Online Cross-border Consumer Transactions: A Proposal for Developing Fair Standard Form Contract Terms

JUSTIN MALBON

INTRODUCTION

Online consumer sales presently represent a relatively small proportion of overall Australian retail sales. The online market is, however, growing at a substantial rate. Part I of this article describes the ways in which the online market is growing in Australia and overseas. An estimated 45% of online purchases by consumers in Australia are from overseas sellers.[1] The question whether these transactions are governed by the Australian Consumer Law (ACL) is examined in Part II. The conclusion drawn is that cross-border transactions are usually governed by the ACL – at least in theory. If so, it suggests that an Australian consumer who purchases goods from overseas seller will benefit from the range of protection measures in the ACL, including those dealing with consumer guarantees and unfair terms. The practical realities, however, are quite different. A consumer seeking remedies against an overseas seller who objects to Australian jurisdiction will invariably confront a bewildering array of procedural complexities and face prohibitive costs.

Given that in reality the law of an overseas jurisdiction may well apply to a transaction, Part III considers whether this is necessarily a bad thing. Particular attention is given to the application of US law because it is reasonable to assume that a substantial proportion of consumers in Australia purchase goods from US sellers. Also, there are marked differences between US law and the laws of European countries. The conclusion drawn is that US law is generally less favourable to consumers than Australian law (and European laws). US courts generally uphold standard form consumer contracts under the party autonomy principle, regardless of the unfairness of the terms. The stance taken by the US courts appears to be enabling a race to the bottom, in which the terms in standard form consumer contracts are developing an increasingly pro-seller bias. Part IV

1 Frost and Sullivan and PricewaterhouseCoopers 'Australian Online Shopping Market and Digital Insights' July 2012 www.pwc.com.au, at p.4. See also Australian Productivity Commission, 'Economic Structure and Performance of the Australian Retail Industry' (Commonwealth of Australia: Canberra, 2011) p. 83.

considers why this is so. Why, for instance, are market forces not operating to provide incentives for the development of party balanced terms? It is speculated that the reasons might include the fact that the terms are in effect invisible because consumers rarely read them. In addition, in many cases there is no correlation between the harshness of the terms and preparedness of a seller to treat its customers fairly. It appears, however, that despite this the harsh terms can lower consumer expectations and deprive them of rights they should be fairly entitled to.

Part V considers ways in which the interests of consumers can be better protected and enhanced regarding cross-border online transactions. It is proposed that there are two possible (and complementary) ways of dealing with the issue. The first involves working towards a greater harmonisation of international laws. This process may take some considerable time, and could meet with limited success. A proposed alternative approach is to develop a series of standard form 'Fair Terms' which could be made freely available on the Internet for parties to voluntarily incorporate into their contracts. This proposal follows the lead provided by developments for international commercial transactions. The article concludes by suggesting starting points for the development of fair terms provisions.

I. The nature and scope of cross-border transactions

Retail online sales constitute a relatively low but rapidly growing proportion of overall Australian retail sales. Australian online shopping expenditure was expected to reach $16 billion during 2012, which constituted a growth of 17.6% from the previous year The trend toward online purchasing is likely to increase, particularly if Australians follow the UK trend where online sales increased from 8.6% in 2008 to 12% a mere two years later.[2] Estimated online expenditure as proportion of total Australian retail sales during 2012 was 6.3%; with 2.8% being from offshore websites and 3.5% from onshore websites.[3] A significant proportion of Australian consumers purchase products online from overseas sellers.[4] Frost and Sullivan and PricewaterhouseCoopers estimated that 75% of Australians who shop online make purchases from offshore sites, with around 45% of online expenditure going overseas.[5]

The Australian online consumer marketplace is located within the Asia-Pacific region. The OECD reports that in 2013 the Asia-Pacific region will become the world's largest business to consumer e-commerce marketplace, with sales in the region representing 34% of total world sales. The regional marketplace will be larger than the North American and the European.[6] The OECD expects that

2 Centre for Retail Research (Newark, Nottinghamshire, UK, 2012) www.retailresearch.org/onlineretailing.php

3 Frost and Sullivan and PricewaterhouseCoopers 'Australian Online Shopping Market and Digital Insights' July 2012 www.pwc.com.au, at p.2.

4 Above.

5 Above at 4.

6 OECD "Empowering and Protecting Consumers in the Internet Economy",

growth will accelerate in the region, with consumers increasingly adopting mobile devices such as smart phones, tablets and e-readers.[7]

Arguably, the growth in the online consumer marketplace delivers economic as well as consumer benefits. It is claimed that in France, for instance, that while the Internet economy destroyed 500,000 jobs, it created 1.2 million new ones generating a net 2.4 jobs created for every job cut.[8] The benefits to consumers of online purchasing include lower prices for products, a greater range of available products and an easier means for comparing products than that available in the real world.[9] Civic Consulting estimated that in Europe alone the consumer welfare gains are in the order of €2.5 billion.[10] Other benefits are the enhanced capacity to search for products and compare prices, and consider consumer reviews about products before purchase.[11] The downside is that consumers are usually not able to examine physical products such as shoes and clothing before purchase – although some online sellers freely enable unsatisfactory products to be returned. There is also enhanced security and privacy risks with online shopping.[12]

In summary, the online consumer marketplace is growing at a rapid rate and offers considerable potential economic and consumer benefits. However, these benefits will be undermined if consumers are not adequately protected, which may lead to financial and other losses to individual consumers along with an overall decline in consumer confidence in the marketplace. A loss of consumer confidence may well lead to a reduction in the growth and potential economic and consumer benefits that would otherwise exist if the market were properly regulated.

II. The limits of the reach of Australian laws

Australian law (notably the Australian Consumer Law – the 'ACL') probably applies in many instances where a consumer purchases goods online from an overseas seller – at least in a formal legal sense. Whether this is so in any particular instance will, of course, turn on the specific facts at play. Generally speaking, Australian law provides reasonably good consumer protection regarding online purchasing, including measures regarding unfair contract terms[13] and consumer

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OECD Digital Economy Papers, No. 216, OECD Publishing, 2013. http://dx.doi.org/10.1787/5k4c6tbcvvq2-en at p.10.

7 Above at p.3.

8 Above at 16.

9 Malbon J, 'Consumer Strategies for Avoiding Negative Online Purchasing Experiences: A Qualitative Study' (2013) 20 *Competition and Consumer Law Journal* 249, pp.256.

10 Civic Consulting, 'Consumer Market Study on the Functioning of E-Commerce and Internet Marketing and Selling Techniques in the Retail of Goods' (Civic Consulting, Berlin: 2011) www.civic-consulting.de, p.9.

11 See Malbon J, 'Taking Fake Online Consumer Reviews Seriously" (2013) 36 *Journal of Consumer Policy* 139-157.

12 Malbon J 'Consumer Strategies for Avoiding Negative Online Purchasing Experiences: A Qualitative Study' (2013) 20 *Competition and Consumer Law Journal* 249 at p.258.

13 Part 2-3 ACL.

guarantees.[14]

This Part considers if and how Australian law (and the ACL in particular) applies to transactions in which an Australian consumer purchases goods from an overseas seller. It concludes that even if Australian law applies as a matter of legal theory, in many cases it is difficult if not almost impossible to apply in practice.

To illustrate the operation of Australian law on a typical cross border transaction, consider a relatively straightforward hypothetical transaction where a consumer in Australia purchases a product online from a seller based, say, in the US. Assume also that: the seller has no physical presence in Australia and no Australian subsidiary or related entity; the products it sells are warehoused in the US, and its webpages are hosted on a server in the US and all electronic transactions take place in the US, including the processing of payments; and the seller arranges for the delivery of the goods to the Australian purchaser via a delivery service that is independent of the seller. Assume, then, that when the purchaser inspects the goods on delivery she discovers it is defective. Assume also that the purchaser remembers that when she purchased the goods online she clicked a button indicating that she agreed to the contract terms set by the seller, and that she now believes the terms are unfair.

Assume the purchaser wants to invoke section 54 ACL, which provides for a statutory guarantee that the goods be of acceptable quality and for various remedies depending on whether there has been a major, or non-major, failure regarding the guarantee.[15] She also wants to invoke the unfair terms provisions in Part 2-3 ACL. The question, then, is; do these provisions apply to the hypothetical transaction? To answer this we turn to section 5 of the *Competition and Consumer Act 2010* (Cwlth), which extends the application of the various provisions of the Act, including the ACL, to conduct outside Australia.[16] Section 5(1) of the Act extends application of the relevant provisions to conduct by Australian incorporated bodies or those carrying on business in Australia, and Australian citizens or people ordinarily resident within Australia. None of these circumstances apply to the hypothetical case, unless it can be said that the US company is carrying on business in Australia. The Act does not define the term 'carrying on business'.[17] It would appear, however, that even if the US company regularly supplied its goods to Australian consumers, it would not constitute sufficient grounds for claiming

14 Part 3-2, Division 1 ACL.

15 A consumer can seek remedies from a supplier or manufacturer for a 'major' or 'non-major' failure of a consumer guarantee; sections 259, 267 and 272 ACL. A consumer might also seek to invoke Part 2-3 ACL, to void an unfair term in standard form contracts.

16 Section 5 does not extend the application of the part 5-3 of the ACL (which deals with country of origin representations) to conduct outside Australia (section 5(1)(c)).

17 Some sense of what the term might mean may be gained from section 21(1) Corporations Act, which provides that: 'A body corporate that has a place of business in Australia, or in a State or Territory, carries on business in Australia, or in that State or Territory, as the case may be'.

that the company is carrying on business in Australia, unless it had an Australian subsidiary or related entity within Australia.[18]

Another way of determining whether the ACL applies to the hypothetical transaction is to examine whether it applies because the relevant conduct was engaged in *within* Australia, rather than *outside* Australia. Arguably, the relevant conduct that invokes jurisdiction is the supplying of goods. If that conduct takes place in Australia, it would appear that Australian jurisdiction is invoked. This can be explained by examining section 54 (statutory guarantees) and section 23 (unfair contract terms). Section 54 provides in part:

Guarantee as to acceptable quality

(1) If:
- (a) a person supplies, in trade or commerce, goods to a consumer; and
- (b) the supply does not occur by way of sale by auction;

there is a guarantee that the goods are of acceptable quality.

Section 23 relevantly provides:

> **23 Unfair terms of consumer contracts**
> (1) A term of a consumer contract is void if:
> (a) the term is unfair; and
> (b) the contract is a standard form contract….
> (3) A ***consumer contract*** is a contract for:
> (a) a supply of goods or services; or
> (b) a sale or grant of an interest in land;
> to an individual whose acquisition of the goods, services or interest is wholly or predominantly for personal, domestic or household use or consumption.

Section 54 applies if a person supplies goods in trade or commerce to a consumer. Section 23 applies if there is a standard form contract[19] for the supply of goods to an individual wholly or predominantly for personal, domestic or household use or consumption.

The relevant conduct for invoking jurisdiction under both provisions is the *supply* of goods. Section 4 of the Act defines 'supply', when it is used as a verb regarding goods, as including the supply or resupply of goods by way of sale, exchange, lease, hire or hire-purchase. The definition of 'supply', when used as a noun, has a corresponding meaning; and the terms 'supplied' and 'supplier' also have

18 Clarke, P (2012) 'The Extraterritorial Reach of the CCA — a Primer' *Competition and Consumer Law News* July 2012, p.312.

19 A standard form contract is defined in section 27 ACL.

corresponding meanings. The term 'acquire' in relation to goods is defined under the section as including acquisition 'by way of purchase, exchange or taking on lease, on hire or on hire-purchase'. According to Lindgren J in *Cook v Pasminco Ltd* the term 'supply' under the Act is the counterpart of the term 'acquire'.[20] That is to say, supply generally involves a bilateral transaction or dealing in which one person acquires goods from another.[21] Lindgren J adds that: 'The definitions of "supply" and "acquire" are symmetrical: a supply of goods must occur as part of a bilateral "transaction" or "dealing" under which the other party acquires them'.[22]

It might be argued by the US seller attempting to avoid Australian jurisdiction in the hypothetical case that the supplying of the goods took place in the US whilst the acquisition took place in Australia, and therefore the relevant conduct of supplying the goods took place outside Australia. The difficulty with this argument is that it reads the terms 'supply' and 'acquire' too narrowly. A reading of the dictionary definition of the term 'supply', for instance, reveals that it is a very broad term. It is relevantly defined by the Oxford Dictionary as including the meaning: 'To provide, or provide with, something'. The term 'provide' is defined as: 'To supply (something) for use; to make available'. This suggests that the act of supplying goods is not complete until the goods are made available (possibly for use) to the consumer, which in turn implies that it is when the goods are made physically available to the consumer. This suggests that supply is usually completed when the goods are delivered to the consumer. If so, the supplying of the goods is an activity that began in the US and was completed in Australia.

The US seller might respond that even if the acts of supply took place in the US, during transit and within Australia, Australian jurisdiction can only extend to the component of supply that took place in Australia. That is, the acts of supply need to be segmented according to the jurisdictions in which it occurred – US jurisdiction applies to the acts of supply in the US, some other jurisdiction may apply during transit, and Australian jurisdiction for the aspects of supply taking place in Australia. Australian courts, however, are unlikely to be impressed by arguments that invite such undue artifice. They appear not to shy away from assuming Australian jurisdiction over Internet related activities if a relevant party is resident in Australia. In *European City Guide* for instance the respondent was found to have engaged in misleading and deceptive conduct in circumstances where its business was registered in Spain and virtually all its relevant business activities were conducted in Spain by emailing misleading forms to businesses in Australia.[23] And in *Dow Jones & Company Inc v Gutnick*[24] the High Court found

20 *Cook v Pasminco Ltd* [2000] FCA 677, [25].

21 Above.

22 Above at [26].

23 See the order made by the judge in *ACCC v European City Guide* [2011] FCA 804 at [85]. See also *The Society of Lloyd's v White* [2004] VSCA 101 regarding the applicability of the misleading and deceptive conduct provision (now section 18 ACL) where the plaintiff had irrevocably agreed by contract that the courts of England had exclusive jurisdiction to settle any dispute between the parties.

24 (2002) 210 CLR 575.

that an Australian court had jurisdiction to deal with a defamation claim despite the fact that the alleged defamatory material was written and uploaded in the US and held on US based servers. It was enough for an Australian court to have jurisdiction if readers in Australia downloaded the allegedly defamatory material and read the material from their computer devices.

Assume, then, that Australian courts have jurisdiction regarding the hypothetical case. Actually asserting jurisdiction in any real and practical sense is likely to be difficult, complex and expensive unless the seller is prepared to submit itself to Australian jurisdiction – which in most cases is unlikely.[25] One of many hurdles a consumer plaintiff may face is that she may well have entered into a standard form contract that includes a choice of law and choice of jurisdiction clause that choses the law of the overseas jurisdiction as applying to the contract, and the courts or tribunals in that jurisdiction as the venue for dealing with any disputes. Amazon provides a relatively typical example of the kinds of terms that will be found in a standard form contract proffered by an overseas based online seller.[26] An Australian consumer purchasing an item from Amazon will be required to click a button indicating that she agrees to the Amazon conditions of use – which is a standard form contract. The contract includes the following terms:

> …To the full extent permissible by applicable law, Amazon disclaims all warranties, express or implied, including, but not limited to, implied warranties of merchantability and fitness for a particular purpose….
> Any dispute or claim relating in any way to your use of any Amazon Service, or to any products or services sold or distributed by Amazon or through Amazon.com will be resolved by binding arbitration, rather than in court, except that you may assert claims in small claims court if your claims qualify. The Federal Arbitration Act and federal arbitration law apply to this agreement….
> By using any Amazon Service, you agree that the Federal Arbitration Act, applicable federal law, and the laws of the state of Washington, without regard to principles of conflict of laws, will govern these Conditions of Use and any dispute of any sort that might arise between you and Amazon.

The contract purports to apply the law of a foreign jurisdiction as the proper law of the contract. If this assertion of jurisdiction is effective, it would in effect substitute the laws of the US state of Washington and US federal law for the statutory guarantees under the ACL. Arguably this assertion will be ineffective under Australian law, at least to the extent of overriding the ACL statutory guarantees, because of the operation of section 67 ACL. The section is yet to

25 Productivity Commission, 'Economic Structure and Performance of the Australian Retail Industry', (Commonwealth of Australia, Canberra, 2011) at 117.

26 Amazon is a US based site for purchasing books and other consumer products that is popular with Australian consumers; see www.amazon.com.

be tested in the courts, and may well prove to be extremely difficult to apply in practice if the seller objects to the application of Australian law.

Section 67 ACL is a modified version of sections 67 and 68 of the predecessor *Trade Practices Act*. The New South Wales Court of Appeal considered the operation of those sections in *Laminex (Australia) Pty Ltd v Coe Manufacturing Co.*[27] The case confirms, if anything, the legal and practical complexities facing a consumer seeking to invoke the provision.[28] Taking the Amazon terms, an Australian court applying the *Laminex* reasoning may well determine that the parties have voluntarily accepted that any dispute be resolved by arbitration under the US Federal Arbitration Act, but that the arbitral body is required to apply the ACL statutory guarantees. A US arbitral body may, however, decide that it is bound by the applicable US federal law and the laws of the state of Washington, regardless of the operation of section 67 ACL. US courts (and possibly the courts of other jurisdictions) will tend to give effect to a choice of law provision in a consumer contract regardless of the laws of the consumer's country. Compelling an overseas arbitral body to apply section 67 and the statutory guarantees may well involve complex legal proceedings in multiple jurisdictions. Clarke observes that the formal legal system struggles to deal with providing remedies regarding cross-border online consumer purchasing. He notes that:

> In absence of an internationally consistent approach to protecting competition and consumers, or an internationally accepted method of resolving competition or consumer disputes having transnational dimensions, the extraterritorial application of competition and consumer law necessarily involves applying the law of one country (country A) to conduct occurring in another country (country B) and perhaps also to the B's citizens in respect of that conduct. Understandably, this will often be a matter of concern for B who may well resent A's intrusion into its jurisdiction. This will be especially sensitive when, for example, B does not prohibit the conduct in question, or where it confers a benefit on B or B's citizens (albeit to the detriment of those in A) or where the commercial well-being of the respondent is important to B's national interest.[29]

Clark notes that on occasions the issue of extraterritoriality has become so politicised, particularly in the case of anti-trust matters, that retaliatory legislation has been enacted to thwart such legislation. Gawith claims that the cost for a consumer of obtaining a remedy will usually be greater than any amounts that

27 [1999] NSWCA 270.

28 See W. Jo-Mei Ma 'What's My Choice – Deciphering the provisions on conflict of laws in the Trade Practices Act' (2003) 11 *Trade Practices Law Journal* 149. See also Davis J 'The Australian Consumer Law and the Conflict of Laws' (2012) 20 *Australian Journal of Competition and Consumer Law* 212.

29 Clarke, P (2012) 'The Extraterritorial Reach of the CCA — a Primer' *Competition and Consumer Law News* July 2012, p.308.

could be recovered.[30] Even if a consumer manages to obtain an order against the overseas seller in an Australian court, she would be confronted with the costs of enforcing the order in the foreign jurisdiction if the seller does not voluntarily comply with the order. In most instances the cost of the outlay or expenditure, whether tangible or intangible, in bringing an action will heavily outweigh any potential benefit in obtaining the desired object or outcome of the action.[31] Sage advice to a consumer in these circumstances may well be that they should cut their losses and not pursue the matter and take heed of the lessons learnt by Voltaire. He apparently claimed that 'I was never ruined but twice; once when I lost a lawsuit and once when I won one'.

III. Maybe the laws of the foreign jurisdiction are not so bad after all

Given the difficulties for an Australian consumer seeking to invoke Australian jurisdiction, it might be asked whether submitting to overseas laws and jurisdiction is such a bad thing after all. It might be claimed that the seller's jurisdiction offers more or less the same rights and protections as Australian law. These claims, however, are difficult to sustain, at least in the case of US law. Generally speaking, it tends, to be less favourable to Australian consumer interests regarding standard term contracts than European and Australian laws.

The focus in the following discussion in this Part is on US law because its consumer protection laws and practices are more at variance with Australian laws and practices than those in the UK and other EC countries. It also appears to be a popular online shopping destination for Australian consumers. PwC, Frost Sullivan estimate, for instance, that 75% of Australians who shop online make purchases from offshore sites, with around 45% of online expenditure going overseas.[32] They provide no estimate of the proportion of those purchases made from US sellers, but it can reasonably be assumed that it is significant.

Broadly speaking, the US common law is not so very different from the common law in Australia and England regarding standard form consumer contracts. In those jurisdictions the common law makes no substantial distinction between the contract law principles that apply to standard form consumer contracts and those that apply to contracts more generally. The courts therefore assume that the parties have consented to the terms of the contract unless there are clear vitiating circumstances, such as duress and unconscionability. The point of departure of US law from the law in jurisdictions such as Australia and EC countries is that the latter jurisdictions have statutory provisions regarding unfair terms, and in the

30 Gawith, D 'Non Litigation-based Redress for International Consumer Transactions Is Not Cost Effective-a Case for Reform?' (2006) 3 *Macquarie Journal of Business Law* 115, 116.

31 Above at, 117.

32 PcW Frost and Sullivan, 'Australian Online Shopping Market and Digital Insights: An Executive Overview July 2012' at p.4. www.pwc.com.au/onlineshopping/

case of Australia at least, statutory consumer guarantees – which the US does not have.

There are, however, dangers in over-generalising about the consumer unfriendliness of US laws. Radin notes, for instance, that:

> Some jurisdictions, especially California, look with more disfavour than others upon adhesion [ie standard form] contracts, especially those that look like boilerplate rights deletions schemes; and some jurisdictions, again especially California, have more solicitude than others with regard to preserving viable remedies for consumers in their state. The overall situation is thus quite favorable to the enforcement of choice of forum clauses, but it is also somewhat unpredictable, depending to some degree on the jurisdiction in which the litigation begins.[33]

A US court might intervene on the grounds that the contract terms are unconscionable. That is to say where the court finds that there is 'an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favourable to the other party'.[34] It might consider whether either or both procedural or substantive unconscionability has arisen. Procedural unconscionability involves an absence of meaningful choice rather than any defect in the bargain.[35] Substantive unconscionability might arise because the contract is one-sided or unequal or oppressive to a degree that a court in good conscience cannot tolerate enforcing its terms.[36] In some US jurisdictions the courts place emphasis on substantive unconscionability, whilst in others they tend only to have regard to procedural unconscionability. Occasionally a court may declare a contract void as against public policy, although this is relatively uncommon.[37]

Despite these causes of action, Australian consumers contracting with US sellers are at considerably greater legal risk than if they were contracting with Australian, and even European, sellers. In the absence of the Australian statutory protections, the US presents a legalistic minefield to a potential consumer plaintiff. For instance, standard form consumer contracts devised in the US often contain a clause, like the Amazon provisions outlined above, stating that the parties agree to have any dispute resolved by arbitration. Radin notes that 'it is at best an uphill battle for any plaintiff who has received an arbitration clause in a form contract to avoid getting her lawsuit dismissed from court and sent to arbitration'.[38] She also explains that arbitration clauses are favoured by US sellers because they can

33 Radin, Margaret Jane, Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law (Princeton University Press, 2012), at 137-38.

34 *Williams v Walker-Thomas Furniture Co*, 350 F.2d 445, 449 (DC Cir. 1965).

35 Radin, Margaret Jane, Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law (Princeton University Press, 2012), at 124.

36 Above, at 124.

37 Above, at 127.

38 Above, at 131.

be effective in avoiding class actions,[39] and because arbitrations generally have no precedent value and are held in secret.[40] In addition, arbitrators are likely to be retired business people or even law professors or lawyers. She says that these arbitrators tend not to be particularly predisposed towards consumers.[41]

In addition, US devised standard form contracts invariably contain, as we have seen in the case of the Amazon clauses, a choice of jurisdiction clause nominating the forum of a US state. The leading case regarding the effectiveness of these clauses in standard form consumer contracts is the US Supreme Court decision in *Carnival Cruise Lines v Shute*.[42] In that case a woman from the State of Washington sought to bring suit for personal injury in her own state, but was limited to bringing the suit in Florida – the forum nominated in the contract. A choice of forum clause appeared in the last page of non-refundable tickets bought by the plaintiff and her husband. The Court found the clause to be effective. One of the rationales for the Court's decision was that by allowing the company to compel all litigants to come to its home state to litigate it would save money for the company, and the savings would be passed on to consumers.[43] The Court offered no empirical basis for such a rationale.

Other clauses upheld by US courts are those that eliminate tort remedies such as damages for personal injury – although in some instances overly broad clauses are struck down.[44] In other instances there may be clauses that purport to limit the buyer's remedies. Section 2-719(1)(a) of the Uniform Commercial Code, for instance, allows for clauses that severely limit remedies under a contract. Consequently, many sellers limit the right to return goods for a refund or repair. A consumer might counter that the limitations clause fails the contract's essential purpose (although it is unclear what this means) and that a limitation of consequential damages is unconscionable.[45] All in all it can be said, however, that US laws and their application by their courts tend to render enforcement of consumer rights contentious, expensive and problematic.

Standard Form Consumer Contract Terms – A race to the bottom

The difficulty for consumers in asserting contractual rights in the US may be playing a key role in a race to the bottom for standard form contract terms in that country. The trend over time is towards the inclusion of increasingly pro-seller biased contract clauses.[46] New terms involve the consumer 'consenting'

39 Above, at 132.
40 Above, at 134.
41 Above, at 134.
42 499 US 585 (1991).
43 Radin, Margaret Jane, Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law (Princeton University Press, 2012), at 136.
44 Above, at 138.
45 Above, at 141.
46 Marotta-Wurgler, F and Taylor, R 'Set in Stone? Change and Innovation in Consumer

to: the seller remotely disabling software on the consumer's computer; the seller monitoring the consumer's usage of the product and his or her usage more generally, and providing that information to third parties; and the right of the seller to unilaterally change the terms after the contract is entered into. A study of over 266 online consumer contracts by Mann and Siebeneicher found that about 90% of US online firms with pro-seller terms have terms that purport to exempt seller liability from any implied warranties relating to their product, and limit claims to consequential damages.[47] The pro-seller terms also include clauses in which a consumer 'agrees' to: indemnify the seller to the extent that the consumer has virtually no enforceable rights against the seller.

Hillman summarises the increased application of these one-sided terms as 'businesses' new internet strategies for taking advantage of consumers'.[48] Hillman and Rachlinski observe that online sellers are 'turning the process of contracting on its head' with terms that render any consumer rights under the contract meaningless.[49] US courts in particular generally find standard form terms to be effective on the pretext that the courts are giving effect to party choice and party autonomy, regardless of the artificiality (and indeed the effective absence) of any meaningful consumer consent. In reality, consumers are contracting out of the formal legal system and 'consenting' to the relinquishment of their legal rights. The US courts are for the most part enabling sellers to opt out of the state's legal system thereby rendering state regulation and sanctioning largely ineffectual.[50]

IV. What about market forces compelling better standard form terms?

It might be asked why standard form consumer contract terms are becoming increasingly one-sided and unfair, at least in the US. Market theory suggests that if some sellers gain a competitive advantage by offering fair and balanced standard form terms, then over time competition will lead to an overall improvement of standard form terms. It also suggests that some sellers would offer price-terms trade-offs, much in the same way as low-budget airlines offer lower prices for inflexible conditions on the terms of travel. A study by Marotta-Wurgler and Taylor indicates, however, that this is not happening in the online consumer

Standard Form Contracts', (2013) 88 *New York University Law Review* 240.

47 Mann, RJ and T Siebeneicher, 'Just One Click: The Reality of Internet Retail Contracting' (2008) 108 *Columbia Law Review* 984.

48 Hillman, RA, 'On-line Consumer Standard-Form Contracting Practices: A Survey and Discussion of Legal Implications' (2005). *Cornell Law Faculty Publications.* Paper 29. http://scholarship.law.cornell.edu/lsrp_papers/29

49 Hillman, RA and Jeffrey J Rachlinski, 'Standard-form Contracting in the Electronic Age' (2002) 77 *New York University Law Review* 429. See also Barnes, Wayne R, 'Toward a Fairer Model of Consumer Assent to Standard Form Contracts: In Defense of Restatement Subsection 211' (2007) 82 *Washington Law Review* 227.

50 Calliess, G-P, 'Transnational Consumer Law: Co-regulation of B2C-E-Commerce' in Olaf Dilling, Martin Herberg and Gerd Winter (eds) *Responsible Business: Self-Governance in Transnational Economic Transactions,* (Oxford: Hart, 2007) 225.

marketplace. As mentioned, the reality is that there is a race to the bottom, leading to harsher and more one-sided terms.[51]

It can be speculated that the one-sided terms are symptomatic of the substantial bargaining power imbalances between buyers and sellers. An opposing view is that consumers, especially with the aid of the Internet, can cause reputational damage to sellers, and that this disciplines market practices.[52] It is true that there are some instances where negative consumer reactions to online standard form terms have led to changes. One example is the consumer response to Dropbox's terms and conditions. Dropbox is a US-based company that provides online file storage services for consumers, including business consumers. It allows consumers to upload their personal files onto Dropbox's computer servers, and enables them to gain access to their files anywhere, and to share them with other users. This service raises issues about the protection and unauthorised use of personal files. During mid-2011 Dropbox met with a barrage of criticism from users over its terms of service, which included a term that users' believed granted Dropbox the right to, and ownership of, users' data.[53] An offending clause provided that: 'You grant us (and those we work with to provide the Services) worldwide, non-exclusive, royalty-free, sublicenseable rights to use, copy, distribute, prepare derivative works (such as translations or format conversions) of, perform, or publicly display [user content] to the extent reasonably necessary for the Service.' Dropbox responded to consumer pressure by overhauling its terms of service. A relevant provision now provides that:

> By using our Services you provide us with information, files, and folders that you submit to Dropbox (together, "your stuff"). You retain full ownership to your stuff. We don't claim any ownership to any of it. These Terms do not grant us any rights to your stuff or intellectual property except for the limited rights that are needed to run the Services, as explained below.

The language of the new terms of service departs markedly from the usual starchy legal style for contracts, and adopts an easy to comprehend conversational style. For instance, a clause dealing with the use of the product states that: 'The Services provide features that allow you to share your stuff with others or to make it public. There are many things that users may do with that stuff (for example, copy it, modify it, re-share it). Please consider carefully what you choose to share or make public. Dropbox has no responsibility for that activity'. However, despite the user friendliness of its terms, Dropbox includes the usual exemption from implied warranties and conditions, and limitations of liability:

51 Marotta-Wurgler, F and R Taylor, 'Set in Stone? Change and Innovation in Consumer Standard Form Contracts', (2013) 88 *New York University Law Review* 240.

52 Bebchuk LA and RA Posner, 'One-Sided Contracts in Competitive Consumer Markets' (2005) 104 *Michigan Law Review* 827.

53 Scott, J 'Dropbox Faces Backlash over T&Cs' 5 July, 2011 www.cloudpro.co.uk/iaas/cloud-storage/1213/dropbox-faces-backlash-over-tcs

Dropbox is Available "AS-IS"

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The consumer backlash over the terms and conditions on sites such as Dropbox and Instagram[54] suggest that sellers risk reputational damage by including unduly harsh terms and conditions in their standard form terms. However, these reactions and responses tend to be the exception rather than the norm. Rakoff, for instance, doubts that 'reputational concerns of firms will produce systematically desirable results'.[55]

54 The photo sharing site Instagram, now owned by Facebook, also meet with a consumer backlash because many users thought its terms of service allowed it to to either sell users' photos or use them in advertising www.huffingtonpost.co.uk/2012/12/21/instagram-reverses-terms-decision_n_2343372.html

55 Rakoff TD, 'The Law and Sociology of Boilerplate' (2006) 104(5*) Michigan Law Review* 1235, p.1236.

Another possible explanation for lack of competition over terms is that harsh standard form terms do not necessarily correlate with the ways sellers actually treat their customers. One empirical study found that there is no correlation between market competition conditions for particular products and the one-sidedness of the terms being offered for those products.[56] The evidence suggests that sellers with contract clauses stating that the consumer has no right to the return of purchased goods will often disregard the terms and accept returns; presumably so as not to deter consumers.[57] That is, a seller 'may be deterred from behaving opportunistically by considerations of reputation'.[58] The Australian Productivity Commission appears to put some faith in the disciplining effects of market forces and reputational impacts as an effective informal mechanism for providing consumer protection. According to the Commission:

> …overseas online retailers may not necessarily provide lesser access to refunds and warranties than domestic retailers. Like local retailers, they face commercial incentives, along with the consumer protection requirements in their country of origin, to provide for refunds, returns and warranties on the products they sell. However, there may be issues of time and convenience for consumers in accessing such redress from overseas retailers.[59]

It remains puzzling as to why US sellers (at least) are inserting increasingly harsh terms in their terms of service, whilst apparently ignoring them when dealing with product returns and consumer complaints. Johnston speculates that the terms may be harsher than their application because the seller seeks to give its managerial employees the discretion to grant exceptions on a case-by-case basis.[60] Helberger et al claim that the unfair terms do in fact directly impact on the buyer seller relationship because they have a pervasive effect in reducing and shaping reasonable consumer expectations about the level of protection they can expect.[61] In this way the terms cast a dark shadow over the buyer-seller relationship.

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56 Marotta - Wurgler F, 'Competition and the Quality of Standard Form Contracts: The Case of Software License Agreements' (2008) 5(3) *Journal of Empirical Legal Studies* 447, p.450.

57 Johnston JS, 'The Return of Bargain: An Economic Theory of How Standard-Form Contracts Enable Cooperative Negotiation Between Businesses and Consumers' (2006) 104 *Michigan Law Review* 857, pp.873-74.

58 Bebchuk LA and RA Posner, 'One-Sided Contracts in Competitive Consumer Markets' (2005) 104 *Michigan Law Review* 827, p.827.

59 Australian Productivity Commission, 'Economic Structure and Performance of the Australian Retail Industry' (Commonwealth of Australia: Canberra, 2011) p. 83, at p.130.

60 Johnston JS, 'The Return of Bargain: An Economic Theory of How Standard-Form Contracts Enable Cooperative Negotiation Between Businesses and Consumers' (2006) 104 *Michigan Law Review* 857.

61 Helberger N et al, 'Digital Content Contracts for Consumers' (2013) 36 *Journal of Consumer Policy* 37.

Yet another possible reason why the terms are becoming harsher is their near invisibility. With the relatively uncommon exception of the response to the Dropbox and Instagram terms, consumers usually enter into contracts ignorant of their terms.[62] Consumers' propensity to not read and to be unaware of the terms is highlighted by an April fool's prank by the video game retailer Gamestation. On 1 April 2010 it included the following provision in its terms and conditions: 'Should we wish to exercise this option, you agree to surrender your immortal soul, and any claim you may have on it, within 5 (five) working days of receiving written notification from gamestation.co.uk or one of its duly authorised minions'. According to a *Financial Times* report, that day '7,500 customers made a purchase from the site. Every single one ticked the box claiming they accepted the conditions, but no one noticed a thing'.[63] It is hardly surprising, then, that market forces and potential reputational effects usually have little, if any, impact.

It appears that consumers do not read the terms because there is little point in doing so, as they are effectively non-negotiable.[64] The OECD identifies other reasons why consumers might not read the terms, including that:

- they are often presented as lengthy and technical legal terms difficult for consumers to understand;
- they are sometimes presented in small size, are buried in footnotes or require accessing through a series of web links or windows;
- consumers need to invest considerable time to review and access information about the terms.[65]

V. What can be done about these unfair standard form terms?

Considerable scholarly pessimism attenuates the notions that consumer contracts will ever be capable of negotiation, or that consumer 'consent' can be at all meaningful in real-world circumstances.[66] Braucher observes that 'most

62 According to a survey carried out in the EU in 2010, 27% of survey respondents did not read the terms and conditions at all, and 30% read them partially; EC (2011b), Special Eurobarometer 342, Consumer Empowerment, Conducted by TNS Opinion & Social on request of Eurostat and DG SANCO, Survey co-ordinated by DG Communication, Brussels, April 2011, http://ec.europa.eu/consumers/consumer_empowerment/docs/report_eurobarometer_342_en.pdf. quoted in OECD (2013), 'Empowering and Protecting Consumers in the Internet Economy', OECD Digital Economy Papers, No. 216, OECD Publishing. http://dx.doi.org/10.1787/5k4c6tbcvvq2-en at p.21.

63 Kellaway L, Financial Times, 23 January 2011, cited in UK Office of Fair Trading 'Consumer Contracts' February 2011.

64 Gillette CP, 'Rolling Contracts as an Agency Problem' (2004) *Wisconsin Law Review* 679.

65 OECD Report OECD (2013), "Empowering and Protecting Consumers in the Internet Economy", OECD Digital Economy Papers, No. 216, OECD Publishing. http://dx.doi.org/10.1787/5k4c6tbcvvq2-en

66 Radin, MJ, Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law (Princeton University Press, 2012), at 136.

policymakers, regulators, and scholars concede that there often can be no real assent to mass-market standard terms, but then balk at meaningful solutions to address market failure. The problem of nasty standard terms is seen as intractable'.[67] There appears to be few, if any, alternatives to the status quo, other than by formal legal and regulatory intervention.

Scholars, policy-makers, legislators, industry participants and consumer representatives appear to assume, however, that a necessary dichotomy exists between negotiability and genuine consumer consent on the one hand, and the low transaction cost advantages of standard form terms on the other – when this may not necessarily be the case.[68] One need only turn to the operation of international commercial contracting to see that is it possible to have a private ordering system that works in conjunction with the formal legal system in a way that is fair to all parties. Indeed, standard form terms have been developed that are widely adopted by parties to international trade contracts that are fair and reasonable for both sellers and buyers.

Businesses engaged in international trade are able to choose from a range of easily understandable, clearly written and party balanced standard terms and incorporate them by reference into their international sale of goods contracts. The terms are known as international commercial terms, or 'incoterms'. The International Chamber of Commerce (ICC) has developed the terms, which are based on the *lex mercatoria* .[69] The terms set out the obligations of the buyer and seller regarding matters such as payment for the goods, arranging for their carriage and insurance, the preparation of exportation documents, and which party carries the risk of damage or loss of the goods.

Developments in the international sphere have gone further with the development of what is in effect a model law governing international commercial sale of goods contracts, which was developed by the UN agency, the United Nations Commission on International Trade Law (UNCITRAL). The Vienna Convention on the International Sale of Goods (CISG) has been adopted or enacted as the domestic law of over 70 countries, including Australia.[70] The CISG deals with matters such as the formation of contracts for the international sale of goods, the obligations of the buyer and seller and the remedies for breach. Parties may, however, expressly or by implication exclude some or all of the provisions of the

67 Braucher J, 'Unfair Terms in Comparative Perspective: Software Contracts' in Larry A. DiMatteo et al (eds) *Commercial Contract Law: Transatlantic Perspectives* (Cambridge University Press, Cambridge 2013), pp. 339-365.

68 Becher s and T Zarsky, 'E-Contract Doctrine 2.0: Standard Form Contracting in the Age of Online User Participation' (2008) 14(2) *Michigan Telecommunications and Technology Law Review* 303.

69 Berger KP, and Center for Transnational Law. *The Creeping Codification of the New Lex Mercatoria*. Kluwer law international, 2010 at 137-38.

70 The CISG appears as a schedule to the Sale of Goods (Vienna Convention) Act in each Australian state; however, in the case of Victoria it appears as a schedule to the Goods Act.

CISG.[71] This contrasts with the operation of the ACL, which in many instances prohibits the parties from excluding the operation of the provisions of the ACL.

These developments have not occurred overnight. The International Chamber of Commerce first began developing the Incoterms in the mid-1930s, which was at about the same time the International Institute for the Unification of Private Law (UNIDROIT) sponsored the drafting of a uniform law on the international sale of goods. Their work was interrupted by World War II, and was completed in 1964. Relatively few counties signed up to the convention they developed. However, it served as the basis for the drafting of the CISG by UNCITRAL.[72]

By contrast to developments regarding the international commercial sales of goods, very little has been done in the way of developing internationally recognised and accepted standard form terms or a model law for governing international consumer sales contracts. This is to an extent unsurprising given there was a very low proportion of cross-border consumer purchasing before the ubiquity of the Internet. The volume of international consumer transactions is now substantial and on a marked increase. The need for reform, therefore, is now pressing. The proposal here is that sets of standard form terms ought to be developed and made readily available on the Internet for parties to incorporate into their consumer sales contracts. The terms could be developed with the voluntary assistance and participation of lawyers, consumer groups, industry groups and relevant national government and international agencies.

Two broad approaches could be taken: one involving reforms designed to bring greater international commonality to formal consumer protection laws for cross-border transactions; and another designed to enhance private ordering, that is to say, the quality, balance and fairness of voluntary contracting terms. Both these proposed approaches to some extent would mirror developments regarding international commercial contracting.

The proposed 'fair terms' standard form contract terms could deal with a range of generic terms such as jurisdiction, choice of law, and so forth. Additional terms could be developed that are more product specific. A voluntary 'code' might also be developed which would act as a kind of underlying law which parties might choose as the 'law' governing the contract. The code could be designed along the lines of the UNIDROIT Principles of International Commercial Contracts.[73]

71 Article 6, United Nations Convention on Contracts for the International Sale of Goods, which appears as a schedule to the following Australian legislation: Sale of Goods (Vienna Convention) Act 1986 (NSW); Goods Act 1958 (Vic); Sale of Goods (Vienna Convention) Act 1986 (Qld); Sale of Goods (Vienna Convention) Act 1986 (WA); Sale of Goods (Vienna Convention) Act 1986 (SA); Sale of Goods (Vienna Convention) Act 1987 (Tas); Sale of Goods (Vienna Convention) Act 1987 (ACT); and Sale of Goods (Vienna Convention) Act 1987 (NT).

72 See Bonell M, 'The CISG, European Contract Law and the Development of a World Contract Law' (2008) 56 *American Journal of Comparative Law* 1.

73 Bonell M 'The UNIDROIT Principles of International Commercial Contracts:

VI. Developing fair international standard form online consumer contracting terms

This Part offers starting points for the development of international standard form online terms for consumer sales contracts. The terms could deal with formation of contract, passing of risk in the goods, consumer guarantees and other obligations of the buyer and seller, termination and remedies, and dispute resolution. The aim would be to develop clear concise and engaging terms that fairly balance the interests of the seller and the consumer parties to the contract.

The standard form 'Fair Terms' could be made freely available on the Internet for parties to incorporate by reference into their international sale of goods consumer contracts. Such an approach would follow in the footsteps of the Creative Commons project. It makes fair standard form terms regarding copyright readily available to parties via the Internet. The Creative Commons standard form terms are widely used by individuals, companies and government entities for granting copyright.[74]

As a starting point for drafting the proposed Fair Terms, the terminology of the terms would need to be concise, and easily comprehensible. The ICC incoterms, for instance, are set out in a concise and easily comprehensible form. To illustrate, consider the terms dealing with the sale of goods on a free on-board (FOB) basis, in which the parties agree that the risk of loss or damage of the goods passes from seller to buyer when the goods pass over the ship's rail at the port of export. The ICC 2010 FOB Incoterms provide in part:

> '**The Seller's Obligations:**
> A1 Provision of Goods in Conformity with the Contract.
> The seller must provide the goods and the commercial invoice, or its equivalent electronic message, in conformity with the contract of sale and any other evidence of conformity which may be required by the contract.
>
> **The Buyer's Obligations:**
> B1. The buyer must pay the price as provided in the contract of sale.'

In addition to being clear and concise, much in the same way as the Incoterms, the proposed standard form Fair Terms could also adopt the more accessible and conversational style as can be found, for example, with the Dropbox terms, which are discussed above.

Achievements in Practice and Prospects for the Future' (2010) 17 *Australian International Law Journal* 177.

74 Cobcroft R 'Creative Commons Case Studies: Volume 1' Creative Commons Clinic, (2008) Australian Research Council Centre of Excellence for Creative Industries and Innovation http://creativecommons.org.au/casestudiesvol1

The terms could have generic provisions that would apply to Fair Terms contracts, along with additional terms that are more product specific. The generic terms could be as follows:

> **Parties**: [Name of seller, address and contact details] (referred to as 'Us' and 'we')
> [Name of buyer, address and contact details] (referred to as 'I' and 'me')
>
> We agree to sell and I agree to buy the following goods on the terms set out below.
>
> **What I am buying** [Specify goods being purchased]
>
> **The total cost** [If necessary breakdown the costs, for example the cost of goods, and the cost of their transportation and delivery]
>
> **How will I pay** (if I haven't already) [Set out means of payment]
>
> **When we expect the goods will arrive** [seller sets out expected delivery times]
>
> We and I agree that the [Party nomination of terms, eg Type 1, A Class[75]] Fair Terms will apply to this contract.
>
> Signed by the parties

The more product specific provisions could possibly be divided into Type 1 and Type 2 terms. The Type 1 terms could apply to tangible goods, such as physical products including clothing, physical books, CDs and DVDs. The Type 2 terms could apply to 'intangible' goods such as computer software, e-books and downloadable music and movies.

Consideration could be given to developing various grades of standard form terms, with A Grade terms providing the highest level of consumer protection, and lower grade terms providing less protection, whilst avoiding the inclusion of surprising and unfair terms. This would enable sellers, in particular, to choose the types of terms they wish to present to consumers. The nomenclature of the terms as grade A, B, C and so forth, would easily and clearly communicate to the consumer the quality of the terms being offered. The ease of comparison enabled by such nomenclature may encourage competition regarding the terms. For instance, sellers may offer products on the basis of the A grade terms at higher price than products being sold on lower grade terms. The A grade terms might provide more favourable terms regarding the entitlements of the consumer to

75 The meaning of these terms is discussed immediately below.

the return of defective or unsatisfactory products, and the seller might be able to clearly indicate on the contract whether or not it will cover the postage costs for returns.

If the Fair Terms gained sufficient recognition, some sellers might be prepared to voluntarily incorporate them into their sales contracts as a way of gaining a competitive edge. Some consumers might be prepared to read and spend some time comprehending them because they would be relatively easy to comprehend. The time spent understanding them would not be wasted if they are relatively widely used. If the same set of terms applies to numerous contracts, they do not need to be re-read each time a contract using them is entered into. Consumer comprehension of the terms would be an advantage to sellers because there would be a reduced propensity for consumers to have unduly heightened expectations about their contractual entitlements.

Guidance on the drafting of key standard terms could be gained from various sources including the UK Office for Fair Trade (OFT) advisory terms regarding unfair contract terms.[76] The OFT is responsible for supervising the operation of the Unfair Terms in Consumer Contracts Regulations 1999. If the OFT believes that a term in a standard form contract breaches the Regulations, it may discuss the matter with the seller and propose ways the seller can amend the terms to comply with the Regulations, or it can declare the term void. The OFT has reported on the outcomes of this process, including the ways an unfair term has been reworked to avoid a breach of the Regulations. The attachment to this article sets out some of these re-worked terms, and in some cases the author of this article has amended them so as to render the language plainer and simpler.

For terms dealing with 'intangible' products, the following sources could offer a useful starting point:

- The checklist for the protection of e-consumers developed by Svantesson and Clarke;[77]
- The American Law Institute's Principles of the Law of Software Contracts.
- The 12 Principles for Fair Commerce in Software and other Digital Products developed by Americans for Fair Electronic Commerce Transactions;[78] and
- The Final Report on Recommendations for Possible Future Rules on

76 www.oft.gov.uk/about-the-oft/legal-powers/legal/unfair-terms/guidance#named1. Another useful source is the EC Proposal for a Regulation on a Common European Sales Law, Brussels Com 0284, 2011.

77 Svantesson D and R Clarke, 'A Best Practice Model for E-Consumer Protection' (2010) 26 *Computer and Security Review* 31.

78 www.ala.org/advocacy/sites/ala.org.advocacy/files/content/copyright/AFFECTbrochure_0205.pdf

Digital Content Contracts.[79]

Svantesson and Clarke propose a number of criteria for assessing the value of e-consumer protection schemes. They believe their criteria can be used as a tool for policymakers, industry and consumer organisations for assessing the appropriateness of consumer protection regulations in any particular jurisdiction. Arguably, their model could also be used for developing standard form terms. Broadly, the issues they discuss include:

- Ensuring that the products sold meets an adequate quality and safety standard. They propose that where a consumer has made clear the purpose for which a product will be used, the seller must only deliver products suitable for that purpose.
- There should be a limitation on the seller's capacity to exclude liability.
- There should be fair and appropriate terms regarding the consumer's right to return or exchange products.
- There should be adequate provisions dealing with the consumer's legitimate right to title in and quiet possession of the goods they purchase.
- There should be adequate protection of the personal information and privacy of the consumer.
- There should be a cheap, fair and easy means for the buyer to resolve any disputes with the seller.[80]

A number of useful principles for the development of standard form terms for consumer contracts regarding the purchase of digital products have been proposed by the organisation Americans for Fair Electronic Commerce Transactions (AFFECT). It is a US national coalition of consumers, retail and manufacturing businesses, financial institutions, technology professionals and librarians who claim to be committed to the growth of fair and competitive US markets in software and other digital products.[81] The Principles include the entitlement of consumers to:

- readily find, review and understand proposed terms when they shop;
- be informed in plain and conspicuous language about all aspects of the proposed deal that may influence a purchasing decision;
- not be bound by the term unless they actively and unambiguously indicate their acceptance. AFFECT does not offer a proposal as to how this can be achieved in any meaningful and practical way;

79 Helberger LM and N Guibault et al (2012) 'Analysis of the Applicable Legal Frameworks and Suggestions for the Contours of a Model System of Consumer Protection in Relation to Digital Content Contracts' Centre for the Study of European Contract Law, University of Amsterdam dare.uva.nl/document/227950.

80 Svantesson D and R Clarke, 'A Best Practice Model for E-Consumer Protection' (2010) 26 *Computer and Security Review* 31, at pp.35-36.

81 www.fairterms.org/12PrincGeneral.htm

- information about all known nontrivial defects in a product before committing to the deal;
- a refund when the product is not of reasonable quality;
- have their disputes settled in a local, convenient venue;
- control their own computer systems and to control their own data;
- fair use of the digital content, including library or classroom use, digital products to the extent permitted by federal copyright law;
- transfer products as long as they do not retain access to them.[82]

VII. Conclusion

A substantial proportion of Australian online consumer purchases are from overseas sellers. Although theoretically the Australian Consumer Law applies to many of these transactions, in reality it is difficult, if not near impossible, for a consumer to pursue their rights under the ACL in the face of a seller's objections. If a consumer in Australia purchases goods from a US seller, she is particularly vulnerable to the risk of entering into a standard form contract containing harsh, one side and unfair terms. The evidence suggests that these terms are becoming increasingly harsh and one sided.

Ways of addressing this issue could include following the developments regarding international commercial contracts. These include the development of 'model' laws for governing cross-border sale of goods transactions. A further development worth considering is the development of party balanced and easy to comprehend standard form terms which parties can incorporate by reference into international consumer transactions. It is suggested in this article that if such terms were developed, it may well set the stage for market forces to encourage a race toward quality terms, in contrast to the present situation in which there is a race to the bottom. This article proposes starting points for the development of fairer party balanced terms.

82 www.fairterms.org/12PrincGeneral.htm

APPENDIX

A Selected Collection of Standard Form Contract Terms Developed by the UK Office of Fair Trading in Response to Terms that Would Otherwise Breach the Unfair Terms in Consumer Contracts Regulations 1999

Some of the terms developed by the OFT have been reworked by the author. Some of the clauses provide alternative ways of dealing with an issue.

Obligations and Liabilities of the Parties

The seller

1. If –
   (a) we lose or damage the goods (or any part of them) because we were negligent, or
   (b) there is a product failure because of a fault

you can choose to have us:

- repair or replace the goods, or part of them, or
- if the same kind goods (or part of them) cannot be provided by us, we will replace them with a similar item of approximately the same standard and value, or
- refund the price you paid for them.

We will do as you choose.

2. We will accept liability if something we do causes death or injury. We will also accept liability if it is our fault that damage was caused to your property.

3. We will provide you product support with reasonable care and skill, within a reasonable time, and substantially as described in this Contract. We do not make any other promises about support service.

The Buyer

1. You will be responsible for all claims, liabilities, damages, costs and expenses we suffer or incur because you breach your contract obligation.

2. You are responsible for any loss or damage to the goods unless the loss or damage is:

   (a) caused by us or our employees,

(b) due to a manufacturing design or design fault, or
(c) due to fair wear and tear.

3. You must tell us about any fault or damage as soon as is reasonably possible.

4. You cannot cancel an order unless you … pay any losses and costs we suffer because of the cancellation. If we cancel the Contract, we must pay you any losses or costs you suffer because of the cancellation.

Liability for losses

1. If either you or we are in breach of the arrangements under this Contract, neither of us will be responsible for any losses that the other suffers as a result, except those losses which are a foreseeable consequence of the breach.

2. We are also responsible for losses you suffer if we breach this Contract if the losses are a foreseeable consequence of our breach. A foreseeable loss happens if we or you could contemplate it at the time this contract started. We are not responsible for indirect losses which happen as a side effect of the main loss or damage and which are not foreseeable by you and us (such as loss of profits or loss of opportunity).

4. We will not be liable under this Contract for any loss or damage caused by us or our employees or agents if:
   (a) there is no breach of a legal duty of care owed to you by us or by any of our employees or agents,
   (b) the loss or damage is not a reasonably foreseeable result of any such breach, and
   (c) any increase in loss or damage results from you breaching any term of this Contract.

Computers

Our and our suppliers' liability does not in any circumstances include losses related to any business you might have or any employment or commercial activity you are involved with. We and our suppliers are not liable for lost data, lost profits or business, commercial or employment interruption.

Disputes

We will try and solve any disagreements quickly and efficiently. If you are not happy with the way we deal with any disagreement and you want to take legal proceedings, you must do this within [name of jurisdiction].