ONLINE SHOPPING TERMS AND CONDITIONS IN PRACTICE: VALIDITY OF INCORPORATION AND UNFAIRNESS

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Abstract

The review of 25 New Zealand and 25 Australian retail websites discussed in this paper aims to give a picture of the practical reality, in respect of terms and conditions, faced by consumers who shop online. Whether terms are successfully incorporated into contracts requires a consideration of the issues of notice and assent. The common methods of incorporating terms into online shopping contracts are known as click wrap and browse wrap. The general principles of incorporation and how they apply to click wrap and browse wrap are discussed with a view to applying those principles to the review results. Analysis of the review results shows that 60 per cent of websites which use browse wrap may not in fact be validly incorporating terms. The paper argues that online traders who have not validly incorporated terms may be engaging in misleading and deceptive conduct by leading consumers to believe that their terms form part of the purchase contract. The paper also highlights the importance of unfair terms legislation for consumers who are bound by disadvantageous terms and suggests that the recent New Zealand reform in this area could be improved if it was amended to allow consumers themselves to challenge unfair terms.

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I. Introduction

How are terms and conditions ("terms") being incorporated into online shopping contracts in practice? This paper reports on the findings of a review of 25 New Zealand and 25 Australian online shopping websites. The review aims to give a picture of the practical reality, in respect of terms, faced by consumers who shop online. Consumers who shop online may be at a disadvantage in respect of terms when compared with consumers who shop in traditional "bricks and mortar" shops. Consumers who purchase goods in traditional shops are not generally asked to assent to terms before making purchases of goods, nor are they exposed to lists of terms which are stated to apply to purchases due to the consumer's presence in the shop. Yet online consumers who await delivery of goods following payment are routinely faced with the online trader's efforts to include terms in the shopping contract. Terms which may disadvantage consumers shopping online include terms which purport to to exclude liability for product failure or limit damages claims; proscribe dispute resolution processes; specify the jurisdiction and law of the contract; authorise the trader to pass the consumer's personal information to third parties; restrict the consumer's ability to make disparaging comments about traders or their products[1] and prohibit the bringing of class actions. In New Zealand many of these types of term will be inoperative, in respect of consumers, due to section 43 of the Consumer Guarantees Act 1993 ("the CGA") which prohibits terms which attempt to avoid the rights and remedies available under that Act unless the consumer is purchasing goods for business purposes.[2] A similar restriction applies in Australia which prevents contracting out of the consumer guarantee provisions in the Australian Consumer Law ("the ACL").[3] However, it is important to determine the circumstances in which consumers may be bound by other disadvantageous terms, which are not rendered inoperative by consumer protection laws.

Whether terms are successfully incorporated into a contract requires a consideration of the issues of notice and assent. The common methods of incorporating terms into online shopping contracts are known as "click wrap" and "browse wrap". The click wrap method has generally been accepted as the more successful method of incorporation. The "click" by the consumer has

1 For a United States' example of this type of "non-disparagement" term see: *Palmer v Kleargear* (unreported default judgment United States District Court for the District of Utah case No. 1:13-cv-00175-DB, 30 April 2014) discussed in Davis, N "The Yelper and the Negative Review: the Developing Battle Over Nondisparagement Clauses" (2014) GPSOLO e 3 (10) <americanbar.org>.

2 Consumer Guarantees Act 1993, s 43(4) provides that any attempt to include such an exclusion may be misleading and deceptive conduct in breach of section 13(i) of the Fair Trading Act 1986.

3 Australian Consumer Law, s 64 set out in Volume 3, Schedule 2 of the Competition and Consumer Law Act 2010 provides that terms which purport to exclude the Guarantee provisions in Part 3 – 2 Division 1 of the ACL are void.

been interpreted as a form of assent to terms or is treated as an effective way of drawing the consumer's attention to terms which works as a form of notice. Whether terms are validly incorporated using the browse wrap method turns solely on the question of the adequacy of notice prior to contract formation. The review of websites discussed in this paper identifies whether the method of incorporation used by each website is click wrap or browse wrap and notes the extent of any efforts to give notice.

The paper begins with a discussion of the general principles applying to the incorporation of terms in online shopping contracts followed by an explanation of the method used to conduct the review. The review results are then presented. Somewhat surprisingly, the results of the review show that 60 per cent of the 50 websites reviewed use the browse wrap method to incorporate terms.[4] The number of words in the terms used by the websites reviewed range from 303 to 10,005 words. The paper goes on to comment on the effectiveness of incorporation in practice and points out that most consumers are unlikely to read terms, especially when the number of words is excessive. The paper argues that some online traders may be engaging in misleading and deceptive conduct by stating that their terms are binding when in fact their terms have not been validly incorporated into the contract. Finally, the paper highlights the importance of unfair terms legislation which can alleviate the impact of terms which are validly incorporated but prove to be unfair.

II. General Principles - Incorporation Of Terms In Online Shopping Contracts

The general principles applying to the incorporation of terms into contracts are well settled. Terms must be incorporated before the contract is made.[5] If a party has signed an agreement containing terms, those terms are binding on that party even if they have not been read.[6] If terms are not signed they may

4 The writer had expected that the click wrap method of incorporation would be the more common method used by online traders.

5 *Parker v South Eastern Railway* (1877) 2 CPD 416; *Harvey v Ascot Dry Cleaning Co Ltd* [1953] NZLR 549; *Spurling Ltd v Bradshaw* [1956] 2 All ER 121; [1956] 1 WLR 461; *Thornton v Shoe Lane Parking* [1971] 2 QB 163; 1 All ER 686; *MacRobertson Miller Airline Services v Commissioner of State Taxation (WA)* (1975) 133 CLR 125; 8 ALR 131; 50 ALJR 348; *Oceanic Sun Line Special Company Inc v Fay* (1988) 165 CLR 197; 79 ALR 9; [1988] HCA 32.

6 *L'Estrange v Graucob* [1943] 2 KB 394 and *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165; 211 ALR 342; [2004] HCA 52; BC200407463.

be incorporated by reasonably sufficient notice before the contract is made.[7] If terms are unexpected or particularly onerous a higher degree of notice is required.[8] This particular rule is known as "the red hand rule" as explained by Lord Denning in *Spurling Ltd v Bradshaw*[9] where he stated, in deciding that an exclusion clause formed part of a contract:[10]

> [T]he more unreasonable a clause is, the greater the notice which must be given of it. Some clauses I have seen would need to be printed in red ink on the face of the document with a red hand pointing to it before the notice could be held to be sufficient.

In *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd*,[11] the High Court of Australia confirmed the established principle from *L'Estrange v Graucob*[12] that, if the contract is signed, then the question of notice, including the degree of notice, is not relevant unless some vitiating element such as misrepresentation, duress or mistake is present.[13]

These general principles apply equally to the incorporation of terms in online shopping contracts. The two common methods of incorporating terms in online shopping contracts have become known as click wrap and browse wrap but the central issues which determine whether incorporation is successful remain those of notice and assent.

III. Click Wrap

The click wrap method of incorporating terms requires the consumer to check a box or click on a phrase such as "I agree" to indicate acceptance of the trader's terms before proceeding with the transaction. The terms may be viewed by clicking on a link, usually posted near the check box or "I agree" button, which will display the terms on another webpage or in a pop up box.

7 *Parker v South Eastern Railway* (1877) 2 CPD 416; *Harvey v Ascot Dry Cleaning Co Ltd* [1953] NZLR 549; *Spurling Ltd v Bradshaw* [1956] 2 All ER 121; [1956] 1 WLR 461; *Thornton v Shoe Lane Parking* [1971] 2 QB 163; 1 All ER 686; *Interfoto Picture Library Limited v Stiletto Visual Programmes Ltd* [1989] 1 All ER 348; [1989] QB 433; *MacRobertson Miller Airline Services v Commissioner of State Taxation (WA)* (1975) 133 CLR 125; 8 ALR 131; 50 ALJR 348; *Oceanic Sun Line Special Company Inc v Fay* (1988) 165 CLR 197; 79 ALR 9; [1988] HCA 32.

8 *Spurling Ltd v Bradshaw* [1956] 2 All ER 121; [1956] 1 WLR 461; *Thornton v Shoe Lane Parking* [1971] 2 QB 163; 1 All ER 686.

9 *Spurling Ltd v Bradshaw* above, n 8.

10 *Spurling Ltd v Bradshaw* [1956] 2 All ER 121 at 125; [1956] 1 WLR 461 at 470.

11 *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165; 211 ALR 342; [2004] HCA 52; BC200407463.

12 *L'Estrange v Graucob* [1943] 2 KB 394.

13 *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 at 181; 211 ALR 342; [2004] HCA 52; BC200407463 at [54] per Gleeson CJ, Gummow, Hayne, Callahan and Heydon JJ.

As long as the consumer has indicated acceptance of the terms, the consumer is permitted to proceed with the transaction whether the terms have been viewed or not. If the consumer does not indicate acceptance of the terms, the consumer cannot proceed with the transaction and is reminded of the need to indicate acceptance.

It is generally accepted that the click wrap method is a valid means of incorporation of terms.[14] In *eBay International AG v Creative Festival Entertainment Pty Ltd*,[15] the Federal Court of Australia held that terms printed on the back of tickets to the "Big Day Out" music festival were not binding because they differed from the terms displayed on the website which had been assented to by customers when tickets were purchased. The Court held that the ticket seller had engaged in misleading and deceptive conduct by printing non-binding terms on the back of the tickets.[16] The Court, in reaching its conclusion, agreed with eBay's assertion that customers were bound by the terms displayed on the website through their conduct of clicking an assent text box and by clicking "OK". Customers indicated assent to the terms by clicking a text box which stated "I have read and agreed to the following terms and conditions". Customers also clicked "OK" in response to message which stated "Please agree the terms and conditions before you proceed." The case is an example of the Federal Court of Australia accepting that the click wrap method is a valid means of incorporating terms. The case confirms that terms displayed on a website and assented to by "clicking" may bind the purchaser.

A more recent decision of the England and Wales High Court (Commercial Division), *Spreadex Ltd v Cochrane*,[17] warns that the click wrap method does not always result in a valid incorporation of terms. The defendant used a website to set up an account to trade in the movement of prices in various commodities. The plaintiff, the website operator, was a spread betting bookmaker. The defendant's user account was set up with a password and private account number. The defendant indicated acceptance of the website operator's terms by clicking on various buttons. One of the terms stated that the user was deemed to have authorised all trading under the user's account number. Several trades were made on the account by a child without the

14 *eBay International AG v Creative Festival Entertainment Pty Ltd* (2006) 170 FCR 450; [2006] FCA 1768 ("the Big Day Out case"); *Feldman v Google Inc* 513 F Supp 2d 229 (2007); *US v Drew 259* FRD 449 (CD Cal 2009); *Ryanair Ltd v Billigfluege.de GMBH* [2010]IEHC 47 and *Ryanair v On the Beach Ltd* [2013] IEHC 124. See slso: J M Paterson "Consumer Contracting in the Age of the Digital Natives" (2011) 27 Journal of Contract Law 152 and D Clapperton and S Corones "Unfair terms in "clickwrap" and other electronic contracts" (2007) 35 ABLR 152 .

15 *eBay International AG v Creative Festival Entertainment Pty Ltd* (2006) 170 FCR 450; [2006] FCA 1768; BC200610545

16 *eBay International AG v Creative Festival Entertainment Pty Ltd* (2006) 170 FCR 450; [2006] FCA 1768; BC200610545 at [81] Rares J held that the ticket seller breached s.52 of the Australian Trade Practices Act 1974 which was the relevant legislation in force at the time.

17 *Spreadex Ltd v Cochrane* [2012] EWHC 1290 (Comm).

defendant's authority and resulted in a loss of over £60,000 accumulating in the defendant's account. The bookmaker sued to recover the funds and argued that the defendant was liable because of the term which deemed that all trades on the account were authorised by the account holder. The High Court found that there was no binding contract due to an absence of consideration and determined that the term in question was "unfair" under the relevant legislation.[18] The court also held that, in any event, the "deemed authority" term had not been validly incorporated. The terms posted on the website included four documents including the Customer Agreement which contained the "deemed authority" term. The Customer Agreement was 49 pages long and contained 49 closely printed and complex paragraphs. The Court stated that, "[t]his was an entirely inadequate way to seek to make the customer liable for any potential trades which he did not authorise, and is a further factor rendering the [relevant clause] an unfair term."[19] The approach of the court is entirely sensible and serves as a reminder that every case will be decided on its own facts. The issue of adequacy of notice will not be ignored by the courts just because a consumer has clicked a consent button.

There are two approaches to determining that terms can be incorporated into contracts through clicking. First, indicating acceptance by clicking "I agree" or checking a box has been treated as akin to signing. Second, clicking has been treated as evidence that the consumer has adequate notice of terms before the contract is made.[20] There are major differences between these approaches. Clapperton and Corones note that there are arguments as to whether assent to terms by clicking "I agree" results in incorporation by signature or notice.[21]

> If treated as incorporation by signature, the user would be bound by the terms whether the terms were read or not. If treated as incorporation by notice, the vendor must have taken reasonable steps to bring the terms to the attention of the consumer at or before the time the contract was formed.

Paterson favours the incorporation by signature analysis but notes that the issue is whether the consumer had notice that the consequence of indicating consent is that the terms will be binding on the consumer: [22]

18 The Unfair Terms in Consumer Contracts Regulations 1999 (UK).

19 *Spreadex Ltd v Cochrane* , above n 17, at [21].

20 *eBay International AG v Creative Festival Entertainment Pty Ltd* (2006) 170 FCR 450; [2006] FCA 1768 ("the Big Day Out case") and *Feldman v Google Inc* 513 F Supp 2d 229 (2007) *US v Drew 259* FRD 449 (CD Cal 2009).

21 D Clapperton and S Corones "Unfair terms in "clickwrap" and other electronic contracts" (2007) 35 ABLR 152 at 157.

22 J M Paterson "Consumer Contracting in the Age of the Digital Natives" (2011) 27 Journal of Contract Law 152 at 163.

> Typically, click-wrap contracts may be treated as signed contracts. The consumer's act of clicking 'I accept' will usually constitute a clear and unequivocal signal of consent to the standardised terms proposed by the supplier. In such cases the supplier's terms will be incorporated into the contract regardless of whether the consumer has read or understood those terms. … For a click-wrap contract to be treated as a signed contract, it must always be shown that consumers were provided with a clear statement of the consequences of the act of clicking (ie, 'By clicking I consent to the attached terms and conditions').

Determining the rationale for finding that clicking a check box or "I agree" button incorporates terms is important – if the click is treated as a signature then the adequacy of notice is not important. If adequate notice is not required the consumer's opportunity to become informed of the content of the terms is reduced and there is no requirement to provide a higher degree of notice for any unexpected or particularly onerous terms.[23] Treating a click as a type of signature is not a helpful approach. Focusing on the issue of notice is preferable and allows a true application of the traditional principles on incorporation of terms.[24] The effect of requiring the consumer to click to indicate assent will often amount to sufficient notice of terms because generally the link to the terms is posted next to the check box or "I agree" button and includes a clear statement that the consumer is clicking to indicate acceptance of terms. If there is no link to view the terms near the check box or "I agree" button, how can the click amount to assent? In the traditional paper contract situation the signature is placed on the document which records the terms. This is quite different from a consumer who clicks to indicate assent to terms if the link to view those terms is not posted anywhere near the check box or "I agree" button. The issue which determines whether terms are incorporated using the click wrap method must then be the question of sufficiency of notice. Has the trader taken sufficient steps to bring the content of the terms to the consumers' attention before they indicate their assent to those terms? The action of clicking can be treated as evidence which confirms one of the steps taken by the trader in informing the consumer about the existence and content of the terms. Other evidence which assists in determining the sufficiency of the notice will be the facts concerning the location of the link to the terms in relation to the assent button, the description of the terms, the number of words included in the terms, the size of the type font used and the clarity of expression in the terms. The review discussed in this paper considers

23 *L'Estrange v Graucob* [1943] 2 KB 394 and *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165; 211 ALR 342; [2004] HCA 52; BC200407463 and see: E Macdonald "Incorporation of Standard Terms in Website Contracting – Clicking 'I Agree'" (2011) 27 Journal of Contract Law 1 at 12.

24 See: *Spreadex Ltd v Cochrane*, above n 17..

the location of the link to terms on the website, the phrase used to describe the terms and the number of words in each set of terms.

IV. Browse Wrap

Browse wrap describes the method of incorporation in which the trader's terms are posted somewhere on the website and can be viewed by clicking on a link to those terms. The link to the terms is usually posted at the bottom of the home page or at the bottom of every page of the website. Sometimes the link to the terms appears in the left or right margin of the webpages. The consumer is able to view the terms by clicking on the link which refers to the terms. The terms usually commence with a statement that the terms are binding on anyone using the website and that the terms apply to any contract made using the website. The consumer is not required to click "I agree" or check a box to indicate assent or agreement to the terms before completing the transaction. The consumer may not view the terms and may indeed not even be aware that they exist before completing a purchase transaction.

Courts have generally been reluctant to treat terms purported to be incorporated using the browse wrap method as valid. In *Specht v Netscape Communications Corp,*[25] a United States court refused to enforce terms alleged to have been incorporated through the browse wrap method. The terms contained in a licence agreement sought to bind persons who downloaded free software from a website. The website user downloaded the software by clicking on a "download" text box. Text following the "download" text box requested that the website user view and agree to the download software licence agreement before downloading and using the software. The licence agreement could be viewed by clicking on a link to another webpage. Website users were not required to view the licence agreement or indicate their consent to the agreement's terms before downloading the software.

The online computer retailer Dell was involved in a number of cases involving online purchases in the United States between 2004 and 2006. In 2004, in *Defontes v Dell Computer Corp*,[26] the Superior Court of Rhode Island held that the arbitration clause in Dell's terms and conditions did not bind the plaintiff, reasoning that the browse wrap method "was not sufficient to put plaintiffs on notice of the terms and conditions of the sale of the computer."[27] In the following year, the Illinois Court of Appeal held in *Hubbert v Dell Corp*[28] that terms which were available through a blue hyperlink at the bottom of five webpages viewed by the customer, were binding due to

25 *Specht v Netscape Communications Corp* 150 F. Supp. 2d 585 (S.D.N.Y. 2001) affirmed *Specht v Netscape Communications Corp* 306 F 3d 17 (2nd Cir 2002).

26 *Defontes v Dell Computer Corp* 2004 R.I. Super. LEXIS 32.

27 At [17].

28 *Hubbert v Dell Corp* 835 N.E.2d 113 (Ill. App. Ct. 2005).

statements on three of the webpages that "All sales are subject to Dell's terms and conditions of sale."[29] The Court held that these statements were enough to put a reasonable person on notice of the terms and make them binding on customers. In both *Defontes* and *Hubbert* the purchaser was not required to click on any box to indicate assent to the terms. More recently, the Supreme Court of British Columbia stated in *Century 21 Canada Limited Partnership v Rogers Communications,*[30] "A properly enforceable browse wrap agreement will give the user opportunity to read it before deeming the consumer's use of the website as acceptance of Terms of Use".

In summary, the browse wrap method of incorporation has not been particularly successful. It may succeed if the notice stating that any contract made while using the website is governed by the trader's terms is prominently displayed prior to the making of the contract.[31] This becomes an issue of adequacy of notice and the traditional ticket cases will aid in reaching a conclusion in any given case. Patterson confirms, "Browse-wrap contracts have been treated as unsigned contracts incorporating terms through notice."[32] The posting of a link to the trader's terms at the bottom of a webpage, without any other notice to the consumer advising of the existence of the terms, is unlikely to amount to sufficient notice. The success of the browse wrap method of incorporation depends on the adequacy of notice and in each case the court will need to consider the location of the link to terms, whether the existence of the terms is drawn to the consumers' attention at other places on the website and at what stage of the transaction process.

V. Review Method

In order to collect the information recorded in the review,[33] the writer posed as an online shopper and "shopped" up to the point where payment details were required. A random product was selected for purchase using the online "shopping cart". An account with the online trader was generally created in order to reach the payment submission details webpage. The method of incorporation of terms used by each online trader was recorded as click wrap or browse wrap and on two occasions, as a hybrid (described below) between the two methods. The location of the link to view the terms

29 At 122.

30 *Century 21 Canada Limited Partnership v Rogers Communications* Inc 2011 BCSC 1196 at [108].

31 *Specht v Netscape Communications Corp* 306 F 3d 17 (2nd Cir 2002); *Defontes v Dell Computers Corp* 2004 R.I. Super. LEXIS 32; *Hubbert v Dell Corp* 835 N.E.2d 113 (Ill. App. Ct. 2005); *Register.com Inc v Verio Inc* 356F 3d 393 (2nd Cir, 2004) and *Southwest Airlines Co v Boardfirst LLC* (2007) US Dist LEXIS 96230.

32 J M Paterson "Consumer Contracting in the Age of the Digital Natives" (2011) 27 Journal of Contract Law 152 at 163.

33 The review information was collected between 1 August 2013 and 30 November 2013.

and the phrase used to describe the terms was noted. The number of words in each set of terms was also recorded. The 25 New Zealand and 25 Australian websites were chosen randomly and included a mix of large and small retailers. Google and Wikipedia searches of "popular retail websites" were conducted to identify suitable websites. The New Zealand websites required a New Zealand delivery address and Australian websites required an Australian delivery address. The review covered a range of websites selling a variety of different products including:

1) Clothing and shoes;
2) Appliances, electronics and computers;
3) Games and DVDs;
4) Books;
5) Groceries;
6) Sports and outdoor equipment;
7) Household goods;
8) Baby gear;
9) Office supplies; and
10) Pharmaceuticals.

VI. The Results

A. Incorporation Methods

The results indicate that the majority of websites used the browse wrap method to purport to incorporate their terms. Of the New Zealand websites reviewed, 52 per cent used the browse wrap method of incorporation and 40 per cent used the click wrap method. The remaining eight per cent used a method of incorporation which has been described as "hybrid". The hybrid method purports to use the click wrap method of incorporation but the check box has already been checked when the webpage which refers to terms is displayed. The review of Australian websites showed that 68 per cent used the browse wrap method and 32 per cent used the click wrap method. The combined results of the 50 websites show that 60 per cent used browse wrap, 36 per cent click wrap and four per cent the hybrid method.

B. Location and Description of Terms

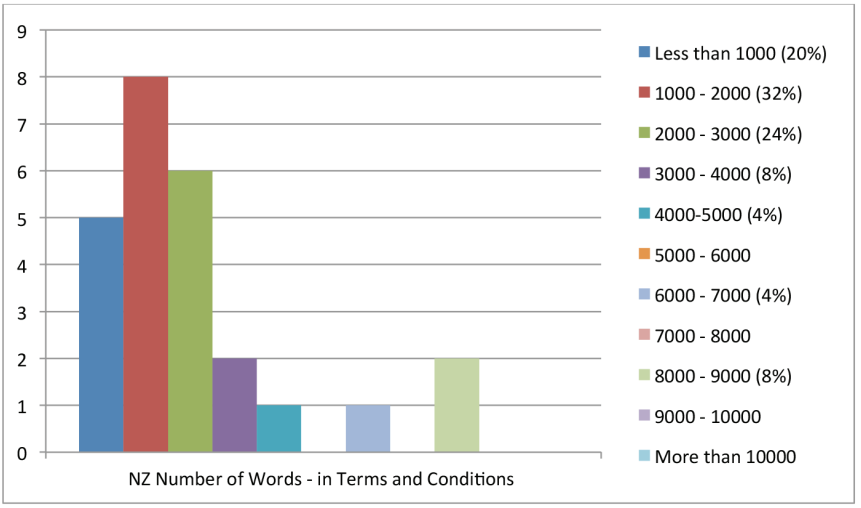
An overwhelming majority of the websites which used browse wrap simply posted a link to the terms at the bottom of each webpage without any other reference to terms during the transaction process. Twelve of 13 New Zealand websites which used browse wrap posted the link to terms at the bottom of each webpage, while one posted the link at the top of the page under a heading "About Us". All 17 Australian websites which used browse wrap posted the link to terms at the bottom of each webpage. Each set of terms contained a term which stated that, by using the website, the user was bound by the terms or that any contract made by the website user would include the terms.

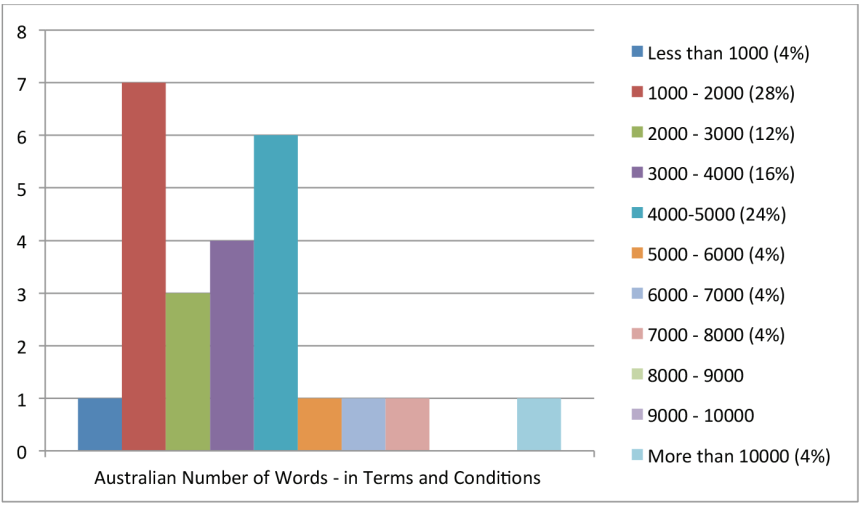
Nine out of 12 New Zealand websites which used click wrap or the hybrid method posted the link to terms near the check box. The other three websites posted the link to terms at the bottom of the page on which the check box or "I agree" button appeared. All eight Australian websites which used click wrap posted the link to the terms near the check box or "I agree" button.

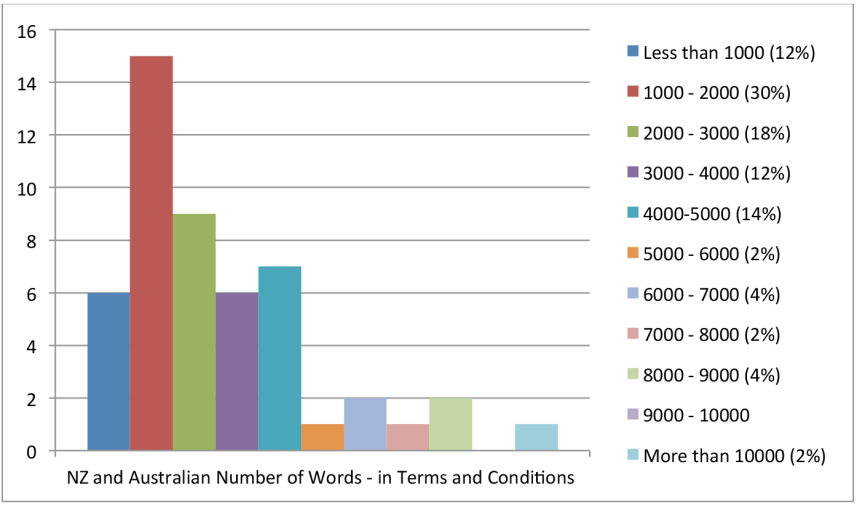
The links to the terms described terms using a somewhat confusing variety of phrases including "conditions of use", "terms and conditions", "TERMS + COND", "Legal", "Sales and refunds", "Terms of Service", "Site Terms and Conditions of Purchase", "Terms and conditions of trade", "customer agreement", "Shipping and returns", "terms of business", "Terms of Use" and "Delivery and returns".

C. Number of Words in Terms

The number of words used by the 25 New Zealand websites in each set of terms ranged from 303 to 8,443 words. The number of words in the terms used by the Australian websites ranged from 334 to 10,005 words. These results are reflected in the charts below:


9
8
7
6
5
4
3
2
1
0
Less than 1000 (20%)
1000 - 2000 (32%)
2000 - 3000 (24%)
3000 - 4000 (8%)
4000-5000 (4%)
5000 - 6000
6000 - 7000 (4%)
7000 - 8000
8000 - 9000 (8%)
9000 - 10000
More than 10000
NZ Number of Words - in Terms and Conditions


8
7
6
5
4
3
2
1
0
Less than 1000 (4%)
1000 - 2000 (28%)
2000 - 3000 (12%)
3000 - 4000 (16%)
4000-5000 (24%)
5000 - 6000 (4%)
6000 - 7000 (4%)
7000 - 8000 (4%)
8000 - 9000
9000 - 10000
More than 10000 (4%)
Australian Number of Words - in Terms and Conditions



VII. Analysis Of The Review Results

A. Adequacy of Notice

It is unlikely that using browse wrap with no reference to the existence of terms other than the posting of a link at the bottom of each webpage is sufficient notice of those terms. More must be done to draw the consumer's attention to the existence and content of the terms. The number of online traders revealed by the review using a basic browse wrap method shows that many terms in online shopping contracts may not be binding on consumers. While this may seem like good news for consumers, it may not be helpful if consumers are not aware that the terms are not binding.

B. Number of Words in the Terms

The review shows that 88 per cent of the terms used by the New Zealand and Australian websites contained over 1,000 words. When the number of words becomes excessive is debatable, but terms which contain over 1,000 words require a considerable amount of a consumer's time and attention to read and absorb. Terms which extend to 10,000 must viewed as excessive.

Studies by Hillman and Rachklinski[34] have confirmed the widely held view that the vast majority of consumers are unlikely to read terms even if they are aware of their existence. The likelihood of reading must drop even further if the terms are excessively long and complex. The length of terms must have an impact on the adequacy of notice. If terms which disadvantage consumers are buried in lengthy documents, without any particular highlighting, then consumers will have strong arguments for avoiding those terms on the grounds of inadequate notice. The approach of the England and Wales High Court (Commercial Division) in *Spreadex Ltd v Cochrane,*[35] discussed above, is to be welcomed in this regard.

VIII. Is Leading A Consumer To Believe That They Are Bound By Terms Which Are Not Binding Misleading And Deceptive Conduct?

Online traders who purport to incorporate terms using the browse wrap method rely on the statement in the terms which declares that the terms are binding on website users and that the terms are included in any contract made using the website. If, in fact, the terms are not validly incorporated, due to insufficiency of notice for example, then the trader has misled the consumer into believing that the terms are binding. Consumers may believe that the terms define their contractual rights when in fact the terms are not binding at all. It can be argued that the trader's conduct of making a statement declaring terms to be binding in circumstances where the terms have not in fact been validly incorporated is misleading and deceptive. Section 9 of the New Zealand Fair Trading Act 1986 ("the FTA") and section 18 and of the Australian Consumer Law ("the ACL") both prohibit conduct in trade which is misleading or deceptive or likely to mislead or deceive. Section 13(i) of the FTA and section 29(1)(m) of the ACL also both provide that no person shall, in trade, in connection with the supply of goods, make a false or misleading

34 R A Hillman and J J Rachlinski "Standard Form Contracting in the Electronic Age" (2002) 77 New York University Law Rev 429 and R A Hillman "Online Consumer Standard Form Contracting Practices: A Survey and Discussion of Legal Implications" in Jane Winn (ed) *Consumer Protection in the Age of the 'Information Economy'* (Ashgate Publishing Ltd, Aldershot, England 2006) at 283. See also: April Fool's day prank by United Kingdom online retailer Games Station, as reported by The Telegraph 17 April 2010 at: <blogs.telegraph.co.uk>.

35 *Spreadex Ltd v Cochrane* [2012] EWHC 1290 (Comm) at [21] where the court held that a term included in a 49 page closely printed and complex document which was one of four documents posted online was not binding even though the customer agreed to the terms by clicking various consent buttons.

representation concerning the "effect of any condition". Breach of section 13 (i) and section 29(1)(m) are criminal offences punishable by significant fines.[36]

In *eBay International AG v Creative Festival Entertainment Pty Ltd*,[37] Rares J held that the ticket seller engaged in conduct which was misleading or deceptive and/or likely to mislead or deceive by representing that certain terms on the back of the paper ticket were binding when those terms were not included in the purchase contract which was completed online. The conduct of the ticket seller in printing terms on the back of a ticket which differed from the terms posted on the seller's website at the time of sale was misleading and deceptive. Only the terms posted on the website were binding. The purchaser had no notice of the terms on the back of the ticket until after the purchase contract was complete. A similar argument could apply to declarations by online traders that certain terms are binding when in fact they are not binding at all. For example, if a term posted on a website states that the consumer has one week from delivery to lodge a complaint about the quality of a product, but that term has not been validly incorporated, the consumer is misled into believing that a complaint time limit applies, when in fact it does not. The Commerce Commission in New Zealand and the corresponding regulatory bodies in Australia should be encouraged to investigate possible FTA and ACL breaches in scenarios where terms have not been validly incorporated but traders claim that the terms are binding.

IX. Unfair terms regulation

Potentially, a number of the terms that traders are using in their contracts, if those terms have been validly incorporated, may be unfair terms. While the Disputes Tribunal in New Zealand has long been able to set aside "harsh or unconscionable" terms,[38] general regulation of "unfair terms" in New Zealand has only recently been introduced. The Fair Trading Amendment Act 2013 introduces unfair terms provisions into the FTA which take effect on 18 March 2015.[39] The New Zealand provisions are similar to the Australian

36 FTA, s 40 maximum fine $60,000 for individuals (to be increased to $200,000 on 17 June 2014 by s 27 of the Fair Trading Amendment Act 2013) and $200,000 for body corporates (to be increased to $600,000 on 17 June 2014 by s 27 of the Fair Trading Amendment Act 2013) and ACL, s 151 maximum fine $220,000 for individuals and $1,100,000 for body corporates.

37 *eBay International AG v Creative Festival Entertainment Pty Ltd* (2006) 170 FCR 450; [2006] FCA 1768; BC200610545.

38 Disputes Tribunals Act 1988, s 19

39 s 26A and ss 46H- 46M of the New Zealand Fair Trading Act 1986 to be inserted by the Fair Trading Amendment Act 2013 and see: "What businesses need to know"under "Changes to consumer laws" <www.consumeraffairs.govt.nz>

Consumer Law ("the ACL").[40] The ACL provides that unfair terms in standard form consumer contracts are void.[41] The New Zealand provisions state that terms which are declared unfair by the Court cannot be used in a standard form contract and cannot be applied, enforced or relied on.[42] Under the ACL, various Australian regulators and any individual can apply to the Court for a declaration that a term of a consumer contract is unfair. The New Zealand reform is restricted in that it stipulates that only the Commerce Commission may apply to the court for a declaration that a term is unfair.[43] However, any person, including a consumer, may ask the Commerce Commission to make an application for such a declaration in relation to a contract in which that person is a party.[44]

A New Zealand court may determine that a contract in which the terms have not been negotiated between the parties is a "standard form contract".[45] In making this determination, the court must take account of factors such as: bargaining power, who drafted the contract and the extent to which the parties had an opportunity to negotiate the terms.[46] Most online shopping contracts with consumers, which include the trader's standard terms and conditions, will meet the definition of "standard form" consumer contract because the consumer generally has no opportunity to negotiate the terms.[47] Goods are generally offered for sale on a "take it or leave it" basis. Section 46L of the FTA and section 24 of the ACL provide that a term in a standard form consumer contract is unfair if:

(a) it would cause a significant imbalance in the parties' rights and obligations arising under the contract;
(b) it is not reasonably necessary to protect the legitimate interests of the party who would be advantaged by the term; and

40 ss 23 - 25 of the Australian Consumer Law is set out in Volume 3, Schedule 2 of the Competition and Consumer Law Act 2010. Regulation of unfair terms in consumer contracts was introduced in the United Kingdom in 1995 in order to implement EU Unfair Consumer Contract Terms Directive. The current Unfair Terms in Consumer Contracts Regulations 1999 (UK) provide that unfair terms are not binding on consumers.

41 ACL, s 23 (1).

42 FTA (NZ), s 26A.

43 Section 46H(1). The Ministry of Consumer Affairs originally proposed that consumers be entitled to challenge unfair contract terms in the Disputes Tribunal but this proposal is not included in the final regulation – see: Ministry of Consumer Affairs "Consumer Law Reform Additional Paper – September 2010 Unfair Contract Terms" <www.consumeraffairs.govt.nz> at 15.

44 FTA (NZ), s 46H(2).

45 Section 46J (1).

46 Section 46J (2).

47 See: section 46J(1) which allows the court to determine that a contract is a standard form contract if the terms have not been subject to effective negotiation between the parties. Factors which the court must take into account in making this determination are listed in s 46J(2) FTA (NZ) and see: s 27 ACL.

(c) it would cause detriment (whether financial or otherwise) to a party if it were applied, enforced or relied on.

Section 46K of the FTA and section 26 of the ACL provide that the unfair terms provisions do not apply to terms relating to the subject matter of the contracts or the upfront price. In determining whether a term is unfair, section 46L(2) of the FTA and section 24(2) of the ACL require the Court to take account of the extent to which the term is transparent and the contract as a whole.[48] "Significant imbalance" has been held to cover a scenario where the parties' rights and obligations under the contract are tilted in the trader's favour.[49] Terms in online shopping contracts which disadvantage consumers may well result in a tilting of rights in the trader's favour which will meet the "significant imbalance" requirement. If such terms are not reasonably necessary to protect the trader's legitimate interests and cause detriment to the consumer then the court may determine that they are unfair.

The unfair terms legislation in New Zealand and Australia includes a "grey list" of types of terms which are examples of unfair terms.[50] Section 46M of the FTA provides that the following kinds of terms may be unfair contract terms:[51]

> (a) a term that permits, or has the effect of permitting, one party (but not another party) to avoid or limit performance of the contract;
>
> (b) a term that permits, or has the effect of permitting, one party (but not another party) to terminate the contract;
>
> (c) a term that penalises, or has the effect of penalising, one party (but not another party) for a breach or termination of the contract:
>
> (d) a term that permits, or has the effect of permitting, one party (but not another party) to vary the terms of the contract;

48 In *Director of Consumer Affairs Victoria v Backloads.com Pty Ltd,* the following term, "This agreement shall be governed by and interpreted and enforced in accordance with the laws applicable in the Australian Capital Territory. This agreement shall be deemed to have been entered into in the Australian Capital Territory", was found to be unfair as it artificially required all contracts to have been made in a specific jurisdiction contrary to reality. The term also had the effect of limiting or deterring consumers outside that jurisdiction from enforcing their contracts. In *Spreadex Ltd v Cochrane* [2012] EWHC 1290 (Comm) a United Kingdom court found that a term which stated that "the account holder authorised all transactions on his account" was "unfair" under the United Kingdom Unfair Terms in Consumer Contracts Regulations 1999.

49 *Director of Fair Trading v First National Bank Plc* [2001] UKHL 52; [2002] 1 AC 481 and see: J Downes "The Australian Consumer Law – is it really a new era of consumer protection?" (2011) 19 *AJCCL* 5 at 15

50 FTA (NZ), s 46M and ACL, s 25.

51 A similar "grey list" of terms is set out in s 25 of the ACL.

(e) a term that permits, or has the effect of permitting, one party (but not another party) to renew or not renew the contract;

(f) a term that permits, or has the effect of permitting, one party to vary the upfront price (as defined in section 46K(2)) payable under the contract without the right of another party to terminate the contract;

(g) a term that permits, or has the effect of permitting, one party unilaterally to vary the characteristics of the goods or services to be supplied, or the interest in land to be sold or granted, under the contract;

(h) a term that permits, or has the effect of permitting, one party unilaterally to determine whether a contract has been breached or to interpret its meaning;

(i) a term that limits, or has the effect of limiting, one party's vicarious liability for its agents;

(j) a term that permits, or has the effect of permitting, one party to assign the contract to the detriment of another party without that other party's consent;

(k) a term that limits, or has the effect of limiting, one party's right to sue another party;

(l) a term that limits, or has the effect of limiting, the evidence one party can adduce in proceedings relating to the contract;

(m) a term that imposes, or has the effect of imposing, the evidential burden on one party in proceedings relating to the contract.

Many terms which disadvantage consumers included in standard form contracts by online traders will be covered by the examples of unfair terms included in the "grey list", but other terms will fall outside those examples. For example, a non-disparagement term which prohibits a consumer from making any negative comments about the online trader or its products is not covered by the examples in the grey list.[52] A term which states that there is no contract until the goods are dispatched by the trader also falls outside the "grey list", but may be an unfair term in circumstances where the consumer pays the full price prior to dispatch.[53] In addition, terms which attempt to exclude consumer rights under the Consumer Guarantees Act 1993 in New

52 A non-disparagement term was at the centre of *Palmer v Kleargear* (unreported default judgment United States District Court for the District of Utah case No. 1:13-cv-00175-DB, 30 April 2014) discussed in an American Bar Association report May 2014 at Davis, N "The Yelper and the Negative Review: the Developing Battle Over Nondisparagement Clauses" (2014) GPSOLO e 3 (10) <americanbar.org>.

53 For a full discussion of this type of term see: T O'Sullivan "Online Shopping and Consumers – the impact of 'contract on dispatch' terms" (2013) 21 CCLJ 186.

Zealand or the consumer guarantee provisions in Part 3 – 2 Division 1 of the ACL, will not be effective due to the prohibitions on contracting out of that legislation.[54]

The Australian unfair terms legislation was applied by the New South Wales Consumer, Trader and Tenancy Tribunal in an online context in *Malam v Graysonline, Rumbles Removals and Storage*.[55] A consumer purchased a glass top table using the Graysonline auction site. When the table was collected for delivery it was packaged in a box and was not inspected. When unpacked on delivery, the glass top was broken and the legs were damaged. Graysonline refused to accept liability for the damage and sought to rely on terms in its user agreement which the consumer had accepted by clicking "yes". The terms stated that "all sales were made on an 'as is, where is' basis" and that Graysonline accepted no responsibility for damage during transit unless it was responsible for delivery. Graysonline also sought to rely on a notice which was displayed on the website, after the purchase was complete, which stated that "items must be inspected before removal from Graysonline as refunds or exchanges are not given under any circumstances." The Tribunal found that the table was broken before it left Graysonline's warehouse. The Tribunal concluded that the user agreement was a standard form consumer contract but the terms in the notice displayed on the website following the purchase were not binding as the contract had already been concluded when the notice was displayed. The Tribunal found that term in the user agreement which prevented the consumer from returning the goods was not "transparent" because it was included in a 13 page agreement which was structured in a confusing way and contained inconsistent clauses. The Tribunal found that the term was "unfair" because it was not necessary to protect the interests of Graysonline and declared that the term was void.

Consumers shopping online who are bound by terms which meet the legislative definition of "unfair" may challenge those terms in Australia. In New Zealand, consumers must request that the Commerce Commission make an application to the court for a declaration that terms are "unfair." [56] If the court declares that a term is unfair, it cannot be used, applied, enforced or relied on.[57] In Australia, an unfair term is treated as void.[58] Continued use of a term which has been declared unfair is a breach of section 26A of the FTA, which is an offence subject to the penalties provided in section 40 of the Act. The unfair terms legislation is an important remedy for online consumers who, in reality, are unlikely to read terms and, even if they do, have little opportunity to negotiate different terms. The effectiveness of the unfair terms regulation for New Zealand consumers would be greatly improved if the limitation which allows only the Commerce Commission to apply for

54 Consumer Guarantees Act 1993 (NZ), s 43 and ACL, s 64.

55 *Malam v Graysonline, Rumbles Removals and Storage* [2012] NSWCTTT 197.

56 FTA (NZ), s 46H.

57 Section 26A(1).

58 ACL, s 23(1) (a).

declarations that terms are unfair were removed. Consumers could then bring their own applications for declarations and, perhaps more importantly, consumers could challenge a trader's reliance on a particular term, on the grounds that the term is unfair.

X. Conclusion

The review shows that a significant majority of the websites reviewed in New Zealand and Australia use a basic browse wrap method which may not in fact result in validly incorporated terms. While this sounds like positive news for consumers, it does not help if consumers are not aware that the terms are not binding. Online traders may actually be engaging in misleading and deceptive conduct by leading consumers to believe that they are bound by terms which have not been validly incorporated. The review highlights the excessive number of words included in many sets of terms. The length of the documents which contain the terms can have a negative effect on the adequacy of notice. The location of the link to terms and the phrase used to describe terms can also have an impact on the adequacy of notice. These factors; the length of terms, the location of the link to terms and the description of terms can all be referred to by consumers in arguing that they have not been sufficiently notified of terms. Consumers who are bound by terms which qualify as "unfair" can resort to unfair terms legislation to challenge those terms, in Australia directly and in New Zealand[59] by requesting the Commerce Commission to take action. The effectiveness of the New Zealand unfair terms legislation would be improved if it were amended to allow consumers to also apply to the court for orders pursuant to the legislation.

59 From 18 March 2015.