Review of the Australian Consumer Law

Submission by

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Unfair Contract Terms and the Maritime Provisions in s.28(1)-(2) of the ACL

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1. Introduction

1.1. The Review Questions

The Review's Interim Report addresses the issue of unfair contract terms in section 2.4. In particular, Consumer Affairs Australia and New Zealand (CANZ) seeks views on this overarching question:

> • Do any issues require legislative intervention, or is the status quo or a non legislative approach appropriate?

I am conscious of the already wide number of options which are available for consideration, but I wish to address an issue that has not previously been highlighted by the Interim Report or stakeholders, and which is not within the list of options canvassed in the Interim Report.

I apologise for submitting a lengthy memorandum on one section of the ACL but, in my opinion, some reconsideration needs to be made of the maritime provisions now contained in Part 2-3, s.28 of the ACL.

1.2. The problem

In summary, s.28(1)-(2) prevent a court from applying the Unfair Terms protections, in the ACL Part 2-3, to consumers (and now small businesses) where the contracts concern listed aspects of maritime law. For example, a consumer who hires a boat for a trip or a holiday may be faced with the sort of exclusions that would be forbidden in a car hire contract. The same problems with exclusions would be faced by a small boat owner who had his boat towed to a repair yard, when wide exclusions in road breakdown contracts would almost certainly be invalid.

While the UK had made these exclusions *inapplicable* to contracts with consumers, s.28(1)-(2), in Part 2-3 of the ACL, is much more lenient towards shipowners. It is unclear why these wide maritime protections for shipowners exist in the ACL; this is especially so as the UK legislation on which they are apparently based specifically accepted that consumers (but not businesses) should be able to rely on the unfair terms protections in relation to such maritime contracts.

Any review of the ACL needs to consider more closely the justifications for making the ACL protections for shipowners wider than the UK (the home of maritime law).

1.3. My expertise

I write as a maritime lawyer of some experience; I have attached a short CV as an Appendix to this submission.

I was also the rapporteur for the British Maritime Law Association (BMLA) Sub-Committee on Unfair Contract Terms which in 2003 made a formal response to the English Law Commission's Consultation Paper No 166: "Unfair Terms in Contracts".[1]

[1] See further, 3.2.2, below.

The submission is written in my personal capacity and not on behalf of the Maritime Law Association of Australia and New Zealand (MLAANZ), of which I am a member.

2. The content of s.28(1)-(2) of the ACL

I am not aware of the detailed drafting history of s.28(1)-(2), but understand that the provisions had been included at a relatively late stage of drafting with the laudable aim of seeking to avoid conflicts with established maritime law.[2]

Section 28 provides

> *(1) This Part does not apply to:*
>
> *(a) a contract of marine salvage or towage; or*
> *(b) a charterparty of a ship; or*
> *(c) a contract for the carriage of goods by ship.*
>
> *(2) Without limiting subsection (1)(c), the reference in that subsection to a contract for the carriage of goods by ship includes a reference to any contract covered by a sea carriage document within the meaning of the amended Hague Rules referred to in section 7(1) of the Carriage of Goods by Sea Act 1991.*
> *(3)…*

The effect of the provision is that the maritime contracts listed cannot be challenged using the ACL Part 2-3 unfair contract terms powers. This exclusion of the powers applies both to business-consumer contracts and those entered into between businesses and small businesses.

It follows that the claimants, who wish to challenge what might otherwise clearly be 'unfair' terms under the ACL, will have to rely on the common law rules which the ACL largely supersedes, or on other provisions of the ACL.[3]

3. UK's Unfair Contract Terms Act 1977

3.1. Drafting origins of s.28(1) in UK law

It is apparent that the ACL s. 28(1) provisions partially mirrored certain exclusions in the UK's Unfair Contract Terms Act 1977 (UCTA) Sched 1, paras (2)-(3). These provided:

> *Schedule 1. Scope of Sections 2 to 4 and 7*
> …
> 2. Section 2(1) extends to--
> (a) any contract of marine salvage or towage;
> (b) any charterparty of a ship or hovercraft; and
> (c) any contract for the carriage of goods by ship or hovercraft;
> but subject to this sections 2 to 4 and 7 do not extend to any such contract except in favour of a person dealing as consumer.
> …

The drafting is rather elliptical, but sections 2 to 4 and 7 were the core provisions of UCTA which allowed the courts to control unfair terms, including exemption clauses. Section 2(1) was a provision which outlawed completely any clause which purported to exclude liability for injury and death.[4] The effect of Sched 1, para (2) of the UCTA was to remove the maritime contracts listed in paras (a)-(c) from the general review powers of the courts, eg for negligent breaches.

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[2] See also 4.1, below.

[3] Such as those dealing with misleading and deceptive conduct, unconscionability or abuse of competitive position. The latter might be particularly relevant to towage contracts where near monopoly conditions operate in many ports and where the standard clauses are notoriously fierce.

[4] Incidentally, it seems somewhat curious that there is no equivalent express provision in the ACL Part 2-3.

We have no need to follow UK law, but the only reason to look at the 1977 legislation (and its successors) is because (i) it seems to have been a main source of s.28(1); and (ii) the UK has traditionally been a strong supporter of freedom of contract in maritime law, yet both the UK Government and the shipping and insurance industry accepted that consumers needed protection in maritime contracts.

3.2. Subsequent developments in UK law

In essence, the UK position has remained largely unchanged, ie that consumer contracts are not subject to any maritime exceptions, while business contracts are, although it is significant that the form of the legislation has changed.

The rather long history in the remainder of 3.2, below, is provided by way of completeness to assist in contrasting the development of the UK and Australian legislation.

3.2.1. EU Council Directive on unfair terms

The UK enacted the Unfair Terms in Consumer Contracts Regulations 1999 to give effect to the EU Council Directive on unfair terms in consumer contracts (Council Directive 93/13/EEC). [5] I note that the ACL Part 2-3 is heavily influenced by the Directive. The Directive does **not** allow for any category of "excluded contracts", including maritime contracts, in respect of consumer contracts. The Directive does, however, have a typical saving provision for existing legislation, although it is worded rather poorly and is contained in Recital 13 and Art 1(2).

> 13. Whereas the statutory or regulatory provisions of the Member States which directly or indirectly determine the terms of consumer contracts are presumed not to contain unfair terms; whereas, therefore, it does not appear to be necessary to subject the terms which reflect mandatory statutory or regulatory provisions and the principles or provisions of international conventions to which the Member States or the Community are party; whereas in that respect the wording "mandatory statutory or regulatory provisions" in Article 1(2) also covers rules which, according to the law, shall apply between the contracting parties provided that no other arrangements have been established; (emphasis added)

Article 1(2) of the Directive gives effect to this intention and is more specific:

> Art 2. The contractual terms which reflect mandatory statutory or regulatory provisions and the provisions or principles of international conventions to which the Member States or the Community are party, particularly in the transport area, shall not be subject to the provisions of this Directive. (emphasis added)

The Directive concept of "reflecting" a Convention is rather unclear[6] and difficult to apply, but the intention is reasonably clear; ie to avoid duplication and conflict with existing provisions.

3.2.2. UK Consultations to revise its unfair terms legislation

The UK Law Commissions proposed to unify the unfair terms legislation then in UCTA 1977 and the 1999 Regulations. The BMLA Sub-Committee in 2003 responded to that consultation and expressly accepted that consumers needed protection in maritime contracts (ie as in UCTA 1977), but reiterating the commercial need for the maritime exceptions to exist for business contracts. I would

[5] The EU Directive "does not permit exemption of these types of consumer contract": English Law Commission Report Reports No. 292, p 195.
[6] See Gaskell, *Bills of Lading: Law and Contracts* (LLP, 2000), paragraph 1.24.

echo the submissions made then by a Sub-Committee composed of lawyers and all sides of the shipping and insurance industries:

> The maritime industry is highly competitive, that clauses operate to allocate risks as part of the price, that certainty of interpretation is regarded as being of crucial importance, that standard contracts are often created after international negotiation and that the market is content with the use of standard terms. Where there have been concerns about unlimited freedom of contract, these have been settled internationally (e.g. through the Hague Rules 1924 and Hague-Visby Rules 1968) and the market would generally prefer that international solutions be sought. Indeed, in the case of towage contracts, the market has itself produced a range of forms (see e.g. the work of BIMCO in producing ocean towage contracts such as Towcon and Towhire) which offer choice or balance where the parties want it. The BMLA is aware that a status quo recommendation may be stigmatised as conservative, but is of the view that contractual change and uncertainty often results in legal costs.

The Law Commissions' Report in 2005[7] was not taken forward at that time, but was reconsidered in 2013.[8] They recommended no change for the position of consumers, ie that that the Directive should govern, but it was clear that some redrafting was necessary if the 1999 Regulations and UCTA were to be rationalised.

In respect of controls over *business contracts* it recommended

> 4.82 In the Consultation Paper we provisionally proposed to maintain the existing categories of excluded contract in respect of business contracts (although we were, at the time, proposing to implement controls similar to those recommended for consumer contracts to business contracts as well). The majority of consultees who responded on this issue agreed with our position on excluded categories.
> 4.83 Since we are not attempting to extend the amount of regulation over contracts between larger businesses, we believe that those categories of contract expressly excluded from the operation of UCTA should continue to be exempt.
> 4.84 We recommend that those categories of contract currently excluded from the operation of UCTA, should continue to be exempt from controls over unfair contract terms. [footnotes omitted]

It also recommended that terms that are (a) required by an enactment or rule of law;(b) required or authorised by an international convention; or(c) required by a competent authority should continue to be exempt under the new legislation.[9]

Following further consultations, the UK has now consolidated its consumer legislation in the Consumer Rights Act 2015 (UK), while reserving UCTA 1977 for business-business contracts.

3.2.3. Consumer Rights Act 2015 (UK) and consumer contracts

The UK has completely removed all reference to the maritime exemptions as far as business-consumer contracts are concerned: see now the Consumer Rights Act 2015 (UK) Sched 4, para 26. As I understand the Act, this means that maritime service contracts to consumers are treated as any other service contracts under Part I (Consumer protection), Chapter 4 (services). Maritime contracts are not excluded from Chapter 4 (see s.48).[10] Section 53 is a standard saving for other legislation.[11]

[7] English Law Commission Report Reports No. 292.
[8] "Unfair terms in consumer contracts – advice to Department of Business Innovation and Skills" (BIS), The Law Commission & The Scottish Law Commission, 2013.
[9] Para 8.18. This was reproduced in the Darft Sched 3 of a Bill annexed to the Report. Again, this only applied to business contracts.
[10] S.48 reserves a power to exclude certain services by Statutory Instrument.

Obligations under Chapter 4 (equivalent to the statutory obligations in the ACL Part 3-2) cannot be excluded by the business: see s.57.

Part 2 of the Consumer Rights Act 2015 now deals with unfair terms (in consumer contracts), and is broadly equivalent to the ACL Part 2-3. It rationalises and replaces the consumer provisions in UCTA and also the 1999 Regulations (while still giving effect to the EU Directive). Again, the maritime "excluded contracts" exemptions do not appear. In effect, any unfair terms in maritime contracts with consumers fall to be treated as any other contracts.

The issue of maritime contracts is then simply treated as an aspect of how to deal with existing legislation. In 2013, in advice to the Department of Business Innovation and Skills" (BIS), the Law Commissions again recommended that the Directive Art 1(2) should be directly reflected in UK law, and the result now appears in s.73 of the Consumer Rights Act 2015 (UK).

> *s. 73 Disapplication of rules to mandatory terms and notices*
> (1) This Part does not apply to a term of a contract, or to a notice, to the extent that it reflects—
> (a) mandatory statutory or regulatory provisions, or
> (b) the provisions or principles of an international convention to which the United Kingdom or the EU is a party.
> (2) In subsection (1) "mandatory statutory or regulatory provisions" includes rules which, according to law, apply between the parties on the basis that no other arrangements have been established.

3.2.4. Consumer Rights Act 2015 (UK) and business contracts

Business-business contracts in the UK are now regulated by UCTA as amended. Sched 1 of UCTA is now preserved for such contracts (and all reference to *consumer* contracts has been removed): see the Consumer Rights Act 2015 (UK) Sched 4, para 26. In other words the maritime contracts are still excluded in business-business contracts (except in so far as there is an attempt to exclude death or injury claims).

There have been long debates in the UK about whether there should be special provisions for small businesses,[12] but these have not been taken forward as far as I am aware. As I understand the position, there are no equivalent provisions to those introduced in Australia by the Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Act 2015 (Cth)).

3.2.5. Conclusions on UK developments as relevant for Australia

This overlong summary of the UK position has only been undertaken to show that the UK has moved on from using the concept of maritime "excluded contracts" in its legislation relating to contracts with individual consumers.

It has continued its position that there should be no special maritime exclusions in consumer contracts, but has simple provisions preserving existing legislation.

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[11] "s.53 Relation to other law on contract terms: (1) Nothing in this Chapter affects any enactment or rule of law that imposes a stricter duty on the trader. (2) This Chapter is subject to any other enactment which defines or restricts the rights, duties or liabilities arising in connection with a service of any description."
[12] As recommended in English Law Commission Report Reports No. 292.

In business to business contracts it has preserved the maritime "excluded contracts", but has apparently made no provision for small businesses.[13]

4. The policy choices in relation to s.28(1)-(2) of the ACL

4.1. Justifications for maintaining ACL s.28(1)-(2)

There was a brief reference to the reason behind s.28(1)-(2) in the Explanatory Memorandum of the Trade Practices Amendment (Australian Consumer Law) Bill 2009 (paras 2.91 to 2.99).[14]

> 2.95 These shipping contracts are already subject to a comprehensive legal framework (nationally and internationally) that deals with contractual terms in a maritime law context.

As a maritime lawyer, I recognise that it was entirely appropriate when drafting Part 2-3 that there was sensitivity about not disturbing maritime law and practice. My simple submission is that s.28 goes further than was necessary, especially in relating to towage and charterparties where there is certainly no real "comprehensive [*legislative*] framework (nationally and internationally)".

It may be that the enactment of s.28(1)-(2) occurred when there was no time for a full analysis and there was an understandable need to ensure that there was no conflict with existing legislation or contracts which reflected international practices. It may, like many maritime law issues, have seemed so specialised that it was easier to put it in the 'too hard' basket and have the wide exclusion now in s.28(1).

It could be argued that there have been no apparent problems in relation to s.28, so no amendment is needed. Of course, it is notorious that problems faced by individual consumers may not be apparent to regulators. My view is that it is necessary to look at the provisions on their merits in order to protect weaker parties form potentially unfair contracts.

It might also be said that the marine contracts listed are likely to involve persons of wealth, eg owners of superyachts, who do not need protection. I consider that it is unlikely that this has ever been a justification for the provisions in s.28(1)-(2) and it would be inconsistent to have different rules for luxury cars, or planes. Issues such as this can properly be addressed by the internal provisions of Part 2-3, ie as to whether there is an "imbalance" or a "legitimate interest" to include particular terms.

The Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Act 2015 of the Part 2-3 extends protection as from November 2016 from contracts made by individual consumers to "small business contracts". This makes a policy reconsideration of s.28(1)-(2) a little more complicated. I address that issue mainly in 5.2, below. I will primarily consider the application of s.28(1)-(2) in relation to individual consumers.

4.2. Towage and charterparties

In relation to the specific list in the ACL s.28(1), there is no Australian legislation of which I am aware which deals with towage or charterparties. Nor is there an international convention dealing with

[13] Cf 5.2, below.

[14] This reasoning was referred to in para 2.34 of the Explanatory Memorandum to the Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Bill Act 2015.

these subjects.[15] It is convenient, therefore to group these contracts together and to deal with them first.

4.2.1. Towage contracts

Most standard from towage contracts offered by the industry contain the widest exclusion and indemnity clauses that I have ever encountered. The UK Standard Conditions for Towage (and other services) are widely used in Australian ports and are perhaps the prime example. In some circumstances the owner of a ship or craft being towed might face a complete exclusion for negligent damage to the ship or craft, while at the same time being liable to pay an indemnity for damage to the tug even if caused by the negligence of the tug's crew. Other standard contracts (eg TOWCON) provide for a knock for knock liability regime, ie each ship pays for its own loss, whoever was at fault.

In the context of commercial shipping contracts, the shipping industry (including liability insurers) recognises that contracts with such wide exclusions and indemnities are actually beneficial in that they reduce litigation costs and risks can be covered though insurance.[16]

In the context of individual consumers, there can be no doubt that towage contracts are potentially very unfair. As noted before, this puts such consumers in a far worse position than those receiving car breakdown and towage services. The UK never removed such marine towage contracts from the protection in UCTA 1977; the BMLA sub-Committee in 2003 accepted that consumers needed protection, and the repeal of the UCTA consumer provisions in the 2015 Act means that UK towage operators must defend their terms against consumers under the ordinary regime for unfair terms (originally in the 1999 Regulations, now under Part 2 of the 2015 Act).

I can see no basis for maintaining the current complete exclusion in the ACL s.28 of towage contracts – especially those made with individual consumers. The introduction of the small business provisions in 2016 (by the Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Act 2015 (Cth)) presents slightly different issues, and I address these in 5.2 below.

4.2.2. Charterparties

Again, there is no legislation "(national or international)"[17] that applies to charterparties. Anglo Australian law on charterparties is entirely a creature of case law. There is no single definition of charterparty in Australian (or English) law, but the term would normally encompass the three types of contract. Two of these are hire contracts: a bareboat (or demise) charter is a hire of an empty ship, ie without crew (equivalent to hiring a car from Avis); a time charter is a hire of a ship with a full crew supplied by the owner (like a chauffeur driven car hired by the day to go anywhere. The third type of charter, a voyage charter, is actually a "contract for the carriage of goods" and so may also fall within s.28(1)(c).

As far as consumers are concerned the most common type of charter which would fall within s.28(1)(b) is a bareboat charter, ie where a holiday maker charters a yacht for a week in the Whitsundays, or possibly even where a person hires a motor boat for a few hours on the Noosa

[15] Cf the 2009 justification in the Explanatory Memorandum referred to in 4.1, above.
[16] See the BMLA quotation in 3.2.2, above.
[17] Cf the 2009 justification in the Explanatory Memorandum referred to in 4.1, above.

River.[18] I say "possibly" because I suppose it is possible that a judge might interpret "charterparty" as being restricted to commercial hires, but that is difficult given the original placing of charterparties in Part 2-3 (which only dealt with individual consumer contracts in the first place). Any problems of defining "charterparty" are best left to the courts and I do not recommend any attempt at an ACL definition.

Standard form commercial charterparties are the paradigm example of contracts with wide exclusion clauses which, for over 150 years, have been upheld by common law courts in classic freedom of contract style. I do not have the resources to be able to conduct a survey of leisure boat hire contracts in Australia. I am frankly puzzled, though, as to why leisure hire of boats by consumers should have been excluded completely from Part 2-3 when other leisure contracts would not be so excluded. As already indicated, the UCTA 1977 (UK) always included consumer (ie non-business) charterparties in the basic protections.

The commercial shipping industry has long accepted the use of standard form charters as a means of risk allocation, and there is absolutely no need, in my view, to protect commercial charterers. This presents a potential problem if s.28 is repealed, as that would mean that small business contracts to charter ships could also now be subject to Part 2-3. This might means that standard forms widely accepted in the industry could be struck down, but that is inherent in the general position that prevails since November 2016, once small businesses had extended to them the protections of Part 2-3.[19]

It may be that a small business charters a small coastal ship for the carriage of, say, gravel for a building project. Such a small business may be unaware of many of the liabilities which might arise in maritime law, eg for demurrage or general average, or (in some circumstances) express or implied indemnities that might be payable to the owner, eg for damage to the ship. While these risks may be familiar to regular commercial charterers (who may also carry P&I insurance against many risks), the small business may be completely unprepared for such risks in a contract which is a 'one-off' for it. This is a classic example of type referred to in the Explanatory memorandum to the Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Act 2015. Such "contracts are often offered on a "take it or leave it" basis; small businesses "lack the resources to understand and negotiate contract terms"; and "small businesses often lack in-house legal expertise", especially in the area of maritime law.

Of course, there are already two reasons why standard clauses might not be struck out. One is that the new s.23(4)(c) definition (with $300,000 or $1,000,000 price caps) would means that most commercial charters would fall outside Part 2-3; the other is that s.24(1)(b) allows the owner to argue that a standard exclusion was normal in the trade and was reasonably necessary to protect its legitimate interests (including risk sharing).

[18] Assuming, of course, that the owner is a corporation for the ACL to apply. Such a restriction would not necessarily apply in State law, as I understand the position.

[19] Indeed, maritime lawyers have already been advising shipping companies that they need now to consider Part 2-3 in relation to the land legs of contracts for the carriage of goods by sea: see 4.4 below.

4.3. Salvage

Salvage law might possibly apply to individual consumers where eg a person's yacht or motor boat is in danger is saved on the basis of a salvage contract.[20]

Salvage is governed by existing Australian statute. The concept of salvage has undergone some changes as a result of the Salvage Convention 1989. The Convention is enacted in Australian law via the Navigation Act 2012, Chapter 7, Part 3. In particular, the Convention created a variety of new liabilities including those under Art. 14 for special compensation for preserving the environment. Article 6 also allowed wide freedom of contract as a special incentive to salvors. Article 7 sets out an internal regulatory code for salvage contracts although it is in far less detail than Part 2-3.

> Article 7: Annulment and modification of contracts
>
> A contract or any terms thereof may be annulled or modified if:
>
> (a) the contract has been entered into under undue influence or the influence of danger and its terms are inequitable; or
>
> (b) the payment under the contract is in an excessive degree too large or too small for the services actually rendered.

On the basis of this provision, it is arguable that there is no need for Part 2-3 of the ACL to apply to salvage contracts. From my experience of the negotiation of the convention, I do not consider that the protections in Art 7 were meant to be exclusive; ie they do not in my preview preclude additional protections in national law. This is almost axiomatic as the 1989 Convention does not itself seek to regulate more general principles of contract law. If s.28 were to be repealed, though, I do not consider that this would create any conflict between the Navigation Act 2012 and the ACL; they would be complementary.

There is, though, some doubt about the precise meaning to be attributed to the word "salvage". The expression is not defined in the Competition and Consumer Act 2010, but it is arguable that to reflect the wording of the Salvage Convention 1989 (as enacted in Australia) it would be better to refer to "salvage, or salvage operations". The latter expression is defined in Art 1 of the Convention to be:

> (a) "Salvage operation" means any act or activity undertaken to assist a vessel or any other property in danger in navigable waters or in any other waters whatsoever.

It may well be that a court would interpret "salvage" and "salvage operations" to be largely synonymous, but I mention the point for completeness.

Standard salvage contracts such as the Lloyd's Open Form 2011 do not contain much that would ordinarily be subject to the ACL (e.g. exclusions or limitations), but the possibility that some other clauses might in future be covered means that the precise definition of "salvage" may need to be reconsidered. Moreover, a standard LOF might provide for arbitration in London.[21] The SCOPIC clause, which is typically agreed with an LOF, also shows that there may be more onerous provisions. But in my view, SCOPIC is unlikely to be relevant to individual consumer contracts.

[20] Note that a salvage claim does not require a contract to be agreed in advance and even when it is agreed it is normal to for any salvage reward to be assessed after the event (eg by arbitration).

[21] It seems unlikely that an Australian contractor would prefer such a venue for a small claim, but it is possible.

I might add that salvage contracts do not easily sit within the new s.23(4) of the ACL, as there is by definition no "upfront price" normally agreed – at least where an LOF is arranged.

On balance, I consider that there are enough protections built in to the salvage regime to make acceptable the continued exclusion of salvage contracts in s.28(1), even for consumers.

If salvage were to be deleted from the list (or there were a complete repeal of s.28(1)-(2)), there would need to be a saving provision for the Navigation Act. I am not sufficiently familiar with the intricacies of the Competition and Consumer Act 2010, eg Part XI[22] to be sure whether any existing 'savings' provisions might apply; I am not presently aware of any relevant ones.

4.4. Contract for the carriage of goods by ship

Contracts for the "carriage of goods by ship" involving consumers will presumably only arise when personal effects are being shipped, eg on immigration. Small businesses might have many more occasions to ship goods.

Contracts for the "carriage of goods by ship" do have existing Australian legislation which is applicable to them. In particular, there is the Carriage of Goods by Sea Act 1991 (Cth) (COGSA). This currently applies the modified (or Amended) Hague Rules, as referred to in s.28(2).[23] The Hague Rules were not designed to protect individual consumers, as such, but shippers of goods who were in a weaker position than carriers (eg Australian fruit exporters who were already protected in Australia in the early years of the 19th Century by our enactment of the equivalent of the US Harter Act).[24] The Rules only deal with loss of or damage to goods, and not other terms that might be found in a contract of carriage. In respect of loss or damage, the Rules provide a minimum standard of protection, but do allow carriers to rely on certain exemptions and limits of liability in Art IV. It is arguable that Australia might be in breach of the convention if it allowed consumers to try to avoid Art IV,[25] but this could be accounted for by a simple savings provision.

The ACL s.28(2)provision, though, is more than a mere savings provision; it reinforces the exclusion of the maritime contracts in s.28(1). I note again that the UK has persistently declined to exclude contracts of carriage by ship with individual consumers from the unfair terms protections. It relies on a simple savings provision to overcome any conflicts (eg to prevent a challenger to a term reflecting Art IV of the Hague Rules.

The expression "contract for the carriage of goods by ship" is not without definitional problems, [26] but the view of the BMLA in 2003 was that few problems had arisen so far in practice and that it was probably not worth tinkering with a definition that can sensibly be applied by the courts. Where multimodal or combined transport is concerned, there are questions as to how far the "contract for

[22] Such as s.131C, which relates to State and Territory law, or Part XI Division 2 for Commonwealth laws.
[23] The Rules have been extended to domestic carriage between States, as well as international carriage, but note the difficulty of application for wholly intra state carriage (Davies and Dickey, *Shipping Law* (4th ed, 2016) 216-7.
[24] I note that wider issues of reform of carriage of goods by sea law were considered by UNCITRAL which produced the Rotterdam Rules 2008 as an updated, more shipper friendly, version of the Hague Rules. Australia has not yet ratified this Convention.
[25] But Art IV appliers in any event as a matter of law, not as a term of the contract. There might be other terms, though, which related to loss or damage, possibly in relation to delay – which is a grey area under the Rules. Note also that the Rules do not apply to land carriage before and after sea carriage.
[26] See *Bills of Lading: Law and Contracts* paragraph 1.22. On combined transport bills see *Bills of Lading: Law and Contracts* paragraphs 8.30-8.31.

the carriage of goods by ship" can extend to periods when, for example, a container is loaded inland and then carried under a single contract which includes land-sea-land legs. The assumption in COGSA 1991 and the Hague/Visby Rules is that the latter do not normally extend to the period before loading and after discharge, although in some circumstances COGSA Sched 1A might extend to the period when goods are in charge of a carrier in a port.[27]

I consider that it would be possible to repeal s.28(1)(c), and to have a simple legislative savings provision; in effect the UK solution. I accept though, that it might be said that carriage by sea contracts with individual consumers will be fairly rare, and there are well established facilities to insure about which international removalists readily provide advice.

In relation to small businesses, I have already noted that the amended ACL will (subject to ACL s.63) possibly apply to aspects of the carriage contracts, eg the land legs of a single combined transport contract. As with towage contracts, above, it might be possible to apply Part 2-3 even to small businesses and let shipowners use the financial caps or "legitimate interests" provisions.

On the other hand, it may be argued that the established balances of interests in the Hague Rules, and the existence and availability of insurance (and advice from freight forwarders acting as agents), means that there is a much lower need to provide additional protection to small businesses.

5. Conclusions

5.1. Amendment or repeal of s.28(1)-(2) in respect of individual consumers

In my view, there is no justification for continuing to allow s.28(1)-(2) to prevent individual consumers from accessing the protection of Part 2-3 in respect of:

- Towage Contracts, and
- Charterparties

Any change for these contracts can be made without fear of any conflict with existing legislation.

As noted, there is already applicable legislation in respect of

- Salvage contracts (the Navigation Act 2012 (Cth))
- Contract for the carriage of goods by ship (the Carriage of Goods by Sea Act 1991 (Cth))

I also consider that it is not *necessary* to continue to allow s.28(1)-(2) to prevent individual consumers from accessing the protection of Part 2-3 in respect of these two categories of contract. Any repeal or amendment of s.28(1)-(2)[28] could simply contain a saving provision for the existing legislation (although probably drafted more simply and widely that the current s.28(2)).

A total repeal of s.28(1)-(2) in respect of individual consumers would simply mean that shipowners would have to rely on the s.24(1)(b) "legitimate interests" test if they wanted to rely on their

[27] Note however the exclusion in the ACL s.63.
[28] For the avoidable of doubt, there is obviously no need to repeal s.28(3) dealing with the constitution of corporations.

standard clauses.[29] I am not aware that this has produced any problems in practice in the UK (or indeed in the EU where the Directive applies generally).

I accept, though, that a case can be made for treating salvage and carriage contracts differently to towage contracts and charterparties, on the grounds both of the existing legislation and pragmatism.[30]

5.2. Amendment or repeal of s.28(1)-(2) in respect of small businesses

The logic of the Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Act 2015) is that small businesses should be subject to the same unfair terms regime as individual consumers. As already noted, this does not mean that the same terms would be affected in the same way between these two categories of claimants, as what might be unfair for an individual may not necessarily be unfair for an experienced small business. If shipowners were to lose the exclusions now in s.28(1), they would still be able to refer to the caps in the new s.23(4), and to the legitimate interests provisions in s.24(1)(b).

It follows that if s.28(1)-(2) were repealed completely for individual consumers (subject to a savings provision), the same result might logically follow for small businesses. – especially in relation to towage contracts and (possibly) charterparties.

I do consider, however, that there is arguably no need for small businesses to be protected in relation to carriage of goods by ship contracts;[31] and it might be said that there is an argument for proceeding cautiously in relation to the application of the maritime excluded contracts to small businesses, given the lack of experience generally with the Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Act 2015) and the existence of the ACL s.63.

On that basis, it would be possible to amend s.28(1)-(2) only in relation to individual consumers (as in 5.1, above). For what it is worth, that would seem to me to (broadly) harmonise Australian law with that in the UK.

I would, though, recommend that, if this course of action is adopted, a provision be inserted in the ACL to allow for the treatment of small businesses to be changed in the future (eg by statutory instrument) if experience indicated that they needed additional protection. I note that under s.12BL of the ASIC Act (as added by the Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Act 2015), a contract will not be covered by the ASIC's unfair contract terms protection where it is subject to an industry-specific law (legislation or regulation of the Commonwealth, a state or a territory) that has been deemed enforceable and equivalent and thereby exempted from the protection. It was explained that:

[29] The recent decision of the UK Supreme Court in *ParkingEye Limited v Beavis* [2015] UKSC 67 [89-114], on the interpretation of the EU Directive, indicates that this is not a fanciful argument.
[30] See also the possibility referred to on fn 32, below, of reserving a power in the future to remove the salvage and carriage exclusions.
[31] See 4.4, above.

> "This regulation-making power allows the Government to limit the operation of the ACL to ensure that the unfair contract term protection does not duplicate protections contained in another law."[32]

I wonder if something similar might be extended to the ACL in respect of the shipping contracts and small businesses.

Appendix: Nick Gaskell – summary CV

I am a Professor of Maritime and Commercial Law at the TC Beirne School of Law, The University of Queensland and a member of the School's Marine and Shipping Law Unit (MASLU). Prior to joining UQ in 2009, I worked for some 33 years at the Institute of Maritime Law, University of Southampton. I am a UK qualified barrister, and am still an Associate Tenant at Quadrant Chambers (London), one of the leading maritime law sets of chambers.

I have had considerable experience of the negotiation of international maritime law conventions. For about 15 years, I represented an NGO (and the UK) at the International Maritime Organisation's Legal Committee. In particular, I participated in IMO Legal Committee and diplomatic conferences which resulted in international maritime law conventions, including the Salvage Convention 1989.

My work in international maritime law was recognised when I was elected a Titulary member of the Comité Maritime International (CMI) in 2002. I am an active member of the Maritime Law Association of Australia and New Zealand (MLAANZ), where I have utilised my experience as a long term member of the Executive of the British Maritime Law Association (BMLA), as well as having served on many of its sub-committees.

I have taught maritime law to governments, practitioners and students within the maritime legal and shipping professions both within Australia and internationally and have authored/edited 7 books, 41 book chapters and over 50 articles. My research covers salvage, towage, and the carriage of goods by sea (including charterparties), all of which are referred to in this submission.

[32] Para 2.30 of the Explanatory Memorandum of the Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Bill 2015. If s.28(1)-(2) were not repealed in total (in respect of individual consumers, because of the existing legislation referred to in 4.3, 4.4, above), the equivalent regulation making power under s.12BL might be used in relation to the salvage contracts and contracts of carriage with consumers.