebbia & Askham, *supra* note 38 at 237. The authors identify other reasons including gaps in the EU legislation leading to problems in its application.

<sup>65</sup> *Ibid.* at 255. The authors recognize that the EU directive was designed on the basis of harmonization rather than prescribing uniform rules as the *ACL*.

<sup>66</sup> Similar to one of the objects of the *ACL*.

<sup>67</sup> By way of example, art. 4 of *EU Directive 93/13* provides that “the unfairness of a contractual term shall be assessed, taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent.”

<sup>68</sup> *Khatun* EWHC decision, *supra* note 61.

<sup>69</sup> [2004] EWCA Civ 55. An earlier decision involving a landlord/tenant dispute in *Starmark Enterprises Ltd v. CPL Distribution Ltd* [2001] EWCA Civ 1252 proceeded on the assumption that the UK legislation did apply to interests in land.

<sup>70</sup> *Ibid.* ¶ 77, Laws L.J. said that “it is commonplace that tenancies are let by landlords who are in business as such. In consequence [he was] unable to perceive any rationale for the exclusion of land transactions from the Directive’s scope. Such exclusion would cut across the grain of the legislation’s aim to provide ‘a high level of protection’.”

It could be argued that the scope of discussions in earlier cases has revolved around interests in land vis-a-vis relationships between landlord and tenant, rather than the broader category of seller and buyer. As part of the proposed review of the 4 consumer rights Directives<sup>71</sup>, the unfair contract terms directive is stated as not applying to immovable property based on the rationale that “the sale of a house is about rules on ownership and therefore outside the scope of the Treaty (Article 295).”<sup>72</sup>

## VI. THE SINGAPORE LANDSCAPE

### A. Singapore Legislation

Singapore does not have any equivalent of the ACL. The legislation regulating the behavior of suppliers and consumers in Singapore is the *Unfair Contract Terms Act*<sup>73</sup> and the *CPFTA*.<sup>74</sup>

The *Unfair Contract Terms Act*<sup>75</sup> is designed to protect consumers who are subject to exception clauses or limitations of liability in the course of a business or from the occupation of business premises. Interestingly, any contract that relates to the creation or transfer of an interest in land is expressly excluded from the ambit of the *Unfair Contract Terms Act*.<sup>76</sup>

The *CPFTA*<sup>77</sup> regulates consumer transactions. Again, transactions involving the acquisition of an estate or interest in any immovable property (but not a lease or timeshare contract) are expressly excluded.<sup>78</sup>

It goes without saying that housing affordability and market conditions contribute to the shaping of government policies in many aspects of the law. This is particularly evident in the rights and regulation of residential land ownership in Singapore where land is a scarce commodity<sup>79</sup>, in a country with one of the highest population densities in the world.<sup>80</sup>

<sup>71</sup> *supra* note 14

<sup>72</sup> Art. 295 of the *Treaty Establishing the European Union*, *supra* note 14, states that “[t]his treaty shall in no way prejudice the rules in Member States governing the system of property ownership”.

<sup>73</sup> *Unfair Contract Terms Act*, *supra* note 15.

<sup>74</sup> *CPFTA*, *supra* note 15.

<sup>75</sup> *Ibid.*

<sup>76</sup> Under s. 1(b) of the First Schedule to the *Unfair Contract Terms Act*, *ibid.*, ss. 2-4 are expressed as not extending to “any contract so far as it relates to the creation or transfer of an interest in land, or to the termination of such an interest, whether by extinction, merger, surrender, forfeiture or otherwise”.

<sup>77</sup> *CPFTA*, *supra* note 15.

<sup>78</sup> Under s. 1(a) of the First Schedule to the *CPFTA*, *ibid.*, “consumer transactions” are expressed as not including “acquisition of an estate or interest in any immovable property (but not including any lease of residential property granted in consideration of rent or any time share contract)”.

<sup>79</sup> Tang Hang Wu & Kelvin F.K. Low, eds., *Tan Sook Yee’s Principles of Singapore Land Law*, 3d ed. (Singapore: LexisNexis, 2009) at 15 [*Tang & Low*].

<sup>80</sup> Singapore is currently ranked no. 3 in the world, with 4,987,600 people living in an area of 710.3 km<sup>2</sup>, equating to a population density of 7,022 persons per km<sup>2</sup> (Sing., *Yearbook of Statistics Singapore, 2010*, (Singapore: Department of Statistics, Ministry of Trade & Industry, 2010) at 9, online: <<http://www.singstat.gov.sg/pubn/reference/yos10/yos2010.pdf>> [*Singapore Yearbook 2010*]). In Australia, as at 28 September 2010, 22,476,261 people live in a total of 7,682,300 km<sup>2</sup>, with a population density of 2,921 persons per km<sup>2</sup>. “Population clock”, *Australian Bureau of Statistics* (28 September 2010), online: Australian Bureau of Statistics

Broadly speaking, the real estate industry in Singapore can be divided into public sector housing and private sector housing.

## B. Regulation in Singapore

With over 80% of Singaporeans owning residential leasehold estates in land owned by Singapore's largest landowner, the Housing and Development Board (HDB)<sup>81</sup>, or involving the resale of HDB flats, the majority of residential land transactions are regulated under the *Housing and Development Act*.<sup>82</sup> This Act regulates the right of disposal<sup>83</sup>, eligibility criteria<sup>84</sup>, rights to own other private property and minimum occupation periods.<sup>85</sup> Resale of HDB properties requires the seller and buyer to use a prescribed HDB standard option to purchase agreement. Any other form of agreement is invalid under the *HDA*.<sup>86</sup> There is no comparable legislation in any State or Territory in Australia.

The boom in housing development in the 1960's led to the introduction of the *Housing Developers (Control and Licensing) Act*<sup>87</sup> providing for the licensing and the setting of standard terms for option agreements and contracts between property developers and individuals.<sup>88</sup> Prior to this time, over anxious buyers, with little or no access to information about the proposed development, would rely upon the glossy brochures and sketchy plans produced by developers or their agents. This vulnerability of bargaining position was exploited by some developers said to have adopted a "cavalier attitude" by "extracting exorbitant option fees" from prospective buyers.<sup>89</sup> Exacerbated by the lack of supply, speculation in the property market was rife and buyers were 'flipping'<sup>90</sup> their interests for much greater prices. As such, the *HDCLA* clearly had the objective of consumer

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<http://www.abs.gov.au/ausstats/abs%40.nsf/94713ad445ff1425ca25682000192af2/1647509ef7e25faaca2568a900154b63?OpenDocument>.

<sup>81</sup> 'HDB flats' are constructed on land owned by the Housing & Development Board, Singapore's public housing authority and a statutory board under the Ministry of National Development, and leased for short terms (up to 3 years as rental units) or longer terms (up to 99 years as home ownership flats). See *Singapore Yearbook 2010*, *ibid.* at 116; Sing., Housing & Development Board, *HDB Annual Report 2008/2009; Key Statistics* (Singapore: n.p., n.d.) at 5, online: HDB <[http://www.hdb.gov.sg/fi10/fi10221p.nsf/0/d4a0f107613b79944825766200236310/\\$file/Key%20Statistics.pdf](http://www.hdb.gov.sg/fi10/fi10221p.nsf/0/d4a0f107613b79944825766200236310/$file/Key%20Statistics.pdf)>.

<sup>82</sup> *Housing and Development Act* (Cap. 129, 2004 Rev. Ed. Sing.) [*HDA*].

<sup>83</sup> Usage of the prescribed HDB Standard Option to Purchase is mandated under s. 49A of the *HDA*, *ibid.*, as without the approval of the Board, any other form of agreement is "null and void".

<sup>84</sup> Ethnic ratios and limits under the Ethnic Integration Policy and Singapore Permanent Resident Quota policy came into effect from 5 March 2010. See e.g., Housing & Development Board, *Ethnic Integration Policy & SPR Quota*, online: HDB <[http://www.hdb.gov.sg/fi10/fi10321p.nsf/w/BuyResaleFlatEthnicIntegrationPolicy\\_EIP?OpenDocument](http://www.hdb.gov.sg/fi10/fi10321p.nsf/w/BuyResaleFlatEthnicIntegrationPolicy_EIP?OpenDocument)>

<sup>85</sup> See cls. 25.5(b), 26.2 in Housing & Development Board, *Terms and Conditions of Sale/Purchase of an HDB Resale Flat*, online: HDB <[http://www101.hdb.gov.sg/hdbvsf/eampuadp.nsf/0/rs\\_common/\\$file/Terms&Conditions+of+Resale.pdf](http://www101.hdb.gov.sg/hdbvsf/eampuadp.nsf/0/rs_common/$file/Terms&Conditions+of+Resale.pdf)>.

<sup>86</sup> Under s. 65(1)(a) of the *Housing and Development Act*, *supra* note 82, the Minister has a general power to make any rules about the terms and conditions of any sale of a HDB property.

<sup>87</sup> *Housing Developers (Control and Licensing) Act* (Cap. 130, 1985 Rev. Ed. Sing.) [*HDCLA*].

<sup>88</sup> *Housing Developers Rules* (Cap. 130, R. 1, 2008 Rev. Ed. Sing.) [*Housing Developers Rules*].

<sup>89</sup> *Tang & Low*, *supra* note 79 at 445.

<sup>90</sup> The practice of onselling the buyer's interest in the property before completion of the transaction.

protection by imposing the rules regarding development and sale to buyers. One initiative within the legislation was the prescribing of standard option agreements and contract terms provisions designed to equal up the bargaining position of the buyer.

The *HDCLA* was initially designed to regulate the standard form agreements between housing developers and buyers on new un-landed developments. However, overtime a resale market evolved with the sale of HDB flats between private sellers and buyers. In 2003, it became necessary to pass further regulations prescribing Terms and Conditions of Sale/Purchase of a HDB Resale Flat.<sup>91</sup> It was recognized that the parties to these private transactions were usually individuals on an equal bargaining platform.<sup>92</sup> However, there was a need to pass on the control imposed under the HDB Act as far as eligibility criteria and other mandatory rules.

The objective of these rules was to prescribe standard form agreements in line with the HDB objectives and also to provide equality in redress should default occur by either party.

### C. Private Land Transactions in Singapore

The remaining transactions comprise the landed dwelling houses between private seller and buyer or un-landed (strata title scheme) properties between a private seller and buyer (as opposed to “off the plan” or un-landed dwellings from housing developers).<sup>93</sup> There is relative freedom of contract, governed only by land use or land type regulations<sup>94</sup> and foreign investment ownership rules.<sup>95</sup> For the purpose of this review, it will be these unregulated transactions, where a standard form contract is used, that will be tested against the ACL fairness principles.

### D. The Standard Land Contract

The Singapore Law Society originally issued the Law Society of Singapore Conditions of Sale in 1936 for auction sales. Over time, these conditions were modified to apply to sales by private treaty.<sup>96</sup> The most current version, issued in 1999, adopted a Plain English language style and has been described as contributing towards greater functionality and precision.<sup>97</sup> By way of comparison, Table 1 identifies those terms within the standard contract which might attract the fairness test under the ACL.<sup>98</sup>

<sup>91</sup>A full copy of these prescribed terms can be found at

[http://www.hdb.gov.sg/fi10/fi10297p.nsf/ImageView/TermsConditions/\\$file/Terms&Conditions+of+Resale.pdf](http://www.hdb.gov.sg/fi10/fi10297p.nsf/ImageView/TermsConditions/$file/Terms&Conditions+of+Resale.pdf) – Updated 18 March 2011.

<sup>92</sup> *Tang & Low, supra* note 79 at 456.

<sup>93</sup> Governed by the *Housing Developers Rules, supra* note 88, r. 12(1)-(2) made pursuant to *HDCLA, supra* note 87, s. 22, with prescribed Sale and Purchase agreements.

<sup>94</sup> Above no. 92

<sup>95</sup> Under the *Residential Property Act* (Cap. 274, 2009 Rev. Ed. Sing.).

<sup>96</sup> The most current version released in 1999, with earlier versions in 1981 and 1994.

<sup>97</sup> Hairani Saban, *Singapore Conveyancing Practice: Forms, Precedents and Materials*, (Singapore: Butterworths Asia, 1992) at c. V, 1.

<sup>98</sup> The 3 elements that are considered under the ACL ‘fairness test’ are whether the term would cause significant imbalance in the parties’ rights and obligations under the contract, is the term reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term, and would the term would cause detriment, whether financial or otherwise, to a party if it were to be applied.



Despite the buoyancy of the real estate market in Singapore, and the historical context of the 1960's intervention to calm the waters, there may still be room for greater disclosure and transparency in those non-regulated real estate transactions.<sup>99</sup>

### E. Time for Change?

Recent developments in Singapore to increase transparency and fairness in regulated land contracts between housing developers and buyers evidences the need for greater balance in the bargaining process.<sup>100</sup> The recent call for public comment on the proposed amendments to the *HDCLA* signifies a step towards greater consumer protection for buyers. In particular, the proposal requiring developers to disclose significant information pertaining to the property and pricing information, together with disclosure of amendments to the standard terms are designed to ensure greater transparency in the bargaining process. The rights of sub-purchasers under the proposals ensures the preservation of legal rights regarding defects, and imposes a statutory form of privity of contract between developers and sub-purchasers.

## VII. THE CRYSTAL BALL FORECAST

Land contracts in Australia, regardless of the legal status or business activity of the supplier, will be governed by the same principles as those suppliers under mobile phone contracts, car hire contract, or a package holiday contract. The threshold issue of whether a contract is a consumer contract takes no notice of the value of the contract or the layers of support that might already exist at common law, in equity or under statute pertaining to the particular goods, or services supplied or interest in land acquired. This is of particular importance in land transactions.<sup>101</sup>

As to the Australian landscape, Professor Peter Butt<sup>102</sup> has suggested two possible approaches to an interpretation of the ACL - one is where the Courts take a robust view of property contracts on the basis that standard terms have been used and accepted in the market for many years. The other is where the Courts give a 'wide and generous interpretation' on the basis that the ACL is designed to protect the public at large. He suggests that only time will tell but considers the latter approach will win the day.

Based on the examples provided by the English courts<sup>103</sup> and the approach to the interpretation of the consumer protection principles, it is suggested that Australian courts will take a wide and generous approach to the interpretation of the consumer protection intent of the ACL. That being the case, the future of land contracts in Australia, regardless of the inbuilt procedural and substantive fairness afforded by established principles and

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<sup>99</sup> There is no prescribed disclosure regime existing in Singapore and caveat emptor prevails.

<sup>100</sup> Singapore Law Watch "New rules to help and protect home buyers" Singapore 17 March 2011 found at [http://www.singaporelawwatch.sg/remweb/legal/ln2/rss/legalnews/71210.html?utm\\_source=rss%20subscription&utm\\_medium=rss](http://www.singaporelawwatch.sg/remweb/legal/ln2/rss/legalnews/71210.html?utm_source=rss%20subscription&utm_medium=rss)

<sup>101</sup> The majority of Australian states and territories have statutory disclosure regimes for residential contracts. In addition, buyers can expect anywhere from 2 to 5 days statutory cooling-off periods in all states with the exception of Western Australia.

<sup>102</sup> Peter Butt, Michael Allen & Malleons Stephen Jaques, "Strata Title Unlocked – Unfair Terms Bill – what are the implications for developers and financiers" (Paper presented at the Australian College of Community Association Lawyers' 4th Annual Conference, Gold Coast, 1 September 2009) [unpublished]. Thanks to Professor Sharon Christensen for providing a copy of this paper.

<sup>103</sup> Above no. 69

prescriptive legislation, will be judged against consumer protection considerations. It is hoped, however, that this new perspective does not add to the litigators satchel when asked by a remorseful buyer for an escape route out of an otherwise binding contractual arrangement.

**TABLE 1: ACL PRINCIPLES AND SINGAPORE STANDARD LAND CONTRACT**

STANDARD CONDITION	ACL PRINCIPLE	COMMENT
<p><b>Condition 4 REQUISITIONS</b></p> <p>4.1 limit on the time in which requisitions can be raised by the purchaser.</p> <p>4.2 Every objection or requisition not so raised is considered as waived.</p>	<p>A term that permits, or has the effect of permitting, one party (but not another party) to limit performance of the contract. Section 4(a)</p> <p>A term that limits or has the effect of limiting one party's right to sue another party: section 4 (k)</p>	<p>Testing this against the elements of fairness, query whether the short time frame for raising objections causes a significant imbalance in the parties' rights and obligations under the contract. When considering the substance of the contract and what is being conveyed, would expanding the time frame for allowing requisitions to be raised by not later than 7 days prior to completion provide a fairer outcome?</p>
<p><b>Condition 5: VENDOR'S POWER OF RECISSION</b></p> <p>5.1 Where the Vendor is unable, or unwilling because of difficulty, delay or expense or for other reasonable cause to remove or comply with any objection or requisition of the Purchaser as to title, contract, sale plan and these conditions, the Vendor has the right to annul the sale...</p> <p>5.4 When the sale is annulled, the Purchaser is entitled to the return of the deposit but without interest, costs or compensation.</p>	<p>A term that permits or has the effect of permitting, one party (but not another party) to avoid or limit performance of the contract. Section 4(a)</p> <p>A term that limits or has the effect of limiting one party's right to sue another party: section 4 (k)</p>	<p>Unilateral decision by the seller.</p> <p>This term limits the purchaser's right to claim to the return of the deposit, regardless of the extent of any loss suffered.</p> <p>Is this reasonably necessary to protect the legitimate interests of the seller?</p>
<p><b>Condition 11: MISDESCRIPTION</b></p>	<p>A term that limits</p>	<p>Given that the buyer inherits</p>

<p>11.3 Neither party has right of compensation if an immaterial error, misdescription or omission is discovered</p>	<p>or has the effect of limiting one party's right to sue another party: section 4 (k)</p>	<p>the obligations of compliance post completion, there is no materiality test when considering the issue of detriment. Query whether this term would cause detriment to a buyer who was required to complete the contract but later, once owner, required to address the particular error, misdescription or omission. For example, an error in the boundaries causing an encroachment onto the neighbouring lot. Re-surveying costs, possible compensation payable for the encroachment.</p>
<p><b>CONDITION 12: DEMANDS OF GOVERNMENT DEPARTMENT OF LOCAL OR STATUTORY AUTHORITIES</b></p> <p>12.1 Subject to Condition 12.3, if the Vendor spends any money in complying with any requirement made between the date of contract and completion by –</p> <p>(a) any Government department or other local or statutory authority; or</p> <p>(b) any landlord or superior landlord of any leasehold property, the Purchaser must on completion reimburse the Vendor for such expenditure.</p>	<p>A term that penalizes, or has the effect of penalizing, one party (but not another party) for a breach or termination of the contract. Section 4 (c)</p>	<p>There is no reciprocal right for a purchaser to claim against the seller reimbursement of the cost of compliance when a seller has failed to comply with a pre-contractual requirement of an authority.</p>