

Optimising and attacking ICT and online contract terms: Part 2

June 2015

Speed read

In this series of articles, we overview some of the issues that we addressed at the New Zealand Law Society's May 2015 IT and Online Law Conference.

Part 2 focuses on the new Fair Trading Act and Consumer Guarantees Act provisions and their implications for B2B. Suppliers to business can more easily get out of FTA liability but it requires careful drafting.

First we outline the story so far: that suppliers to business can often be liable under the FTA, despite a limitation on liability. Then we set out how the new law changes this ongoing basic position.



The Detail

This follows our earlier article:

- [Optimising and attacking ICT and online contract terms: Part 1](#)

What's this about?

We will address these issues through our eyes, as a company who attacks and defends contracts in ICT disputes, and who reviews others' ICT contract drafting in order to optimise it (e.g. to iron out weaknesses).

In this article, we'll look at how the new Fair Trading Act (FTA) and Consumer Guarantees Act (CGA) provisions impact ICT B2B contracts and liability. When we advise on ICT disputes, we often look at ways around contractual restrictions, such as limitation of liability (LOL) clauses, and we've found that that can provide fertile ground. The FTA is the ICT litigator's gift that keeps on giving, but the new changes rather spoil the party, as suppliers can escape much exposure on top of the LOL, but with careful footwork.

We'll weave into this some thoughts on ICT LOL clauses.

Generally the examples will be larger ICT projects, but the thinking morphs nicely to other ICT and online contract issues.

In Part 3, we'll discuss some of the new B2C FTA implications for ICT and online, especially unfair contract terms.

We'll wrap up with "What's important when drafting/reviewing ICT and online contracts?" in Part 4 of this article series. Often, the big issue is not what first appears to us lawyers (for example, LOL clauses are often well down the list of priorities).

Added are links to our articles for those that want more detail; we see this article series as short summaries, linking to more detail.

For some background as to a litigator's perspective, see our article [Tips for compensation on problematic ICT projects](#), and our paper from the NZLS conference before this one, [Winning ICT Disputes – a Case Study](#).

The story so far

The law so far still applies, but with a new overlay. Before 2014, say we were advising a customer who wants to claim on a software development contract as things have gone wrong. The LOL cuts out much of the potential claim. We would be looking closely at whether there is a civil claim (for compensation etc.) under s 9 FTA (as to misleading and deceptive conduct). We would look at ads, sales pitches, and responses to RFPs etc., because often the LOL cannot override the FTA statutory liability.¹

That's how Unisys ended up paying big money to RACV (a large Victorian insurer) under the Australian equivalent of s 9 FTA, despite a tight LOL.

RACV wanted to install an online document imaging/ retrieval system in order to enable its staff to have ready access to documents. We call that a Storage Area Network or SAN these days. It put out an RFP and Unisys responded with a proposal which ultimately was accepted. The supplier and RACV entered into an agreement that, as usual, limited the supplier's liability for breach, including in relation to loss of profit etc.

RACV claimed that:

- The supplier had stated in sales material that documents would be retrieved to PCs within a specified number of seconds (and this was backed up by a test site demo).
- Some documents were to be retrieved within 2-4 seconds and others in around 20 seconds.
- The response time was actually much slower than those speeds.

RACV successfully sued for several million dollars, as the RFP response and test site

demo involved misleading and deceptive conduct, for which there's a money remedy under the legislation.² This overrode the LOL and the "small print" qualification on the statements made in the response to the RFP.

This is a classic example that plays out elsewhere too, in different guises- what's said, what's emailed, what's in ads, what's in product descriptions, and so on.

What happens now with the new changes to the FTA?

The *Unisys v RACV* type of liability still applies, with added exposure as to unsubstantiated representations, as we explain below.

However, for B2B ICT transactions, suppliers can now, under s 5D, carve-out FTA liability under s 9 and the like, such as by LOL, entire agreement clauses, and clauses confirming that the customer does not rely on representations and conduct.

The carve-out, like the B2B CGA carve-out, needs to be in writing. The CGA has been changed too (at s 43 CGA), so that both the CGA and FTA carve-outs must be "fair and reasonable," if they're going to work.

The FTA at s 5D lists factors in deciding what is "fair and reasonable" namely all of the circumstances including:

- The subject matter of the agreement and its value;
- The respective bargaining power of the B2B parties and issues such as "take it or leave it" terms
- Whether either party was legally represented;

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- Whether the supplier knew that, but for the provision in the contract, certain of the relevant FTA provisions would have been breached (notably that excludes s 9).

***Fujitsu v St Albans Council*:³ a case study for how the new regime might apply**

This case on UK law as to rejecting unfair contract terms in B2B, is a good example of how the “fair and reasonable” assessment might play out under the FTA. It shows that despite a focus on protecting big suppliers dealing with smaller players, even big customers can get suppliers terms knocked over.

The city council contracted Fujitsu to provide a system for use in collecting rate-like charges from ratepayers.

Due to a fault in the software, the charge was set too low. St Albans sued Fujitsu under the contract to recoup the under-recovery. Fujitsu said that its liability was limited by a LOL clause in its contract. However, St Albans claimed that the term was unreasonable and should not be able to be relied upon, under the UK unfair contract term legislation, applicable to B2B transactions. Reasons for this included facts that are also commonplace in deals between multi-national and national ICT vendors, and NZ larger corporates, including the public sector.

Those reasons included:

- Fujitsu was a multi-national with large assets and far higher insurance cover than the LOL cap (compared with St Albans Council, which would have had to increase rates and/or reduce services due to the error);
- Fujitsu was the one making a profit;

- Fujitsu was in a strong bargaining position. While St Albans had raised the LOL cap during negotiations, they decided not to pursue that further, as Fujitsu had said that they would have to escalate the issue to their in-house lawyers. If that happened, St Albans wouldn't be able to meet its timetable for implementation of the charge, and so it had no realistic option but to accept the LOL. In our experience, such time pressure and variations on that theme are commonplace (although some managers prefer to avoid bringing in the lawyers!);
- Fujitsu didn't offer consideration such as a reduced price to accept the limitation;
- St Albans had no opportunity to get better terms elsewhere, as other suppliers had similar LOL terms.

The Court of Appeal confirmed that the LOL clause was not fair and reasonable under the UK legislation, including for the bullet pointed reasons. Given the sort of facts outlined above, which often arise on NZ ICT deals, this is a useful case study to show the sorts of issues that may arise when interpreting and applying the new NZ legislation. For example, sales to large corporate and public sector entities will not necessarily be outside the NZ regime, striking out FTA disclaimers. ICT suppliers will need to look closely at their contracts and sales processes.

This new regime can also be an ICT B2B carve-out (not B2C) for the new unsubstantiated representation provisions, to which we now turn (the same rules apply e.g. as to fairness and reasonableness, including whether the supplier knew that the representation was unsubstantiated (s 5D(4)(e) and 12A).

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We've outlined more detail in our articles:

- *Case study: Limiting ICT B2B liabilities under new NZ law*
- *New law from June 2014: Reducing exposure under NZ B2B supply contracts*
- *Summary: Fair Trading Act and Consumer Guarantees Act Changes*

1. This paper provides a high level description of what can be a complex area: for example, *David v TFAC Ltd* [2009] NZCA 44; [2009] 3 NZLR 239 shows that the Courts may sometimes allow a contract to override FTA liability in B2B contracts, depending on the facts and the contract terms.

2. *RACV v Unisys* [2004] VSCA 81.

3. [1996] 4 All ER 481.

We welcome your feedback on this article and any enquiries in relation to its contents. This article is intended to provide a summary of the material covered and does not constitute legal advice. We can provide specialist legal advice on the full range of matters contained in this article.

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