

# Contract Drafting and Standard Form Contracts

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## 1. Introduction

Contracts regulate the relationship between the parties to the contract; however legislation, particularly the Trade Practices Act, has an important role in determining the rights of parties outside the contractual relationship.

The Trade Practices Act can imply conditions into the contract such as prohibition on engaging in misleading or deceptive conduct, prohibition on engaging in unconscionable conduct in business transactions and a range of consumer protection. The Act also allows the Australian Competition and Consumer Commission to review contracts and the effect of those contracts on competition.

When drafting a contract and when considering the enforcement of a contract, the parties therefore must consider the impact of the Trade Practices Act, as well as the principles of contract law.

## 2. Standard Form Contracts

There are two types of standard form contracts:

- Industry standard form contracts; and
- Standard contracts developed by a particular client for its general use.

I will consider each of these separately.

### 2.1 Industry Standard Contracts

There are a number of industries which use standard form documents, including the standard form real property contracts such as the REIQ suite of contracts; within the construction industry and within the banking industry.

Industry standard documents can be very useful, particularly for consumer arrangements where the parties may not involve lawyers at all or not at the initial stage of signing the contract. Where industry standard documents are used, it is important that the parties recognise who has developed the documents. For example, for the construction of a domestic house, there are three different types of documents which could be used:

1. The Australian standard building and construction contract such as AS2124 or the AS4000. These contracts and the associated suite of contracts include general conditions of contract, code of tendering, general conditions of contract for engagement of consultants, general conditions of contract for design and construct, etc. Standards Australia developed the contracts and other standard documents through a committee process with participation from various aspects of the industry, government, universities and the community. In general, it is the standard building document which is the most "neutral".

2. The Royal Australian Institute of Architects has developed a suite of documents such as the MW1 for major works contracts and the SW1 for simple works contracts. These contracts have been developed on the basis that the architect would be the certifier, and as such, provide a degree of independence for the architect/certifier which is not present in the other types of construction contracts.
3. The Master Builder's Association in various states have developed a series of contracts for domestic housing for both major and minor works. In general, this suite of documents is quite simple, but is pro-builder.

FIDIC, the international organisation for engineers, has also developed standard documents for major international construction projects. These contracts are not suitable for domestic situations.

When choosing a standard form of contract it is, therefore, important to know who has developed the contract, the "slant" or bias which may be inherent in that document and to consider whether that "slant" is acceptable in the circumstances.

In property transactions in Queensland, the REIQ has published a suite of contracts, some of which are produced in conjunction with the Queensland Law Society and others which have been produced by the REIQ alone. Some of these contracts, such as the standard house and land residential contract are the industry norm and it would be unusual to find parties entering into a residential contract on terms other than an REIQ standard document. These documents have achieved industry acceptance because they have been developed to provide a fair outcome for both the seller and the buyer. Other documents within the suite, such as the Commercial Leasing Contract, are less commonly used and would be rarely used where a lawyer was involved.

In the banking sphere, for example, there are standard contracts dealing with access to EFTPOS machines and use of ATM machines, there are standard agreements dealing with the CHES system and the Australian Payments Clearing Association and there are various international agreements dealing with letters of credit and other trade arrangements.

### **Advantages of Industry Standard Documents**

The great advantage of an industry standard document is that there is a body of jurisprudence dealing with those documents and the exact wording from those documents. For example, many of the terms in the standard residential contract have been judicially interpretation such as using the term "*time is of the essence of the contract*" rather than

stating a plain English version such as "the buyer must complete on the date for completion". Similarly, in building contracts, phrases to do with "latent conditions" have been litigated and it is accepted to mean a "*defect which could not be discovered by a person of competent skill and using ordinary care*" (the Dimitrios and Rallias (1922) 13LILR363). There are many cases which hold that the physical conditions on the site due to weather conditions off the site are not latent conditions. For example, if the sub-soil is wetter than expected because of heavy rain, that is not a latent condition.

The use of an industry standard document can assist the parties to reach an agreement quickly. The standard residential contract is a very good example of this – provided that there are no amendments or special conditions, many buyers are happy to sign an REIQ contract without discussing the matter with their lawyer. Within the residential conveyancing industry, there is general acceptance that this form of contract is fair to both parties.

Finally, the use of industry standard contracts prevents the parties having to "reinvent the wheel". Particularly where the parties are not large, there can be significant savings in legal costs by using the industry standard document and relying on the industry body to have considered the implications of that standard contract. Many domestic builders rely on the Master Builders contract because the profit in each job is not sufficient to justify engaging a lawyer to draft a contract from scratch. The party with whom the builder is contracting may also be more comfortable dealing with the Master Builder's contract or another industry standard contract rather a contract developed by a specific builder.

### **Changes to Industry Standard Contracts**

The advantage of the industry standard contract is that the parties can assume that the contract reflects the industry standard. The usual practice for these documents is for changes to be incorporated in a schedule which sets out special conditions. In this way, a person who is familiar with the standard document can easily see what are the changes and also the administrator of the documents can keep track of changes or where a particular contract is different from the others.

There is a real risk where a party amends a standard form document within the body of the document. I was recently asked to provide an advice on what purported to be an Australian Standard consultancy agreement. The agreement had the standard document front page and was formatted like the standard document but it had various changes within the document rather than in the separate schedules. When I asked for a copy of the contract with all the changes marked up, every clause had been amended

and the only page without mark ups was the front page saying it was the Australian Standard document.

Using a standard document in this way raises a number of issues:

1. It may breach the copyright of the publisher of the original document.
2. It maybe misleading particularly if the document has been provided to the other party stating it is the standard document and with the knowledge that the other party may not be seeking independent legal advice.
3. It defeats the purpose of having a standard document – it means that every clause has to be compared and reviewed to determine why changes had been made and the effect of those changes.

It may be better for all involved in the negotiations for the principal to provide its own form of standard document rather than extensively modifying the standard document.

## 2.2 Client Standard Contracts

Most clients who regularly enter into contracts will have developed their own standard documents or standard changes to one of the industry standard documents.

Where the party is in "control" of the transaction such as the franchisor, licensor, principal of a building contract etc, there are great advantages in having a client standard document with variations in the schedule.

Using a standard document with a schedule with the commercial terms and with variations to the standard document makes it very easy for the contact administrator to identify changes and to keep track of the commercial terms. There is a tendency for the other party to vary the standard provisions in the contract and to use the schedule for commercial terms. There is a risk in changing the standard terms that these changes will not be noted in the data base of contracts and errors will occur.

## 2.3 Trade Practices Act

There is a risk that the use of standard form contracts can be considered to be anti-competitive and in breach the Trade Practices Act.

The advantages of using the standard contract (whether an industry standard or a company standard) is that negotiations can proceed more quickly; the industry standard documents can reduce the costs involved in negotiating the contract; and the parties become familiar with the standard forms and terms of those standard form contracts which can make the negotiation process smoother, reduce potential conflicts and

generally make the contractual process more efficient so that the parties can concentrate on the commercial terms and therefore being more competitive.

The Trade Practices Commission issued a circular relating to standard contracts (number 22 dated 24 October 1977) which is no longer current. That guideline stated that the Commission considered that the standard forms contracts were less likely to lessen competition where:

1. The form of terms is prepared by an independent body for use by the general public – such as the industry standard documents.
2. The form of terms is prepared by an industry body for use of its members or other people contracting with its members such as the Master Builders Contract.

The Commission also considered that:-

1. The standard form document should leave blanks for insertion of matters which are significant such as price, variations, rates, margins, retentions, the details of performance, methods of payment, completion date, apportionment of risk, defects liability etc;
2. There is no coercion on anyone to use the form and no recommendation that the form be used unaltered;
3. The form of terms should be freely available to the public on the same terms as it is available to members of the industry body;
4. The form should provide for the appointment of an arbitrator who would be independent for the determination of disputes;
5. The form must self contained and state all the terms applying to that transaction;
6. The form should be used in a already competitive industry such as the construction industry or real estate; and
7. The form provides for changes to the standard document.

Where the parties to the contract include consumers or small business people without expertise in understanding the contracts, the Commission would consider whether the standard form document offered a reasonable, equitable and cost effective scheme of trading or whether it was a means to limit the ability of the small business person to negotiate.

The ACCC has considered the use of standard contracts in a number of determinations.

### **Lift Manufacturers Association of Australia**

The Commission considered the situation where three Australian companies held 90% of the market and they all used a standard form of contract relating to rise and fall provisions, liquidated damages, retention monies, favourable payment terms, maintenance obligations and warranty periods. The Commission considered that in a highly concentrated industry, the ability to compete on terms and conditions and on other "non price" matters was important for the competitive process and that the use of the standard documents had effectively sealed off competition. By standardising the "non price" terms of the arrangement, the three companies were in effect reducing competition.

### **Fire Protection Industry Association of Australia**

The 26 members of the Fire Protection Industry Association of Australia which included most of the large manufacturers of fire protection equipment agreed to a standard contract which included a limitation of liability clause to remove post installation liability from the manufacturer.

The Commission considered that the standard contract was anticompetitive because the form of contract was designed to limit the warranty which is offered by the members of the association. While the Commission recognised that the individual members could provide a further warranty if they wished and the form contained only a statement of the minimum warranty required by law, the effect of stating this in a standard form is that users of the form are likely to move to that minimum rather than leaving the matter for individual negotiations. The Commission and the association agreed to change the standard form document.

### **Construction Contracts**

The Commission considered some of the standard form construction contracts including the contract recommended by the Master Builders Association of Victoria and the Building Industry Subcontractors Association of Western Australia. Those contracts contained standard conditions dealing with issues such as payments, arbitration, progress payments, warranties etc.

The initial contract provided by the Master Builders Association of Victoria was considered to be anticompetitive because the way the standard document was to be used inhibited competition. The document was biased towards the builders to the degree that the arbitrator was to be the president of the Master Builders Association.

The contract was subsequently amended in detail and was granted authorisation by the commission.

The subcontractors association document was granted authorisation because the contract was negotiated after discussions with all relevant parties and was publicly available and the clauses which affected competition most were left to genuine negotiation.

### **Summary**

The use of standard contracts within an industry generally assists the parties to simplify the negotiation process and generally is not anticompetitive. A standard industry document may be anticompetitive where it limits the opportunity for the parties to negotiate or it standardises the nonmonetary terms to such an extent that the only differentiator between contracts is the monetary amount.

Where a standard contract is used, it is preferable to provide for a schedule with the commercial terms and for provision for amendments in special conditions. The contract must allow the parties to negotiate so that there is true competition.

## **3. Exclusion Clauses**

Each party to a contract will want to limit its liability as much as possible. The Trade Practices Act section 52(1) states:

"A corporation shall not in trade or commerce engage in conduct that is misleading or deceptive or is likely to mislead or deceive."

This seemingly simple section forms the basis of much litigation and overrides many exclusionary clauses. As you are aware, the parties can not contract out of the Trade Practices Act – if a party's conduct is misleading or deceptive and the other party suffers loss as a result of relying on that deception then any exclusionary clause will not be effective to protect the party. The deceptive or misleading statement must have led the party to have entered into the contract irrespective of whether the contract excludes liability or not.

As stated by Mr Justice Wilcox in *Collins Marrickville* (1987) ATPR 40-783:

"If in fact the misleading conduct of the respondent has induced an applicant to enter into an agreement that inducement is not negated because in the agreement itself the applicant says to the contrary. Of course, the fact that the applicant so says may bear upon the question whether he or she should be

believed in asserting that the misleading conduct was an inducement; although in the case of a printed exclusion clause this may be of little moment. And, once it is found as a fact that the conduct induced the transaction, the Act itself gives a remedy."

An exclusion clause will be effective where the applicant was not induced to enter into the contract because of the misrepresentation.

In that case the applicant had bought a business known as the "New York Deli" owned by Collins Marrickville. During discussions on the purchase, the applicant was induced to believe that the restaurant had a seating capacity of 128 and this was in fact the capacity however the restaurant was only licensed to serve 84 people. Neither the Council nor the Licensing Authority had ever enforced this restriction. A lawyer was retained to carry out investigations about the liquor licence but did not do so. The applicant entered into the contract to buy the business. The contract of sale contained an acknowledgement by the buyer that it had not relied on any statement, representation or warranty given on behalf of the seller and that the document constituted the whole of the agreement between the parties. This is a standard exclusion clause in a sale of business.

After the applicant bought the business it became aware of the true position and brought an action in the Federal Court claiming that the seller had engaged in misleading or deceptive conduct.

The seller raised three defences: -

1. There was no misrepresentation as any statement about the number of seats in the restaurant could not be said to be a representation about the number the restaurant was licensed to serve.
2. Even if there was a misrepresentation it had not induced the applicant to enter into the contract – the buyer was induced to enter into the contract by what was said by his lawyer not by the statements from the agent and the buyer should be fixed with constructive knowledge of what his lawyer would have learnt if he had made proper enquiries.
3. The contract specifically stated that the buyer had not entered into the contract relying on any representations.

The court found for the buyer on the basis that:

1. The seller or its agent had said that there are 128 seats in the restaurant. It was not necessary to say that the restaurant was licensed to serve 128 people – that was a clear implication of the statement.
2. Sometimes it is necessary to speak out to avoid a misleading statement and the court found that this was one of those cases. The supply of information as to takings without reference to the qualification that the level of those takings was effected by illegal trading was to engage in misleading conduct. A duty to speak arose because, to the knowledge of the representator, the representations as to takings were incomplete and potentially misleading. Information as to takings was supplied to the buyer to satisfy itself about the income producing potential of the business but the buyer could not rely on the information because it was based on takings gained in disregard of restrictions imposed by law.
3. It was no answer that the buyer had relied on his solicitor and, if the solicitor had carried out his instructions properly and reported about the seating then the buyer may have terminated the contract. The fact that the buyer's lawyers acted improperly does not affect the representations made by the seller.
4. Finally the court found that the exclusion clause in the contract was not effective.

There are numerous cases in which the courts have confirmed that the obligation in section 52 of the Trade Practices Act overrides any exclusion clause in the contract.

Another interesting decision dealing with the exclusion clauses is the Lenard's poultry case – *Silver Fox Company Pty Ltd v Lenards Pty Ltd* [2004] FCA1225 and on appeal [2005] FCAFC 131.

The facts were similar to many of the exclusion clause cases.

Mr and Mrs Baker (through their company Silver Fox Co Pty Ltd) entered into a franchise agreement with Lenard's for a poultry shop at Hilton Shopping Centre, South Australia. Before entering into the agreement, the Bakers were provided with information about the franchise including two disclosure documents which set out weekly sales targets and the profitability figures for other Lenard's franchises. The documents stated that the franchisor had carefully selected the shop location for all their franchised businesses. The Bakers entered into a franchise for a total cost of \$192,402.00 and commenced operations on 2 September 1998. The weekly sales did not live up to their expectations and they were unable to make payments under the

franchise agreement. On 12 July 2000 they were given notice to terminate the franchise agreement.

As a result of entering into the franchise agreement and its subsequent termination, Silver Fox and the Bakers suffered significant financial loss – they lost the business, the opportunity to earn further profits, Mr and Mrs Baker lost the income they would have otherwise earned from other employment and there is also an allegation that Mr and Mrs Baker suffered mild psychiatric illness due to the collapse of the business.

Mr Justice Mansfield in the first instance found in favour of the applicants to the extent that Lenard's had engaged in misleading and deceptive conduct by providing documentary material to Mr and Mrs Baker. He found that there were two representations referred to as the sales profitability representation and the site quality representation.

The sales profitability representation was that Lenard's stated that "provided the applicants complied with their system" a "representative and reasonable weekly gross sales target" was \$8,000.00 per week with a net profit of \$50,000.00 per year being achievable. They also stated that a minimum performing Lenard's shop would produce a weekly gross sales figure in the order of \$8,000.00 per week. The primary judge found that the applicants had relied on these representations in entering into the franchise agreement found that Lenard's did not have any reasonable grounds for making these statements and that it was not reasonable for the franchisor to extrapolate from the performance of other Lenard's shops to the shop taken by the Bakers because of the newness of the shopping centre and the associated economic composition of the surrounding residential areas required separate consideration for that shop.

On the site representation, Mansfield J found that Lenard's had not carefully considered the selection of the shop site and had only considered the significance of the lower socio economic grouping of the catchment area in a general way. His Honour found that the shop was not likely to perform to its full sales potential in the first year or two of its operations.

The appeal was by way of rehearing of the evidence produced before the primary judge. In rehearing the evidence, the Full Court reviewed the disclosure documents which had been provided to the Bakers and in the decision refers specifically to various exclusions clauses such as:

"A franchisee is required to make his/her own enquiries and investigations and is to satisfy himself/herself as to potential sales, income and gross/net profits."

"This disclosure document should help you make up your mind. While it includes some information about your contract/franchise agreement do not rely on it alone to understand your contract. Read all of your contract carefully. Buying a franchise is a serious undertaking. Take your time to decide. You are also required to have the contract explained to you by a solicitor and should seek accountancy and financial advice on the franchise proposition."

"Neither Lenard's nor any other person guarantees your success the gross sales or the profitability of the franchised business. These matters are subject to a number of factors which are beyond the control of Lenard's including (but not limited to) the following.....".

"Based on the experience of other Lenard's stores a gross profit of 47% after product cost is achievable but other factors such as the competition, your pricing strategy and the prevailing market will influence your retail prices and in turn will effect the level of gross profit."

The Bakers signed these statements including the acknowledgement that they would undertake their own investigations about the business and take their own independent legal accounting and franchising consultant advice.

In determining whether the conduct was misleading or deceptive, the Full Court stated that whether or not a corporation has contravened section 52 is a question of mixed fact and law. It is not necessarily answered by asking whether someone was in fact misled although evidence to that effect might be highly relevant. Where the conduct in question is conduct relating to particular individuals the whole of the relevant conduct of the corporation towards those individuals must be considered having regard to the circumstances in which that conduct took place.

The court needs to look at what a reasonable person in the position of Mr and Mrs Baker would have made of the various disclosure documents. On the evidence Mr and Mrs Baker were confident and mature individuals. They read the disclosure documents which clearly stated that Lenard's would not guarantee that a franchise would achieve the same result as contained in the targets or that a franchise would succeed; they had a lawyers advice and they also had advice from a chartered accountant. There was no pressure on them to sign the franchise documents.

The Full Court found that "no reasonable person who had read and considered the whole of the documentary material provided by (Lenard's) to Mr and Mrs Baker could have been under any illusion that (Lenard's) was representing to him or her that, provided the franchisee complied with the Lenard's system, any particular weekly level

of gross sales would be achieved or any particular level of annual net operating profit would be achieved. It is not easy to see how (Lenard's) could have made more clear than it did that it was making no representations to Mr and Mrs Baker touching on the likely profitability of the Hilton shop and that (Lenard's) expected them to obtain their own advice on that issue. This was stated in plain terms in disclosure documents."

The Bakers had been provided with a copy of the Lenard's standard franchise agreement more than two months before the franchise agreement was executed. They had plenty of time to review the document and to understand that any information provided was general and not to be relied upon.

The Full Court made a similar finding in respect of the choice of location.

### **Summary**

It is useful to review cases such as this to see how exclusion clauses can be effectively used. The mere fact that the contract does not result as the party had anticipated does mean that the other party engaged in misleading conduct. Similarly if there is an error one of a series of documents, the courts will look at the whole suite of documents to see whether a reasonable person would be induced to enter into the contract based on that mistake or error.

As stated in *Butcher v Lachlan Elder Realty Pty Ltd* 218CLR592, the agent's conduct had to be considered as a whole including the character of the aggrieved party. In that case, the purchasers were a company director and his wife who were "intelligent, shrewd and self reliant", the agent was a residential real estate agent. The representation alleged was a representation about title which the court said was complex legally and factually and the representation was about a matter outside the skills of an agent. The buyers must have been aware the survey had not been prepared by the agent and the relevant disclaimer on the back and the front of the brochure disclaimed responsibility for the accuracy of the information contained in the brochure. The court specifically said "only persons of very poor eyesight would have found the disclaimer illegible and there was no evidence that the purchaser's eyesight was defective."

Again this case shows that disclaimers can be effective and the courts will look at all the circumstances surrounding the statement.

### **How to Draft and Effective Disclaimer**

In considering whether a disclaimer is effective, the courts will look at all surrounding circumstances including the attributes of the applicant.

A disclaimer will not be effective if it is in a font size which is difficult to read or if it is located in a position where a reasonable person is unlikely to read it.

One of the most important aspects from the cases is that applicant must have had sufficient time to read the contract and to understand that it contains a disclaimer and the effect of that disclaimer. As in the Lenard's case, the franchisees had received the documents two months before signing the eventual franchise agreement. They had plenty of time to read the franchise documents and comprehend that the information which was being provided by Lenard's was not to be relied upon. Lenard's had directed them on several occasions to obtain independent legal and accounting advice. They had sufficient time to do so.

The position was quite different from the Collins Marickville case where the representation about the seating of the restaurant had been made while due diligence was being undertaken and the contract containing the disclaimer was signed within a short period. While the buyer could have reviewed the contract more carefully (and engaged a more careful lawyer!), at the time the representation was made about the seating of the restaurant, Collins or its agent had not indicated that the buyer should not rely upon any information provided. That disclaimer was given later and the buyer entered into the contract which contained the disclaimer based on the representations that had been made.

The party relying on the disclaimer should not pressure the other party to sign the contract. Some contracts have a provision that the contract must be signed within 24 hours otherwise the party may enter into a contract with someone else. A disclaimer in such a contract is less likely to be effective.

## **4. Unconscionable Conduct**

The Trade Practices Act section 51AC provides that:-

"A corporation must not, in trade or commerce, in connection with:

- (a) the supply or possible supply of goods or services to a person (other than a listed public company); or
- (b) the acquisition or possible acquisition of goods or services from a person (other than a listed public company);

engage in conduct that, is in all the circumstances, unconscionable".

Under subparagraph (3), the court may have regard to the:-

- (a) the relative strengths of the bargaining positions of the supplier and the business consumer;
- (b) whether, as a result of conduct engaged in by the supplier, the business consumer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the supplier;
- (c) whether the business consumer was able to understand any documents relating to the supply or possible supply of the goods or services;
- (d) whether any undue influence or pressure was exerted on or any unfair tactics were used against the business consumer or person acting on behalf of the business consumer by the supplier;
- (e) the amount for which, and the circumstances under which, the business consumer could have acquired identical or equivalent goods or services from a person other than the supplier;
- (f) the extent to which the supplier's conduct towards the business consumer was consistent with the supplier's conduct in similar transactions between the supplier and other like business consumers;
- (g) the requirements of any applicable industry code; and
- (h) the extent to which the supplier and the business consumer acted in good faith.

The acquisition of goods or services are limited to goods and services the price of which does not exceed \$3 million.

This section provides potential for a small business operator to have a court or the ACCC review a contract which is in place.

In *Ford Motor Company of Australia Limited v Jefferson Ford Pty Ltd* (2007) ATPR 42-167, The Federal Court considered an application by Ford in relation to a dealer agreement which dealt with distribution of Ford vehicles, parts and accessories by Jefferson Ford. Ford claimed that Jefferson had sold parts under the name of Ford that had not been manufactured, approved or licensed by Ford. Jefferson claimed that Ford had engaged in unconscionable conduct and had contravened an industry code. The court rejected the claim by Jefferson Ford under section 51AC because subsection (9) limits the subject matter for which an application can be brought. The total sales exceeded \$3million.

In *Australian Competition and Consumer Commission v Dataline.net.au Pty Ltd* (2007) ATPR 42-181, the Federal Court of Australia considered on appeal a decision of Justice Kiefel.

ACCC alleged that Dataline and an associated company Australis Internet Pty Ltd, contravened the Act including resale price maintenance, misleading and deceptive conduct, unconscionable conduct, undue harassment and coercion. Dataline offered to

sell services to various internet service providers on plans on the basis of a retail price which Dataline specified. On one occasion, Dataline offered a plan for sale on the express condition that the re-sellers could not re-sell them to consumers for less than the specified retail price. The court found that the ACCC had not identified the conduct which was unconscionable and should be restrained.

The final case I'll consider is *Canon Australia Pty Ltd v Patton* (2007) ATPR 42-183. This is an appeal by Canon against a decision of the Supreme Court, that its failure to supply goods to a company called James Aston Pty Ltd which owed money, was unconscionable and in breach of section 51AC.

Patton had incorporated James Aston to run the business of selling parts for Canon and Hewlett Packard printers. There was no long-term supply agreement between Canon and James Aston and an invoice included the provision that accounts were to be paid on the due date or Canon had a right to defer, without penalty, delivery of further orders.

Between November 2004 and April 2005, Patton placed various orders of parts with Canon for Canon printers and Hewlett Packard printers. Canon supplied the parts for the Canon printers but not those for the HP printers. In May 2005, Patton placed another order for HP parts which were not supplied. Canon had delivered goods to the value of \$175,000 which had not been paid for.

The judge at first instance found that Canon had breached section 51AC by failing to supply the parts for the HP printers which meant that the company was unable to pay its debts and Patton was liable as a guarantor. The judge found that Patton, as guarantor, was entitled under section 82 of the Trade Practices Act, to damages equivalent to the claim on the guarantee.

On appeal, the court found that it had not been shown that the conduct of Canon in failing to supply HP only parts was unconscionable, nor that the failure of Canon to supply those parts had caused damage to Patton. The court found that a person who alleges that a transaction is unconscionable has the onus of proving that it is more likely than not that it is unconscionable. The court further found that the debt was not due to any unconscionable behaviour on the part of Canon. The court, on appeal, found that the primary judge was incorrect in stating that Canon had acted unconscionably by refusing to take back stock in hand in satisfaction of the debt because there was no evidence received about the age or condition of the stock and/or the value of the stock. The return of goods was outside the terms of trade between Canon and the company.

There was some disagreement between Basten J and Campbell J about what is required for section 51AC. Campbell J had referred to "a high level of moral impropriety". Basten J considered that the word should not have any special meaning.

Section 51AC can therefore be used in a variety of circumstances to override commercial terms or for a consumer business to seek to rewrite the terms of a contract. The cases show that the courts are reluctant to use the powers in section 51AC unless the performance of the section are clearly identified and the factors to be taken into account by the court set out in subsection 51AC(3) are satisfied.

From a drafting perspective, a supplier can minimise the risk of the other party relying on section 51AC by ensuring that the contract is clear and that the business consumer understands the document, that the business consumer has had plenty of time to review the proposed structure and that the supply is on terms similar to those used for the supply to other business consumers.

### **Summary**

The Trade Practices Act can have significant impact on contracts and the relationship between the parties to contracts. As the Act is intended to enhance competition, and to ensure that the relationship between parties (particularly parties with different bargaining power) is fair, the impact of the Act is minimised where the contracts are fair and reasonable.

When drafting a contract, a party can minimise the impact of the Trade Practices Act by ensuring that all information provided is correct, that both parties have sufficient time to review the contract to understand the provisions, particularly any exclusion provisions, and there is no coercion or pressure placed on either party to sign the contract.

From a lawyers point of view, it is useful to provide timetables or checklists for clients as well as standard documents. The procedure undertaken in the Lenard's case shows the benefit of having a clear process of providing information, disclosure documents etc, allowing sufficient time for review of those documents, and having signoff by both parties at various stages that they understand the provisions and that they understand the need to obtain independent legal advice.

Just because a party has failed in business, or have found a contract to be difficult to fulfil, does not mean that that party has rights under the Trade Practices Act. The courts will look at all the surrounding circumstances to determine whether there has been misrepresentation or unconscionable conduct.