FEDERAL COURT OF AUSTRALIA

Australian Competition and Consumer Commission v Servcorp Limited [2018] FCA 1044

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| File number: |  |
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| Judge: | **MARKOVIC J** |
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| Date of judgment: | 13 July 2018 |
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| Catchwords: | **CONSUMER LAW** – unfair contract terms – where the parties are agreed that the relevant contracts were standard form contracts within the meaning of s 27 of the Australian Consumer Law, being Sch 2 to the *Competition and Consumer Act 2010* (Cth) (**ACL**) and small business contracts within the meaning of s 23(4) of the ACL – where the parties are agreed that the contracts contained terms which created a significant imbalance in the parties’ rights and obligations in favour of the second and third respondents and would cause detriment to the small business client if relied on by the second and third respondents – where the parties jointly submit that the relevant terms in the contract are unfair terms within the meaning of s 24(1) of the ACL – whether the Court should make the proposed declarations and orders – application allowed. |
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| Legislation: | *Competition and Consumer Act 2010* (Cth) Sch 2 ss 23, 24, 25, 27  *Federal Court of Australia Act 1976* (Cth) s 23  *Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Act 2015* (Cth) Sch 1 |
|  |  |
| Cases cited: | *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2018) 351 ALR 190; [2018] HCA 3  *Australian Competition and Consumer Commission v Chrisco Hampers Australia Ltd* (2015) 239 FCR 33  *Australian Competition and Consumer Commission v CLA Trading Pty Ltd* [2016] ATPR 42–517; [2016] FCA 377  *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* [2014] FCA 1405  *Australian Competition and Consumer Commission v JJ Richards & Sons Pty Ltd* [2017] FCA 1224  *Commonwealth v Director Fair Work Building Industry Inspectorate* (2015) CLR 482  *Paciocco v Australian and New Zealand Banking Group Limited* (2015) 236 FCR 199  *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia (No 3)* (1998) 195 CLR 1 |
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| Date of hearing: | 27 June 2018 |
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| Registry: | New South Wales |
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| Division: | General Division |
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| National Practice Area: | Commercial and Corporations |
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| Sub-area: | Regulator and Consumer Protection |
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| Category: | Catchwords |
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| Solicitor for the Respondents: | PricewaterhouseCoopers |

ORDERS

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|  | | NSD 1610 of 2017 |
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| BETWEEN: | AUSTRALIAN COMPETITION AND CONSUMER COMMISSION  Applicant | |
| AND: | SERVCORP LIMITED ACN 089 222 506  First Respondent  SERVCORP PARRAMATTA PTY LTD ACN 123 707 273  Second Respondent  SERVCORP MELBOURNE 18 PTY LTD ACN 103 547 968  Third Respondent | |

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| JUDGE: | MARKOVIC J |
| DATE OF ORDER: | 13 July 2018 |

THE COURT DECLARES THAT:

1. Each of:
   1. the contract between the second respondent (**Servcorp Parramatta**) and Torch Professional Services Pty Ltd dated 24 April 2015 set out in Annexure A to the applicant's originating application dated 14 September 2017 (**Application**) (**TPS Contract**);
   2. the contract between Servcorp Parramatta and Australasian Supply Chain Institute dated 13 October 2016 set out in Annexure B to the Application (**ASCI Contract**); and
   3. the contract between the third respondent (**Servcorp Melbourne**) and Occidental Migration Services dated 8 December 2015 set out in Annexure C to the Application (**OMS Contract**)

are:

* 1. small business contracts within the meaning of s 23(4) of the Australian Consumer Law which is Sch 2 to the *Competition and Consumer Act 2010* (Cth) (**ACL**); and
  2. standard form contracts within the meaning of s 27 of the ACL.

1. Clauses 4, 5(b), 5(d), 9(a), 12(d), 13(a), 13(g), 17(a), 17(b), 21(b) and 21(c) of the TPS Contract, ASCI Contract and OMS Contract and cl 11(b) of the ASCI Contract are unfair terms within the meaning of s 24 of the ACL and are void by operation of s 23 of the ACL, in that each of those terms:

(a) would cause a significant imbalance in the parties' rights and obligations arising under the TPS Contract, the ASCI Contract and the OMS Contract;

(b) are not reasonably necessary in order to protect the legitimate interests of Servcorp Melbourne and Servcorp Parramatta; and

(c) would cause detriment (whether financial or otherwise) to the small business counterparties if they were to be applied or relied on by Servcorp Melbourne or Servcorp Parramatta.

**THE COURT ORDERS BY CONSENT THAT:**

1. Servcorp Parramatta and Servcorp Melbourne at their own expense:

(a) establish and implement a program which has the purpose of ensuring compliance with Pt 2-3 of the ACL, with the terms and content of such program to be agreed between the applicant and Servcorp Parramatta and Servcorp Melbourne, or in the absence of agreement, to be ordered by the Court (**Compliance Program**); and

(b) procure that Servcorp Administration Pty Ltd, including any relevant employees and agents, participate in and administer the Compliance Program.

1. Servcorp Parramatta and Servcorp Melbourne pay the Applicant's costs of and incidental to this proceeding fixed in the amount of $150,000.
2. The proceeding otherwise be dismissed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

MARKOVIC J:

1. On 21 September 2017 the Australian Competition and Consumer Commission (**ACCC**) commenced this proceeding seeking declaratory and other relief against the respondents, Servcorp Limited (**Servcorp**), Servcorp Parramatta Pty Ltd (**Servcorp Parramatta**) and Servcorp Melbourne 18 Pty Ltd (**Servcorp Melbourne**) (collectively, **Respondents**), on the basis of the unfair contract terms provisions of the Australian Consumer Law, being Sch 2 to the *Competition and Consumer Act 2010* (Cth) (**ACL**).
2. Servcorp is a publicly listed entity and the ultimate holding company of Servcorp Parramatta and Servcorp Melbourne. Servcorp Parramatta and Servcorp Melbourne as well as other subsidiaries of Servcorp (collectively, **Servcorp Group**) supply serviced office spaces and virtual office services such as, office suites, secretarial services, IT and communications, to clients occupying office suites in 24 locations around Australia.
3. This proceeding concerns two contracts entered into by Servcorp Parramatta and one contract entered into by Servcorp Melbourne (collectively, **Service Contracts**). The ACCC contends that each of these contracts is a “small business contract” within the meaning of s 23(4) of the ACL and a “standard form contract” within the meaning of s 27 of the ACL and that certain terms in those contracts are “unfair” within the meaning of s 24 of the ACL and thus void by operation of s 23(1) of the ACL.
4. The ACCC and the Respondents have reached an agreement in relation to the relief sought and have provided a proposed consent order (**Proposed Orders**) as well as a statement of agreed facts pursuant to s 191 of the *Evidence Act 1995* (Cth) and joint submissions in support of the Proposed Orders.
5. For the reasons that follow, I am satisfied that the declarations and orders sought in the Proposed Orders should be made.

# unfair contract terms

## Statutory framework

1. Part 2-3 of Ch 2 of the ACL concerns unfair contract terms.
2. Section 23(1) relevantly provides that a term of a small business contract is void if the term is unfair and the contract is a standard form contract.
3. Section 23(4) relevantly provides that a contract is a “small business contract” if: the contract is for the supply of goods or services; at the time the contract in entered into, at least one party to it is a business that employs less than 20 people; and either the upfront price payable for the contract does not exceed $300,000 or the contract has a duration of more than 12 months and the upfront price payable under the contract does not exceed $1m.
4. Section 27(1) of the ACL creates a rebuttable presumption in that it provides:
5. If a party to a proceeding alleges that a contract is a standard form contract, it is presumed to be a standard form contract unless another party to the proceeding proves otherwise.
6. Section 27(2) of the ACL provides that in determining whether a contract is a standard form contract, a court may take into account such matters that it thinks relevant but must take into account the following:

(a) whether one of the parties has all or most of the bargaining power relating to the transaction;

(b) whether the contract was prepared by one party before any discussion relating to the transaction occurred between the parties;

(c) whether another party was, in effect, required either to accept or reject the terms of the contract (other than the terms referred to in section 26(1)) in the form in which they were presented;

(d) whether another party was given an effective opportunity to negotiate the terms of the contract that were not the terms referred to in section 26(1);

(e) whether the terms of the contract (other than the terms referred to in section 26(1)) take into account the specific characteristics of another party or the particular transaction;

(f) any other matter prescribed by the regulations.

1. Section 24 of the ACL sets out the meaning of “unfair”. Subsection (1) relevantly provides that a term of a small business contract is unfair if:

(a) it would cause a significant imbalance of the parties’ rights and obligations arising under the contract;

(b) it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and

(c) it would cause detriment (whether financial or otherwise) to a party if it were applied or relied on.

1. Section 24(4) of the ACL sets up a rebuttable presumption that a term is not reasonably necessary to protect the legitimate interests of the party who would be advantaged by it.
2. In determining whether a term of a contract is unfair the Court may take into account such matters as it thinks relevant but it must take into account the extent to which the term is transparent and the contract as a whole: s 24(2) of the ACL. A term is transparent if it is expressed in reasonably plain language; legible; presented clearly; and readily available to any party affected by the term: see s 24(3) of the ACL.
3. Section 25 of the ACL sets out examples of the kinds of terms of a small business contract that may be unfair. They are:

(a) a term that permits, or has the effect of permitting, one party (but not another party) to avoid or limit performance of the contract;

(b) a term that permits, or has the effect of permitting, one party (but not another party) to terminate the contract;

(c) a term that penalises, or has the effect of penalising, one party (but not another party) for a breach or termination of the contract;

(d) a term that permits, or has the effect of permitting, one party (but not another party) to vary the terms of the contract;

(e) a term that permits, or has the effect of permitting, one party (but not another party) to renew or not renew the contract;

(f) a term that permits, or has the effect of permitting, one party to vary the upfront price payable under the contract without the right of another party to terminate the contract;

(g) a term that permits, or has the effect of permitting, one party unilaterally to vary the characteristics of the goods or services to be supplied, or the interest in land to be sold or granted, under the contract;

(h) a term that permits, or has the effect of permitting, one party unilaterally to determine whether the contract has been breached or to interpret its meaning;

(i) a term that limits, or has the effect of limiting, one party’s vicarious liability for its agents;

(j) a term that permits, or has the effect of permitting, one party to assign the contract to the detriment of another party without that other party’s consent;

(k) a term that limits, or has the effect of limiting, one party’s right to sue another party;

(l) a term that limits, or has the effect of limiting, the evidence one party can adduce in proceedings relating to the contract;

(m) a term that imposes, or has the effect of imposing, the evidential burden on one party in proceedings relating to the contract;

(n) a term of a kind, or a term that has an effect of a kind, prescribed by the regulations.

## Legal principles

1. In *Australian Competition and Consumer Commission v CLA Trading Pty Ltd* [2016] ATPR 42–517; [2016] FCA 377 at [54] Gilmour J, in the context of considering unfair consumer contracts, set out some of the principles found in cases which had considered the unfair contract terms regimes in Victoria and the United Kingdom as follows:

(a) the underlying policy of unfair contract terms legislation respects true freedom of contract and seeks to prevent the abuse of standard form consumer contracts which, by definition, will not have been individually negotiated: *Jetstar Airways Pty Ltd v Free* [2008] VSC 539 at [112];

(b) the requirement of a “significant imbalance” directs attention to the substantive unfairness of the contract: *Director-General of Fair Trading v First National Bank plc* [2002] 1 AC 481 at [37];

(c) it is useful to assess the impact of an impugned term on the parties' rights and obligations by comparing the effect of the contract with the term and the effect it would have without it: *Director-General of Fair Trading v First National Bank plc* at [54];

(d) the “significant imbalance” requirement is met if a term is so weighted in favour of the supplier as to tilt the parties’ rights and obligations under the contract significantly in its favour – this may be by the granting to the supplier of a beneficial option or discretion or power, or by the imposing on the consumer of a disadvantageous burden or risk or duty: *Director-General of Fair Trading v First National Bank* at 494 [17] per Lord Bingham, applied in *ACCC v ACN 117 372 915 Pty Ltd (in liq) (formerly Advanced Medical Institute Pty Ltd)* [2015] FCA 368 at [950];

(e) significant in this context means “significant in magnitude”, or “sufficiently large to be important”, “being a meaning not too distant from substantial”: *Jetstar Airways Pty Ltd v Free* at [104]-[105] per Cavanough J: Cf. *Director of Consumer Affairs Victoria v AAPT Ltd* [2006] VCAT 1493 at [32]-[33];

(f) the legislation proceeds on the assumption that some terms in consumer contracts, especially in standard form consumer contracts, may be inherently unfair, regardless of how comprehensively they might be drawn to the consumer’s attention: *Jetstar Airways Pty Ltd v Free* at [115]; and

(g) in considering “the contract as a whole”, not each and every term of the contract is equally relevant, or necessarily relevant at all. The main requirement is to consider terms that might reasonably be seen as tending to counterbalance the term in question: *Jetstar Airways Pty Ltd v Free* at [128].

1. In *Australian Competition and Consumer Commission v Chrisco Hampers Australia Ltd* (2015) 239 FCR 33 (***Chrisco***) at [44] Edelman J said the following in relation to s 25 of the ACL:

Although there was some dispute about (6), a contextual approach to statutory interpretation cannot ignore the matters provided in s 25 which are specifically provided for the purpose of giving examples of potentially unfair terms: see also *Jetstar Airways Pty Ltd v Free* (2008) VAR 295, [110] and [114] (Cavanough J); *Director General of Fair Trading v First National Bank plc* [2002] 1 AC 481 at [17] (Lord Bingham). Further, the Explanatory Memorandum to the *Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010* (Cth) in which these provisions were introduced, provided in [5.44] that the examples in s 25 “provide statutory guidance on the types of terms which may be regarded as being of concern. They do not prohibit the use of those terms, nor do they create a presumption that those terms are unfair”. See also the Second Reading Speech of the *Trade Practices Amendment (Australian Consumer Law) Bill 2009* (Cth), Hansard, House of Representatives, 24 June 2009, 6986 (Dr Emerson).

1. As submitted by the parties, the Court’s assessment of whether a term is unfair within the meaning of s 24 of the ACL is guided by consideration of that concept as discussed in both the ACL and other contexts. For example, in relation to the former Victorian equivalent of the unfair contract terms provisions, in *Paciocco v Australia and New Zealand Banking Group Ltd* (2015) 236 FCR 199 at [363]-[364], Allsop CJ (Besanko and Middleton JJ agreeing) emphasised the evaluative nature of the assessment of unfairness, which is to be carried out with a close attendance to the statutory terms. His Honour also observed that “unjustness and unfairness are of a lower moral ethical standard than unconscionability”.
2. In *Chrisco* Edelman J referred to s 24 of the ACL, noting in particular that, when the provisions were introduced, Parliament departed from the reference in the UK legislation to the requirement of “good faith” given the unsettled status of the doctrine of good faith in the Australian law of contract: at [39]-[42].
3. At [43] Edelman J accepted the following matters in relation to the construction of s 24:

(1) for a term to be unfair it must satisfy the requirements of all of s 24(1)(a) to (c);

(2) the onus is upon the applicant to prove the matters in s 24(1)(a) and (c) but it is upon the respondent in relation to s 24(1)(b);

(3) s 24(2)(a) only requires the Court to consider transparency in relation to the particular term that is said to be unfair and only in relation to the matters concerning that term in s 24(1)(a) to (c);

(4) similarly, the assessment of the contract as a whole in s 24(1)(c) only requires the Court to consider the contract as a whole in relation to the particular term that is said to be unfair and only in relation to the matters concerning that term in s 24(1)(a) to (c);

(5) as the Explanatory Memorandum to the *Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010* provided at [5.39], “if a term is not transparent it does not mean that it is unfair and if a term is transparent it does not mean that it is not unfair”; and

(6) guidance can be had to s 25 which provides examples of unfair terms.

1. In relation to whether a term creates a significant imbalance in the parties’ rights and obligations arising under the contract, at [49]-[51] Edelman J noted that:

* the focus remains on the terms of the section; and
* the fact that there is a lack of individual negotiation of the contract between an entity and its customers is not relevant to whether a term causes a significant imbalance in the parties’ rights and obligations under the contract. Rather, the assessment of whether the relevant term causes a significant imbalance in the rights and obligations arising under the contract, requires consideration of the relevant term together with the parties’ other rights and obligations arising under the contract.

1. At [52]-[53] Edelman J noted that other relevant matters under s 24(2) may be whether a party can “opt-out” of an unfair term and whether the contract gives one party a right without imposing a corresponding duty or without giving any substantial corresponding right to the counterparty.
2. In *Australian Competition and Consumer Commission v JJ Richards & Sons Pty Ltd* [2017] FCA 1224 (***JJ Richards***) at [31] Moshinsky J observed that:

A term is less likely to give rise to a significant imbalance if there is a meaningful relationship between the term and the protection of a party, and that relationship is reasonably foreseeable at the time of contracting. The fact that a party might profit from breaches of contract by a customer, without the customer in breach acquiring something in return, would not alone be sufficient to allow it to be concluded that the term caused a significant imbalance in the parties’ rights and obligations arising under the contract: *Paciocco v Australia & New Zealand Banking Group Ltd* (2016) 258 CLR 525 at [201] per Gageler J.

# orders by consent and declarations

## Relevant principles

1. In *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* [2014] FCA 1405 (***Coles Supermarkets***) at [70]-[76] Gordon J summarised the well-established principles in relation to making orders by agreement and making declarations as follows:

***2.3.1 Orders sought by agreement***

…

70 The applicable principles are well established. First, there is a well-recognised public interest in the settlement of cases under the Act: *NW Frozen Foods Pty Ltd v Australian Competition & Consumer Commission* (1996) 71 FCR 285 at 291. Second, the orders proposed by agreement of the parties must be not contrary to the public interest and at least consistent with it: *Australian Competition & Consumer Commission v Real Estate Institute of Western Australia Inc* (1999) 161 ALR 79 at [18].

71 Third, when deciding whether to make orders that are consented to by the parties, the Court must be satisfied that it has the power to make the orders proposed and that the orders are appropriate: *Real Estate Institute* at [17] and [20] and *Australian Competition & Consumer Commission v Virgin Mobile Australia Pty Ltd (No 2)* [2002] FCA 1548 at [1]. Parties cannot by consent confer power to make orders that the Court otherwise lacks the power to make: *Thomson Australian Holdings Pty Ltd v Trade Practices Commission* (1981) 148 CLR 150 at 163.

72 Fourth, once the Court is satisfied that orders are within power and appropriate, it should exercise a degree of restraint when scrutinising the proposed settlement terms, particularly where both parties are legally represented and able to understand and evaluate the desirability of the settlement: *Australian Competition & Consumer Commission v Woolworths (South Australia) Pty Ltd (Trading as Mac’s Liquor)* [2003] FCA 530 at [21]; *Australian Competition & Consumer Commission v Target Australia Pty Ltd* [2001] FCA 1326 at [24]; *Real Estate Institute* at [20]-[21]; *Australian Competition & Consumer Commission v Econovite Pty Ltd* [2003] FCA 964 at [11] and [22] and *Australian Competition & Consumer Commission v The Construction, Forestry, Mining and Energy Union* [2007] FCA 1370 at [4].

73 Finally, in deciding whether agreed orders conform with legal principle, the Court is entitled to treat the consent of Coles as an admission of all facts necessary or appropriate to the granting of the relief sought against it: *Thomson Australian Holdings* at 164.

***2.3.2 Declarations***

74 The Court has a wide discretionary power to make declarations under s 21 of the Federal Court Act: *Forster v Jododex Australia Pty Ltd* (1972) 127 CLR 421 at 437-8; *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 581-2 and *Tobacco Institute of Australia Ltd v Australian Federation of Consumer Organisations Inc (No 2)* (1993) 41 FCR 89 at 99.

75 Where a declaration is sought with the consent of the parties, the Court’s discretion is not supplanted, but nor will the Court refuse to give effect to terms of settlement by refusing to make orders where they are within the Court’s jurisdiction and are otherwise unobjectionable: see, for example, *Econovite* at [11].

76 However, before making declarations, three requirements should be satisfied:

(1) The question must be a real and not a hypothetical or theoretical one;

(2) The applicant must have a real interest in raising it; and

(3) There must be a proper contradictor:

*Forster v Jododex* at 437-8.

1. In addition in *Commonwealth v Director Fair Work Building Industry Inspectorate* (2015) 258 CLR 482 at [57] French CJ, Kiefel, Bell, Nettle and Gordon JJ said:

… in civil proceedings there is generally very considerable scope for the parties to agree on the facts and upon consequences. There is also very considerable scope for them to agree upon the appropriate remedy and for the court to be persuaded that it is *an* appropriate remedy.

(original emphasis)

## Have the requirements for making the declarations sought been met?

1. I am satisfied that the three requirements for the making of declarations referred to at [76] of *Coles Supermarkets* (set out at [23] above) have been met. That is:
2. the question that is being resolved by the declarations, whether the relevant contractual terms are void, is real and not a hypothetical or theoretical one;
3. the ACCC, as the public regulator under the ACL, has a real interest in raising the question; and
4. there is a proper contradictor, namely, the Respondents.
5. The observations of Moshinsky J in *JJ Richards* at [10] apply equally here. That is:

In the circumstances, it is in the public interest for the proposed declarations and orders to be made. A significant legal controversy is being resolved. The declarations are appropriate because they serve to record the Court’s disapproval of the conduct, vindicate the ACCC’s claim that the relevant contractual terms are void, assist the ACCC in carrying out its regulatory duties in the future, inform the public of the relevant conduct, and deter other companies from entering into relevant contracts with such terms.

# Facts

1. As noted above, the parties have provided a statement of agreed facts, a copy of which is annexed to these reasons. The summary of facts below is based on the statement of agreed facts.
2. Relevant entities within the Servcorp Group, including Servcorp Parramatta and Servcorp Melbourne, contract directly with clients, including small business clients. Servcorp is not a party to any contract with clients for the supply of serviced office space or virtual office services.
3. Servcorp Administration Pty Ltd (**Servcorp Administration**), a wholly owned subsidiary of Servcorp, drafts and updates certain base terms from time to time (**Servcorp Base Terms**). The Servcorp Base Terms are not a concluded contract. They are provided to relevant entities within the Servcorp Group, such as Servcorp Parramatta and Servcorp Melbourne, which then use the Servcorp Base Terms to enter into contracts with prospective clients in Australia.
4. The Service Contracts which have been identified by the ACCC for the purpose of this proceeding are:
5. the contract dated 24 April 2015, renewed on 15 June 2016 and 15 June 2017, between Servcorp Parramatta and Torch Professional Services Pty Ltd (**TPS**) (**TPS Contract**). At the time the TPS Contract was entered into and renewed TPS had three or less employees;
6. the contract dated 13 October 2016, renewed on 12 June 2017, between Servcorp Parramatta and Australian Supply Chain Institute (**ASCI**) (**ASCI Contract**). At the time the ASCI Contract was entered into and renewed ASCI had between four and five employees; and
7. the contract dated 8 December 2015, renewed on 1 January 2017, between Servcorp Melbourne and Occidental Migration Services (**OM**) (**OM Contract**). At the time the OM Contract was entered into and renewed OM had one employee.
8. For the purpose of this proceeding the Respondents do not dispute that each of the Service Contracts has the following characteristics:
9. each was entered into prior to the commencement of the unfair contract terms regime as applicable to small business contracts which became operational on 12 November 2016 by virtue of amendments made by Sch 1 to the *Treasury Legislation Amendment (Small Business and Unfair Contract Terms)* *Act 2015* (Cth) (**Treasury Amendment Act**);
10. each was renewed after 12 November 2016;
11. each was for the supply of services by Servcorp Parramatta or Servcorp Melbourne;
12. at the time each contract was entered into and renewed, the relevant clients were all businesses that employed fewer than 20 persons;
13. the upfront price payable under each of the Service Contracts did not exceed $300,000 and each had a duration of 12 months or less;
14. the terms of the Service Contracts were prepared by either Servcorp Parramatta or Servcorp Melbourne; and
15. either Servcorp Parramatta or Servcorp Melbourne had most of the bargaining power in the transactions. The Servcorp Base Terms were prepared prior to any discussions between the parties and either Servcorp Parramatta or Servcorp Melbourne presented the terms of the Service Contracts without inviting the counterparty to negotiate the terms, other than the terms defining the main subject matter of the Service Contract (i.e. the length of the contract term, the location of the office space and the upfront price payable).
16. For the purpose of this proceeding the Respondents do not dispute that each of the Service Contracts were standard form contracts within the meaning of s 27 of the ACL and small business contracts within the meaning of s 23(4) of the ACL.
17. For the purpose of this proceeding the Respondents do not dispute that the Service Contracts contain terms (collectively, **Impugned Terms**) which cause a significant imbalance in the parties’ rights and obligations in favour of either Servcorp Parramatta or Servcorp Melbourne and would cause detriment to the small business client if applied or relied upon by Servcorp Parramatta or Servcorp Melbourne. The Impugned Terms are:
18. clause 4:

(a) in the ASCI Contract which provides:

**4. Services Continuation**

Unless:

a. Servcorp gives at least one month’s notice to the Client demanding that it ceases its temporary occupation of the Office(s) on the Initial Term Ending Date (as set out in section 7 overleaf); or

b. The Client gives at least the required notice (being the Notice Period set out in section 7 overleaf) to Servcorp IN WRITING to end temporary occupation on the date of expiration and not before the Initial Term Ending Date:

this Service Agreement shall from the Initial Term Ending Date continue as a periodic Service Agreement for ongoing periods equal to the duration of the Service Agreement term (as set out in section 7 overleaf), at a service fee which is appropriate at the time of such renewal as determined by Servcorp in its absolute direction and notified by it to the Client.

(b) in the OM Contract and the TPS Contract which provides:

**4. Services Continuation**

Unless:

a. Servcorp gives at least one month’s written notice to the Client demanding that it ceases its temporary occupation of the Office(s) on date of expiration of the original term of this Service Agreement; or

b. The Client gives at least the required notice (as set out in item 6 overleaf) to Servcorp IN WRITING to end temporary occupation on that date of expiration and not before the Initial Term Ending Date:

This Service Agreement shall from that date of expiration continue as a periodic Service Agreement for ongoing periods equal to the duration of the original term of the Service Agreement (as set out in Item 6 overleaf), at a service fee which is appropriate at the time of such renewal as determined by Servcorp in its absolute discretion and notified by it to the Client.

(2) clauses 5(b) and (d) of the Service Contracts which provide:

**5. Insurance**

…

b. To insure all goods held in the Office(s) Servcorp will not be held responsible for loss, theft or damage of the good howsoever caused.

…

d. The client will not make any claim in tort, contract or otherwise against Servcorp’s landlord under the Headlease.

(3) clause 9(a) of the Service Contracts which provides that the counterparty and guarantor, where applicable, covenant:

**9. Services**

1. To pay during the term of the Service Agreement all charges for Services rendered by Servcorp to the Client at the rates stipulated by Servcorp from time to time. Servcorp reserves the right to change, review or vary the Services charges.

(4) clause 11(b) of the ASCI Contract which provides:

**11. Notice**

Any written notice required or authorised by [the ASCI Contract]:

1. Shall be deemed to have served on Servocrp only if emailed, hand delivered or sent by registered post to the Manager of the Servcorp location being occupied under this Service Agreement, and a confirmation of termination letter is received by the Client in return.

(5) clause 12(d) of the Service Contracts which provides:

**12. Headlease**

d. Should the Client, in the absolute discretion of Servcorp, be carrying on illegal activities or be in breach of the provisions of Clause 12 c above, this Service Agreement shall terminate with immediate effect.

(6) clause 13(a):

(a) in the ASCI Contract which provides:

**13. Termination**

a. As governed by the Headlease, Servcorp may terminate this Service Agreement by giving on month’s written notice to the client at any time.

(b) in the OM Contract and the TPS Contract which provides:

**13. Termination**

a Servcorp may terminate this Service Agreement by giving one month’s written notice to the Client at any time.

(7) clause 13(g) of the Service Contracts which provides:

…

g. If the Client fails to demand the refund of the security deposit within 360 days after the date of termination of this Service Agreement, the security deposit shall be deemed forfeited to Servcorp absolutely.

(8) clauses 17(a) and (b):

(a) in the ASCI Contract which provide:

**17. Exemption from Indemnity**

(a) The Client acknowledges that Servcorp (including its employees and agents), with the exception of gross negligence or wilful misconduct, shall accept no liability whatsoever with respect to theft or loss from the Office(s) or damage to the Office(s) that occurs during the Client’s occupation of the Office(s) set out in section 7 overleaf.

(b) The Client acknowledges that Servcorp (including its employees and agents), with the exception of gross negligence or wilful misconduct, shall accept no liability whatsoever with respect to the loss, damage or alternation of any data due to failure or defect of the hardware, software, internet, voicemail or communications system/s that occurs during the Client’s term of this Service Agreement.

(b) in the OM Contract and the TPS Contract which provide:

**17. Indemnity Clause**

a. With the exception of gross negligence or wilful misconduct, the Client shall expressly indemnify Servcorp, its employees, caretakers, cleaners, agents or invitees, against any theft or loss from the Office(s) or damage to the Office(s) and its contents attributable to the Client, howsoever occurring.

b. The Client shall expressly indemnify Servcorp against any loss, damage, corruption of data or any loss of information whether from hardware, software, internet, voice or communication system failure that may occur to the Client during the term of this service Agreement.

(9) clauses 21(b) and (c) which provide:

**21. Servcorp Clients**

…

b. In the event of a material breach of Clause 21a by the Client, the Client shall promptly pay to Servcorp an amount of US$15,000 as a penalty.

c. Payment of the penalty under Clause 21b shall not preclude Servcorp demanding further payment for damages.

1. The Respondents do not seek to rebut the presumption created by s 24(4) of the ACL nor dispute that the Impugned Terms as drafted are not reasonably necessary to protect the legitimate interests of either Servcorp Parramatta or Servcorp Melbourne. Further, the Respondents do not dispute that each of the Impugned Terms are unfair terms within the meaning of s 24(1) of the ACL and void by reason of s 23(1) of the ACL.

# consideration

## The Service Contracts are subject to the unfair contract terms regime

1. I am satisfied that the Service Contracts are subject to the unfair contract terms regime, as applicable to small business contracts, which became operational on 12 November 2016 by virtue of amendments to the ACL made by Sch 1 to the TreasuryAmendment Act because:
2. each of the contracts was entered into prior to the commencement of the unfair contract terms regime applicable to small business contacts;
3. by virtue of s 290A(2)(a) of the ACL, if a contract entered into prior to the commencement of Sch 1 to the Treasury Amendment Act, as applicable to small business contracts, is renewed on or after that commencement, the amendments apply to the contract as renewed on and from the day on which the renewal takes effect in respect of conduct that occurs on or after that date; and
4. for the purpose of this proceeding the Respondents do not dispute that each of the Service Contracts was renewed after 12 November 2016.

## The Service Contracts are small business contracts

1. I am also satisfied that the Service Contracts are all small business contracts within the meaning of s 23(4) of the ACL because:
2. each of the Service Contracts was for, among other things, the supply of goods or services;
3. at the time of entry into each of the Service Contracts the relevant counterparty was a business that employed fewer than 20 people; and
4. the upfront price payable under each of the Service Contracts did not exceed $300,000 and each had a duration of 12 months or less.

## The Service Contracts are standard form contracts

1. As set out at [9] above s 27(1) of the ACL creates a rebuttable presumption that a contract is a standard form contract. The Respondents have not sought to rebut that presumption and have, for the purpose of this proceeding, agreed that the Service Contracts are standard form contracts. In any event, I am satisfied that the Service Contracts are standard form contracts by reason of the following matters:
2. their terms were prepared by Servcorp Parramatta or Servcorp Melbourne; and
3. Servcorp Parramatta or Servcorp Melbourne had most of the bargaining power in the transactions as the Servcorp Base Terms were prepared prior to any discussion between the parties and either Servcorp Parramatta or Servcorp Melbourne presented the terms without inviting the counterparty to negotiate those terms, other than the terms defining the main subject matter of the contract, namely, its length, the location of the office space and the upfront price payable.

## Significant imbalance and detriment

1. As I have already observed, for the purpose of this proceeding, the Respondents do not dispute that each of the Impugned Terms creates a significant imbalance in the parties’ rights and obligations arising under the Service Contracts and would cause detriment if they were applied or relied on by Servcorp Parramatta or Servcorp Melbourne. Further, based on the statement of agreed facts and my own review of the Impugned Terms, I accept that they create a significant imbalance in the parties’ rights and obligations and would cause detriment for the reasons which follow.

### Clause 4

1. Clause 4 in each of the Service Contracts is an automatic renewal clause. If the relevant counterparty does not give the required notice to terminate the contract, Servcorp Parramatta or Servcorp Melbourne is permitted to unilaterally vary the price payable under the contract at its absolute discretion without providing the counterparty with a corresponding right to terminate at the time the new term commences. There is no obligation for either Servcorp Parramatta or Servcorp Melbourne to notify the client of any price increase prior to expiry of the notice period, which is the period during which the counterparty can terminate the contract. The counterparty is automatically locked into a further full term of the agreement (six months in the case of the ASCI Contract and 12 months in the case of the OM Contract and the TPS Contract). The operation of this clause may result in the counterparty inadvertently missing the opportunity to terminate the contract and remaining contracted to either Servcorp Parramatta or Servcorp Melbourne for a further period with no opportunity to terminate the contract and not suffer financial detriment.
2. In the context of each of the Service Contracts considered as a whole cl 4 creates a significant imbalance in the respective rights and obligations of the parties. Servcorp Parramatta and Servcorp Melbourne are more likely to be aware of when contracts are due for renewal than small business customers. Consequently, these small businesses may unknowingly find themselves locked into a new term at a higher price. The clause would clearly cause financial detriment to the customer, given the ability to impose a higher monthly price, and also lacks transparency as to certain rights of the counterparties in the event of an automatic continuation.

### Clauses 5(b) and (d)

1. Clause 5(b) in each of the Service Contracts limits the liability of Servcorp Parramatta or Servcorp Melbourne. It requires the counterparty to insure all goods held in the relevant premises and provides that either Servcorp Parramatta or Servcorp Melbourne will not be held responsible for any loss, theft or damage to the goods howsoever caused. The clause could be relied upon by Servcorp Parramatta or Servcorp Melbourne in circumstances where that company had caused the “loss, theft of damage”. Conversely, cl 17(a) and (b) (see [33(8)] above) provide that the counterparty must indemnify either Servcorp Parramatta or Servcorp Melbourne for any theft, loss or damage howsoever caused with the exception of gross negligence and wilful misconduct.
2. Clause 5(b) is an example of a clause contemplated by s 25(k) of the ACL as a kind of term that may be unfair. It limits or has the effect of limiting one party’s right to sue another. In the context of each of the Service Contracts taken as a whole, the clause creates a significant imbalance in the respective rights and obligations of the parties given its operation viewed in the context of other clauses and would cause detriment to the counterparty if it were to be applied or relied on.
3. Clause 5(d) in each of the Service Contracts is again the type of clause envisaged by s 25(k) of the ACL as an example of a clause that may be unfair. It has the effect of limiting or purporting to limit the counterparty’s right to sue the landlord including in circumstances where the counterparty has a legitimate claim against the landlord. There is no clause in each of the Service Contracts which imposes any reciprocal limitation on the Servcorp Parramatta or Servcorp Melbourne or the landlord who are free to sue the counterparty. In those circumstances, cl 5(d) creates a significant imbalance in the parties’ rights and obligations arising under the Service Contracts and would cause detriment if it were applied or relied on by Servcorp Parramatta or Servcorp Melbourne.

### Clause 9(a)

1. Clause 9(a) in each of the Service Contracts entitles Servcorp Parramatta or Servcorp Melbourne to change, review or vary the charges for the “Services” as defined in cl 1(a)(iii) of the Service Contracts. The term “Services” comprises “Core Services” and “Ancillary Services”. Servcorp Parramatta or Servcorp Melbourne can unilaterally vary the price payable for the Services at their absolute discretion and without providing the counterparty with any notice. There is no limitation on the face of the clause requiring Servcorp Parramatta or Servcorp Melbourne to act fairly or reasonably in any decision to change the pricing of the Services or indeed consult with the counterparty. It should be noted though that, pursuant to cl 9(c), the counterparty has the right to terminate the Services on one month’s written notice to the either Servcorp Parramatta or Servcorp Melbourne.
2. In the context of the whole agreement, cl 9(a) creates a significant imbalance in the parties’ rights and obligations arising under the Service Contracts and would, at least in the short term, cause detriment to the counterparty if relied on by Servcorp Parramatta or Servcorp Melbourne. In the event that either Servcorp Parramatta or Servcorp Melbourne exercises its rights under cl 9(a) the counterparty could be faced with having to pay higher service charges without any opportunity to negotiate the price or to receive any corresponding benefit.

### Clause 11(b)

1. Clause 11(b) is exclusive to the ASCI Contract. It entitles Servcorp Parramatta to determine the time at which a notice has been validly served by ASCI. There is no corresponding clause for the benefit of ASCI. By contrast, cl 11(a) provides that any notice required or authorised by the agreement shall be deemed to have been served on ASCI if it was emailed, delivered to the office(s) or posted to its last known address in which case it shall be deemed to have been served on the second working day after posting. When considered in conjunction with cl 4 (see [33(1)] and [39]-[40] above), cl 11(b) enables Servcorp Parramatta to determine whether ASCI has exercised a termination right in the specified timeframe to ASCI’s detriment.
2. In the context of the whole agreement cl 11(b) creates a significant imbalance in the parties’ rights and obligations arising under the ASCI Contract and would cause detriment if it were applied or relied on by Servcorp Parramatta.

### Clause 12(d)

1. Clause 12(d) in each of the Service Contracts permits Servcorp Parramatta or Servcorp Melbourne to immediately terminate the agreement if the counterparty is in breach of cl 12(c) which, in turn, provides:

The Client shall comply with all Acts, Legislation, Regulations and bylaws as required by the Headlease and comply with any regulations or procedures issued or required by the landlord under the Headlease.

1. Relying on cl 12(d), either Servcorp Parramatta or Servcorp Melbourne can terminate the agreement in circumstances where any asserted breach may not be a material breach, the counterparty may not have been notified of, or aware of, the breach or given an opportunity to remedy the breach, or the counterparty may have already remedied the breach. Further, if the counterparty had not sought details of the cl 12(c) obligations, it would not be aware of them. Clause 12(d), read in conjunction with cl 12(c), lacks transparency as to the nature and extent of the obligations under cl 12(c).
2. It is clear that cl 12(d), if applied or relied on in conjunction with, in particular, cl 12(c), which the ACCC does not contend is itself unfair, would create a significant imbalance in the parties’ rights and obligations under the Service Contracts and would cause detriment if it was applied or relied on by either Servcorp Parramatta or Servcorp Melbourne.

### Clauses 13(a) and (g)

1. Clause 13(a) in each of the Service Contracts is the type of clause envisaged by s 25(b) of the ACL as an example of a term of a contract that may be unfair. It entitles Servcorp Parramatta or Servcorp Melbourne to terminate the Service Contract by giving one month’s written notice to the counterparty at any time. That right can be exercised without cause or reason and without giving compensation to the counterparty. The period of one month is not determined by reference to the length of the relevant Service Contract. In contrast, the counterparty has very limited termination rights under each of the Service Contracts and does not have a corresponding right of termination which can be exercised without cause or reason on one month’s written notice. Given those matters, cl 13(a) creates a significant imbalance in the parties’ rights and obligations and would cause detriment if it were applied or relied on by either Servcorp Parramatta or Servcorp Melbourne.
2. Clause 13(g) in each of the Service Contracts obliges the counterparty to secure a refund of its security deposit within a specified time after termination of the relevant Service Contract, failing which it will be forfeited to Servcorp Parramatta or Servcorp Melbourne. There is no obligation imposed on Servcorp Parramatta or Servcorp Melbourne to return the security deposit to the counterparty or to notify them of the forfeiture. In effect Servcorp Parramatta and Servcorp Melbourne are able to unilaterally acquire the counterparty’s property. In those circumstances the clause creates a significant imbalance in the parties’ rights and obligations and would cause detriment if it was applied or relied on by Servcorp Parramatta or Servcorp Melbourne.

### Clauses 17(a) and (b)

1. In the ASCI Contract these clauses seek to limit Servcorp Parramatta’s liability except in the case of gross negligence or wilful misconduct. The clauses create a significant imbalance in the parties’ rights and obligations given that there is no corresponding clause which limits ASCI’s liability to Servcorp Parramatta in this way. ASCI would clearly suffer detriment if the clauses were relied on or applied by Servcorp Parramatta.
2. In the case of the OM Contract and the TPS Contract, these clauses seek to create an unlimited indemnity in favour of either Servcorp Parramatta or Servcorp Melbourne (other than in the case of gross negligence or wilful misconduct) even where the loss or damage is caused by either Servcorp Parramatta or Servcorp Melbourne. There is no corresponding benefit in favour of the counterparty. The indemnity provided for in these clauses causes a significant imbalance in the parties’ rights and obligations and the counterparties would suffer detriment if they were relied on by Servcorp Parramatta or Servcorp Melbourne.

### Clauses 21(b) and (c)

1. These clauses in each of the Service Contracts operate in the event of a breach of cl 21(a) which provides:

In the event that during this Service Agreement, or within two years of the termination or expiration of this Service Agreement, the Client entices or persuades clients receiving services of Servcorp or any Affiliate of such client to leave Servcorp offices and to move to other premises not owned or run by Servcorp or Servcorp’s Affiliates and receive services not operated by Servcorp or Servcorp’s Affiliates, this shall constitute a material breach of this Service Agreement

1. Clauses 21(b) and (c) create a significant imbalance in the parties’ rights and obligations under the Service Contracts and would cause detriment if relied on by Servcorp Parramatta or Servcorp Melbourne. Clause 21(b) imposes a penalty on the counterparty if it persuades any other counterparty to leave Servcorp and move to a competitor. In the event that this clause was interpreted to extend to an affiliate of the client, the client is unlikely to know whether an entity is a client of one of the 25 offices managed by Servcorp Parramatta or Servcorp Melbourne, or an affiliate of such a client. Furthermore, the penalty of US$15,000 applies regardless of whether Servcorp suffers any loss or damage and Servcorp is able to seek further amounts by way of damages. Finally, the clauses generally lack transparency as to the way it would be applied.

## The Impugned Terms not reasonably necessary to protect legitimate interests of Servcorp Parramatta and Servcorp Melbourne

1. As noted at [34] above, the Respondents have not sought to rebut the presumption that arises by reason of s 24(1)(b) and (4) or dispute that the terms in issue are not reasonably necessary to protect the legitimate interests of Servcorp Parramatta or Servcorp Melbourne. In any event, having regard to each of the Impugned Terms, I am satisfied that the requirements of s 24(1)(b) are met.

## The Impugned Terms are unfair

1. For the reasons set out above I am satisfied that each of the Impugned Terms is unfair within the meaning of s 24 of the ACL. It follows that the Impugned Terms, insofar as they are contained in the Service Contracts, which are standard form contracts and small business contracts, are void under s 23(1) of the ACL. In those circumstances it is appropriate to make the declarations sought by the parties in the Proposed Orders.

## Compliance program

1. The ACCC seeks an order that Servcorp Parramatta and Servcorp Melbourne establish and implement a compliance program which has the purpose of ensuring compliance with Pt 2-3 of the ACL (**Compliance Program**) and that they procure that Servcorp Administration, including any relevant employees and agents, participate in and administer the Compliance Program (**Compliance Order**). The Respondents consent to the Compliance Order.
2. The parties submitted that as s 246 of the ACL, which provides that non-punitive orders can be made, including the establishment of a compliance program, does not apply to the present circumstances, it is appropriate to make the Compliance Order under s 23 of the *Federal Court of Australia Act 1976* (Cth) (**Federal Court Act**). Pursuant to s 246 of the ACL, the regulator can apply to the Court for an order included in subs (2) in relation to a person who has engaged in conduct that contravenes a provision in, relevantly, Ch 2. Here there has been no relevant contravention. However, s 23 provides that the Court has power, in relation to matters in which it has jurisdiction, to make orders of such kind and to issue, or direct the issue of, writs of such kind as the Court thinks appropriate.
3. In *JJ Richards* an order requiring the respondent to implement a compliance program was made by consent pursuant to s 233 of the ACL: at [66]-[70]. It appears from Moshinky J’s reasons that the relevant order was sought pursuant to s 232 and/or s 233 of the ACL and that no submission was put to the Court about the availability of s 23 of the Federal Court Act as a source of power to make the compliance order.
4. In *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia (No 3)* (1998) 195 CLR 1 (***Patrick Stevedores***) at [27] Brennan CJ, McHugh, Gummow, Kirby and Hayne JJ said the following in relation to the power conferred on the Court by s 23 of the Federal Court Act:

27 Once the jurisdiction conferred on the Federal Court by the Act is invoked, that Court has power under s 23 of the *Federal Court of Australia Act* 1976 (Cth) (the Federal Court Act) to make "orders of such kinds, including interlocutory orders ... as the Court thinks appropriate". That power may be exercised in any proceeding in which the Federal Court has jurisdiction unless the jurisdiction invoked is conferred in terms which expressly or impliedly deny the s 23 power to the Court in that class of proceeding. It cannot be invoked to grant an injunction where the Court acquires its jurisdiction under a statute which provides an exhaustive code of the available remedies and that code does not authorise the grant of an injunction. But this is not such a case.

(footnotes omitted)

1. In *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2018) 351 ALR 190; [2018] HCA 3 at [109] Keane, Nettle and Gordon JJ said the following in relation to s 23 of the Federal Court Act:

… Section 23 of the Federal Court Act empowers the Federal Court to make such orders as it considers "appropriate" to be made in the exercise of its jurisdiction and powers, as an incident of the general grant to it as a superior court of law and equity of the jurisdiction to deal with such matters. The power conferred by s 23 extends to making orders necessary to ensure the effective exercise of the determination of a matter and orders reasonably required or legally ancillary to ensuring that the court's order is effective according to its tenor. But the power conferred by s 23 does not extend to making penal orders. …

(footnotes omitted)

1. In the circumstances I am satisfied that the Compliance Order is appropriate and that the Court has power to make the Compliance Order under s 23 of the Federal Court Act. The circumstances that were present in *Patrick Stevedores* are not found here and the Compliance Order is not a penal order. Section 23 confers a wide power on the Court to make orders, including orders that the Court considers are appropriate to be made in the exercise of its jurisdiction and which will ensure the effective the determination of a matter. The Compliance Order is of that nature.

# costs

1. The Proposed Orders include an order that Servcorp Parramatta and Servcorp Melbourne pay the ACCC’s costs of and incidental to this proceeding fixed in the sum of $150,000. I will make that order.

# conclusion

1. For the reasons set out above I will make declarations and orders in the terms of the Proposed Orders.

|  |
| --- |
| I certify that the preceding sixty-six (66) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Markovic. |

Associate:

Dated: 13 July 2018

**Annexure A  
Statement of Agreed Facts**