



COMMENTARY
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Statutory Protections vs. Freedom of Contract: A Shift in the Balance?

IN SHORT

The Situation: Australian courts have struggled with balancing the broad statutory protections afforded to consumers and businesses whilst giving effect to the contractual bargains of well-advised, sophisticated commercial entities.

The Development: A recent decision by the Supreme Court of Victoria could indicate a shift from the position favouring statutory rights over freedom of contract.

Looking Ahead: Still, a number of related issues remain unsettled, and the effectiveness of contractual limitations to claims under the *Australian Consumer Law* ("ACL") remains open to debate.

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Australian courts in recent times have grappled with balancing the broad statutory protections afforded to consumers and businesses whilst giving effect to the contractual bargains of well-advised, sophisticated commercial entities.

It is commonplace for claimants to pursue claims under the ACL in large construction and projects disputes either in place of, or as an alternative to, "traditional" contractual claims. One of the major benefits in bringing a claim under the ACL is that it is perceived to be immune to contractual time bars that would otherwise be effective against contractual claims.

A recent Supreme Court of Victoria judgment, *Brighton Australia Pty Ltd v Multiplex Constructions Pty Ltd*, could indicate a shift from the position espoused by the Supreme Court of New South Wales favouring statutory rights over freedom of contract. Ultimately, the balance is yet to be conclusively determined, and the effectiveness of contractual limitations on ACL rights remains uncertain.

One of the major benefits in bringing a claim under the ACL is that it is perceived to be immune to contractual time bars that would otherwise be effective against contractual claims.

The Brighton Case

Brighton Australia Pty Ltd was a subcontractor on the NAB Project in Docklands, Melbourne. Brighton brought a number of claims against Multiplex, including allegations that Multiplex made misleading or deceptive representations in contravention of the ACL. The disputes were referred to a special referee appointed by the Supreme Court of Victoria to determine the disputes. The special referee found in favour of Multiplex in respect of Brighton's ACL claim and determined (among other things) that contractual time bars were effective against Brighton's ACL claim.

While the Court ultimately adopted the referee's decision in respect of the merits of the ACL claim, Justice Riordan disagreed with the special referee's findings on the enforceability of time bars to Brighton's ACL claim and determined, for reasons of public policy, that a claimant's right to have recourse to the ACL within six years of the cause of action accruing was protected.

The Status of Time Bars on ACL Claims

The *Brighton* decision raises a question as to what extent (if any) a party can limit the operation or effect of the ACL by way of limitation periods, liability caps or exclusions on classes of damages.

Before the *Brighton* decision, three decisions out of the Supreme Court of New South Wales suggested that parties could agree to temporal or monetary limits for claims under the ACL. In deciding that temporal and monetary limitations were effective in *Firstmac Fiduciary Services Pty Ltd v HSBC Bank of Australia Ltd*, Justice Sakar drew an important distinction between a contractual term that purports to bar a statutory remedy altogether and one that purports to impose a monetary or temporal limit on the extent of a claimant's remedy.

Does the Reasonableness of the Contractual Limitation Matter?

The notice requirements in *Brighton* required Brighton to submit a notice within seven days of becoming aware of the claim event. This limitation was significantly more onerous than the limitations in the New South Wales cases which afforded much more time to the prospective claimant (one year in *Lane Cove*, two years in *Kell* and five years in *Firstmac*).

While the nature of the time bar could be considered relevant when assessing whether the legislative purpose has been fulfilled, Justice Riordan cautioned against an attempt to distinguish certain time bars from others, noting that it was not consistent with the public purpose of the ACL to leave claimants uncertain about whether contracted time limits were so unreasonable to be enforceable.

The Status of Other Contractual Limitations

The question of whether a contractual cap on liability or a consequential loss exclusion will be effective to limit a claimant's recovery of damages under the ACL was not considered in *Brighton*.

The decisions of the Supreme Court of New South Wales support a position that parties can agree to impose monetary limits on claims under the ACL and that these limits can be effective and enforceable. However, these cases did not directly consider issues of public policy in the same manner as *Brighton*.

The judgment in *Brighton* points to the nature of the claim under the ACL as being a relevant factor in the consideration of this issue. The case run by Brighton was a "no contract" claim—Brighton asserted that absent the allegedly misleading conduct, it would not have entered into the subcontract with Multiplex. If this assertion were valid, Justice Riordan concluded that Multiplex could not rely on the provisions of that subcontract to defeat Brighton's ACL claim.

If monetary limits on liability under the ACL are found to be enforceable, it would significantly reduce the attractiveness of an ACL claim as a "Hail Mary" for sophisticated commercial claimants seeking to pursue a cause of action that was immune to all contractual limitations. However, the question would then turn to how a decision-maker would consider a scenario where the liability cap under a contract was set at a nominal amount, such as \$1.

At present, these issues are unsettled, and the effectiveness of contractual limitations to claims under the ACL remains open to debate.

TWO KEY TAKEAWAYS

1. The *Brighton* decision raises a question as to what extent (if any) a party can limit the operation or effect of the ACL by way of limitation periods, liability caps or exclusions on classes of damages.
2. The balance between statutory rights and freedom of contract is yet to be definitively determined, and the effectiveness of contractual limitations on ACL rights remains uncertain.

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