Are the Chapter 2 General Protections in the Australian Consumer Law Mandatory Laws?

Neerav Srivastava, a Ph.D. candidate at Monash University offers an analysis on whether the Chapter 2 general protections in the Australia's Competition and Consumer Act 2010 are mandatory laws.

Online Australian consumer transactions on multinational platforms have grown rapidly. Online Australian consumers contract typically include exclusive jurisdiction clauses (EJC) and foreign choice of law clauses (FCL). The EJC and FCL, respectively, are often in favour of a US jurisdiction. Particularly when an Australian consumer is involved, the EJC might be void or an Australian court may refuse to enforce it.[1] And the 'consumer guarantees' in Chap 3 of the *Australian Consumer Law* ('*ACL*') are explicitly 'mandatory laws'[2] that the contract cannot exclude. It is less clear whether the general protections at Chap 2 of the *ACL* are non-excludable. Unlike the consumer guarantees, it is not stated that the Chap 2 protections are mandatory. As Davies et al and Douglas[3] rightly point out that *may* imply they are not mandatory. In 'Indie Law For Youtubers: Youtube And The Legality Of Demonetisation' (2021) 42 *Adelaide Law Review*503, I argue that the Chap 2 protections are mandatory laws.

The Chap 2 protections, which are not limited to consumers, are against:

- misleading or deceptive conduct under s 18
- unconscionable conduct under s 21
- unfair contract terms under s 23

I. PRACTICALLY SIGNIFICANT

If the Chap 2 protections are mandatory laws, that is practically significant. Australian consumers and others can rely on the protections, and multinational platforms need to calibrate their approach accordingly. Australia places a greater emphasis on consumer protection,[4] whereas the US gives primacy to freedom of contract.[5] Part 2 may give a different answer to US law. For example, the

YouTube business model is built on advertising revenue generated from content uploaded by YouTubers. Under the YouTube contract, advertising revenue is split between a YouTuber (55%) and YouTube (45%). When a YouTuber does not meet the minimum threshold hours, or YouTube deems content as inappropriate, a YouTuber cannot monetise that content. This is known as demonetisation. On the assumption that the Chap 2 protections apply, the article argues that

- not providing reasons to a Youtuber for demonetisation is unconscionable
- in the US, it has been held that clauses that allow YouTube to unilaterally vary its terms, eg changing its demonetisation policy, are enforceable. Under Chap 2 of the *ACL*, such a clause is probably void.

If that is correct, it is relevant to Australian YouTubers. It may also affect the tactical landscape globally regarding the demonetisation dispute.

II. WHETHER MANDATORY

As to why the Chap 2 protections are mandatory laws, first, the *ACL* does not state that they are not mandatory. The Chap 2 protections have been characterised as rights that cannot be excluded.[6]

The objects of the *ACL*, namely to enhance the welfare of Australians and consumer protection, suggest[7] that Chap 2 is mandatory. A FCL, sometimes combined with an EJC, may alienate Australian consumers, the weaker party, from legal remedies.[8] Allowing this to proliferate would be inconsistent with the *ACL*'s objects. If Chap 2 is not mandatory, all businesses — Australian and international — could start using FCLs to avoid Chap 2 and render it otiose.

Further there is a public dimension to the Chap 2 protections,[9] in that they are subject to regulatory enforcement. It can be ordered that pecuniary penalties be paid to the government and compensation be awarded to non-parties. In this respect, Chap 3 is similar to criminal laws, which are generally understood to have a strict territorial application.[10]

As for policy being 'particularly' important where there is an inequality of bargaining power, both ss 21[11] and 23 are specifically directed at redressing inequality.[12]

Regarding the specific provisions:

- Authority on, at least, s 18 suggests that it is mandatory.[13]
- Section 21 on unconscionable conduct has been held to be a mandatory law, although that conclusion was not a detailed judicial consideration.[14] In any event, it is arguable that 'conduct' is broader than a contract, and parties cannot exclude 'conduct' provisions.[15] Unconscionability is determined by reference to 'norms' of Australian society and is, therefore, not an issue exclusively between the parties.[16]
- Whether s 23 on unfair contract terms is a mandatory law is debatable.[17] At common law, the proper law governs all aspects of a contractual obligation, including its validity. The counterargument is that s 23 is a statutory regime that supersedes the common law. As a matter of policy, Australia is one of the few jurisdictions to extend unfair terms protection to small businesses expressly, for example, a YouTuber. An interpretation that s 23 can be disapplied by a FCL would be problematic. A FCL designed to evade the operation of ss 21 or 23 might itself be unconscionable or unfair.[18] If s 23 is not mandatory, Australian consumers may not have the benefit of an important protection. Section 23 also has a public interest element, in that under s 250 the regulator can apply to have a term declared unfair. On balance, it is more likely than not that s 21 is a mandatory law.

The Chap 2 protections are an integral part of the Australian legal landscape and the market culture. This piece argues that the Chap 2 protections *are* mandatory laws. Whether or not that is correct, as a matter of policy, they should be.

FOOTNOTES

[1] A possibility implicitly left open by *Epic Games Inc v Apple Inc* [2021] FCA 338, [17]. See too *Knight v Adventure Associates Pty Ltd* [1999] NSWSC 861, [32]–[36] (Master Malpass); *Quinlan v Safe International Försäkrings AB* [2005] FCA 1362, [46] (Nicholson J), *Home Ice Cream Pty Ltd v McNabb Technologies LLC* [2018] FCA 1033, [19].

[2] 'laws the respect for which is regarded by a country as so crucial for safeguarding public interests (political, social, or economic organization) that they are applicable to any contract falling within their scope, regardless of the law which might otherwise be applied'. See Adrian Briggs, *The Conflict of Laws*

(Oxford University Press, 3rd ed, 2013) 248.

[3] M Davies et al, *Nygh's Conflict of Laws in Australia* (LexisNexis Butterworths, 10th ed, 2019) 492 [19.48], Michael Douglas, 'Choice of Law in the Age of Statutes: A Defence of Statutory Interpretation After *Valve*' in Michael Douglas et al (eds), *Commercial Issues in Private International Law: A Common Law Perspective* (Hart Publishing, 2019) 201, 226-7.

[4] Richard Garnett, 'Arbitration of Cross-Border Consumer Transactions in Australia: A Way Forward?' (2017) 39(4) *Sydney Law Review* 569, 570, 599.

[5] *Sweet v Google Inc* (ND Cal, Case No 17-cv-03953-EMC, 7 March 2018).

[6] *Home Ice Cream Pty Ltd v McNabb Technologies LLC* [2018] FCA 1033, [19].

[7] M Davies et al, *Nygh's Conflict of Laws in Australia* (LexisNexis Butterworths, 10th ed, 2019) 470–2 [19.10].

[8] See, eg, *Océano Grupo Editorial SA v Murciano Quintero* (C-240/98) [2000] ECR I-4963.

[9] *Epic Games Inc v Apple Inc* (2021) 392 ALR 66, 72 [23] (Middleton, Jagot and Moshinsky JJ).

[10] John Goldring, 'Globalisation and Consumer Protection Laws' (2008) 8(1) *Macquarie Law Journal* 79, 87-8

[11] Historically, the essence of unconscionability is the exploitation of a weaker party. *Australian Securities and Investments Commission v Kobelt* (2019) 267 CLR 1, 36 [81] (Gageler J) ('*ASIC v Kobelt*').

[12] M Davies et al, *Nygh's Conflict of Laws in Australia* (LexisNexis Butterworths, 10th ed, 2019) 470–2 [19.10], 492 [19.48].

[13] *Home Ice Cream Pty Ltd v McNabb Technologies LLC* [2018] FCA 1033, [19].

[14] *Epic Games Inc v Apple Inc* [2021] FCA 338, [19] (Perram J). On appeal, the Full Court of the Federal Court of Australia exercised its discretion afresh and refused the stay: *Epic Games Inc v Apple Inc* (2021) 392 ALR 66. That said,

Perram J's conclusion that s 21 was a mandatory law was not challenged on appeal.

[15] Analogical support for a 'conduct' analysis can be found from cases on s 18 like *Australian Competition and Consumer Commission v Valve Corporation [No 3]* (2016) 337 ALR 647 (Edelman J, at first instance). In *Valve* it was reiterated that the test for s 18 was objective. See 689 [212]–[213]. A contractual term might neutralise the misleading or deceptive conduct, but it cannot be contracted out of. See *Medical Benefits Fund of Australia Ltd v Cassidy* (2003) 135 FCR 1, 17 [37] (Stone J, Moore J agreeing at 4 [1], Mansfield J agreeing at 11 [17]); *Downey v Carlson Hotels Asia Pacific Pty Ltd* [2005] QCA 199, 29–30 [83] (Keane JA, Williams JA agreeing at [1], Atkinson J agreeing at [145]).

[16] *Australian Competition and Consumer Commission v Get Qualified Australia Pty Ltd (in liq) [No 2]* [2017] FCA 709, [60]–[62] (Beach J).

[17] M Davies et al, *Nygh's Conflict of Laws in Australia* (LexisNexis Butterworths, 10th ed, 2019) 463 [19.1], 492 [19.48].

[18] M Davies et al, *Nygh's Conflict of Laws in Australia* (LexisNexis Butterworths, 10th ed, 2019) 470–2 [19.10]. While a consumer might be able to challenge a proper law of contract clause on the grounds of unconscionability, it would be harder for a commercial party to do so.