Read a PhD thesis? Or online terms?

Speed read

Some recent research shows that online Ts and Cs can be so long that comparing 3 or 4 of them when selecting a product – to see what price and product combination, with legal terms – best suits the consumer, can involve reading as many words as a PhD thesis. That's never going to happen.

Plus, how many people actually open the online Ts and Cs before clicking accept?

Less than 2 per 1000.

In our article *The Economist and five bucks off a bottle of wine,* we overviewed Lord Currie's paper about the implications of behavioural economics for competition law and regulation.

Expanding the story, what does behavioural economics tell us about the law more broadly, such as the new unfair contract terms regime and the contract law question of incorporating terms in contracts (the so called Lord Denning Red Hand test)? Those are the two examples that we have in our April article, *Air NZ's opt-out insurance charge an example of two big online contract issues*.

And what can suppliers do to reduce risk?

Will the courts increasingly use behavioural economics in their analysis (something it already does such as in the Fair Trading Act example about so-called marketing webs we gave in our earlier article *Carpet Manufacturers' spat clarifies marketers' legal obligations*.

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The Detail

Taking the online Ts and Cs example from the behavioural economics world, Lord Currie points to research by the Norwich based *Centre for Competition Policy* around how many consumers actually read online Ts and Cs. Of the less than two per thousand, only a fraction read the actual terms.

That's not surprising, for, as he notes, the Ryanair online terms run to 18,000 words and the HSBC online terms run to 29,000 words. This length of online terms is a widespread issue as our article *To read or not to read… online Ts and Cs. Or Hamlet* shows.

For the so called rational consumer to compare the Ts and Cs of 3 or 4 competitors could involve the equivalent of reading a PhD thesis. Actually, not reading such Ts and Cs is the predictably rational thing to do.

Lord Currie's speech and the Centre for Competition Policy's research was

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on marketplace competition. As he said about such long online Ts and Cs:

> *"That most definitely puts paid to the so-called 'informed-minority' hypothesis of the law and economics literature that a minority of informed consumers can act as a discipline on the terms and contracts of firms, to the benefit of all. My hunch is that those who actually read and comprehend the terms and conditions are a vanishingly small number of any company's potential customer base, and are not amongst those they seek to woo, so that they are irrelevant to the marketing strategy of the company."*

But what of the same points when applied to broader legal issues, of which the unfair contract terms regime and the law as to incorporation of terms (particularly onerous terms) in contracts? We think the court will go even further as circumstances evolve to have regard to surveys, research and evidence such as the reality that few read Ts and Cs. It's the sort of thing that the courts already do (the marketing web concept under the Fair Trading Act being one example).

As to unfair contract terms, a key component under the new regime is that a term is more likely to be unfair if it is not "transparent". For a term to be transparent, it must be in reasonably plain language, legible, presented clearly and readily available to the party affected by the term (s2 Fair Trading Act). Even before addressing issues such as intelligibility/ legal gobbledegook, multiple thousand word Ts and Cs would be at real risk of failing the transparency test, even more so in view of the conclusions in the research noted above.

Then there's the issue as to incorporation of terms in contracts, an issue all contract law students learn about as part of car park ticketing cases and Lord Denning's Red Hand test as to onerous terms. With research like the above, ultimately finding its way to court in one way or another (survey evidence, or otherwise), this looks like an increasingly risky area for suppliers.

One point yet to be nailed is whether the 'click accept' of Ts and Cs is equivalent to hand signed acceptance. The latter is treated differently from terms incorporated separately into contracts.

This issue around unfair contract terms and also incorporation of terms in the contract show that, in many ways, drafters of online contracts should be much more concerned about whether or not the terms are binding in the first place, than panel beating the terms themselves. To be safest, the supplier would draw careful attention to important terms. But the supplier in practice can only do that as to some.

So, the supplier faces the question in deciding what to do: what is most important to do to protect my interests?

Wigley+Company
PO Box 10842
Level6/23 Waring Taylor Street, Wellington
T +64(4) 472 3023 E info@wigleylaw.com
and in Auckland
T +64(9) 307 5957
www.wigleylaw.com