

Contract law online essay

[Business](#), [Customers](#)



Introduction

This paper is going to examine the extent to which there is clear certainty and clarity in the establishment of terms of contract used in transactions completed online. Therefore, the focus will be on the concept of use and incorporation of terms through notice and signature under Australian Law. It will also cover any Commonwealth or NWS statutory provisions that related to e-commerce.

The terms browsewrap and clickwrap gained popularity in several US court decisions, which saw the establishment of contracts online. Shrinkwrap licenses gave rise to the terms. The shrinkwrap licenses on the other hand came up during the packaging of software 1 boxes. A common clickwrap agreement presents an internet user with the terms of using a website, on a scroll box or on a page. In this agreement, the user has to click on a button. This button to be clicked writes words or says in a box, “ I accept.” These words imply that the user can now undertake a desired activity, for instance downloading electronic files or buying goods from the website. On the other hand, a browsewrap agreement has terms in the website, usually through a hyperlink. These terms do not need an active assent expression before carrying out activities like browsing on the site (Helewitz, 2010).

Several cases have maintained the enforceability of the terms regarding clickwrap. In one of the cases in America, that involved *Scarcella v America Online*⁵, the wording used on the website gave the acceptor positive encouragement not to go through and read the terms of the contractual agreement before indicating assent. The court’s decision was that the user

had done something that was perilously next to deceit. The court also refused to affect a forum selection clause. The internet user was disadvantaged significantly by this (Elliott & Quinn, 2011).

As far as browsewrap and clickwrap contexts are concerned, *Specht v Netscape Communications Corp*⁷ was the important case that led to the enactment of law. This case made a clear distinction between the enforceability of browsewrap and clickwrap terms⁸. Two software programs in this case, smartdownload and communicator were offered on Netscape's website free. In order to download Communicator program, an internet user was given a scrollable text containing license terms. The user could only download the software after clicking a " yes" button. The " yes" button in this case indicated assent. This is a typical clickwrap agreement. According to the court, when there is an existence of notice indicating contractual terms for online contracts, the notice must be conspicuous (Elliott & Quinn, 2011).

At the same time, the consumer is required to unambiguously manifest the assent. The court decided that the enforceability of clickwrap agreement that governed the use of communicator had no applicability in this case.

SmartDownload on the other hand had terms, which governed it. These terms or lack of them were relevant. Consequently, to get SmartDownload, internet users were required to click on a button written " download" By doing this, purported terms that were applicable to program download were displayed through a hyperlink. This hyperlink was only available upon scrolling down until the user get to the next screen, which was " after" the button. Therefore, to view the arbitration clause, one had to scroll through

several screens. Therefore, the court held that there was no indication of assent when the user clicked on “download” button (Smith, 2002).

The court held that because the user did not read the agreement before assenting, there was no way a contract could exist unless there was a clear and conspicuous notice. In other words, in a situation where the nature of terms is not clearly contractual, while the notice is not brought to the internet users, then there is no contract. This American contractual position is identical and similar to fundamental Australian contractual principles.

In order to enforce browsewrap terms in US and Australia, there must be existence of obvious assent. This can be reinforced by the Specht refusal of the terms of SmartDownload browsewrap. Therefore, there must be an existence of sufficient notice of the contractual terms, which can be done by underlining or indicating the terms using a different striking colour, for the contractual agreement to be enforced (Smith, 2002).

As far as sufficient notice is concerned, the red hand rule comes into play. Consequently, the red hand rule refers to an unfair contractual term that is printed in ink. According to Lord Denning MR, who coined the term, the best way of giving a contractual notice are that of using red ink to print the notice. The printing is also done in such a way that the red hand points to the notice being printed. If not red hand, something that is startling should be used. Various cases have been heard regarding the red hand rule (Adams, 2004).

MacRobertson Miller Airline Services v Commissioner of State Taxation (WA).

In Australia, Jacons J. made an important suggestion regarding the case involving MacRobertson Miller Airline Services v Commissioner of State Taxation (WA). In his suggestion, he claims that in case an unreasonable clause is added in contract terms, in this case an unsigned or printed airline ticket, that are less likely or that cannot be read, then that condition cannot be acceptable in any case. In addition, there was a High Court Case involving Oceanic Sun Line Special Shipping Company Inc. v Fay. In this case, Brennan J. refers to Thornton's case and claim that various steps may be required to bring an exception clause to the notice of the passenger (Weise, 2004). These steps are more important especially while referring to an unusual clause. It should be stressed however, that Brennan J also argued that in case a passenger appends his or her signature. This means that he or she binds himself or herself, to the contract terms of the carriage having a clause that exempts the carrier from being liable for loss that arise out of the carriage, it is unreasonable that the passenger did not take time to see the contract's contents. From the above statement, it is clear that His Honor was distinguishing between unsigned and signed documents. Therefore, the rule that relates to reasonable notice and hence the hand rule is not applicable to signed documents (Smith, 2002).

LeMans Grand Prix Circuits Pty Ltd v Iliadis18 (Le Mans)

The red hand rule was considered in Victoria by the Court of Appeal during LeMans Grand Prix Circuits Pty Ltd v Iliadis18 (Le Mans) case. In this case, Iliadis had gone for a promotional event at the go-kart track of the

defendant. In the function, he was requested to sign a form titled ' TOHELP US WITHOURADVERTISING'. Believing that the form was allowing him to drive a vehicle, which was faster, Iliadis signed the form. He also believed that the defendant used the form for marketing purposes. In the article, an exemption clause that relieved the defendant from personal injury liability existed.

Therefore, it is only in a situation where there is no signing of a contractual document that a new rule applies. In this new rule, the party that relies on the terms of the document must come up with a sufficient notice or reasonable evidence. Therefore, according to Batt JA judgment the Inferfoto case was not applicable since there was no signing of the document.

Therefore, in brief, the requirement of the red hand rule and reasonable notice is not applicable to signed documents (Koffman & Macdonald, 2007).

In Australia, it is not expected to find online contracting being treated as Australia's law sui generis area. According to the early indicators, Australian tribunals and courts are likely to use established principles regarding contract law in establishing the enforceability of treaties concluded partially or wholly in cyberspace. Considering the general contract law principles, there is incorporation of terms into an agreement. By assenting to those terms, it means that parties are accepting to be bound by the terms. Consequently, the incorporation of express terms has to be done by reference, by prior dealing, by notice or by signature (Michael 1993). The general law guiding signed contracts as it is in Australia can be said briefly as- a signature can be used to incorporate a term irrespective of whether the party against whom the term will be operating reads the

contract or knows of its content or existence (Helewitz, 2010).

In *L'Estrange v Graucob*²² case in UK, the court's decision was that by signing a contractual document, the knowledge of the contractual terms needs not to be known. The Australian High Court adopted the decision in *Toll v Alphapharm*²³ case. According to some commentators in Australia, it is likely to enforce clickwrap terms in Australia based on notice²⁴ instead of signature. However, it seems no good reason in Australian law ²⁵ that prevent electronic signature from being binding as a handwritten signature (Chandler & Brown, 2007).

A judge in a Federal Court in Australia in late 2006 in *eBay v Creative* did not find it hard discovering an enforceable contract coming into existence with clickwrap presentation of contract terms. Here, the central issue was one of a claim of deceptive and misleading conduct. Rares J however characterized the cliclwrap terms clearly in this case. He said that clickwrap terms refer to a written contract signed by the parties. Therefore, when one click on the relevant button, so that the computer brings up all the terms required to buy, it is assumed that the whole online transaction was in writing, agreed and signed by the parties(Koffman & Macdonald, 2007).

According to some commentators, many consumers and buyers do not treat a signature or click with the same attention and seriousness that they give to a written signature. They therefore, think and believe that courts should not give them the same treatment as it is in authority²⁷. However, UK and Australian courts have a lasting tradition of enforcing contracts that have been executed and that have never been understood or read by the signing party. At the same time, just because the contractual terms are given online

makes this agreement not to be more or less unfair. Specifically, several consumers and buyers now are ready to hand over huge sums of money through online transactions. This is efficient because, should they have been offline, the agreement that they could sign could be multi-page, for instance using online action to buy a car (Elliott & Quinn, 2011).

According to postulation by at least one commentator, clickwrap terms are only made online or available to the website consumer after assent 28 may not be captured under Australian law. In Australia or UK, no website-based or online authority that would negate or support this reasoning. However, the chances of unenforceability in web-based or online cases are backed by an offline terms' authority after the making of contract, for instance *Oceanic Sun Line Special Shipping Co Inc. v Fay*³⁰ (Elizabeth 1988).

The Australian High Court in this decision, refused to add or incorporate a jurisdiction clause that was exclusive into a cruise contract. This was because the ticket that contained the clause had not reached to the hands of the customer for that long time until after the booking and paying of cruise (Elliott & Quinn, 2011).

When performing an online transaction, the parties involved should not in any way preclude the fact there is need to apply all the necessary elements of an Australian contract law. The elements that must be considered are offer and acceptance, capacity of entering into a contract and consideration. E-commerce takes different forms. In other words, online transactions are categorized into three kinds of e-commerce contracts. These types of contracts are click-through, browse-wrap and shrink-wrap agreements (Abdulhadi & Alghamdi, 2011).

In each type of e-commerce contract, a customer is needed to undergo several steps for the transaction to be validated. Online shoppers find the click-through type of electronic contract being more familiar. Under the click-through contract, a person has scroll through conditions and terms of agreement before facilitating their acceptance of their desire to be bound by the contract, which is enforceable. Therefore, ticking a box or clicking on a button at the end of the agreement, the person is accepting to be bound by the enforceable contract (Siemer, 2011).

A number of elements that is necessary for the creation of an e-commerce contract. For a small business owner wishing to make an enforceable contract, it must meet such elements as:

The company presents an unambiguous notice to the client indicating that the contract law terms are governing the online transaction.

The company gives the client an opportunity to go through the terms and conditions stated in the agreement before the contract becomes binding (Peden, 2003).

The company issues a clear statement of the constituents of the acceptance of the agreement.

During the establishment of the validity of an online transaction, one of the requirements is to produce a record or a document in recording or writing or retaining the entire necessary information and content in electronic form. In addition, a digital signature may be applied. In this case, the user will have a “ private key” and a “ public key.” The user only knows the private key while

the public key is the identity known to others who use the internet
(Abdulhadi & Alghamdi, 2011).

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