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THE UNIVERSITY OF WESTERN AUSTRALIA LAW REVIEW

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Introduction

WAYNE MARTIN AC¹

Just over a decade ago, Professors Robert Hillman and Jeffrey Rachlinski noted that:

*Contract law, with its quaint origins in cases involving the delivery of cotton by clipper ship or mill shafts by horsedrawn carriage, seems ill-equipped to respond to contracts made at the speed of light. Can contract law adapt to this fundamental change in the way people make contracts, or is a new legal order required?*²

The notion of the ‘meeting of minds’ which underpinned traditional legal doctrine on the sanctity and freedom of contract is far removed from the contemporary realities of online purchases using standard, lengthy and often un-reviewed contract terms; commonly giving consumers a simple but stark choice – ‘take it or leave it’.

A nice example of the changing context of contract law is provided in an article in this collection, Justin Malbon’s ‘Online Cross-border Consumer Transactions: A Proposal for Developing Fair Standard Form Contract Terms’. Malbon refers to a *Financial Times* report of a 2010 April Fools Day prank. It seems 7,500 customers who purchased an item from a video game retailer on 1 April accepted conditions which included a provision agreeing ‘to surrender your immortal soul, and any claim you may have on it, within 5 (five) working days of receiving written notification’.³

The common law notion of a contract representing a true consensus, a meeting of the minds of well-informed parties willingly concluding their bargain free of constraint and cognisant of its risks and consequences is far removed from reality in many areas of contemporary commercial activity.

This poses the question addressed in this collection of articles, of whether the common law emphasis upon freedom of contract should be augmented by broader principles of fairness and unconscionability, so as to mitigate the potential harshness of the strict enforcement of contractual provisions.

1 Chief Justice of Western Australia

2 Robert A. Hillman & Jeffrey J. Rachlinski, ‘Standard-Form Contracting in the Electronic Age’ May, 2002 77 NYUL Rev 429, 430.

3 Justin Malbon’s ‘Online Cross-border Consumer Transactions: A proposal for Developing Fair Standard Form Contract Terms’ UMA Law Review 2013 [to be completed]

Earlier this year the Federal Court of Australia declared a number of clauses in an internet provider's standard form consumer contracts unfair and therefore void. These legal proceedings had been brought by the Australian Competition and Consumer Commission (ACCC) relying exclusively on the new unfair contract terms provisions of the Australian Consumer Law (ACL).⁴ The ACL commenced as a law of the Commonwealth and of each State and Territory on 1 January 2011.⁵

One of the key factors prompting the 2008 Productivity Commission's recommendation to introduce a single generic consumer law applying across Australia was the increasingly national nature of Australia's consumer markets.⁶ In part this was attributable to the internet. The internet has also fostered the rapid growth of international trade in consumer goods. Even in geographically isolated countries like Australia, transactions between a retailer in one country, and a consumer in another are now commonplace.

Recent developments in the law on unfair contract terms in Australia and elsewhere have gone some way to grappling with these contemporary realities. As consumer transactions increasingly cross national borders we have even more reason to learn about and from consumer protection laws in other jurisdictions.

This special edition of the *University of Western Australia Law Review* is a timely addition to the scholarship on the 'new legal order' of unfair contract terms. It examines just how effective reforms have been to date as well as pointing the way forward in this important and dynamic area of consumer protection, both nationally and internationally.

This collection of articles addresses a number of the pitfalls and opportunities of the electronic commercial environment in which many consumers operate. It also examines international developments which attempt to grapple with the changing nature of the international market economy, as well as warning that the specific socio-economic context of the country of origin is not to be ignored. Closer to home but equally important other articles in this collection identify the gaps in the existing law on unfair contract terms in Australia and the significant opportunities for further reform.

The special edition articles

Dr Christine Riefa's article 'An Empirical Study of Unfair Terms in Online Auction Contracts in the UK: Evidence of the Need for Better Enforcement Mechanisms'

4 ACCC (30 July 2013), 'Court declares consumer contract terms unfair' Media Release 174/13, accessed at www.accc.gov.au/media-release/court-declares-consumer-contract-terms-unfair 7 November 2013.

5 Australian Consumer Law 2010, 'Implementation' at http://www.consumerlaw.gov.au/content/Content.aspx?doc=the_acl/implementation.htm (accessed 5 November 2013).

6 Productivity Commission 2008, *Review of Australia's Consumer Policy Framework*, Final Report, Canberra, p 2.

is based on the results of an empirical examination of the effectiveness of unfair terms legislation using online auction contracts in the UK as the medium of assessment. Riefa concludes that compliance with unfair terms legislation is lower than might be expected considering the legislation has been in place for well over a decade. She examines the limitations of the current enforcement model, noting that reliance on private redress is not best fitted to remedying widely used unfair contract terms, and advocates targeted public enforcement of a preventative nature followed by the development of model industry standards.

Justin Malbon's article, referred to previously, points to the practical difficulties in pursuing the remedies available under the ACL against an overseas supplier. He notes that if European laws apply to the transaction, the consumers' rights may be enhanced, whereas under US laws the terms in standard form consumer contracts are increasingly pro-seller. Malbon proposes ways in which the interests of consumers could be better protected in cross-border transactions, following developments in international commercial contracting, and including the development of 'model' laws governing cross-border sales and of on-line 'Fair Term' standard form contracts.

In 'Looking at the Fine Print: Standard Form Contracts for Telecommunications Products and Consumer Protection Law in Australia' Dr Jeannie Marie Paterson and Jonathon Gadir report on the results of the 'Fine Print Project' which was set up following concerns about unfairness in the telecommunications industry. The project demonstrated that despite the provisions of the *Telecommunications Consumer Protection Industry Code* and the ACL, there was widespread use of terms in telecommunications contracts that had previously been identified as unfair or potentially unfair. Paterson and Gadir examine the possible reasons for this widespread failure and the implications for the effectiveness of the consumer protection regime more broadly. Significantly they note a lack of respect for the rule of law in this space.

Chris Willett's article 'Transparency and Fairness in Australian and UK Regulation of Standard Terms' contrasts the approach to the regulation of unfair standard contract terms in Australia and the UK, and in particular assesses whether priority is given to unfair substantive outcomes or to transparency (procedural fairness). In the latter case, otherwise unfair terms are excused provided the consumer is in a position to make an 'informed choice', with for example the (unfair) term being readily available, clearly stated and appropriately prominent. Willett concludes that in certain key ways the Australian approach is more concerned with substantive fairness and as such more protective of consumers, attributing this to the absence of a 'good faith' requirement and the exclusion of only the 'upfront price' from the test of unfairness. However Willett notes the requirement that there be a 'significant imbalance' in the parties' rights and obligations under the contract in Australian law may yet prove to be an important limitation on the extent of consumer protection.

In 'Challenges for the Development of Unfair Contract Terms Law in Nigeria' Dr Adejoke Oyewunmi and Dr Abiola Sanni examine the history of the law with respect to unfair contract terms in Nigeria since 1961. That history includes early proactive interpretation by the Nigerian judiciary to improve consumer protection, its ostensible abandonment by the Supreme Court of Nigeria in 1986 following the *Photo Production Limited v Securicor Transport* case in the UK, and the more recent convergence of legislative and judicial approaches to revive consumer protections against comprehensive exclusion clauses and other unfair contract terms. Although these have been positive developments the authors highlight the need for a statutory framework for consumer protection in Nigeria. They also note the importance of legal developments in Nigeria reflecting the socio-economic context of that country.

Kate Tokeley's article 'New Zealand Moves to Prohibit Unfair Terms: A Critical Analysis of the Current Proposal' compares the current proposals for the prohibition of unfair contract terms in New Zealand with the legislation in Australia and the United Kingdom. Tokeley argues that the revised Consumer Law Reform Bill, which prohibits unfair contract term provisions based upon substantive unfairness, is a novel and drastic move away from the principles of freedom and sanctity of contract. However, she welcomes the reforms as an important addition to New Zealand's consumer protection law, given their restricted application to only unexamined (non-core) terms in standard form consumer contracts which are not subject to market forces and for which the ordinary rules of contract law do not provide sufficient protection. However, Tokeley identifies some aspects of the proposed legislation which are either confusing or fail to correspond with the rationale for unfair terms prohibition. Another significant shortcoming is the failure to provide consumers with the capacity to bring unfair contract term proceedings, with this option vesting solely in the proposed Consumer Commission.

In 'Small Business – Forgotten and in need of Protection from Unfairness?' Aviva Freilich and Eileen Webb highlight the failure of the ACL to protect small businesses against unfair contract terms. Freilich and Webb argue that, contrary to the evidence, this omission presumes that all businesses are 'one and the same' and better resourced and informed than consumers. The article also includes a useful review of the potential protections at common law and under s 21 ACL (for unconscionable conduct) for small businesses affected by unfair contract terms which, Freilich and Webb argue, indicates that the lack of protection for small businesses may be more apparent than real. Nonetheless the authors contend that if the term of a contract is unfair it should not matter to whom it is directed.

In 'The Applicability of Unfair Contract Terms Legislation to Franchise Contracts' Elizabeth Crawford Spencer examines the exclusion of franchisees from the ACL protections relating to unfair contract terms. She argues that the consumer/business distinction which excludes franchisees from the ACL is not

a sound basis for excluding the operation of the legislation. Indeed, Crawford Spencer postulates that franchising provides the paradigm example of a drafting party having all or most of the bargaining power and the capacity to prepare the contract prior to any discussion between the parties. As the franchisor/franchisee relationship is almost by definition imbalanced, the author argues that franchisors should be limited in the exercise of their discretion so as not to unduly harm franchisees. However as virtually all of the unfair contract terms listed in section 25 of the ACL are commonly used in franchising contracts, Crawford Spencer suggests that franchise contracts may not be amenable to the ACL protections in its current form and a different approach may need to be adopted.

Lisa Goldacre's article 'The Contract for the Supply of Educational Services and Unfair Contract Terms: Advancing Students' Rights as Consumers' examines the reasons why students seldom seek redress in relation to infringement of their rights as consumers despite the transformation of the landscape of the higher education sector into a culture of consumerism. A particular impediment to claims for redress has been that claims in relation to academic matters are considered to be non-justiciable. However, Goldacre argues that this may not to be such an impediment in relation to unfair contract terms as the adjudication is not based on the quality and standard of educational services supplied but on the fairness of the term (provided the supply of the service can also be brought within the definition of being provided in 'trade or commerce' and is not otherwise excluded by the ACL). Goldacre concludes that the ACL can provide effective protection to students as consumers of educational services by providing more extensive and wide-ranging remedies.

Gail Pearson's article 'Regarding Unfair Terms in Financial Services Contracts' examines the unfair contract terms applying to financial services pursuant to the *Securities and Investments Commission Act 2001* (Cth) (mirroring the terms of the ACL) and the *Insurance Contracts Act 1984* (Cth). Pearson examines some of the significant exclusions and ambiguities under this regime and concludes that the biggest current unresolved issue is whether investment is an acquisition for personal reasons. If not, many acquirers of financial products and services will not have protection under the unfair terms regime.

In 'Unfair Contract Terms: Termination for Convenience' Anthony Gray examines clauses in business to business contracts which grant one party the right to terminate the contract at their convenience. Gray regards such clauses as effectively 'contracting out' of the traditional law of contract which would only allow termination for a breach of a condition and not a warranty. As unfair contract terms provisions in the ACL do not apply because these are not consumer contracts, Gray considers the potential applicability of good faith principles in contracting, in particular reasonableness, as well as the doctrines of unconscionability and unjust enrichment.

In 'Legitimate Interests and Unfair Terms: the other Threshold Test' Anthony Hevron uses the case law on the common law doctrine of restraint of trade, which focuses upon the reasonable protection of legitimate interests as a framework for exploring unfairness under the ACL, specifically the proviso which allows contractual terms to stand should these be reasonably necessary to protect the legitimate interests of the party who will benefit from them. Hevron concludes that if this key part of the test under the ACL was modelled on the restraint of trade cases, it would provide for a very practical and commercially appropriate test.

Is contract law up to the challenge?

The dramatic changes to contract law highlighted in this special edition and the calls for even more reform may give us reason to doubt Professors Hillman and Rachlinski's 2002 conclusion that '[a]lthough the electronic environment is a truly novel advance in the history of consumerism, existing contract law is up to the challenge'.⁷ However, as they also pointed out:

*Courts in both [electronic and paper] worlds either must trust the market and enforce the standard terms, or decide that the market has failed and refuse to enforce them.*⁸

While the form and parameters of 'market failure' will clearly be impacted by the changing nature of commerce, the fundamental basis for intervention through the law - namely, that the market has failed to provide the parties with the capacity to effectively protect their interests, remains unaltered. The challenge is for the law to remain alive to the changing commercial environment so that it continues to be relevant and effective in assessing whether the market has failed, in this sense.

Professor Michael Blakeney, Associate Professor Aviva Freilich and Professor Eileen Webb, the student editors, together with the contributing authors are to be commended for producing a thought-provoking special edition on unfair contract terms which so ably assists in the continuing development of this important area of law.

7 Robert A. Hillman & Jeffrey J. Rachlinski, 'Standard-Form Contracting in the Electronic Age' May, 2002 77 NYUL Rev 429, 495.

8 Robert A. Hillman & Jeffrey J. Rachlinski, 'Standard-Form Contracting in the Electronic Age' May, 2002 77 NYUL Rev 429, 495.

An Empirical Study of Unfair Terms in Online Auction Contracts in the UK: Evidence of the Need for Better Enforcement Mechanisms

CHRISTINE RIEFA*

INTRODUCTION

Much is written about the theory of unfair contract terms in consumer contracts. The literature abundantly covers the rationale for intervention and control¹ as well as the scope of application of unfair contract terms legislation.² Much also exists commenting on court decisions and singling out unfair terms in a particular industry or focussing on a type of clause.³ By contrast, few studies look at unfair terms ‘in situ’, attempting to assess the compliance levels of suppliers as well as the effectiveness ‘on the ground’ of the legislation in place and in particular its enforcement. This article proposes to do just that, using online auction contracts as its backdrop. More specifically, this article is based on the results of empirical research into the content of terms and conditions applicable to consumers on a total of 28 online auction websites. All auction sites included in the survey are established in a Member State of the European Union and operate in the UK.⁴ The terms and conditions were collected between February 2012 and March 2013 and

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1 According to Paolisa Nebbia for example, unfair terms are controlled because of the use of standardised contract terms and/or the fact that consumers are weaker parties to a contract. See Nebbia, *Unfair Contract Terms in European Law, a study in comparative and EC Law*, Hart 2007, p. 34. Howells and Weatherill offer a more sophisticated interpretation, linking the control of unfair terms with market imperfections and the imbalance between suppliers and consumers. See Geraint Howells and Stephen Weatherill, *Consumer Protection Law*, second edition, Ashgate 2005, p. 261.

2 See for example, Chris Willett, *Fairness in Consumer contracts: the case of unfair terms*, Ashgate 2007; Paolisa Nebbia, *Unfair contract terms in European Law: a study in comparative and EC law*, Hart 2007. See also, Chris Willett and Youseph Farah, *Unfair contract terms: rethinking remedies and enforcement*, in Eugene Buttigieg, *Rights and remedies for the consumer in the European Union*, Gutenberg Press (Malta) 2012, pp. 29-48.

3 See for example, the scholarship studying *Office of Fair Trading v Abbey National Plc [2009] UKSC 6*, including Simon Whittaker, *unfair contract terms, unfair prices and bank charges*, M.L.R. 2011, 74(1), 106-122.

4 Note that since data collection ended a small number of sites are no longer accessible. They continue to be included as they represent an accurate snapshot of compliance during the period of study enabling to derive trends and infer relevant course of action for the future.

analysis conducted in April/ May of 2013.⁵

Online auctions have been used as a method of sale to consumers for the best part of 20 years, democratised by the success of eBay in the mid 1990's. The spread of auctions as a popular way to sell property evolved across the years and many auction models are now competing. Essentially, two types of platforms are in operation: intermediary websites and proprietary websites. The survey conducted followed this architecture and tested compliance of a number of clauses contained in the terms and conditions of intermediary and proprietary auction platforms.

The archetype of the intermediary model is eBay, which enables sellers to organise auctions as well as fixed price sales, and matches them with buyers. eBay is therefore an intermediary that does not take possession of the goods put up for sale, nor does it intervene in the collection of payments or the delivery of the goods. Other sites operate along the same model in the UK.⁶ In total, the survey included 14 intermediary websites of varying sizes.⁷

The typology of proprietary website is more complex. The survey included a total of 14 of such sites, made out of a number of sub-groups: specialised auctions, television auctions, penny auctions, sealed auctions, unique bid auctions and chicken race auctions.

Two specialised auction sites were included in the survey.⁸ Specialised auctions run like eBay, but since the sales are organised by the principal owning the site, there are no fees other than the price of the winning bid to pay. As their name indicates, they are auctions that run for specialised goods, in our sample, namely household appliances and Golf equipment.

Four television auction sites were included in the survey.⁹ Those auctions run on television channels but are also accessible online, often in real time. Those websites run mostly Dutch auctions¹⁰ but on a descending price model. In those

5 While I acknowledge that it is possible that some terms may have changed during the collection period and the results may, as a result, not reflect the exact landscape, a spot check of terms revealed no changes. Many of the Terms and conditions collected also reflected that they had not been updated for some significant periods (some dating back to 2010), indicating that the results obtained can be seen as representative at the time of submission to the publisher.

6 Note that eBay also operate as a pay-to-sell site, a model mostly followed by all other intermediary websites with a few exceptions.

7 The following sites were included in the sample: eBay, Cqout, eBid, Zolanta, 121bid, 2made, Armchair trading, auction1, Avabid, CJS auctions, Dream Auctions, Flogitall, Specialist auctions and UK Bids Away.

8 The two sites included in the sample are Golfbidder and Comet clearance. The latter is now defunct at the time of writing because the mother company that also owned many high street shops has folded.

9 Those sites were gems.tv, bid.tv, speedauctions.tv and pricedrop.tv.

10 Dutch auctions generally are auctions where multiples of the same items are available. They are traditionally organised following an ascending bid technique allowing multiple buyers to place a bid and all win the auction, up to the maximum quantity available. The

auctions the successful bidders have to bid before quantities run out whilst the price decreases at regular intervals. At the end of the auction, all buyers pay the lowest price. The television channel is normally in possession of the goods it sells and acts therefore as a principal and not an intermediary, as was the case for eBay.

In penny auctions, a price ascending technique is normally used to determine the winning bid. The auctions are run by a principal, the owner of the website, which offers for sale mostly electronics and other attractive items that normally have a fairly high ticket price in the shops. Bidders have to pay to place a bid online and this cost can vary, depending on the site and sometimes the item put up for sale. The bidders will pay for each bid placed and the site generates revenue not from the sale of the item per se, but from the placing of bids. Those auctions are called penny auctions because bids only go up by increments of one penny at a time. The highest bidder at the end of the auction will be the winner and will pay in addition to the cost of the bids placed already, the final value of the bid. However, losing bidders cannot recoup the costs they had to pay to enter the auction, leaving many consumers disappointed and out of pocket.¹¹ The survey included three penny auction sites.¹²

Techniques such as unique bid auctions, sealed bid auctions and chicken race auctions are also starting to develop, all tending to prefer pay-to-bid business models similar to penny auctions. Often those sites carry a number of mixed auction models. Bidson for example offers penny auctions, lowest unique bid and chicken race auctions. The sample included a total of five sites using a variety of those auction techniques.¹³ In unique bid auctions, the winner of the auction will be the buyer with the lowest (low bid auctions) or the highest unique bid (high bid auction).¹⁴ In sealed bid auctions, buyers will only be able to place one single bid, and the winning bid will be the highest bid placed by the end of the auction.¹⁵ Chicken race auctions follow a slightly different model. To enter the auction, participants have to pay a fee for which they can bid on a number of selected auctions. The winner of each auction is the person making the highest bid on a descending price

use of this technique is also found on some intermediary platforms.

- 11 This has raised concerns and in the USA, penny auctions were amongst the top 10 scams according to the Better Business Bureau, <http://www.bbb.org/blog/top-scams-of-2011.html>, accessed 17/04/2012. There are clear concerns about those sites in the UK also and the OFT acted back in 2010 to investigate resulting in the closure of one site and undertaking being agreed with a software company supplying this industry and who had included an artificial bid function considered to amount to an unfair commercial practice. For more information on this, see <http://oft.gov.uk/OFTwork/consumer-enforcement/consumer-enforcement-completed/penny-auctions-battybid/> and <http://oft.gov.uk/OFTwork/consumer-enforcement/consumer-enforcement-completed/penny-auctions-scriptmatix/>, both accessed 17/04/2012.
- 12 This included Madbid, Ziinga and Quibids.
- 13 The sites included in the sample are: Auctionair, Bidson, Spree4, Bassabids and Fastbidding.
- 14 For an example of those auction techniques, see www.auctionair.co.uk, bidson, spree4.com, Bassabids (all included in the survey).
- 15 Auctionair.co.uk (included in our sample) also runs this type of auctions on some products.

auction. Auctions last for a short space of time (10 minutes or so).¹⁶

This article will begin by laying down some of the basic legal principles concerning the control of unfair terms in the UK. Following on, this article will review some of the terms uncovered and assess their fairness. This part will conclude that compliance levels are rather low, considering that legislation has been in force for well over a decade in an industry that is no longer in development. This article moves on to demonstrate that amidst the lack of compliance with unfair term legislation, the current enforcement model is unlikely to yield positive results. The article concludes with a few practical solutions enabling prevention as well as improving enforcement and consumer protection on online auction platforms.

1. Control of unfair terms: basic legal principles guiding the survey

The control of unfair terms in the UK finds its origin in the doctrine of incorporation of terms. Legislation was later enacted to correct the most unfair of terms (exclusion clauses) in all types of contracts through the Unfair Contract Terms Act 1977.¹⁷ More recently the Unfair Terms in Consumer Contracts Directive¹⁸, implemented in the UK by the Unfair Terms in Consumer Contracts Regulations 1999¹⁹ (UTCCR) provides protection from unfair terms that have not been individually negotiated²⁰ in contracts concluded between a seller and a consumer. It is this latter piece of legislation that the survey used to assess the fairness of terms contained in the terms and conditions of the online auction websites included in the survey.

According to Reg 5, a term is “*regarded as unfair if, contrary to the requirements of good faith, it causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer*”.

There are therefore two main hurdles for unfairness to be demonstrated. First, the term needs to cause a significant imbalance between the parties, to the detriment of the consumer. Schedule 2 contains an indicative and non-exhaustive list of the terms, which may be regarded as unfair.²¹ This includes terms granting traders ill-defined discretionary powers, especially when no equivalent protection is extended

¹⁶ For more details, see <http://www.bidson.com/uk/chicken-race-auctions/how-it-works/>, last consulted 21/05/2013.

¹⁷ Unfair Contract Terms Act 1977 (1977, c. 50). This Act still operates in the UK and can overlap with more recent legislation. It has a wider scope and can apply to B2B relationships as well as include notices and not just contractual relationships. However it is reserved to exclusion clauses only. All other clauses are not within its scope.

¹⁸ Council Directive 93/13/EEC of 5. April 1993 on Unfair Terms in Consumer Contracts OJ L 95/29, 21.04.1993.

¹⁹ SI1999/2083.

²⁰ Under Regulation 5(4), it is for the seller or supplier who claims that a term was individually negotiated to show that it was. In B2C contracts, there is therefore a presumption that terms are not negotiated but rather imposed by the supplier.

²¹ Reg 5(5).

to consumers or terms imposing disproportionately heavy burdens on consumers and protecting the trader from claims that the consumer would ordinarily expect to be able to make.²² The terms listed in the Regulations' Schedule 2 are very diverse, but cover many of the terms habitually found in consumer contracts. However, because Schedule 2 is only a grey list, each term needs to be assessed for fairness on a case by case basis to decide whether it creates a significant imbalance between the parties or not. Under the Regulations, unfairness shall not be assessed in isolation.

Under Reg 6, the “*unfairness of a contractual term is assessed taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of the conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependant*”.

As a result, the survey looked at each suspect term, taking into account a number of factors, including assessing if the process by which the consumers are committing themselves is transparent or if it may be construed as unfair. Terms must also be expressed in plain and intelligible language or the supplier risks the term be interpreted against them under Reg 7, an element that is taken into consideration in the study conducted.

Second, the term needs to be contrary to the requirement of good faith.²³ Good faith involves fair dealing and the absence of ‘sharp practice’ according to Lord Bingham in the case of *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd*.²⁴ Lord Bingham further refined the definition of ‘good faith’ in *Director of Fair Trading v First National Bank Plc*²⁵ and noted that

*‘good faith in this context is not an artificial or technical concept; nor, (...) is it a concept wholly unfamiliar to British lawyers. It looks to good standards of commercial morality and practice.’*²⁶

The requirement of good faith is one of fair and open dealing. This dictates that the online auction platform must behave in a way, which enables the consumer to make a well informed choice, having knowledge of the terms of the contract and

22 G. Howell and S. Weatherill, *Consumer protection Law*, 2nd edition, (Aldershot, Ashgate 2005) 281.

23 Note, however that although not wholly unfamiliar, good faith is a relatively new concept for English lawyers. For more, see Woodroffe and Lowe’s, *Consumer Law and Practice*, seventh edition, (London, Sweet & Maxwell 2007) 166. G. Howell and S. Weatherill, “*consumer protection Law*, 2nd edition, (Aldershot, Ashgate 2005) 285.

24 [1988] 2 W.L.R. 615 at 620.

25 [2002] 1 AC 481 (HL). Note that this case was decided against the backdrop of the 1994 Regulations and not the 1999 Regulations, but this makes little difference and the case is still good law.

26 *The Director General of Fair Trading v First National Bank* [2002] 1 AC 481 (HL) para 17.

what they imply. Any behaviour by which a business tries to camouflage terms in small print or lose it in a jungle of hyperlinks may be interpreted as contrary to the principle of good faith in the light of the above case law.

Any terms found to be unfair will not be binding on the consumer under Reg 8, a sanction which is, as I will explain, inappropriate for online auction contracts.

2. Review of a selection of unfair terms found in online auction platforms' terms and conditions

The terms and conditions varied greatly in their content. From very succinct to very detailed²⁷ accounting for discrepancies in some of the results. This was the case, for example, where a clause is only used in a small number of sites. While in those cases less consumers are likely to be affected, it remains that the volume of consumers affected is not a measure of the unfairness of clauses.²⁸ Indeed, by means of private enforcement, it is sufficient for only one consumer to be affected for legal action to take place. Further, the measure of fairness in the UTCCR does not simply rest on actual impact, but rather on the propensity for a clause to cause a significant imbalance to the detriment of the consumer. Indeed, public enforcement dictates that a clause may be struck out from contracts before any detriment occurs for some consumers. Therefore, the presence of a clause that has the propensity to cause detriment due to its unfairness is sufficient to justify its study. The survey considered that clauses used in even a small number of sites had sufficient significance and were included.

While the survey conducted on the 28 websites focussed on a larger number of unfair terms, this article only covers a small sample. In any event, it is important to note that out of the 28 websites surveyed, all contained at least one term that had the propensity to be unfair in isolation. Often however, terms also had a susceptibility to unfairness when put into a wider context, whereas procedural unfairness or simply by juxtaposition to a number of other terms contained in the contract.²⁹

27 This is for example the case of Armchair Trading and Dream Auctions, whose terms and conditions fit on one side of A4 and contains very little details and Madbid or eBay, whose contract were the most furnished. Within the sample we found a range of contracts, some of which were possibly crafted with little to no legal advice. For example, The Flogitall terms and conditions contain a rather humorous section on 'registering membership', which reads: *'Only idiots try it on with partial addresses and bogus names, we give them 24 hours to correct that or their membership is cancelled and IP addresses blocked for ever. We don't want these people or need them, neither do you.'*

28 Although it is clear that it is in fact an important consideration for public enforcement, although the OFT has a duty to consider any complaint that a term contained in a standard form contract is unfair (see Regulations 10-12, UTCCR).

29 Procedural unfairness is unfairness that affects the process leading to the conclusion of the contract. Regulation 6 UTCCR states: the *"unfairness of a contractual term is assessed taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of the conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all the other terms of the*

The terms discussed below include terms arbitrarily reserving the right to cancel or suspend an online auction account and terms reserving the online auction platform the right to unilaterally modify the contract or service.³⁰ From even this small sample, it is possible to infer that unfair contract term legislation is deficient in protecting consumers on online auction platforms.

1.1. Arbitrarily reserving the right to cancel or suspend an account

Out of the 28 sites surveyed, 75% reserved the right to cancel or suspend an account. It was unclear if such a term existed in 7% of cases, mostly because the term included evoked the possibility of sanction on particular sales, but was vague as to whether or not an account could be suspended or closed.³¹ Finally, 18% of sites did carry terms and conditions that did not contain such term. More intermediary sites reserved such right compared to proprietary sites. Indeed, on intermediary platforms, such a clause was found in 86% of cases compared to 64% only on proprietary websites. The survey looked at the justifications for suspending or closing accounts as well as the use of notices preceding such actions.

1.1.1. Justifications for suspending or closing accounts

The presence of such a clause is not, at face value, always problematic. Indeed, it seems perfectly justifiable for online auction sites to restrict access and participation of some users, in particular, in order to protect other users. What is unfair is to impose a sanction such as suspension or cancellation without a valid justification.

Indeed, in most extreme cases where the account is cancelled, such action could be seen as contrary to Schedule 2(1)(f) according to which, *'authorising the seller or supplier to dissolve the contract on a discretionary basis where the same facility is not granted to the consumer (...)'* could be considered unfair. We did not find, in any of the online auction contracts surveyed, a possibility for consumers to dissolve their contract on a discretionary basis. If such possibility exists in practice it is not clearly spelt out in the contracts. Since the discretion to dissolve is not offered to online auction consumers, online auction platforms can only proceed with objectively justified contract cancellations, or fall foul of the

contract or of another contract on which it is dependant".

30 The original survey studied further terms, including clauses unilaterally reserving the right to modify the price, clauses incorporating remote terms by reference, terms imposing onerous conditions, liability clauses and arbitration and exclusive jurisdiction clauses. The full survey will be published in my forthcoming monograph (under contract with Ashgate).

31 This was the case for Avabid and Comet. On Avabid, the clause indicates that items that are put up to bids are subject to review by the staff of AVABID.com and may be removed without prior notice, if in violation with the User Agreement. On Comet, the clause indicates: *'We reserve the right to exclude you, or withdraw your participation, from any auction at any time'* but does not elaborate further on whether or not a suspension from the site would be possible.

legislation.

In the sample, twelve main reasons for sanctions (including cancellation) were found (some of which could overlap). The most popular justification was the violation of the terms and conditions of use (31%) followed by the conduct of illicit activities on site (18%). Failure to comply with sales obligations such as paying the price or delivery (11%) came joint third with conducting practices such as shill bidding or team bidding or any kind (11%). Next, the violation of the rights of others and in particular intellectual property rights was used in 8% of cases, although on some other sites, such practices could also be caught under the heading of illicit or illegal activities on the site. Other justifications included the failure to pay fees (5%), misstatements or misleading descriptions of goods (here again sometimes covered by illicit or illegal activities on the site) (5%) and spamming (3%). Lastly a number of justifications exclusively concerned intermediary online auction platforms and included low feedback rating, the conduct of off-site transactions and the lack of respect for buyer protection procedures.³²

Despite the existence of an array of justifications present in the surveyed clauses, ‘discretion’ is a term that was found in almost all relevant clauses. On eBay, discretion can be used to decide on the appropriate sanction for repeat IP infringers, while on eBid, the site’s sole discretion will be used to terminate any auction or use of the services. In practice, it is for the site to determine if the actions of the users are contrary to the site’s rules or not. It would be impractical to expect an ‘expert’ determination from a mediator or even a court for such occurrences. However, the use of sole discretion suggests a potential for arbitrary decisions being taken. If it was the case this would be a cause for concern.

Unfortunately, in the absence of data from users about potential suspensions and cancellations, the survey was not able to assess this aspect. It is true that in situations where the suspension or cancellation is considered arbitrary, the consumer is free to proceed in court in order to get re-established. This is however, only a theoretical incidence as the cost of going to court would most certainly act as a deterrent. However, one example of a dispute regarding an online platform’s right to cancel or suspend an account, is found in the case of *eBay Europe et eBay France v DWC*.³³ Although the case emanates from a French court and concerns a small business and not a consumer, its findings are useful and could be persuasive on an English court. In this case, four accounts opened by DWC, an importer of motorcycles, scooters and spa products from China had been closed by eBay without warning. The closure was motivated by the fact that DWC’s company directors were previously using other accounts, under the name of XSS that had been closed by eBay following much negative feedback. Indeed, the bulk of the negative feedback was due mostly to the dubious quality of their products, the

32 Those justifications were found on eBay. The site does indeed offer buyer protection on some items. Sellers are required to comply with eBay’s decisions on those cases.

33 CA Paris, 9 November 2007.

misleading information communicated to their clients about the said products, and the use of tactics to avoid negative evaluations. This included the sale in mass of low value items without any link to its principal activity to build positive feedback. The practices were also the object of a press article published in “Quad magazine” in August 2006, which criticised the activity of XSS and exposed the danger posed by the products that were sold (imported from China).

The closure, in accordance to eBay’s terms and conditions, required XSS not to use eBay in whatever way including by the opening of new accounts or accounts linked to the litigious one. This closure was not contested. Instead Mr Louvet and Gornes created another company, DWC, the object of the present closures. DWC used the same tactics employed by XSS and continued to source its motorcycles, scooters and other items from the same supplier in China leading to eBay deciding to close DWC accounts. While originally, at first instance the court had ordered that DWC’s account be re-instated, eBay subsequently appealed the decision.

The Paris Court of Appeal considered that eBay had enough elements to justify the closure, including the demonstration of the links with XSS and the fact that accounts had been reopened in violation of eBay’s terms and conditions. The court also noted that given the links between XSS and DWC eBay could legitimately believe that the activity of DWC will expose eBay to liability and that the opening of new accounts was a way of getting around the previous closure. It found that eBay was not dispensed of an obligation to ensure, within its means, that the site was not used for reprehensible activities and that similarly, users had the obligation to respect eBay’s terms and conditions. The closing of the account was thus justified and the term allowing eBay to do so could not, in this instance, be considered unfair.

1.1.2. Notice of cancellation or suspension

Under Schedule 2(1)(g), a term *‘enabling the seller or supplier to terminate a contract of indeterminate duration without reasonable notice except where there are serious grounds for doing so’* could be considered unfair.

In *eBay Europe et eBay France v DWC*³⁴, the Court of Appeal did not find that that the activity of an auction broker included an obligation to warn users prior to the closure of their account. This was justified, primarily because the party was a trader rather than a consumer (not benefiting from the protection of the unfair terms Directive implementation in France) but, in any event, because the grounds on which the closure occurred could be considered serious, and therefore not requiring notice.

As a result, it is possible to consider the following clause, found in eBid’s terms and conditions fair, providing that the grounds for termination are considered

sufficiently serious. The contract states: ‘*You agree that eBid, in its sole discretion, may terminate any auction or use of the service immediately and without notice if (a) eBid believes that you have acted inconsistently with the spirit or the letter of this Terms of Service or (b) if eBid believes you have violated or tried to violate the rights of other users*’.

However, anecdotal evidence points towards the fact that some users have been barred from using online auction sites for less than serious or justified reasons (although we have not been able to verify with those sites their version of events).³⁵ For example, a post on ‘screamingreviews.com’, concerning a small business points towards a cancellation based on the denunciation of fraudulent activities on the site.³⁶ Similarly, on ‘ripoffreport.com’, a number of allegations of closure on Quibids were easily located.³⁷

In those situations, it seems essential that the consumer be put on notice before any sanctions take place. This is because for closures concerning consumer accounts (and not small businesses), violations are likely to be less serious and therefore, any closure without adequate notice could be considered unfair under Schedule 2(1)(g). Without serious grounds, the absence of notice creates a significant imbalance between the rights and obligations of the parties to the detriment of the consumer.

1.2. Unilateral modifications to contract, service and price

Online auction platforms terms and conditions contain a number of clauses affecting unilateral changes, most of which displayed the characteristics of an unfair term. Unilateral changes were primarily located concerning changes to the terms and conditions themselves as well as changes to the service or product offered, and on some rarer occasions the price at which a product or service is provided on online auction sites.

1.2.1. Unilateral changes to terms and conditions

The survey encompassed a study of terms that fell within the scope of Schedule 2(1)(j), i.e. ‘*enabling the seller or supplier to alter the terms of the contract unilaterally without a valid reason which is specified in the contract.*’ Therefore

³⁵ This evidence primarily originates in the USA, but sites are known to operate in broadly the same manner in all jurisdictions. Thus, such reports are also relevant to EU consumers.

³⁶ See ‘eBay cancelled my account because I wrote them a letter exposing the scams going on on eBay!’, <http://screamingreviews.com/ebay-cancelled-my-account-because-i-wrote-them-a-letter-exposing-the-scams-going-on-on-ebay/>, last consulted 17/05/2013.

³⁷ See, Rip-off Report, Complaint review: Quibids LLC, <http://www.ripoffreport.com/r/quibids-llc/-internet-/quibids-llc-cancelled-auction-i-legitimately-won-internet-533597>, last consulted 17/05/2013. Note however that this report also contains a rebuttal apparently from a Quibids’ employee claiming that the consumer in question had opened multiple accounts against the rules.

unfairness is only derived if the modification of terms is not justified in the contract.

There are however secondary elements to consider with regard to these clauses. These concern the manner in which the changes are communicated to the consumer, as well as the freedom given to the consumer to walk away following the changes. Indeed, according to Schedule 2(2)(b), *'Paragraph 1(j) is (...) without hindrance to terms under which a seller or supplier reserves the right to alter unilaterally the conditions of a contract of indeterminate duration, provided that he is required to inform the consumer with reasonable notice and that the consumer is free to dissolve the contract.'* In contrast, if such information as well as freedom to dissolve the contract is not offered, the term can be considered unfair.

Clauses in online auction contracts varied greatly, ranging from the absence of such a clause (in a total of 11 contracts) to pushing the responsibility of being informed about changes to consumers. The survey tested terms on all three grounds separately on the 17 contracts that contained a clause pertaining to unilateral changes of the terms and condition.

The results were that 94% of the clauses studied did not contain a justification for such a change in the terms and conditions and yet, all but a few made it very clear that the site retained the right to change terms.³⁸ Only Quibids provided a justification, although we doubt it would be sufficient since the clause indicates: *'We reserve the right to change these terms including for legal, regulatory or security reasons at any time'*. Therefore many other reasons could allow Quibids to proceed with modification without those being spelt out in the contract. Changes prompted by legal, regulatory or security reasons would however be adequately justified. Thus, should controls over identity for example be changed to reduce frauds on the site, such change prompted by security concerns could be acceptable.

With regards to the way consumers are informed about any changes of the terms and conditions (justified or not), none of the sites that included a clause on this aspect provided adequate information about the changes.³⁹ It was found that 29% of clauses were clearly unfair on this point. The worst practice was found to be reserving the right to revise the terms and conditions without giving prior notice.⁴⁰

38 Overall, across the 28 sets of terms and conditions reviewed, 39% did not have a term, 57% contained a clause where no justification was present and in 4% of cases, a justification was present but incomplete in our view.

39 Overall, across the 28 sets of terms and conditions reviewed, 39% did not have a term, 18% did not provide information on changes to consumers and 43% contained some provisions for informing consumers but they were all likely to be considered unfair.

40 For example, Auctionair's terms and conditions state: *'We reserve the right to review and revise our terms and conditions from time to time without giving prior notice and by participating in the auction subsequent to any revision of our terms and conditions, you agree to be bound by such changes'*.

The other 71% of clauses encountered could be deemed unfair, especially in light of the absence of justification or an absence of a clear message releasing the consumer from the contract, should he or she disagree with the changes. Indeed, in 71% of cases, the clauses often referred to informing the consumer of changes, but in most, the method by which changes would be notified was unclear. For many, it was for the consumer to monitor the changes on the website. For example, on 2made, the clause reads as follows: *'This agreement sets out legally binding terms for your membership or involvement with the website and may be edited by 2made from time to time. Any modifications shall commence upon posting or notification by email, by 2made on the website. You may also receive a copy of this agreement by emailing us at: support@2made.com, subject: terms of service agreement.'* Therefore the operator retains the option to notify either via email, or by posting on the website only. This type of clause was rather frequent, sometimes the only acceptable method to communicate changes would be to publish on the website. Indeed, on Bidson, the terms and conditions indicate: *'Bidsons reserves the right to change these terms during on-going bidding. The new terms come into force upon being published.'*

Worse still, a few online auction sites use a clause enabling a change of terms (justified or not), explaining that consumers should stop using the site following a change to the terms and conditions they did not agree to, and when they did, give a realistic deadline for doing so.⁴¹ Out of the sites where a clause was found, 6% used a clearly unfair term while the rest of the sample (94%) could be seen as unfair, although the clauses did not specifically block consumers from walking away.

For example, Golfbidder's terms and conditions explain:

'We reserve the right to change these terms from time to time, and to post the new terms on the website. The new terms will take effect, and will govern all activity on or through the website and/or your relationship with us, commencing one (1) week after the date of such posting (or such later date as we indicate in such posting). If you do not wish to be governed by the new terms, you may notify us within the above period of one (1) week, and from the date when the new version takes effect you must cease to use the website.'

Yet, one week seems extremely short for a change that the consumer needs to spot using the website, especially since no notification seems to be sent to consumers from the online platform. Further, on this site, consumers need to notify Golfbidder but it is unclear if ceasing to use the site on its own would be sufficient. It seems that one week is too short a period to enable a consumer to gain knowledge

⁴¹ Overall, across the 28 sets of terms and conditions reviewed, 39% did not have a term, 4% were not giving consumers the ability to walk away after changes to the terms and conditions and 57% contained some provisions that were often unclear and all likely to be considered unfair.

of the changes, review them and decide if they are happy to continue or wish to stop using the site. As a result, this clause could be deemed unfair. A better practice was spotted on eBay where the period to cancel the contract is of 30 days following the changes notified by email or on the site. In any event, it seems that notification at the very least should be required. It is indeed, almost impossible for consumers to monitor changes in terms and conditions if they have not been flagged. It seems that the clause contained in the contract with Gems TV would also be considered unfair. This clause states: *'These terms and conditions may be revised at any time and we reserve the right to do so. You are, therefore, advised to keep up to date with the contents of these terms and conditions as revisions are binding upon you.'* This clause would force a consumer visiting the site to review the entirety of terms upon every visit in order to avoid a change being binding. This is a term that as a result, creates a significant imbalance between the rights and obligations of the parties, in particular because the terms and conditions do not state any justifications for the changes nor makes provisions to advise the consumer of such changes.

1.2.2. Unilateral changes to the service offered

Schedule 2(1)(k) of the unfair terms in consumer contracts Regulations 1999 states that terms which have the object or effect of *'enabling the seller or supplier to alter unilaterally without a valid reason any characteristics of the product or service to be provided'* may be regarded as unfair.

The survey therefore started with testing if terms and conditions carried a clause pertaining to the unilateral modification of the service or products offered. No clause concerning the unilateral modifications of the service or product was found in 32% of cases out of the 28 sites surveyed.⁴² Out of the sites that contained a clause⁴³, four sites (21%)⁴⁴ in our sample used a clause unambiguously reserving the right to unilaterally modify the service offered, while the rest of the sample (79%) contained a clause that did have the effect of allowing modification of service or product but without directly expressing this was the case.

The survey proceeded with assessing the fairness of the terms. This included testing whether or not a justification for the unilateral modification was included in the term as well as any notice that accompanied the modification. Contrary to the unilateral modification of terms and conditions, a valid reason is required but that reason does not have to be spelt out in the contract. This made monitoring compliance more difficult, but not impossible, since the absence of justification would not render the clause unfair, but could contribute towards making the

⁴² This represents a total of 9 sites.

⁴³ The sample discussed is therefore composed of 19 sites whose terms and conditions contained a clause to the object or effect of unilaterally modifying the service or product offered.

⁴⁴ This included eBay, Specialist Auctions, Bassabids and Golfbidder.

clause ambiguous for example, or at best, should the modification occur arbitrarily unfair. Thus in the absence of a justification, it is likely that the clauses could be interpreted to the consumer's favour.⁴⁵

In the four instances (21%) where unilateral modification of service was clearly expressed, the reasons for a modification were justified via a range of headings including changes in the law or operational requirements⁴⁶. Despite the unilateral modification being justified, the clauses were not always able to be considered fair. Indeed, on Golfbidder's for example, the site reserves the right to close their service where they have compelling legal or technical reasons for doing so (valid reason) or otherwise at their sole discretion (reason likely to be interpreted as invalid).⁴⁷ Similarly, Bassabids reserves the right to cancel any sales if it is reasonable to do so, or refuse access if it is considered necessary. The vagueness of this term may, in some circumstances, be interpreted in favour of the consumer.

Besides a justification, all sites committed to giving prior notice of such changes, although the length of this notice period as well as the communication of those changes to consumers was not clear on all sites. Golfbidder's terms explained that the site will try to provide advance notice, but does not guarantee it will do so, whereas Bassabids did not provide a notice period at all. By contrast on both eBid and Specialist auctions, a 30 days' notice period applies. Arguably, a modification not followed by a reasonable amount of time for consumers to consider the changes and decide whether or not to continue their relationship with the online auction platform seems a pre-requisite to fairness. Otherwise, any change could be considered contrary to Schedule 2(1)(i). Indeed, such changes would have the

⁴⁵ Regulation 7(2) states: *'If there is a doubt about the meaning of a written term, the interpretation which is most favourable to the consumer shall prevail.'*

⁴⁶ This concerned eBid and Specialist Auctions. eBid's terms read as follows: *'We reserve the right to modify or discontinue the service if there is a change in the law or our operational requirements. We will not be liable for you for any loss you may suffer if we have to modify or cease the service for reasons beyond our control if we give you at least 30 days-notice. In certain exceptional circumstances beyond our control we may have to change or discontinue the service without giving you this amount of notice. If this is the case we will give you as much notice as we can'*. Specialist Auctions term is quasi-identical and reads: *'We reserve the right to modify or discontinue the service if there is a change in the law or our operational requirements. We will not be liable for you for any loss you may suffer if we have to modify or cease the service for reasons beyond our control if we give you at least 30 day- notice. In certain exceptional circumstances beyond our control we may have to change or discontinue the service without giving you this amount of notice. If this is the case we will give you as much notice as we can. If you do not wish to use the new operating rules or policies you should not continue to use the service after the notice requirement'*.

⁴⁷ The clause reads: *'We reserve the to close auctions early, to extend auctions, to cancel or withdraw listings or to terminate the entire service of providing auctions, where we have compelling legal or technical reasons for doing so (including without limitation technical difficulties experienced by us or on the internet) or otherwise in our sole discretion. Where practicable we shall try to provide reasonable advance prior notice to you of any such steps we take. We will use our reasonable endeavours to process bids which are placed, but do not guarantee that any individual bid will be processed. We are not bound contractually or otherwise to offer any of the auctions'*.

effect of irrevocably binding the consumer to terms with which he had no real opportunity to become acquainted with before the conclusion of the amended contract. As a result, while 30 days seems adequate especially if it is accompanied by a direct notification to the consumer via email, the absence of a notice period or the provision of one of short length would be inadequate and would result in the clause being considered unfair.

For the remaining 79% of the clauses concerning the unilateral modification of the service of product, the clauses often referred to the right to amend the service to deal with system outage or other technical disturbances⁴⁸ or allowed the site to make changes due to suspected foul play in the running of an auction.⁴⁹ In some instances, the clauses were primarily concerning unilateral changes to terms and conditions but also contained a reference to operating rules or policies which may form part of the way the service is supplied to consumers. For example on eBay, the terms and conditions indicate that from time to time changes may be made to additional terms policy. Those include identity, prohibited items, outage policy, accepted payments, etc. and to some extent define the service provided by eBay. Thus, reserving the right to change those policy documents may result in unilateral changes to the service provided and similar clauses have therefore been included in the result. Overall, most clauses had the potential to be unfair principally because notice periods were unclear or inexistent at worst.⁵⁰ For example, on the TV auction channels bid.tv, speedacuctions.tv and pricedrop.tv, the term reserved the right of the operator to cancel, suspend, extend, close or withdraw any auctions at any time and only committed to trying to give consumers notice where practicable.⁵¹

As already explained, should consumers not be made aware of changes with sufficient time to consider the use of the service under the new term, clauses could be considered contrary to Schedule 2(1)(i) for irrevocably binding consumers to

48 For example, on Bidson the term states: *'Normally, the service is in operation 24 hours per day, seven days a week. The service may encounter operational disturbances. Bidson reserves the right to postpone dates and times for finishing an auction after unforeseen operational disturbances. Included are, but not limited to, errors, in the internet connection to the server, unauthorized access to computer systems, service interruptions at the supplier and force majeure.'*

49 Ziinga's terms and conditions state: *'Ziinga maintains the right to suspend auctions, revise bidding time of on-going future auctions and re-open closed auctions upon suspicions of any misdeeds'*.

50 This was for example the case on most websites that either remained silent on the existence of a notice or worst barred the availability of a notice. For example, Madbid's term states: *'Madbid reserves the right to change the auction times at any time. Additionally, Madbid can add, reschedule or remove products from the Madbid.com website at any time without notice, including auctions already in progress or live. (...) In the event that Madbid cancels an auction, Madbid may give Credits back to affected Users.'*

51 The clause reads: *'Bid shopping reserves the right to cancel, suspend, extend, close or withdraw any auction at any time, and with no liability for any bids or orders taken though it shall where practicable try to give customers notice of any such decisions (...)'*.

terms that they have not been able to get accustomed to.⁵²

3. Potential solutions for better enforcement of unfair terms on online auction platforms

As we have seen, at least some terms in online auction consumer contracts show a high propensity for unfairness, while others are clearly unfair. We must therefore turn towards what a consumer can do when faced with an unfair term. Unfortunately, the system of enforcement currently in place is not sufficient to offer effective protection.

Indeed, the current system relies essentially on private redress. A consumer affected by an unfair term has to go to court to obtain a declaration that the term is not binding.⁵³ This means that for every consumer subjected to an unfair clause on eBay for example, a separate court case would have to be started. This is because the decision on unfairness will only have effect between the parties. As a result, the same clause can continue to apply to any other consumers that are not disputing it in court. Yet, most consumers using an online auction site will not proceed with a claim in court in order to avoid the application of a term. Rather, because of low understanding of their rights or because the procedure necessary to void a term is too expensive by comparison to the benefit to be obtained, consumers are likely to let the term stand and yield to its effects.

Public enforcement of a preventative nature is therefore necessary to complement private redress. In the UK, this type of enforcement is conducted by the Office of Fair Trading (OFT) under Regulation 10 which imposes a duty to consider any complaints made to it regarding the unfairness of a term. The OFT can seek an injunction to prevent the continued use of unfair terms.⁵⁴ In those instances the OFT can require that a term be struck out in a standard term contract, benefiting the entire class of consumers. Unfortunately, there is evidence that such public enforcement is not having the impact it ought to and that it remains somewhat inadequate to the needs of consumers.

Willett argues that preventative enforcement has limits⁵⁵, mostly located in the reluctance of higher courts in the UK to take a protective approach in cases where the action is preventive rather than in individual cases where the impact of the decision will be limited to the parties. In those later cases, higher courts in England have shown that they can be more lenient and apply a higher standard

52 Since such assessment needs to be made on a case by case basis we were not able to conclude on the unfairness of each term.

53 As per Regulation 8, unfair terms are not binding. However contracts, continue to bind the parties insofar that they are capable of continuing without the removed term.

54 See Regulation 12.

55 Chris Willett and Youseph Farah, *Unfair contract terms: rethinking remedies and enforcement*, in Eugene Buttigieg, *Rights and remedies for the consumer in the European Union*, Gutenberg Press (Malta) 2012, pp. 29-48.

of protection.

Further, the OFT is not in a position to pursue all infringements. Even with qualifying bodies being allowed to act on behalf of the OFT (such as consumer associations), resources are scarce and only the worst and most systematic infringements are likely to be pursued. To date, no intervention in the area of online auctions has taken place. This is not surprising since the industry itself and the potential losses generated by online auctions are not top priorities for OFT. Yet, the real damage caused is not quantified. It is at best a diffuse damage. Another enforcer (namely trading Standards) may however be able to assist under the application of the Consumer Protection from Unfair Trading Regulations 2008 (UTRs thereafter).⁵⁶ One interesting proposal is indeed formulated by Orlando⁵⁷ who suggests that unfair contract terms as well as terms that are not drafted in plain and intelligible language present the characteristics of unfair commercial practices. As a result, they can respectively be considered misleading actions and omissions. For terms that are unfair and thus non-binding on consumers, their inclusion in a contract is a misleading action because the contract contains false information or deceptive information regarding the extent of the trader's commitments, the rights of the trader or the consumer's rights contrary to Regulation 5 UTR. Terms that lack the sufficient transparency under unfair term legislation can also be deemed misleading omissions, whereby the trader omits material information as intended by Regulation 6 UTR. Any enforcement actions could thus not only disable the clauses in all contracts via the use of Regulation 12 of the Unfair Terms in Consumer Contracts Regulations 1999, but also impose on traders a duty not to use unfair terms or risk the imposition of a penalty under the Consumer Protection from unfair trading Regulations 2008. The author indeed argues that the two piece of legislation are compatible and able to be used in conjunction. This may provide online auction platforms an incentive to pay more attention to the way they use terms in their contracts and may also act as an incentive for public enforcer, although it is unlikely to drastically change the way enforcers decide on priorities and according to available budgets. In the UK, the current the discussions on a right of private redress for unfair commercial practices⁵⁸ would also offer consumers another possible avenue for redress when they have suffered a detriment. Here again however, and because consumers tend to shy away from court proceedings, the application of both pieces of legislation

56 Indeed, since April 2013, enforcement duties have changed increasing the role of Trading Standards in the enforcement of consumer law. While the OFT retain enforcement powers under the UTCCR, it now shares this power with the Trading Standards. The OfT powers are more focussed on systemic failures in a market. Therefore Trading Standards may be more willing to pursue breaches under the UTRs coupled with the UTCCRs.

57 Salvatore Orlando, The use of unfair contractual terms as an unfair commercial practice, ERCL 1/2011, 25-56.

58 Law Commission, Preliminary advice to the Department for Business Enterprise and Regulatory Reform: a private right of redress for unfair commercial practices?, November 2008; Hugh Collins, a report for Consumer Focus, A private right of redress for unfair commercial practices, April 2009; OFT, response to the Law Commission and the Scottish law Commission on redress for misleading and aggressive practices, July 2011, OFT1355.

may not yield results sufficient to eradicate such practices. This is unless the gain of going to court for a practice considered misleading is worth the investment of time and money for the consumer.

As a result, with reliance on public and private enforcement being inadequate to fully assist consumers using online auctions, it seems that ex-ante controls ought to be used. A recent economic study shows that only 4% of consumers do read terms and conditions presented to them online.⁵⁹ This means that pre-contractual information is unlikely to help ex-ante. In any event, the same study demonstrated that consumers who had read the contract terms continued to have an incorrect interpretation of them due to over-optimism as a result of various biases.⁶⁰ Consequently, the best way to protect online auction users is, in my view to ensure via a universal mechanism, that terms do not reach online auction contracts in the first place. While this is something that may not work in every setting, it is possible to envisage that some form of industry standard may be used as a model for many online auction sites operating in the UK.

Indeed, while the empirical survey conducted did not look into the causes for lack of compliance and the use of unfair terms, the results highlight some root-causes. Compliance was indeed better on bigger sites. For example, eBay, while not carrying a perfect record, tends to perform better than other sites. This may be because it has access to better legal advice and is also more exposed having attracted the attention of enforcement authorities, courts or media in the past, all contributing to forcing the site to move towards better compliance practices. Amongst the smaller players, the survey identified a number of quasi-identical sets of terms and conditions. On intermediary platforms, a number of websites used a standard set. It seems that some of the sites using this set all appear to use the same software to run their auctions.⁶¹ In the TV auction industry, 3 sites, all run by the same company, carried identical terms and conditions. However, cross-fertilisation of terms and conditions also appeared on sites not using identical software, or being owned by the same company. It appears that smaller sites possibly put terms and conditions together without any real legal knowledge or having obtained advice. A certain amount of 'copying' was clearly identified across the industry.

Therefore, it seems that one way to avoid the use of unfair terms in online auction consumer contracts may be to start by forcing big sites, through public enforcement to comply with legislation. A simple action against the main auction software provider may fix a vast number of issues. Such action could push standards up

59 Michael G. Faure & Hanneke A. Luth, Behavioural Economics in Unfair Contract Terms, Cautions and Considerations, *Journal of Consumer Policy* (2011) 337-358.

60 Ibid

61 The most common software used was PHP Pro Software, www.phpprobid.com. The live user end demo site displays a set of terms and conditions (http://www.phpprobid.com/auction-software-demo/terms.page,content_pages) which seems to have been used by most sites using the software as a template without much modification.

as the terms are likely to be emulated by smaller structures. Further, the use a set of model terms that smaller sites could use could be useful for any newcomers. It seems that the OFT could produce such model contract and enable any trader to use them as a blueprint. While variations are allowed, using the OFT standard terms could be incentivised by the ability for the trader to display some kind of kite mark.

Conclusions

This empirical study revealed that many terms likely to be considered unfair were identified in online auction contracts. While this will come as no surprise, this article deplores the level of non-compliance as well as the potential detriment caused to consumers, who for lack of knowledge or resources are unlikely to challenge the imposition of such terms in their relationship with an online auction platform. While public enforcement may also assist, this technique also has limitations. Those include the reaction of higher courts setting lower standards of fairness and most importantly the lack of resources devoted to combatting unfair terms in the online auction industry by way of public enforcement. As a result, and given a particular pattern of drafting unfair term observed on online auction platforms, this article recommends the exploration of targeted public action followed by the use of model terms that are likely to be adopted by at least the smaller platforms. It is hoped that by using best practices as well as more robust enforcement, unfair terms can become less of an occurrence on online auction platforms.

Online Cross-border Consumer Transactions: A Proposal for Developing Fair Standard Form Contract Terms

JUSTIN MALBON

INTRODUCTION

Online consumer sales presently represent a relatively small proportion of overall Australian retail sales. The online market is, however, growing at a substantial rate. Part I of this article describes the ways in which the online market is growing in Australia and overseas. An estimated 45% of online purchases by consumers in Australia are from overseas sellers.¹ The question whether these transactions are governed by the Australian Consumer Law (ACL) is examined in Part II. The conclusion drawn is that cross-border transactions are usually governed by the ACL – at least in theory. If so, it suggests that an Australian consumer who purchases goods from overseas seller will benefit from the range of protection measures in the ACL, including those dealing with consumer guarantees and unfair terms. The practical realities, however, are quite different. A consumer seeking remedies against an overseas seller who objects to Australian jurisdiction will invariably confront a bewildering array of procedural complexities and face prohibitive costs.

Given that in reality the law of an overseas jurisdiction may well apply to a transaction, Part III considers whether this is necessarily a bad thing. Particular attention is given to the application of US law because it is reasonable to assume that a substantial proportion of consumers in Australia purchase goods from US sellers. Also, there are marked differences between US law and the laws of European countries. The conclusion drawn is that US law is generally less favourable to consumers than Australian law (and European laws). US courts generally uphold standard form consumer contracts under the party autonomy principle, regardless of the unfairness of the terms. The stance taken by the US courts appears to be enabling a race to the bottom, in which the terms in standard form consumer contracts are developing an increasingly pro-seller bias. Part IV

¹ Frost and Sullivan and PricewaterhouseCoopers 'Australian Online Shopping Market and Digital Insights' July 2012 www.pwc.com.au, at p.4. See also Australian Productivity Commission, 'Economic Structure and Performance of the Australian Retail Industry' (Commonwealth of Australia: Canberra, 2011) p. 83.

considers why this is so. Why, for instance, are market forces not operating to provide incentives for the development of party balanced terms? It is speculated that the reasons might include the fact that the terms are in effect invisible because consumers rarely read them. In addition, in many cases there is no correlation between the harshness of the terms and preparedness of a seller to treat its customers fairly. It appears, however, that despite this the harsh terms can lower consumer expectations and deprive them of rights they should be fairly entitled to.

Part V considers ways in which the interests of consumers can be better protected and enhanced regarding cross-border online transactions. It is proposed that there are two possible (and complementary) ways of dealing with the issue. The first involves working towards a greater harmonisation of international laws. This process may take some considerable time, and could meet with limited success. A proposed alternative approach is to develop a series of standard form 'Fair Terms' which could be made freely available on the Internet for parties to voluntarily incorporate into their contracts. This proposal follows the lead provided by developments for international commercial transactions. The article concludes by suggesting starting points for the development of standard form of fair terms provisions.

I. The nature and scope of cross-border transactions

Retail online sales constitute a relatively low but rapidly growing proportion of overall Australian retail sales. Australian online shopping expenditure was expected to reach \$16 billion during 2012, which constituted a growth of 17.6% from the previous year. The trend toward online purchasing is likely to increase, particularly if Australians follow the UK trend where online sales increased from 8.6% in 2008 to 12% a mere two years later.² Estimated online expenditure as proportion of total Australian retail sales during 2012 was 6.3%; with 2.8% being from offshore websites and 3.5% from onshore websites.³ A significant proportion of Australian consumers purchase products online from overseas sellers.⁴ Frost and Sullivan and PricewaterhouseCoopers estimated that 75% of Australians who shop online make purchases from offshore sites, with around 45% of online expenditure going overseas.⁵

The Australian online consumer marketplace is located within the Asia-Pacific region. The OECD reports that in 2013 the Asia-Pacific region will become the world's largest business to consumer e-commerce marketplace, with sales in the region representing 34% of total world sales. The regional marketplace will

2 Centre for Retail Research (Newark, Nottinghamshire, UK, 2012) www.retailresearch.org/onlinereetailing.php

3 Frost and Sullivan and PricewaterhouseCoopers 'Australian Online Shopping Market and Digital Insights' July 2012 www.pwc.com.au, at p.2.

4 Above.

5 Above at 4.

be larger than the North American and the European.⁶ The OECD expects that growth will accelerate in the region, with consumers increasingly adopting mobile devices such as smart phones, tablets and e-readers.⁷

Arguably, the growth in the online consumer marketplace delivers economic as well as consumer benefits. It is claimed that in France, for instance, that while the Internet economy destroyed 500,000 jobs, it created 1.2 million new ones generating a net 2.4 jobs created for every job cut.⁸ The benefits to consumers of online purchasing include lower prices for products, a greater range of available products and an easier means for comparing products than that available in the real world.⁹ Civic Consulting estimated that in Europe alone the consumer welfare gains are in the order of €2.5 billion.¹⁰ Other benefits are the enhanced capacity to search for products and compare prices, and consider consumer reviews about products before purchase.¹¹ The downside is that consumers are usually not able to examine physical products such as shoes and clothing before purchase – although some online sellers freely enable unsatisfactory products to be returned. There is also enhanced security and privacy risks with online shopping.¹²

In summary, the online consumer marketplace is growing at a rapid rate and offers considerable potential economic and consumer benefits. However, these benefits will be undermined if consumers are not adequately protected, which may lead to financial and other losses to individual consumers along with an overall decline in consumer confidence in the marketplace. A loss of consumer confidence may well lead to a reduction in the growth and potential economic and consumer benefits that would otherwise exist if the market were properly regulated.

II. The limits of the reach of Australian laws

Australian law (notably the Australian Consumer Law – the ‘ACL’) probably applies in many instances where a consumer purchases goods online from an overseas seller – at least in a formal legal sense. Whether this is so in any particular instance will, of course, turn on the specific facts at play. Generally speaking, Australian law provides reasonably good consumer protection regarding online

6 OECD “Empowering and Protecting Consumers in the Internet Economy”, *OECD Digital Economy Papers*, No. 216, OECD Publishing, 2013. <http://dx.doi.org/10.1787/5k4c6tbcvqv2-en> at p.10.

7 Above at p.3.

8 Above at 16.

9 Malbon J, ‘Consumer Strategies for Avoiding Negative Online Purchasing Experiences: A Qualitative Study’ (2013) 20 *Competition and Consumer Law Journal* 249, pp.256.

10 Civic Consulting, ‘Consumer Market Study on the Functioning of E-Commerce and Internet Marketing and Selling Techniques in the Retail of Goods’ (Civic Consulting, Berlin: 2011) www.civic-consulting.de, p.9.

11 See Malbon J, ‘Taking Fake Online Consumer Reviews Seriously’ (2013) 36 *Journal of Consumer Policy* 139-157.

12 Malbon J ‘Consumer Strategies for Avoiding Negative Online Purchasing Experiences: A Qualitative Study’ (2013) 20 *Competition and Consumer Law Journal* 249 at p.258.

purchasing, including measures regarding unfair contract terms¹³ and consumer guarantees.¹⁴

This Part considers if and how Australian law (and the ACL in particular) applies to transactions in which an Australian consumer purchases goods from an overseas seller. It concludes that even if Australian law applies as a matter of legal theory, in many cases it is difficult if not almost impossible to apply in practice.

To illustrate the operation of Australian law on a typical cross border transaction, consider a relatively straightforward hypothetical transaction where a consumer in Australia purchases a product online from a seller based, say, in the US. Assume also that: the seller has no physical presence in Australia and no Australian subsidiary or related entity; the products it sells are warehoused in the US, and its webpages are hosted on a server in the US and all electronic transactions take place in the US, including the processing of payments; and the seller arranges for the delivery of the goods to the Australian purchaser via a delivery service that is independent of the seller. Assume, then, that when the purchaser inspects the goods on delivery she discovers it is defective. Assume also that the purchaser remembers that when she purchased the goods online she clicked a button indicating that she agreed to the contract terms set by the seller, and that she now believes the terms are unfair.

Assume the purchaser wants to invoke section 54 ACL, which provides for a statutory guarantee that the goods be of acceptable quality and for various remedies depending on whether there has been a major, or non-major, failure regarding the guarantee.¹⁵ She also wants to invoke the unfair terms provisions in Part 2-3 ACL. The question, then, is; do these provisions apply to the hypothetical transaction? To answer this we turn to section 5 of the *Competition and Consumer Act 2010* (Cwlth), which extends the application of the various provisions of the Act, including the ACL, to conduct outside Australia.¹⁶ Section 5(1) of the Act extends application of the relevant provisions to conduct by Australian incorporated bodies or those carrying on business in Australia, and Australian citizens or people ordinarily resident within Australia. None of these circumstances apply to the hypothetical case, unless it can be said that the US company is carrying on business in Australia. The Act does not define the term ‘carrying on business’.¹⁷ It would appear, however, that even if the US company regularly supplied its goods

13 Part 2-3 ACL.

14 Part 3-2, Division 1 ACL.

15 A consumer can seek remedies from a supplier or manufacturer for a ‘major’ or ‘non-major’ failure of a consumer guarantee; sections 259, 267 and 272 ACL. A consumer might also seek to invoke Part 2-3 ACL, to void an unfair term in standard form contracts.

16 Section 5 does not extend the application of the part 5-3 of the ACL (which deals with country of origin representations) to conduct outside Australia (section 5(1)(c)).

17 Some sense of what the term might mean may be gained from section 21(1) Corporations Act, which provides that: ‘A body corporate that has a place of business in Australia, or in a State or Territory, carries on business in Australia, or in that State or Territory, as the case may be’.

to Australian consumers, it would not constitute sufficient grounds for claiming that the company is carrying on business in Australia, unless it had an Australian subsidiary or related entity within Australia.¹⁸

Another way of determining whether the ACL applies to the hypothetical transaction is to examine whether it applies because the relevant conduct was engaged in *within* Australia, rather than *outside* Australia. Arguably, the relevant conduct that invokes jurisdiction is the supplying of goods. If that conduct takes place in Australia, it would appear that Australian jurisdiction is invoked. This can be explained by examining section 54 (statutory guarantees) and section 23 (unfair contract terms). Section 54 provides in part:

Guarantee as to acceptable quality

- (1) If:
 - (a) a person supplies, in trade or commerce, goods to a consumer; and
 - (b) the supply does not occur by way of sale by auction; there is a guarantee that the goods are of acceptable quality.

Section 23 relevantly provides:

23 Unfair terms of consumer contracts

- (1) A term of a consumer contract is void if:
 - (a) the term is unfair; and
 - (b) the contract is a standard form contract....
- (3) A **consumer contract** is a contract for:
 - (a) a supply of goods or services; or
 - (b) a sale or grant of an interest in land;
 to an individual whose acquisition of the goods, services or interest is wholly or predominantly for personal, domestic or household use or consumption.

Section 54 applies if a person supplies goods in trade or commerce to a consumer. Section 23 applies if there is a standard form contract¹⁹ for the supply of goods to an individual wholly or predominantly for personal, domestic or household use or consumption.

The relevant conduct for invoking jurisdiction under both provisions is the *supply* of goods. Section 4 of the Act defines 'supply', when it is used as a verb regarding goods, as including the supply or resupply of goods by way of sale, exchange,

¹⁸ Clarke, P (2012) 'The Extraterritorial Reach of the CCA — a Primer' *Competition and Consumer Law News* July 2012, p.312.

¹⁹ A standard form contract is defined in section 27 ACL.

lease, hire or hire-purchase. The definition of ‘supply’, when used as a noun, has a corresponding meaning; and the terms ‘supplied’ and ‘supplier’ also have corresponding meanings. The term ‘acquire’ in relation to goods is defined under the section as including acquisition ‘by way of purchase, exchange or taking on lease, on hire or on hire-purchase’. According to Lindgren J in *Cook v Pasmenco Ltd* the term ‘supply’ under the Act is the counterpart of the term ‘acquire’.²⁰ That is to say, supply generally involves a bilateral transaction or dealing in which one person acquires goods from another.²¹ Lindgren J adds that: ‘The definitions of “supply” and “acquire” are symmetrical: a supply of goods must occur as part of a bilateral “transaction” or “dealing” under which the other party acquires them’.²²

It might be argued by the US seller attempting to avoid Australian jurisdiction in the hypothetical case that the supplying of the goods took place in the US whilst the acquisition took place in Australia, and therefore the relevant conduct of supplying the goods took place outside Australia. The difficulty with this argument is that it reads the terms ‘supply’ and ‘acquire’ too narrowly. A reading of the dictionary definition of the term ‘supply’, for instance, reveals that it is a very broad term. It is relevantly defined by the Oxford Dictionary as including the meaning: ‘To provide, or provide with, something’. The term ‘provide’ is defined as: ‘To supply (something) for use; to make available’. This suggests that the act of supplying goods is not complete until the goods are made available (possibly for use) to the consumer, which in turn implies that it is when the goods are made physically available to the consumer. This suggests that supply is usually completed when the goods are delivered to the consumer. If so, the supplying of the goods is an activity that began in the US and was completed in Australia.

The US seller might respond that even if the acts of supply took place in the US, during transit and within Australia, Australian jurisdiction can only extend to the component of supply that took place in Australia. That is, the acts of supply need to be segmented according to the jurisdictions in which it occurred – US jurisdiction applies to the acts of supply in the US, some other jurisdiction may apply during transit, and Australian jurisdiction for the aspects of supply taking place in Australia. Australian courts, however, are unlikely to be impressed by arguments that invite such undue artifice. They appear not to shy away from assuming Australian jurisdiction over Internet related activities if a relevant party is resident in Australia. In *European City Guide* for instance the respondent was found to have engaged in misleading and deceptive conduct in circumstances where its business was registered in Spain and virtually all its relevant business activities were conducted in Spain by emailing misleading forms to businesses in

20 *Cook v Pasmenco Ltd* [2000] FCA 677, [25].

21 Above.

22 Above at [26].

Australia.²³ And in *Dow Jones & Company Inc v Gutnick*²⁴ the High Court found that an Australian court had jurisdiction to deal with a defamation claim despite the fact that the alleged defamatory material was written and uploaded in the US and held on US based servers. It was enough for an Australian court to have jurisdiction if readers in Australia downloaded the allegedly defamatory material and read the material from their computer devices.

Assume, then, that Australian courts have jurisdiction regarding the hypothetical case. Actually asserting jurisdiction in any real and practical sense is likely to be difficult, complex and expensive unless the seller is prepared to submit itself to Australian jurisdiction – which in most cases is unlikely.²⁵ One of many hurdles a consumer plaintiff may face is that she may well have entered into a standard form contract that includes a choice of law and choice of jurisdiction clause that chooses the law of the overseas jurisdiction as applying to the contract, and the courts or tribunals in that jurisdiction as the venue for dealing with any disputes. Amazon provides a relatively typical example of the kinds of terms that will be found in a standard form contract proffered by an overseas based online seller.²⁶ An Australian consumer purchasing an item from Amazon will be required to click a button indicating that she agrees to the Amazon conditions of use – which is a standard form contract. The contract includes the following terms:

... To the full extent permissible by applicable law, Amazon disclaims all warranties, express or implied, including, but not limited to, implied warranties of merchantability and fitness for a particular purpose....

Any dispute or claim relating in any way to your use of any Amazon Service, or to any products or services sold or distributed by Amazon or through Amazon.com will be resolved by binding arbitration, rather than in court, except that you may assert claims in small claims court if your claims qualify. The Federal Arbitration Act and federal arbitration law apply to this agreement....

By using any Amazon Service, you agree that the Federal Arbitration Act, applicable federal law, and the laws of the state of Washington, without regard to principles of conflict of laws, will govern these Conditions of Use and any dispute of any sort that might arise between you and Amazon.

23 See the order made by the judge in *ACCC v European City Guide* [2011] FCA 804 at [85]. See also *The Society of Lloyd's v White* [2004] VSCA 101 regarding the applicability of the misleading and deceptive conduct provision (now section 18 ACL) where the plaintiff had irrevocably agreed by contract that the courts of England had exclusive jurisdiction to settle any dispute between the parties.

24 (2002) 210 CLR 575.

25 Productivity Commission, 'Economic Structure and Performance of the Australian Retail Industry', (Commonwealth of Australia, Canberra, 2011) at 117.

26 Amazon is a US based site for purchasing books and other consumer products that is popular with Australian consumers; see www.amazon.com.

The contract purports to apply the law of a foreign jurisdiction as the proper law of the contract. If this assertion of jurisdiction is effective, it would in effect substitute the laws of the US state of Washington and US federal law for the statutory guarantees under the ACL. Arguably this assertion will be ineffective under Australian law, at least to the extent of overriding the ACL statutory guarantees, because of the operation of section 67 ACL. The section is yet to be tested in the courts, and may well prove to be extremely difficult to apply in practice if the seller objects to the application of Australian law.

Section 67 ACL is a modified version of sections 67 and 68 of the predecessor *Trade Practices Act*. The New South Wales Court of Appeal considered the operation of those sections in *Laminex (Australia) Pty Ltd v Coe Manufacturing Co.*²⁷ The case confirms, if anything, the legal and practical complexities facing a consumer seeking to invoke the provision.²⁸ Taking the Amazon terms, an Australian court applying the *Laminex* reasoning may well determine that the parties have voluntarily accepted that any dispute be resolved by arbitration under the US Federal Arbitration Act, but that the arbitral body is required to apply the ACL statutory guarantees. A US arbitral body may, however, decide that it is bound by the applicable US federal law and the laws of the state of Washington, regardless of the operation of section 67 ACL. US courts (and possibly the courts of other jurisdictions) will tend to give effect to a choice of law provision in a consumer contract regardless of the laws of the consumer's country. Compelling an overseas arbitral body to apply section 67 and the statutory guarantees may well involve complex legal proceedings in multiple jurisdictions. Clarke observes that the formal legal system struggles to deal with providing remedies regarding cross-border online consumer purchasing. He notes that:

In absence of an internationally consistent approach to protecting competition and consumers, or an internationally accepted method of resolving competition or consumer disputes having transnational dimensions, the extraterritorial application of competition and consumer law necessarily involves applying the law of one country (country A) to conduct occurring in another country (country B) and perhaps also to the B's citizens in respect of that conduct. Understandably, this will often be a matter of concern for B who may well resent A's intrusion into its jurisdiction. This will be especially sensitive when, for example, B does not prohibit the conduct in question, or where it confers a benefit on B or B's citizens (albeit to the detriment of those in A) or where the commercial well-being of the respondent is important to B's national interest.²⁹

27 [1999] NSWCA 270.

28 See W. Jo-Mei Ma 'What's My Choice – Deciphering the provisions on conflict of laws in the Trade Practices Act' (2003) 11 *Trade Practices Law Journal* 149. See also Davis J 'The Australian Consumer Law and the Conflict of Laws' (2012) 20 *Australian Journal of Competition and Consumer Law* 212.

29 Clarke, P (2012) 'The Extraterritorial Reach of the CCA — a Primer' *Competition and*

Clark notes that on occasions the issue of extraterritoriality has become so politicised, particularly in the case of anti-trust matters, that retaliatory legislation has been enacted to thwart such legislation. Gawith claims that the cost for a consumer of obtaining a remedy will usually be greater than any amounts that could be recovered.³⁰ Even if a consumer manages to obtain an order against the overseas seller in an Australian court, she would be confronted with the costs of enforcing the order in the foreign jurisdiction if the seller does not voluntarily comply with the order. In most instances the cost of the outlay or expenditure, whether tangible or intangible, in bringing an action will heavily outweigh any potential benefit in obtaining the desired object or outcome of the action.³¹ Sage advice to a consumer in these circumstances may well be that they should cut their losses and not pursue the matter and take heed of the lessons learnt by Voltaire. He apparently claimed that ‘I was never ruined but twice; once when I lost a lawsuit and once when I won one’.

III. Maybe the laws of the foreign jurisdiction are not so bad after all

Given the difficulties for an Australian consumer seeking to invoke Australian jurisdiction, it might be asked whether submitting to overseas laws and jurisdiction is such a bad thing after all. It might be claimed that the seller’s jurisdiction offers more or less the same rights and protections as Australian law. These claims, however, are difficult to sustain, at least in the case of US law. Generally speaking, it tends, to be less favourable to Australian consumer interests regarding standard term contracts than European and Australian laws.

The focus in the following discussion in this Part is on US law because its consumer protection laws and practices are more at variance with Australian laws and practices than those in the UK and other EC countries. It also appears to be a popular online shopping destination for Australian consumers.

Broadly speaking, the US common law is not so very different from the common law in Australia and England regarding standard form consumer contracts. In those jurisdictions the common law makes no substantial distinction between the contract law principles that apply to standard form consumer contracts and those that apply to contracts more generally. The courts therefore assume that the parties have consented to the terms of the contract unless there are clear vitiating circumstances, such as duress and unconscionability. The point of departure of US law from the law in jurisdictions such as Australia and EC countries is that the latter jurisdictions have statutory provisions regarding unfair terms, and in the case of Australia at least, statutory consumer guarantees – which the US does not have.

Consumer Law News July 2012, p.308.

30 Gawith, D ‘Non Litigation-based Redress for International Consumer Transactions Is Not Cost Effective-a Case for Reform?’ (2006) 3 *Macquarie Journal of Business Law* 115, 116.

31 Above at, 117.

There are, however, dangers in over-generalising about the consumer unfriendliness of US laws. Radin notes, for instance, that:

Some jurisdictions, especially California, look with more disfavour than others upon adhesion [ie standard form] contracts, especially those that look like boilerplate rights deletions schemes; and some jurisdictions, again especially California, have more solicitude than others with regard to preserving viable remedies for consumers in their state. The overall situation is thus quite favorable to the enforcement of choice of forum clauses, but it is also somewhat unpredictable, depending to some degree on the jurisdiction in which the litigation begins.³²

A US court might intervene on the grounds that the contract terms are unconscionable. That is to say where the court finds that there is ‘an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favourable to the other party’.³³ It might consider whether either or both procedural or substantive unconscionability has arisen. Procedural unconscionability involves an absence of meaningful choice rather than any defect in the bargain.³⁴ Substantive unconscionability might arise because the contract is one-sided or unequal or oppressive to a degree that a court in good conscience cannot tolerate enforcing its terms.³⁵ In some US jurisdictions the courts place emphasis on substantive unconscionability, whilst in others they tend only to have regard to procedural unconscionability. Occasionally a court may declare a contract void as against public policy, although this is relatively uncommon.³⁶

Despite these causes of action, Australian consumers contracting with US sellers are at considerably greater legal risk than if they were contracting with Australian, and even European, sellers. In the absence of the Australian statutory protections, the US presents a legalistic minefield to a potential consumer plaintiff. For instance, standard form consumer contracts devised in the US often contain a clause, like the Amazon provisions outlined above, stating that the parties agree to have any dispute resolved by arbitration. Radin notes that ‘it is at best an uphill battle for any plaintiff who has received an arbitration clause in a form contract to avoid getting her lawsuit dismissed from court and sent to arbitration’.³⁷ She also explains that arbitration clauses are favoured by US sellers because they can be effective in avoiding class actions,³⁸ and because arbitrations generally have

32 Radin, Margaret Jane, *Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law* (Princeton University Press, 2012), at 137-38.

33 *Williams v Walker-Thomas Furniture Co*, 350 F.2d 445, 449 (DC Cir. 1965).

34 Radin, Margaret Jane, *Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law* (Princeton University Press, 2012), at 124.

35 Above, at 124.

36 Above, at 127.

37 Above, at 131.

38 Above, at 132.

no precedent value and are held in secret.³⁹ In addition, arbitrators are likely to be retired business people or even law professors or lawyers. She says that these arbitrators tend not to be particularly predisposed towards consumers.⁴⁰

In addition, US devised standard form contracts invariably contain, as we have seen in the case of the Amazon clauses, a choice of jurisdiction clause nominating the forum of a US state. The leading case regarding the effectiveness of these clauses in standard form consumer contracts is the US Supreme Court decision in *Carnival Cruise Lines v Shute*.⁴¹ In that case a woman from the State of Washington sought to bring suit for personal injury in her own state, but was limited to bringing the suit in Florida – the forum nominated in the contract. A choice of forum clause appeared in the last page of non-refundable tickets bought by the plaintiff and her husband. The Court found the clause to be effective. One of the rationales for the Court’s decision was that by allowing the company to compel all litigants to come to its home state to litigate it would save money for the company, and the savings would be passed on to consumers.⁴² The Court offered no empirical basis for such a rationale.

Other clauses upheld by US courts are those that eliminate tort remedies such as damages for personal injury – although in some instances overly broad clauses are struck down.⁴³ In other instances there may be clauses that purport to limit the buyer’s remedies. Section 2-719(1)(a) of the Uniform Commercial Code, for instance, allows for clauses that severely limit remedies under a contract. Consequently, many sellers limit the right to return goods for a refund or repair. A consumer might counter that the limitations clause fails the contract’s essential purpose (although it is unclear what this means) and that a limitation of consequential damages is unconscionable.⁴⁴ All in all it can be said, however, that US laws and their application by their courts tend to render enforcement of consumer rights contentious, expensive and problematic.

Standard Form Consumer Contract Terms – A race to the bottom

The difficulty for consumers in asserting contractual rights in the US may be playing a key role in a race to the bottom for standard form contract terms in that country. The trend over time is towards the inclusion of increasingly pro-seller biased contract clauses.⁴⁵ New terms involve the consumer ‘consenting’ to: the seller remotely disabling software on the consumer’s computer; the seller

39 Above, at 134.

40 Above, at 134.

41 499 US 585 (1991).

42 Radin, Margaret Jane, *Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law* (Princeton University Press, 2012), at 136.

43 Above, at 138.

44 Above, at 141.

45 Marotta-Wurgler, F and Taylor, R ‘Set in Stone? Change and Innovation in Consumer Standard Form Contracts’, (2013) 88 *New York University Law Review* 240.

monitoring the consumer's usage of the product and his or her usage more generally, and providing that information to third parties; and the right of the seller to unilaterally change the terms after the contract is entered into. A study of over 266 online consumer contracts by Mann and Siebeneicher found that about 90% of US online firms with pro-seller terms have terms that purport to exempt seller liability from any implied warranties relating to their product, and limit claims to consequential damages.⁴⁶ The pro-seller terms also include clauses in which a consumer 'agrees' to: indemnify the seller to the extent that the consumer has virtually no enforceable rights against the seller.

Hillman summarises the increased application of these one-sided terms as 'businesses' new internet strategies for taking advantage of consumers'.⁴⁷ Hillman and Rachlinski observe that online sellers are 'turning the process of contracting on its head' with terms that render any consumer rights under the contract meaningless.⁴⁸ US courts in particular generally find standard form terms to be effective on the pretext that the courts are giving effect to party choice and party autonomy, regardless of the artificiality (and indeed the effective absence) of any meaningful consumer consent. In reality, consumers are contracting out of the formal legal system and 'consenting' to the relinquishment of their legal rights. The US courts are for the most part enabling sellers to opt out of the state's legal system thereby rendering state regulation and sanctioning largely ineffectual.⁴⁹

IV. What about market forces compelling better standard form terms?

It might be asked why standard form consumer contract terms are becoming increasingly one-sided and unfair, at least in the US. Market theory suggests that if some sellers gain a competitive advantage by offering fair and balanced standard form terms, then over time competition will lead to an overall improvement of standard form terms. It also suggests that some sellers would offer price-terms trade-offs, much in the same way as low-budget airlines offer lower prices for inflexible conditions on the terms of travel. A study by Marotta-Wurgler and Taylor indicates, however, that this is not happening in the online consumer marketplace. As mentioned, the reality is that there is a race to the bottom, leading

46 Mann, RJ and T Siebeneicher, 'Just One Click: The Reality of Internet Retail Contracting' (2008) 108 *Columbia Law Review* 984.

47 Hillman, RA, 'On-line Consumer Standard-Form Contracting Practices: A Survey and Discussion of Legal Implications' (2005). *Cornell Law Faculty Publications*. Paper 29. http://scholarship.law.cornell.edu/lrsp_papers/29

48 Hillman, RA and Jeffrey J Rachlinski, 'Standard-form Contracting in the Electronic Age' (2002) 77 *New York University Law Review* 429. See also Barnes, Wayne R, 'Toward a Fairer Model of Consumer Assent to Standard Form Contracts: In Defense of Restatement Subsection 211' (2007) 82 *Washington Law Review* 227.

49 Calliess, G-P, 'Transnational Consumer Law: Co-regulation of B2C-E-Commerce' in Olaf Dilling, Martin Herberg and Gerd Winter (eds) *Responsible Business: Self-Governance in Transnational Economic Transactions*, (Oxford: Hart, 2007) 225.

to harsher and more one-sided terms.⁵⁰

It can be speculated that the one-sided terms are symptomatic of the substantial bargaining power imbalances between buyers and sellers. An opposing view is that consumers, especially with the aid of the Internet, can cause reputational damage to sellers, and that this disciplines market practices.⁵¹ It is true that there are some instances where negative consumer reactions to online standard form terms have led to changes. One example is the consumer response to Dropbox's terms and conditions. Dropbox is a US-based company that provides online file storage services for consumers, including business consumers. It allows consumers to upload their personal files onto Dropbox's computer servers, and enables them to gain access to their files anywhere, and to share them with other users. This service raises issues about the protection and unauthorised use of personal files. During mid-2011 Dropbox met with a barrage of criticism from users over its terms of service, which included a term that users' believed granted Dropbox the right to, and ownership of, users' data.⁵² An offending clause provided that: 'You grant us (and those we work with to provide the Services) worldwide, non-exclusive, royalty-free, sublicenseable rights to use, copy, distribute, prepare derivative works (such as translations or format conversions) of, perform, or publicly display [user content] to the extent reasonably necessary for the Service.' Dropbox responded to consumer pressure by overhauling its terms of service. A relevant provision now provides that:

By using our Services you provide us with information, files, and folders that you submit to Dropbox (together, "your stuff"). You retain full ownership to your stuff. We don't claim any ownership to any of it. These Terms do not grant us any rights to your stuff or intellectual property except for the limited rights that are needed to run the Services, as explained below.

The language of the new terms of service departs markedly from the usual starchy legal style for contracts, and adopts an easy to comprehend conversational style. For instance, a clause dealing with the use of the product states that: 'The Services provide features that allow you to share your stuff with others or to make it public. There are many things that users may do with that stuff (for example, copy it, modify it, re-share it). Please consider carefully what you choose to share or make public. Dropbox has no responsibility for that activity'. However, despite the user friendliness of its terms, Dropbox includes the usual exemption from implied warranties and conditions, and limitations of liability:

50 Marotta-Wurgler, F and R Taylor, 'Set in Stone? Change and Innovation in Consumer Standard Form Contracts', (2013) 88 *New York University Law Review* 240.

51 Bebchuk LA and RA Posner, 'One-Sided Contracts in Competitive Consumer Markets' (2005) 104 *Michigan Law Review* 827.

52 Scott, J 'Dropbox Faces Backlash over T&Cs' 5 July, 2011
www.cloudpro.co.uk/iaas/cloud-storage/1213/dropbox-faces-backlash-over-tcs

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The consumer backlash over the terms and conditions on sites such as Dropbox and Instagram⁵³ suggest that sellers risk reputational damage by including unduly harsh terms and conditions in their standard form terms. However, these reactions and responses tend to be the exception rather than the norm. Rakoff, for instance, doubts that ‘reputational concerns of firms will produce systematically desirable results’.⁵⁴

53 The photo sharing site Instagram, now owned by Facebook, also meet with a consumer backlash because many users thought its terms of service allowed it to either sell users' photos or use them in advertising
www.huffingtonpost.co.uk/2012/12/21/instagram-reverses-terms-decision_n_2343372.html

54 Rakoff TD, ‘The Law and Sociology of Boilerplate’ (2006) 104(5) *Michigan Law Review* 1235, p.1236.

Another possible explanation for lack of competition over terms is that harsh standard form terms do not necessarily correlate with the ways sellers actually treat their customers. One empirical study found that there is no correlation between market competition conditions for particular products and the one-sidedness of the terms being offered for those products.⁵⁵ The evidence suggests that sellers with contract clauses stating that the consumer has no right to the return of purchased goods will often disregard the terms and accept returns; presumably so as not to deter consumers.⁵⁶ That is, a seller ‘may be deterred from behaving opportunistically by considerations of reputation’.⁵⁷ The Australian Productivity Commission appears to put some faith in the disciplining effects of market forces and reputational impacts as an effective informal mechanism for providing consumer protection. According to the Commission:

...overseas online retailers may not necessarily provide lesser access to refunds and warranties than domestic retailers. Like local retailers, they face commercial incentives, along with the consumer protection requirements in their country of origin, to provide for refunds, returns and warranties on the products they sell. However, there may be issues of time and convenience for consumers in accessing such redress from overseas retailers.⁵⁸

It remains puzzling as to why US sellers (at least) are inserting increasingly harsh terms in their terms of service, whilst apparently ignoring them when dealing with product returns and consumer complaints. Johnston speculates that the terms may be harsher than their application because the seller seeks to give its managerial employees the discretion to grant exceptions on a case-by-case basis.⁵⁹ Helberger et al claim that the unfair terms do in fact directly impact on the buyer seller relationship because they have a pervasive effect in reducing and shaping reasonable consumer expectations about the level of protection they can expect.⁶⁰ In this way the terms cast a dark shadow over the buyer-seller relationship.

55 Marotta - Wurgler F, ‘Competition and the Quality of Standard Form Contracts: The Case of Software License Agreements’ (2008) 5(3) *Journal of Empirical Legal Studies* 447, p.450.

56 Johnston JS, ‘The Return of Bargain: An Economic Theory of How Standard-Form Contracts Enable Cooperative Negotiation Between Businesses and Consumers’ (2006) 104 *Michigan Law Review* 857, pp.873-74.

57 Bebchuk LA and RA Posner, ‘One-Sided Contracts in Competitive Consumer Markets’ (2005) 104 *Michigan Law Review* 827, p.827.

58 Australian Productivity Commission, ‘Economic Structure and Performance of the Australian Retail Industry’ (Commonwealth of Australia: Canberra, 2011) p. 83, at p.130.

59 Johnston JS, ‘The Return of Bargain: An Economic Theory of How Standard-Form Contracts Enable Cooperative Negotiation Between Businesses and Consumers’ (2006) 104 *Michigan Law Review* 857.

60 Helberger N et al, ‘Digital Content Contracts for Consumers’ (2013) 36 *Journal of Consumer Policy* 37.

Yet another possible reason why the terms are becoming harsher is their near invisibility. With the relatively uncommon exception of the response to the Dropbox and Instagram terms, consumers usually enter into contracts ignorant of their terms.⁶¹ Consumers' propensity to not read and to be unaware of the terms is highlighted by an April fool's prank by the video game retailer Gamestation. On 1 April 2010 it included the following provision in its terms and conditions: 'Should we wish to exercise this option, you agree to surrender your immortal soul, and any claim you may have on it, within 5 (five) working days of receiving written notification from gamestation.co.uk or one of its duly authorised minions'. According to a *Financial Times* report, that day '7,500 customers made a purchase from the site. Every single one ticked the box claiming they accepted the conditions, but no one noticed a thing'.⁶² It is hardly surprising, then, that market forces and potential reputational effects usually have little, if any, impact.

It appears that consumers do not read the terms because there is little point in doing so, as they are effectively non-negotiable.⁶³ The OECD identifies other reasons why consumers might not read the terms, including that:

- they are often presented as lengthy and technical legal terms difficult for consumers to understand;
- they are sometimes presented in small size, are buried in footnotes or require accessing through a series of web links or windows;
- consumers need to invest considerable time to review and access information about the terms.⁶⁴

V. What can be done about these unfair standard form terms?

Considerable scholarly pessimism attenuates the notions that consumer contracts will ever be capable of negotiation, or that consumer 'consent' can be at all meaningful in real-world circumstances.⁶⁵ Braucher observes that 'most

61 According to a survey carried out in the EU in 2010, 27% of survey respondents did not read the terms and conditions at all, and 30% read them partially; EC (2011b), Special Eurobarometer 342, Consumer Empowerment, Conducted by TNS Opinion & Social on request of Eurostat and DG SANCO, Survey co-ordinated by DG Communication, Brussels, April 2011,

http://ec.europa.eu/consumers/consumer_empowerment/docs/report_eurobarometer_342_en.pdf. quoted in OECD (2013), 'Empowering and Protecting Consumers in the Internet Economy', OECD Digital Economy Papers, No. 216, OECD Publishing. <http://dx.doi.org/10.1787/5k4c6tbcvq2-en> at p.21.

62 Kellaway L, *Financial Times*, 23 January 2011, cited in UK Office of Fair Trading 'Consumer Contracts' February 2011.

63 Gillette CP, 'Rolling Contracts as an Agency Problem' (2004) *Wisconsin Law Review* 679.

64 OECD Report OECD (2013), "Empowering and Protecting Consumers in the Internet Economy", OECD Digital Economy Papers, No. 216, OECD Publishing. <http://dx.doi.org/10.1787/5k4c6tbcvq2-en>

65 Radin, MJ, *Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law* (Princeton University Press, 2012), at 136.

policymakers, regulators, and scholars concede that there often can be no real assent to mass-market standard terms, but then balk at meaningful solutions to address market failure. The problem of nasty standard terms is seen as intractable'.⁶⁶ There appears to be few, if any, alternatives to the status quo, other than by formal legal and regulatory intervention.

Scholars, policy-makers, legislators, industry participants and consumer representatives appear to assume, however, that a necessary dichotomy exists between negotiability and genuine consumer consent on the one hand, and the low transaction cost advantages of standard form terms on the other – when this may not necessarily be the case.⁶⁷ One need only turn to the operation of international commercial contracting to see that it is possible to have a private ordering system that works in conjunction with the formal legal system in a way that is fair to all parties. Indeed, standard form terms have been developed that are widely adopted by parties to international trade contracts that are fair and reasonable for both sellers and buyers.

Businesses engaged in international trade are able to choose from a range of easily understandable, clearly written and party balanced standard terms and incorporate them by reference into their international sale of goods contracts. The terms are known as international commercial terms, or 'incoterms'. The International Chamber of Commerce (ICC) has developed the terms, which are based on the *lex mercatoria*.⁶⁸ The terms set out the obligations of the buyer and seller regarding matters such as payment for the goods, arranging for their carriage and insurance, the preparation of exportation documents, and which party carries the risk of damage or loss of the goods.

Developments in the international sphere have gone further with the development of what is in effect a model law governing international commercial sale of goods contracts, which was developed by the UN agency, the United Nations Commission on International Trade Law (UNCITRAL). The Vienna Convention on the International Sale of Goods (CISG) has been adopted or enacted as the domestic law of over 70 countries, including Australia.⁶⁹ The CISG deals with matters such as the formation of contracts for the international sale of goods, the obligations of the buyer and seller and the remedies for breach. Parties may, however, expressly or by implication exclude some or all of the provisions of the

66 Braucher J, 'Unfair Terms in Comparative Perspective: Software Contracts' in Larry A. DiMatteo et al (eds) *Commercial Contract Law: Transatlantic Perspectives* (Cambridge University Press, Cambridge 2013), pp. 339-365.

67 Becher s and T Zarsky, 'E-Contract Doctrine 2.0: Standard Form Contracting in the Age of Online User Participation' (2008) 14(2) *Michigan Telecommunications and Technology Law Review* 303.

68 Berger KP, and Center for Transnational Law. *The Creeping Codification of the New Lex Mercatoria*. Kluwer law international, 2010 at 137-38.

69 The CISG appears as a schedule to the Sale of Goods (Vienna Convention) Act in each Australian state; however, in the case of Victoria it appears as a schedule to the Goods Act.

CISG.⁷⁰ This contrasts with the operation of the ACL, which in many instances prohibits the parties from excluding the operation of the provisions of the ACL.

These developments have not occurred overnight. The International Chamber of Commerce first began developing the Incoterms in the mid-1930s, which was at about the same time the International Institute for the Unification of Private Law (UNIDROIT) sponsored the drafting of a uniform law on the international sale of goods. Their work was interrupted by World War II, and was completed in 1964. Relatively few countries signed up to the convention they developed. However, it served as the basis for the drafting of the CISG by UNCITRAL.⁷¹

By contrast to developments regarding the international commercial sales of goods, very little has been done in the way of developing internationally recognised and accepted standard form terms or a model law for governing international consumer sales contracts. This is to an extent unsurprising given there was a very low proportion of cross-border consumer purchasing before the ubiquity of the Internet. The volume of international consumer transactions is now substantial and on a marked increase. The need for reform, therefore, is now pressing. The proposal here is that sets of standard form terms ought to be developed and made readily available on the Internet for parties to incorporate into their consumer sales contracts. The terms could be developed with the voluntary assistance and participation of lawyers, consumer groups, industry groups and relevant national government and international agencies.

Two broad approaches could be taken: one involving reforms designed to bring greater international commonality to formal consumer protection laws for cross-border transactions; and another designed to enhance private ordering, that is to say, the quality, balance and fairness of voluntary contracting terms. Both these proposed approaches to some extent would mirror developments regarding international commercial contracting.

The proposed ‘fair terms’ standard form contract terms could deal with a range of generic terms such as jurisdiction, choice of law, and so forth. Additional terms could be developed that are more product specific. A voluntary ‘code’ might also be developed which would act as a kind of underlying law which parties might choose as the ‘law’ governing the contract. The code could be designed along the lines of the UNIDROIT Principles of International Commercial Contracts.⁷²

70 Article 6, United Nations Convention on Contracts for the International Sale of Goods, which appears as a schedule to the following Australian legislation: Sale of Goods (Vienna Convention) Act 1986 (NSW); Goods Act 1958 (Vic); Sale of Goods (Vienna Convention) Act 1986 (Qld); Sale of Goods (Vienna Convention) Act 1986 (WA); Sale of Goods (Vienna Convention) Act 1986 (SA); Sale of Goods (Vienna Convention) Act 1987 (Tas); Sale of Goods (Vienna Convention) Act 1987 (ACT); and Sale of Goods (Vienna Convention) Act 1987 (NT).

71 See Bonell M, ‘The CISG, European Contract Law and the Development of a World Contract Law’ (2008) 56 *American Journal of Comparative Law* 1.

72 Bonell M ‘The UNIDROIT Principles of International Commercial Contracts:

VI. Developing fair international standard form online consumer contracting terms

This Part offers starting points for the development of international standard form online terms for consumer sales contracts. The terms could deal with formation of contract, passing of risk in the goods, consumer guarantees and other obligations of the buyer and seller, termination and remedies, and dispute resolution. The aim would be to develop clear concise and engaging terms that fairly balance the interests of the seller and the consumer parties to the contract.

The standard form 'Fair Terms' could be made freely available on the Internet for parties to incorporate by reference into their international sale of goods consumer contracts. Such an approach would follow in the footsteps of the Creative Commons project. It makes fair standard form terms regarding copyright readily available to parties via the Internet. The Creative Commons standard form terms are widely used by individuals, companies and government entities for granting copyright.⁷³

As a starting point for drafting the proposed Fair Terms, the terminology of the terms would need to be concise, and easily comprehensible. The ICC incoterms, for instance, are set out in a concise and easily comprehensible form. To illustrate, consider the terms dealing with the sale of goods on a free on-board (FOB) basis, in which the parties agree that the risk of loss or damage of the goods passes from seller to buyer when the goods pass over the ship's rail at the port of export. The ICC 2010 FOB Incoterms provide in part:

'The Seller's Obligations:

A1 Provision of Goods in Conformity with the Contract.

The seller must provide the goods and the commercial invoice, or its equivalent electronic message, in conformity with the contract of sale and any other evidence of conformity which may be required by the contract.

The Buyer's Obligations:

B1. The buyer must pay the price as provided in the contract of sale.'

In addition to being clear and concise, much in the same way as the Incoterms, the proposed standard form Fair Terms could also adopt the more accessible and conversational style as can be found, for example, with the Dropbox terms, which are discussed above.

Achievements in Practice and Prospects for the Future' (2010) 17 *Australian International Law Journal* 177.

73 Cobcroft R 'Creative Commons Case Studies: Volume 1' Creative Commons Clinic, (2008) Australian Research Council Centre of Excellence for Creative Industries and Innovation <http://creativecommons.org.au/casestudiesvol1>

The terms could have generic provisions that would apply to Fair Terms contracts, along with additional terms that are more product specific. The generic terms could be as follows:

Parties: [Name of seller, address and contact details] (referred to as ‘Us’ and ‘we’)

[Name of buyer, address and contact details] (referred to as ‘I’ and ‘me’)

We agree to sell and I agree to buy the following goods on the terms set out below.

What I am buying [Specify goods being purchased]

The total cost [If necessary breakdown the costs, for example the cost of goods, and the cost of their transportation and delivery]

How will I pay (if I haven’t already) [Set out means of payment]

When we expect the goods will arrive [seller sets out expected delivery times]

We and I agree that the [Party nomination of terms, eg Type 1, A Class⁷⁴] Fair Terms will apply to this contract.

Signed by the parties

The more product specific provisions could possibly be divided into Type 1 and Type 2 terms. The Type 1 terms could apply to tangible goods, such as physical products including clothing, physical books, CDs and DVDs. The Type 2 terms could apply to ‘intangible’ goods such as computer software, e-books and downloadable music and movies.

Consideration could be given to developing various grades of standard form terms, with A Grade terms providing the highest level of consumer protection, and lower grade terms providing less protection, whilst avoiding the inclusion of surprising and unfair terms. This would enable sellers, in particular, to choose the types of terms they wish to present to consumers. The nomenclature of the terms as grade A, B, C and so forth, would easily and clearly communicate to the consumer the quality of the terms being offered. The ease of comparison enabled by such nomenclature may encourage competition regarding the terms. For instance, sellers may offer products on the basis of the A grade terms at higher price than products being sold on lower grade terms. The A grade terms might provide more favourable terms regarding the entitlements of the consumer to

74 The meaning of these terms is discussed immediately below.

the return of defective or unsatisfactory products, and the seller might be able to clearly indicate on the contract whether or not it will cover the postage costs for returns.

If the Fair Terms gained sufficient recognition, some sellers might be prepared to voluntarily incorporate them into their sales contracts as a way of gaining a competitive edge. Some consumers might be prepared to read and spend some time comprehending them because they would be relatively easy to comprehend. The time spent understanding them would not be wasted if they are relatively widely used. If the same set of terms applies to numerous contracts, they do not need to be re-read each time a contract using them is entered into. Consumer comprehension of the terms would be an advantage to sellers because there would be a reduced propensity for consumers to have unduly heightened expectations about their contractual entitlements.

Guidance on the drafting of key standard terms could be gained from various sources including the UK Office for Fair Trade (OFT) advisory terms regarding unfair contract terms.⁷⁵ The OFT is responsible for supervising the operation of the Unfair Terms in Consumer Contracts Regulations 1999. If the OFT believes that a term in a standard form contract breaches the Regulations, it may discuss the matter with the seller and propose ways the seller can amend the terms to comply with the Regulations, or it can declare the term void. The OFT has reported on the outcomes of this process, including the ways an unfair term has been reworked to avoid a breach of the Regulations. The attachment to this article sets out some of these re-worked terms, and in some cases the author of this article has amended them so as to render the language plainer and simpler.

For terms dealing with ‘intangible’ products, the following sources could offer a useful starting point:

- The checklist for the protection of e-consumers developed by Svantesson and Clarke;⁷⁶
- The American Law Institute’s Principles of the Law of Software Contracts.
- The 12 Principles for Fair Commerce in Software and other Digital Products developed by Americans for Fair Electronic Commerce Transactions;⁷⁷ and
- The Final Report on Recommendations for Possible Future Rules on

75 www.offt.gov.uk/about-the-offt/legal-powers/legal/unfair-terms/guidance#named1. Another useful source is the EC Proposal for a Regulation on a Common European Sales Law, Brussels Com 0284, 2011.

76 Svantesson D and R Clarke, ‘A Best Practice Model for E-Consumer Protection’ (2010) 26 *Computer and Security Review* 31.

77 www.ala.org/advocacy/sites/ala.org.advocacy/files/content/copyright/AFFECTbrochure_0205.pdf

Digital Content Contracts.⁷⁸

Svantesson and Clarke propose a number of criteria for assessing the value of e-consumer protection schemes. They believe their criteria can be used as a tool for policymakers, industry and consumer organisations for assessing the appropriateness of consumer protection regulations in any particular jurisdiction. Arguably, their model could also be used for developing standard form terms. Broadly, the issues they discuss include:

- Ensuring that the products sold meets an adequate quality and safety standard. They propose that where a consumer has made clear the purpose for which a product will be used, the seller must only deliver products suitable for that purpose.
- There should be a limitation on the seller's capacity to exclude liability.
- There should be fair and appropriate terms regarding the consumer's right to return or exchange products.
- There should be adequate provisions dealing with the consumer's legitimate right to title in and quiet possession of the goods they purchase.
- There should be adequate protection of the personal information and privacy of the consumer.
- There should be a cheap, fair and easy means for the buyer to resolve any disputes with the seller.⁷⁹

A number of useful principles for the development of standard form terms for consumer contracts regarding the purchase of digital products have been proposed by the organisation Americans for Fair Electronic Commerce Transactions (AFFECT). It is a US national coalition of consumers, retail and manufacturing businesses, financial institutions, technology professionals and librarians who claim to be committed to the growth of fair and competitive US markets in software and other digital products.⁸⁰ The Principles include the entitlement of consumers to:

- readily find, review and understand proposed terms when they shop;
- be informed in plain and conspicuous language about all aspects of the proposed deal that may influence a purchasing decision;
- not be bound by the term unless they actively and unambiguously indicate their acceptance. AFFECT does not offer a proposal as to how this can be achieved in any meaningful and practical way;

78 Helberger LM and N Guibault et al (2012) 'Analysis of the Applicable Legal Frameworks and Suggestions for the Contours of a Model System of Consumer Protection in Relation to Digital Content Contracts' Centre for the Study of European Contract Law, University of Amsterdam dare.uva.nl/document/227950.

79 Svantesson D and R Clarke, 'A Best Practice Model for E-Consumer Protection' (2010) 26 *Computer and Security Review* 31, at pp.35-36.

80 www.fairterms.org/12PrincGeneral.htm

- information about all known nontrivial defects in a product before committing to the deal;
- a refund when the product is not of reasonable quality;
- have their disputes settled in a local, convenient venue;
- control their own computer systems and to control their own data;
- fair use of the digital content, including library or classroom use, digital products to the extent permitted by federal copyright law;
- transfer products as long as they do not retain access to them.⁸¹

VII. Conclusion

A substantial proportion of Australian online consumer purchases are from overseas sellers. Although theoretically the Australian Consumer Law applies to many of these transactions, in reality it is difficult, if not near impossible, for a consumer to pursue their rights under the ACL in the face of a seller's objections. If a consumer in Australia purchases goods from a US seller, she is particularly vulnerable to the risk of entering into a standard form contract containing harsh, one side and unfair terms. The evidence suggests that these terms are becoming increasingly harsh and one sided.

Ways of addressing this issue could include following the developments regarding international commercial contracts. These include the development of 'model' laws for governing cross-border sale of goods transactions. A further development worth considering is the development of party balanced and easy to comprehend standard form terms which parties can incorporate by reference into international consumer transactions. It is suggested in this article that if such terms were developed, it may well set the stage for market forces to encourage a race toward quality terms, in contrast to the present situation in which there is a race to the bottom. This article proposes starting points for the development of fairer party balanced terms.

APPENDIX

A Selected Collection of Standard Form Contract Terms Developed by the UK Office of Fair Trading in Response to Terms that Would Otherwise Breach the Unfair Terms in Consumer Contracts Regulations 1999

Some of the terms developed by the OFT have been reworked by the author. Some of the clauses provide alternative ways of dealing with an issue.

Obligations and Liabilities of the Parties

The seller

1. If –
 - (a) we lose or damage the goods (or any part of them) because we were negligent, or
 - (b) there is a product failure because of a fault

you can choose to have us:

- repair or replace the goods, or part of them, or
- if the same kind goods (or part of them) cannot be provided by us, we will replace them with a similar item of approximately the same standard and value, or
- refund the price you paid for them.

We will do as you choose.

2. We will accept liability if something we do causes death or injury. We will also accept liability if it is our fault that damage was caused to your property.
3. We will provide you product support with reasonable care and skill, within a reasonable time, and substantially as described in this Contract. We do not make any other promises about support service.

The Buyer

1. You will be responsible for all claims, liabilities, damages, costs and expenses we suffer or incur because you breach your contract obligation.
2. You are responsible for any loss or damage to the goods unless the loss or damage is:
 - (a) caused by us or our employees,

- (b) due to a manufacturing design or design fault, or
 - (c) due to fair wear and tear.
3. You must tell us about any fault or damage as soon as is reasonably possible.
 4. You cannot cancel an order unless you ... pay any losses and costs we suffer because of the cancellation. If we cancel the Contract, we must pay you any losses or costs you suffer because of the cancellation.

Liability for losses

1. If either you or we are in breach of the arrangements under this Contract, neither of us will be responsible for any losses that the other suffers as a result, except those losses which are a foreseeable consequence of the breach.
2. We are also responsible for losses you suffer if we breach this Contract if the losses are a foreseeable consequence of our breach. A foreseeable loss happens if we or you could contemplate it at the time this contract started. We are not responsible for indirect losses which happen as a side effect of the main loss or damage and which are not foreseeable by you and us (such as loss of profits or loss of opportunity).
4. We will not be liable under this Contract for any loss or damage caused by us or our employees or agents if:
 - (a) there is no breach of a legal duty of care owed to you by us or by any of our employees or agents,
 - (b) the loss or damage is not a reasonably foreseeable result of any such breach, and
 - (c) any increase in loss or damage results from you breaching any term of this Contract.

Computers

Our and our suppliers' liability does not in any circumstances include losses related to any business you might have or any employment or commercial activity you are involved with. We and our suppliers are not liable for lost data, lost profits or business, commercial or employment interruption.

Disputes

We will try and solve any disagreements quickly and efficiently. If you are not happy with the way we deal with any disagreement and you want to take legal proceedings, you must do this within [name of jurisdiction].

LOOKING AT THE FINE PRINT: STANDARD FORM CONTRACTS FOR TELECOMMUNICATIONS PRODUCTS AND CONSUMER PROTECTION LAW IN AUSTRALIA

JEANNIE MARIE PATERSON* AND JONATHAN GADIR*

1 INTRODUCTION

Consumer contracts for telecommunications products are usually ‘standard form contracts’¹, which means that they have been prepared by providers and presented to consumers on a ‘take it or leave it basis’. In an ideal world, this lack of an opportunity for consumers to negotiate the terms of their contracts would not necessarily result in one-sided contracts that are balanced against the interests of those consumers. Ideally, consumers would shop around and select between providers not only on the basis of the products offered by them, but also on the basis of the contract terms accompanying those products. The reality is that this almost never occurs.² It is often difficult for consumers to scrutinise closely the terms of standard form contracts or to compare the contracts offered by different providers before making their purchasing decisions. Sometimes consumers are not given access to the contract until the point of sale, when they are already committed to the transaction and are, accordingly, less likely to be dissuaded from purchasing their chosen product by the recently revealed terms of the relevant contract.³ In other cases, the contracts are difficult for consumers to read and understand because of the way in which they are presented and written. Even if consumers do read the standard form contracts presented to them, studies in behavioural economics have shown that consumers are usually not very good at predicting the likely impact of those contract terms on their future enjoyment of the product in question.⁴

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1 This is acknowledged in the Telecommunications Act 1997 (Cth) s 479.

2 See Margaret Jane Radin, *Boilerplate: the Fine Print, Vanishing Rights and the Rule of Law* (Princeton University Press, 2013).

3 See further J M Paterson, ‘Consumer Contracting in the Age of the Digital Natives’ (2011) 27 *Journal of Contract Law* 152.

4 See generally Oren Bar-Gill, *Seduction by Contract* (2012, Oxford University Press).

The common law of contract provides very little support for consumers in their dealings with standard form contracts.⁵ Consumers will be bound by the terms of a contract provided they have given some formal indication of ‘consent’ to those terms,⁶ such as through signing a paper document,⁷ agreeing verbally as part of a telephone conversation⁸ or clicking ‘I agree’ in an online contract.⁹ There is no common law requirement for timely disclosure of contract terms, which means that consumers do not have to have been provided with a realistic opportunity to compare and assess the terms before committing to the contract. Nor is there a requirement for consumers actually to have read or understood those terms before being bound. The common law does not regulate the substantive fairness of the terms of consumer contracts. As a result, consumers may be left at mercy of providers, who may choose to include in the ‘fine print’ of their standard form contracts onerous terms that undermine the very essence of the bargain consumers have entered into.

In Australia, recognition of the risks to consumers arising from the widespread use of standard form contracts in consumer transactions has led to increasingly robust regulation to ensure both procedural and substantive fairness in the terms of those contracts.¹⁰ Protection for consumers of telecommunications products is provided through the *Telecommunications Consumer Protection Industry Code* (“TCP Code”) and the *Australian Consumer Law* (“ACL”). The TCP Code includes provisions that seek to promote a fair contract making process by requiring consumers to be provided with salient information about the products they are purchasing and the contracts applying to the supply of those products. The TCP Code also requires those contracts to be ‘transparent’ in the sense of being clearly presented and expressed. The ACL contains new measures that ensure the very substance of standard form consumer contracts for telecommunications products is fair and thereby consistent with the reasonable expectations of consumers. The ACL does this, in particular, through the combined effect of the unfair contract terms regime, which renders void unfair terms in standard form consumer contracts, and the consumer guarantees regime, which provides consumers with non-excludable rights to goods or services of a reasonable standard of quality.

5 See further J M Paterson, ‘Consumer Contracting in the Age of the Digital Natives’ (2011) 27 *Journal of Contract Law* 152.

6 See e.g. *L’Estrange v F Graucob Ltd* [1934] 2 KB 394; *Toll (FGCT) Pty v Alphapharm Pty Limited* [2004] HCA 52; (2004) 219 CLR 165.

7 *Toll (FGCT) Pty v Alphapharm Pty Limited* [2004] HCA 52; (2004) 219 CLR 165.

8 Cf *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197.

9 *eBay International AG v Creative Festival Entertainment Pty Limited* [2006] FCA 1768; (2006) 170 FCR 450.

10 See further J M Paterson, ‘The Australian Unfair Terms Law: The Rise of Substantive Unfairness as a Ground for Review of Standard Form Consumer Contracts’ (2009) 33 *Melbourne University Review* 934 and ‘The New Consumer Guarantee Law’ (2011) 35 *Melbourne University Law Review* 252.

Despite the existence of these regimes, the Australian Competition and Consumer Commission (“ACCC”) has expressed concern about the prevalence of unfair terms in consumer contracts in a number of industries, including the telecommunications industry.¹¹ These concerns are supported by a recent review of contract terms in consumer contracts in the telecommunications industry, undertaken by the Australian Communications Consumers Action Network (“ACCAN”). The “Fine Print Project” involved the review of standard form consumer contracts from ten providers¹² for forty two different telecommunications products,¹³ including fixed line phone, mobile pre and post paid, internet and entertainment bundles, in order to assess compliance with the regulatory regimes in the TCP Code and the ACL governing the boiler plate or fine print terms.¹⁴

The Project found that most of the contracts reviewed contained terms that arguably did not comply with the substantive fairness requirements in the ACL. Perhaps unsurprisingly, the contracts of the larger providers of telecommunications products were largely compliant with the relevant regulatory regimes, the main concerns being with the sheer number of documents that consumers may be required to navigate and read. Some of the smaller providers’ contracts demonstrated substantial levels of non-compliance with both the TCP Code and the ACL. Terms in the contract of one such provider have, in fact, recently been declared to be void as unfair terms under the ACL.¹⁵

This paper reports on these findings of the Fine Print Project. The paper outlines the regulatory regimes governing standard form consumer contracts for telecommunications products. It discusses the areas where the contracts surveyed did not comply with the regimes. The paper then considers why there is such a widespread failure in standard form consumer contracts for telecommunications products to comply with what is, at least in its core areas, a largely straightforward consumer protection regime. It is suggested that the issues identified by this project have broad implications for consumer protection in Australia. Most consumers have contracts for telecommunications products and access to those products is becoming essential for participation in the modern ‘digital’ society. It is disappointing if consumers of telecommunications products are not getting the benefit of the new consumer protection regimes that were enacted to protect them. It is also likely that at least some of the compliance issues found in the standard

11 Australian Competition and Consumer Commission, *Unfair Contract Terms – Industry Review* (2013). For recent enforcement action see *Australian Competition and Consumer Commission v Hewlett-Packard Australia Pty Ltd* [2013] FCA 653; *Australian Competition and Consumer Commission v Bytecard Pty Limited* Consent order (P)VID301/2013.

12 The providers covered in the review were: Telstra, Optus, Aldi Mobile, Boost Mobile, Dodo, iiNet, Kogan Mobile, Netspeed, TPG and Vodafone. The terms for Virgin Mobile were the same as for Optus.

13 All contracts discussed in this paper were as made available on the webpage of the provider on 15 March 2013.

14 The Fine Print Project Review (April 2013), on file with ACCAN.

15 *Australian Competition and Consumer Commission v Bytecard Pty Limited* Consent order (P)VID301/2013.

form consumer contracts in the telecommunications industry are replicated in other industries.¹⁶

2 FAIR PROCESS: DISCLOSURE, ACCESS AND TRANSPARENCY

The TCP Code is made as a code governing the conduct of providers of telecommunications products pursuant to the *Telecommunications Act 1997* (Cth) s 117.¹⁷ It is ‘designed to ensure good service and fair outcomes for all Consumers of Telecommunications Products in Australia’.¹⁸ The TCP Code covers a range of matters, including advertising and billing as well as information disclosure and transparency. One important aspect of the TCP Code is directed at promoting what is sometimes referred to as ‘procedural fairness’, namely fairness in the process of making a contract. The TCP Code does this by requiring consumers to be provided with salient information about the products they are purchasing¹⁹ and by ensuring that consumers are given access to the contracts for those products before the time of purchase.²⁰ The TCP Code also promotes ‘transparency’ in consumer contracts for telecommunications products²¹ by requiring those contracts to be provided in a format that is easy for consumers to navigate,²² clearly presented²³ and expressed in plain language.²⁴

The TCP Code disclosure, access and transparency requirements provide an important form of protection to consumers of telecommunications products. The requirements should assist consumers more easily to compare different products and to make better choices in entering into telecommunications contracts.²⁵ The requirements should also assist consumers after the contract is made in resolving any disputes or problems about their ongoing use of the product by assisting consumers in more easily ascertaining and understanding their contractual rights.

Almost all of the telecommunications providers surveyed complied with the TCP Code requirements to make information about their products and their standard form consumer contracts available on their websites. Most contracts surveyed complied with the transparency requirements under the TCP Code and the ACL in terms of clear presentation and the use of plain language. There were of course

16 See the common features in the contracts surveyed in the ACCC Report.
 17 The TCP Code in its current form was registered by ACMA on 1 September 2012.
 18 TCP Code 1.
 19 TCP Code r 4.1.2 – 4.1.3.
 20 TCP Code r 4.5.1.
 21 TCP Code r 4.1.1(b); 4.5.2. Transparency is also a factor to consider in assessing whether a term is unfair under the test for an unfair term set out in the ACL: see ACL s 24(3).
 22 TCP Code r 4.5.1.
 23 TCP Code r 4.1.1(b); 4.5.2(b).
 24 TCP Code r 4.5.2(a).
 25 For further insights on the types of information disclosure requirements that would assist consumers see Oren Bar-Gill, *Seduction by Contract* (2012, Oxford University Press) Ch 4.

some exceptions, as illustrated by the following term:

“In the event that we suspend the Service, the Service will be automatically terminated 7 days subsequent to the suspension date if the account has not been reconnected prior to this date.”²⁶

All providers might have done more to utilise the creative potential of digital technology in presenting their contracts to consumers. In particular, providers might have improved the navigability of their contracts by including links between defined terms and the use of those terms in the contracts.

The core transparency issue for consumers seeking to obtain and understand the contract terms governing their telecommunications products was the number of documents that had to be located, opened, read and reconciled. The contracts of several providers had terms spread across a number of documents. In some cases, providers’ contractual documents dealt with the same issues repeatedly but using different terminology and imposing different obligations in respect to the same issue, which makes it difficult for consumers accurately to gauge their contractual rights. For example, the documents of one major provider used different language to describe the consumer guarantee regime in Part 3-2 of the ACL. Some documents referred to ‘consumer protection laws’, some to the ‘Competition and Consumer Act’, some to guarantees applying to goods and services, some only guarantees applying to goods and some documents referred to compensation for loss and some only to a remedy of repair in cases of a failure to comply with the consumer guarantees in the ACL.²⁷

3 SUBSTANTIVE FAIRNESS: UNFAIR TERMS AND CONSUMER GUARANTEES

The ACL, in schedule 2 of the *Competition and Consumer Act 2010* (Cth),²⁸ is a comprehensive consumer protection regime applying in all Australian jurisdictions. The ACL contains provisions promoting what is sometimes called ‘substantive fairness’ by regulating the very content of consumer contracts. The ACL does this through the ‘unfair contract terms law’, which renders void unfair contract terms²⁹ in standard form consumer contracts³⁰ that consumers had no opportunity to negotiate,³¹ and through the ‘consumer guarantees law’, which requires goods

26 Kogan Mobile *General Terms and Conditions* 3.4.

27 See the various Telstra customer terms for home and family at <http://www.telstra.com.au/customer-terms/home-family/index.htm>.

28 The CCA was, until 2010, called the *Trade Practices Act 1974* (Cth); see the *Trade Practices Amendment (Australian Consumer Law) Act (No 2) 2010* (Cth), sch 5, items 1 – 2.

29 See also the TCP Code r 4.5.3.

30 The ACL does not apply to terms that are ‘required, or expressly permitted, by a law of the Commonwealth, a State or a Territory’ or that define ‘the main subject matter of the contract’ or set ‘the upfront price payable under the contract’: ACL s 26(1).

31 See further J M Paterson, *Unfair Contract Terms in Australia* (Thomson, 2012).

and services supplied to consumers to meet basic quality standards, regardless of any attempts by providers to exclude or limit their contractual liability.³²

3.1 Unfair contract terms under the ACL³³

Under the ACL, a term will be unfair if:³⁴

- a) it would cause a significant imbalance in the parties' rights and obligations arising under the contract; and
- 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 to be applied or relied on.

Although the unfair terms regime is of relatively recent origin in Australia, there are numerous sources of guidance for providers as to the type of terms that are likely to be unfair under the ACL and also alternative ways of drafting terms that protect the legitimate interests of providers without being unfair in their effect on consumers. The ACL sets out a list of 'examples of the kind of terms of a consumer contract that may be unfair'.³⁵ Both the ACCC and Consumer Affairs Victoria have published information on the unfair terms regime.³⁶ There are a number of decisions applying unfair contract terms law from the previous regime in Victoria and in the United Kingdom. More recently, the ACCC conducted a review of the standard form contracts used in a range of industries including telecommunications and identified a number of continuing concerns with potentially unfair terms.³⁷ Despite this guidance, the Fine Print Review found that the contracts of a number of providers contained terms that have been previously identified in these various sources as unfair or potentially unfair. While there is scope for argument over some of the terms identified, others were almost certainly void under the legislation.

32 See further J M Paterson and K Tokeley, 'Consumer Guarantees' in Justin Malbon and Luke Nottage (eds), *Consumer Law and Policy in Australia and New Zealand* (Federation Press, 2013).

33 On the regulation of unfair terms under the ACL see further J M Paterson, *Unfair Contract Terms in Australia* (2012).

34 ACL s 24(1).

35 ACL s 25.

36 See further Consumer Affairs Victoria, *Preventing Unfair Terms in Consumer Contracts: Guidelines for Businesses* (2011).

37 Australian Competition and Consumer Commission, *Unfair Contract terms: Industry Report* (2013) 1.

Entire agreement clauses

The contracts of a number of providers contained ‘entire agreement’ clauses providing that the written contract prepared by the provider represented the ‘entire agreement’ of the parties and that no other rights apply. The aim of such clauses is to exclude liability that might otherwise accrue to the provider for any representations or statements made by the provider in the course of negotiations and later relied upon by consumers. The form of such clauses may vary but the following is typical:

“These Terms and Conditions supersede all previous representations, understandings or agreements and shall prevail notwithstanding any variance with terms and conditions of any order submitted.”³⁸

Entire agreement clauses of this type are likely to be void as unfair terms under the ACL. Both regulators and courts have regularly suggested that such clauses are unfair.³⁹ It is unfair for providers to attempt to avoid liability for statements that were made to induce consumers to enter into the contract in the first place. In deciding whether to enter into a particular contract for goods or services, consumers often rely on what was said or represented by the provider. Entire agreement clauses may also reduce the incentive for providers to take care to ensure that the representations made by their employees and agents are accurate.

Providers of telecommunications products have a legitimate interest in explaining to consumers that the written contract is the primary source of their legal rights. This is acceptable provided the provider does not attempt to disclaim responsibility for conduct that might otherwise have legal effect. For example, the issue was effectively, and fairly, by a provider in the following manner:

“Your service is supplied on the terms expressly set out and subject to non-excludable rights under consumer protection laws. Other representations or statements we make to you, whether in person, over the phone or in advertising or other materials you received, are not part of these terms. However, you may have other legal rights in relation to those representations.”⁴⁰

38 Netspeed *General Terms and Conditions* 10.1. Similarly iiNet, *Our Customer Relationship Agreement Section A*, 19.8; Kogan *Mobile General Terms and Conditions* 17.1.

39 Office of Fair Trading, *Unfair Contract Terms Guidance: Guidance for the Unfair Terms in Consumer Contracts Regulations 1999* (2008) 61; Australian Competition and Consumer Commission, *A Guide to the Unfair Contract Terms Law* (2011) p 22; Australian Competition and Consumer Commission, *Unfair Contract Terms – Industry Review* (2013) 13. Entire agreement clauses were found to be unfair under the UTCCR in *Office of Fair Trading v MB Designs (Scotland) Ltd* [2005] SLT 691, [45] and under the former Pt 2B of the FTA (Vic) in *Director of Consumer Affairs Victoria v Trainstation Health Clubs Pty Ltd (Civil Claims)* [2008] VCAT 2092, [163].

40 Telstra, *Our customer terms – BigPond service section - Part A – General terms for BigPond services* 8.1.

Unilateral variation clauses

All of the standard form consumer contracts reviewed gave providers very broad rights to vary the terms of the contract and the conditions under which their products were provided, without obtaining the consent of their consumer customers.⁴¹ Thus, under most telecommunications contracts surveyed:

- providers were entitled to change any terms of the contract, including monthly access fees, minimum monthly fees, termination and default fees, call or data rates, download limits and features of the service;⁴²
- changes could be made at any time, including immediately after a consumer entered into the contract;
- there were no limits on the circumstances in which changes could be made;
- there were no limits on the degree or the significance of the changes that could be made;
- there were no requirements for a corresponding increase in cost to the provider associated with the changes; and
- there were no requirements that changes be a proportionate response to the circumstances that prompted the change.

Certainly, providers in the telecommunications industry, may have good commercial reasons for seeking a broad variation power to allow them to respond to changes affecting their own performance of the contract, as the service provided is affected by a range of variable including such as changes in costs, regulatory requirements or third party providers.⁴³ Nonetheless, broad or unfettered unilateral variation clauses are highly vulnerable to challenge as unfair terms under the ACL. Such terms have been included the 'grey list' of potentially unfair terms in the ACL,⁴⁴ identified the subject of concern to regulators⁴⁵ and struck down under

41 See also the discussion of variation terms in electronic contracts generally in Dale Clapperton and Stephen Corones, 'Unfair terms in 'clickwrap' and other electronic contracts' (2007) 35 ABLR 152.

42 The Dodo general terms limited the power of Dodo to make changes to these types of matters.

43 The possibility of changes to telecommunications contracts is recognised in the *Telecommunications (Standard Form of Agreement Information) Determination 2003* s 11, made pursuant to the *Telecommunications Act 1997* (Cth). The determination is expressed to be subject to the provisions of the TPA, now the ACL.

44 ACL s 25(1)(d).

45 See Consumer Affairs Victoria, *Preventing Unfair Terms in Consumer Contracts: Guidelines for Businesses* (2011) 15; Australian Competition and Consumer Commission, *A Guide to the Unfair Contract Terms Law* (2010) 17, 19; Australian Competition and Consumer Commission, *Unfair Contract Terms – Industry Review* (2013) 6.

other unfair terms laws.⁴⁶

Perhaps the most extreme clause in the contracts surveyed was the following:

“NetSpeed reserves the right to change prices or services at any time without prior notice to customers or the public, except when the service is an Australian Broadband Guarantee Service. Price changes will not be retroactive for existing prepaid customers. It is the User’s responsibility to check this online.”⁴⁷

Unsurprisingly this clause has now been declared unfair by the Federal Court.⁴⁸

The key issue in assessing the validity of a unilateral variation clause will be the safeguards provided for protecting consumers’ interests.⁴⁹ There are at least three ways in which such protection may be provided. These are through:

1. an undertaking to provide consumers with notice of changes;⁵⁰
2. allowing consumers a right to terminate in response to changes, or at least in response to adverse changes; and
3. limits on the discretion of the provider to make changes.

Most contracts reviewed provided consumers with a right to notice of at least significant changes to the terms and conditions governing their use of the product⁵¹ and rights to terminate in response to such changes.⁵² The standard form consumer contracts of the most providers followed a ‘tiered’ approach to protecting the interests of consumers following changes to the contract terms. Consumers would receive

46 Unilateral variation clauses were found to be unfair under Pt 2B of the FTA in *Director of Consumer Affairs Victoria v AAPT Ltd* [2006] VCAT 1493, [50]; *Director of Consumer Affairs Victoria v Craig Langley Pty Ltd & Matrix Pilates & Yoga Pty Ltd* [2008] VCAT 482, [30]; *Director of Consumer Affairs Victoria v Trainstation Health Clubs* [2008] VCAT 2092 (Unreported, Harbison V-P, 24 October 2004), [126]–[149]; *Director of Consumer Affairs Victoria v Backloads.com Pty Ltd (Civil Claims)* [2009] VCAT 754, [235] – [238]. Compare *Director of Consumer Affairs Victoria v Trainstation Health Clubs Pty Ltd (Civil Claims)* [2008] VCAT 2092, [125].

47 Netspeed *General Terms and Conditions* 1.7.

48 See also *Director of Consumer Affairs Victoria v AAPT Ltd* [2006] VCAT 1493, [50].

49 See Consumer Affairs Victoria, *Preventing Unfair Terms in Consumer Contracts: Guidelines for Businesses* (2011) 15; Australian Competition and Consumer Commission, *A Guide to the Unfair Contract Terms Law* (2010) 17, 19.

50 The *Telecommunications (Standard Form of Agreement Information) Determination 2003* s 11, which requires providers to give notice to consumers of variations to the contract likely to adversely effect those consumers.

51 The exception, which did not give notice rights, was the Netspeed, *General Terms and Conditions* 1.7.

52 The exception was Kogan *Mobile General Terms and Conditions* 2.7.

notice of changes. The type of notice provided depended on the effect of the change on consumers. Consumers were given a right to terminate the contract in response to specified categories of changes that would have an adverse effect on them. Most contracts provided that customers who terminated in response to an adverse change in the terms and conditions of supply would not have to pay outstanding fees for equipment they could no longer use.

While these types of measures go some way to protecting the interests of consumers, it is suggested that, they are not completely successful in this regard. The fundamental objection is that the variation rights in most telecommunications contracts contain no limits on the discretion of a provider to change the terms at any time or for any reason. Such broad ranging discretion is contrary to the very understanding of a contract. The consumer's right to terminate is not an adequate protection. Consumers who terminate may have sunk costs that they may be unable to recoup. Consumers may have incurred an 'opportunity cost' in choosing to contract with one provider as opposed to some other provider who, at the time of contracting, might have had competitive offers that are no longer available. Moreover, studies in consumer behaviour have highlighted the 'inertia' factor, which shows that consumers, once committed to an arrangement, tend not to opt out of that arrangement.⁵³ The inconvenience of change can be considerable and can provide a negative incentive for change. The combination of an unfettered power to make changes and the inertia of many consumers provides a risk of opportunistic behaviour by providers.

It is suggested that a provider who has contracted to provide services on particular terms should not be able to change those terms at whim, even if the consumer is given the right to terminate the contract should the changes impact adversely on them and even if consumers are released from charges they would otherwise have incurred. If providers want discretion to change the terms of the contract then the circumstances in which those changes can be made should be defined and there should be limits on the degree of change that can be made. Providers should not be able to vary the essential features of contracts they have committed themselves to perform.

Providers' rights to terminate

At the time of the Fine Print Project, one contract gave the provider an unfettered right to terminate at will:

“ [the provider] reserves the right to terminate any account at any time with or without cause or reason. ... ”⁵⁴

53 Russell Korobkin, 'Bounded Rationality, Standard Form Contracts, and Unconscionability' (2003) 70 *University of Chicago Law Review* 1203.

54 Netspeed *General Terms and Conditions* 6.5.

This term has been declared unfair by the Federal Court.⁵⁵ It goes beyond what is needed to protect the provider's interests and gives no protection to the interests of consumers.

Even where a provider's right to terminate the contract is restricted to specified events, the termination right must be a proportionate response to those events. This concern with proportionality was apparent in *Director of Consumer Affairs Victoria v AAPT Ltd*.⁵⁶ In this case, the contract provided a right for the trader immediately to terminate the contract where the consumer had breached the contract, or changed its address or contact details without notifying the trader. President Morris found that these terms were unfair within the meaning of Pt 2B of the FTA (Vic). The terms were "broadly drawn, and ... one sided in their operation".⁵⁷ President Morris stated:⁵⁸

"A customer may have breached the Agreement in a manner which is inconsequential, yet faces the prospect of having the service terminated. Further, if the customer changes his or her address (which will not necessarily be the address for the receipt of billing information), this will also provide a ground to AAPT to terminate the Agreement."

Another contract reviewed provided:

"We may terminate the Service Terms immediately if:

- a) you have breached any provision of the Service Terms; ..."⁵⁹

Terms in a standard form consumer contract that allow providers to terminate or suspend performance for any breach by consumers are similarly likely to be unfair under the ACL.⁶⁰ Termination is a disproportionate response to all breaches of contract. At common law, a right to terminate a contract in response to a breach will arise only in response to significant events, such as a breach of a condition, a serious breach of an intermediate term or a repudiation of the contract by the

55 *Australian Competition and Consumer Commission v Bytecard Pty Limited* Consent order (P)VID301/2013.

56 [2006] VCAT 1493.

57 [2006] VCAT 1493, [53].

58 [2006] VCAT 1493, [53].

59 Kogan *Mobile General Terms and Conditions* 7.2.

60 Consumer Affairs Victoria, *Preventing Unfair Terms in Consumer Contracts: Guidelines for Businesses* (2011) 15; Australian Competition and Consumer Commission, *A Guide to the Unfair Contract Terms Law* (2010) 15; Australian Competition and Consumer Commission, *Unfair Contract Terms – Industry Review* (2013) 11.

Overly broad termination clauses were found to be unfair under Pt 2B of the FTA in *Director of Consumer Affairs Victoria v AAPT Ltd* [2006] VCAT 1493 (Unreported, Morris P, 2 August 2006), [53]; *Director of Consumer Affairs Victoria v Trainstation Health Clubs Pty Ltd* [2008] VCAT 2092, [175] (Unreported, Harbison VP, 24 October 2004).

consumer.⁶¹ Terms that allow a provider to terminate in response to trivial or minor events detract from these common law rights and impose an undue restriction on the rights of consumers.

Most of the contracts surveyed gave the providers a right to terminate only in response to a material breach of the contract and, moreover, gave consumers an opportunity to remedy the breach before the contract could be terminated. Other serious events affecting the consumers' ability to perform the contract also gave rise to a right to terminate. These clauses balanced the interests of both parties and provided a fair approach to termination by the provider.⁶²

Early termination fees

All of the contracts reviewed charged consumers who terminated their contracts before the end of a fixed term an early termination fee. The amount of the early termination fee differed between providers and also between products. For example, in some cases, the early termination fee for a mobile phone plan was almost the full cost of the plan, calculated by reference to the monthly cost and the time remaining on the contract. In other cases the contract specified a maximum amount that was payable as an early termination fee. This was considerably less than the contract price.

Different views have been expressed as to what amounts to a fair early termination fee for the purposes of the ACL. One view is that providers should only recover the costs directly associated with early termination.⁶³ Another view draws an analogy with agreed damages clauses to suggest that "fair" early termination fees can allow providers to recover the full amount owing for the remainder of the contract term, provided the fee is discounted by any other benefits accruing to the trader on termination, as well as reasonable administrative costs associated with early termination. On this approach all of the various approaches to imposing early termination fees in the contracts surveyed would be valid.

Default fees

Most of the contracts reviewed charged a default fee for late payments and for dishonoured payments. The size of these fees varied between the providers, ranging from \$5 (late fee) to \$22 (dishonour fee). A default fee that is akin to a penalty under the common law is likely to be unfair.⁶⁴ Under the common

61 Paterson J, Robertson A and Duke A, *Principles of Contract Law* (3rd ed, Lawbook Co, 2008) Chap 21.

62 Cf *Director of Consumer Affairs Victoria v Trainstation Health Clubs Pty Ltd (Civil Claims)* [2008] VCAT 2092, [174].

63 Consumer Affairs Victoria, *Options for Fair Early Termination Fees in Consumer Contracts* (2010).

64 Australian Competition and Consumer Commission, *A Guide to the Unfair Contract Terms Law* (2010) 16; Office of Fair Trading, *Unfair Contract Terms Guidance: Guidance for the*

law a sum payable on breach of a contract will be a penalty where the sum is “extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach, rather than a genuine pre-estimate of the loss likely to be caused by a breach of the contract”.⁶⁵ This is on the ground that a trader should not recover more than its own reasonable costs associated with a breach or default under the contract.

There is no indication in the contracts reviewed of the purpose served by default fees.⁶⁶ Are they a way of recouping costs to the provider that have been incurred by the late or dishonoured payment, such as administrative costs or the cost of borrowing to cover income foregone through the late payments? What are these costs? Are the fees a way of ‘encouraging’ consumers to pay on time? Are they a way for the provider to raise additional revenue? It is therefore difficult to determine whether the default fees are legitimate, as a genuine pre-estimate of the costs to the providers occasioned by the default, or whether they are imposed as penalties for breach and therefore unfair terms under the ACL.⁶⁷ This is a matter that may warrant further investigation.

Assignment

A number of the contracts surveyed allowed the providers to assign their rights and obligations under the contract without the consent of the consumer.⁶⁸ In one case this was expressed as an absolute right:

“We may assign any of our rights or obligations under the Service Terms”.⁶⁹

Assignment clauses of this kind may be unfair contrary to the ACL⁷⁰ if they do not ensure that consumers are protected against detriment or prejudice.⁷¹ Such protection was provided in other contracts. For example, one contract provided that the provider could only assign its obligations to providers who would supply the service on materially the same terms and conditions as under the original arrangement;⁷² and another provided that the provider could only assign its

Unfair Terms in Consumer Contracts Regulations 1999 (2008) 41.

65 *Dunlop Pneumatic Tyre Co Ltd v New Garage Motor Co Ltd* [1915] AC 79; *Ringrow Pty Ltd v BP Australia Pty Ltd.* (2005) 224 CLR 656.

66 The law firm Maurice Blackburn has suggested that the cost to banks of exception fees is probably only about \$2 per transaction: Press Release 12 may 2010.

67 Office of Fair Trading, *Calculating Fair Default Charges in Credit Card Contracts: A Statement of the OFT’s Position* (2006) 5.

68 ACL s 25(1)(j); ASIC Act s 12BH(1)(j).

69 *Kogan Mobile General Terms and Conditions* 12.2.

70 For example, *Director of Consumer Affairs Victoria v Backloads.com Pty Ltd (Civil Claims)* [2009] VCAT 754, [260] (assignment clause found unfair under the former Pt 2B of the FTA (Vic)).

71 Office of Fair Trading, *Unfair Contract Terms Guidance* (2008) 66; Australian Competition and Consumer Commission, *A Guide to the Unfair Contract Terms Law* (2010) 21.

72 iiNet *Our Customer Relationship Agreement Section A* 18.

obligations under the agreement without permission or notice if it considered there would be no detriment to customers.⁷³

Exclusive jurisdiction

One standard form consumer contract surveyed committed the parties to the exclusive jurisdiction of the courts of Victoria.⁷⁴ Terms requiring consumers to sue in a particular jurisdiction are likely to be unfair contrary to the ACL.⁷⁵ Exclusive jurisdiction clauses can be said to cause a significant imbalance in the rights and obligations of the parties under the contract because it will usually be the consumer who will suffer the cost and inconvenience of suing in another jurisdiction.⁷⁶

4.2 Consumer guarantees under the ACL

Part 3-2 of the ACL provides a range of ‘consumer guarantees’ that apply to the supply of goods and services to consumers. Telecommunications consumers may acquire both goods (handsets, modems etc) and services (telephone, mobile or internet etc) from their provider. The guarantees ensure that consumers are assured of basic standards of quality in the products they acquire. Thus in the supply of goods to consumer there are guarantees that:

- the goods will be of acceptable quality;⁷⁷
- the goods are fit for any disclosed purpose;⁷⁸
- in the case of a sale of goods by description, that the goods match their description;⁷⁹
- spare parts and repair will be reasonably available for a reasonable period after the goods are supplied reasonably available;⁸⁰ and
- there will be compliance with express warranties.⁸¹

73 TPG *Standard Terms and Conditions* 15.

74 Kogan *Mobile General Terms and Conditions* 14.1.

75 *Oceano Grupo Editorial SA v Rocio Murciano Quintero* [2000] ECR I-4941; *Standard Bank London Ltd v Apostolakis (No 2)* [2002] CLC 939; *Director of Consumer Affairs Victoria v Backloads.com Pty Ltd (Civil Claims)* [2009] VCAT 754, [210].

76 Australian Competition and Consumer Commission, *A Guide to the Unfair Contract Terms Law* (2010) 21.

77 ACL s 54.

78 ACL s 55.

79 ACL s 56.

80 ACL s 58.

81 ACL s 59.

In the supply of services to consumers there are guarantees that:

- the services will be rendered with due care and skill;⁸²
- the services, and any product resulting from the services, will be fit for a purpose⁸³ or to achieve a result⁸⁴ that the consumer made known to the provider; and
- the services will be supplied within a reasonable time.⁸⁵

Regulation 90 wording for express warranties

Where a provider gives an express warranty against defects in respect to goods or services provided by it, the *Competition and Consumer Regulations 2010* (Cth) require certain specified information to be given to consumers.⁸⁶ This information includes details of who is giving the warranty, the period for which the warranty applies and how to claim under the warranty.⁸⁷ In addition, the written document providing a warranty against defects must expressly advise consumers of the existence of the consumer guarantees under the ACL as follows:⁸⁸

“Our goods come with guarantees that cannot be excluded under the *Australian Consumer Law*. You are entitled to a replacement or refund for a major failure and for compensation for any other reasonably foreseeable loss or damage. You are also entitled to have the goods repaired or replaced if the goods fail to be of acceptable quality and the failure does not amount to a major failure.”

If a provider does not provide the prescribed information, or does not provide it in the prescribed form, the provider may be subject to a civil pecuniary penalty⁸⁹ and may also be guilty of a criminal offence.⁹⁰ Almost all contracts that contained an express warranty surveyed under the Fine Print Project included the required wording from *Competition and Consumer Regulations 2010* (Cth) reg 90.

Other information about the consumer guarantees in the ACL

Even where not actually required by the ACL, it can be useful for providers to include in their contracts good quality, accurate information about the consumer

82 ACL s 60.

83 ACL s 61(1).

84 ACL s 61(2).

85 ACL s 62.

86 *Competition and Consumer Regulations 2010* (Cth) reg 90.

87 *Competition and Consumer Regulations 2010* (Cth) reg 90.

88 *Competition and Consumer Regulations 2010* (Cth) reg 90(2).

89 ACL s 224.

90 ACL s 151.

guarantees in the ACL. This information will assist consumers in understanding their rights under the legislation. In particular it will assist consumers in understanding that the consumer guarantees prevail over providers' contract terms and cannot be excluded by those contract terms. Accurate information about the statutory consumer guarantee regime also assists providers in complying with the ACL. Accurate contractual information about the consumer guarantees makes it more likely that terms dealing with the providers' contractual liability will be valid, as opposed to void as an attempt to avoid liability under the legislation⁹¹ or misleading consumers about their statutory rights.⁹²

The approach by providers in the contracts surveyed under the Fine Print Project varied considerably. Some providers did not acknowledge the ACL at all. Others referred to consumer protection legislation but in an inconsistent and inaccurate fashion. Still others used out of date terminology to describe consumers' rights, referring to 'implied terms' or 'warranties' rather than consumer guarantees⁹³ or the '*Trade Practices Act 1974*'⁹⁴ rather than the current legislation, the ACL, which is contained in schedule 2 to the *Competition and Consumer Act 2010*. This misuse of terminology does not assist consumers and in some cases may mislead them. It gives no confidence that the providers will accurately explain their rights and obligations in face-to-face or telephone dealings with consumers.

Pleasingly, a couple of providers' contracts provided very good summaries of consumers' rights under the ACL and made clear that the consumer guarantees prevailed over the providers' own contract terms. For example, the following extract gives consumers a very clear indication of their statutory rights under legislation:

"Our liability to you

We have responsibilities and obligations under the law, including under:

- i the Telecommunications Legislation,
- ii the Competition and Consumer Act, including the Australian Consumer Law,
- iii applicable laws, regulations and codes.

Nothing in the agreement removes or limits any rights that you have under existing laws or regulations.

91 See ACL s 64.

92 ACL s 29(1)(m).

93 Eg Dodo *Standard Form of Agreement – Consumer Services* 6.2; Kogan Mobile *General Terms and Conditions* 8.1.

94 Optus *Digital TV terms* 11.2.

Your statutory rights as a consumer

...

Consumer guarantees apply regardless of any express warranties to which you may be entitled under this agreement.

We guarantee that:

[Sets out a thorough summary of the consumer guarantees in the ACL and the remedies for a failure to comply with these guarantees.] ...⁹⁵

Consumer guarantees under the ACL and terms limiting liability

In most cases, the consumer guarantees in the ACL are mandatory and cannot be excluded by contract.⁹⁶ This means that attempts by providers to limit or exclude their liability arising under the consumer guarantees will usually be void.⁹⁷ For example, under the ACL providers cannot exclude liability for failing to use due care and skill in the supply of services or limit their obligation to provide redress for goods that are not of acceptable quality. The consumer guarantees will prevail over any voluntary or extended warranty given by providers.⁹⁸ For example, the consumer guarantees may provide a right to redress for consumers even in circumstances where the providers' voluntary warranty period has expired or does not apply.

The ACL also prohibits a person from making a false or misleading representation 'concerning the existence, exclusion or effect of' any consumer guarantee.⁹⁹ This prohibition might be breached by a provider who, in attempting to limit or exclude its liability under the contract, failed to clearly acknowledge the consumer guarantees in the ACL or to make clear that the rights under these guarantees 'trump' anything in the provider's contract. A provider who is found to have made a misleading representation about the existence or effect of a consumer guarantee under the ACL may be liable to pay a pecuniary penalty under the Act.¹⁰⁰ Many of the contracts surveyed as part of the Fine Print Project contained exclusion clauses that would be void and/or misleading under the ACL.

95 Optus, *Standard Form of Agreement* 13.2. Also well done in Vodafone *Standard terms for the Supply of the Vodafone Mobile Telecommunications Service - Customers commencing or Renewing on or after 1 January 2011 Section 2*.

96 ACL s 64.

97 Some opportunity for limitations on liability is provided in ACL s 64A(3), but this only applies where the goods or services are not of a kind ordinarily used for personal, domestic or household use or consumption.

98 ACL s 64.

99 ACL s 29(1)(m).

100 ACL s 224.

Attempts to exclude or limit liability that do not acknowledge the ACL

Some contracts contained limitation or exclusion clauses that did not acknowledge the non-excludable consumer guarantees under the ACL. For example, the one contract contained the following term:

“[The provider] makes no warranties of any kind, whether express or implied, for the services it provides. [The provider] also disclaims any warranty of merchantability or fitness for a particular purpose. [The provider] will not be responsible for any direct, indirect or consequential damages, which may result from the use of its services including loss of data resulting from delays, non-delivery or interruption in service. While we take great care with information that you deposit with us we cannot and do not guarantee that all such information will reach its intended destination (including electronic mail) inside or outside our network.”¹⁰¹

Another provider’s contract stated:

“You use the service at your own risk and we take no responsibility for any data downloaded and/or the content stored on your computer or mobile phone. You agree not to make any claim against us, our providers, employees, contractors or assignees for any loss, damages or expenses relating to, or arising from, the use of the service.”¹⁰²

These clauses are highly likely to be void as attempting to exclude liability under the ACL. The terms may also be misleading contrary to the ACL because they incorrectly represent that the provider can limit or exclude any liability that may arise in connection with the supply of its services. While the clauses do not expressly disclaim liability under the consumer guarantees in the ACL, they convey a strong and wrongful impression that the consumer has no rights of complaint against the provider for substandard services or products.¹⁰³

Information about the consumer guarantees that is contained in another document prepared by the provider and located elsewhere on that provider’s webpage should be not sufficient to save an otherwise void exclusion clause expressed in broad and absolute terms. Consumers are not necessarily experienced at reading legal documents together or at assessing the relationship between different and potentially inconsistent contract terms.

101 Netspeed, *General Terms and Conditions* 8.1.

102 TPG *Mobile Service Description and Terms* 18.1.

103 This clause was not the subject of the recent declaration as to unfair terms in this provider’s contract *Australian Competition and Consumer Commission v Bytecard Pty Limited* Consent order (P)VID301/2013.

Indemnity

Similarly problematic are broad indemnity clauses that require consumers to indemnify the provider for any losses it might incur, regardless of the parties' respective fault and without recognising the qualifications to this claim imposed by the ACL consumer guarantee regime. Once such clause has been declared to be unfair by the Federal Court:¹⁰⁴

“The User agrees to indemnify and hold NetSpeed, its affiliates, its licensors, its contractors or their respective employees harmless against any and all liability, loss claim, judgment or damage. This indemnity includes, but is not limited to an indemnity against all actions, claims and demands (including the cost of defending or settling any actions, claim or demand) which may be instituted against us, as well as all expenses, penalties or fines (including those imposed by any regulatory body or under statute)”.¹⁰⁵

Service interruption

In addition to excluding or limiting the provider's liability for certain losses, all of the contracts surveyed sought to ensure that the providers' obligations in respect to the service were narrowly defined, thus further reducing the potentially liability of the provider to consumers. There can be no complaint with a provider explaining in its contract that it cannot guarantee a continuous or fault free service. What is problematic is for a provider to attempt to disclaim responsibility for any loss suffered as a result of interruptions to the service. For example, the one contract provided:

“While we will endeavour to make Mobile services available to customers 24 hours a day, 7 days a week, Mobile services are not fault free and we cannot guarantee uninterrupted service, or the speed, performance or quality of the service. There are many factors outside of our control that affect Mobile services, such as the performance of third party providers and equipment, Force Majeure events, electromagnetic interference, network congestion, and performance of your equipment. We accept no liability for interruptions to your Mobile service or for any resulting damage or loss suffered by you or any third party.”¹⁰⁶

104 *Australian Competition and Consumer Commission v Bytecard Pty Limited* Consent order (P)VID301/2013.

105 Netspeed *General Terms and Conditions* 4.1 and see also 4.2.

106 TPG *Mobile service description and terms* 5.1. See also Kogan *Mobile Prepaid Plan Terms and Conditions* 3.1; Netspeed *General Terms and Conditions* 1.3; Vodafone *Standard terms or the supply of the Vodafone Mobile Telecommunications Service (post 1 January 2011)* 5.2.

This type of unqualified term may be void as an attempt to exclude liability under the consumer guarantee regime in the ACL. There are undoubtedly a large number of variables that may affect the provision of telecommunications services. It is reasonable for a provider to explain to consumers that their service may be interrupted by events outside its control. However, providers nonetheless remain subject to the consumer guarantees in the ACL. The obligations imposed by these guarantees will be shaped by the particular nature of the services being provided but their application cannot be excluded merely because the services can never be fault free. For example, providers must use due care and skill in providing the service. Part of due care and skill may involve taking steps to minimise the detrimental effect of foreseeable disruptive events.

Terms describing the limits of the service and of the provider's liability for that service should contain an express acknowledgment that they are subject to the consumer guarantees in the ACL. This was nicely done in the term below, which clearly explained the continuing existence of consumers' rights under the ACL (albeit referring to warranties and not guarantees) and which referred consumers back to the term that explained those rights:

“We will use reasonable care and skill in providing the Services. Given the nature of telecommunications systems, including Our reliance on systems, Equipment and services that We do not own or control, We cannot promise that Our Services will be continuous and fault free. This does not affect Your rights under the statutory warranties as described in clause 6.2.”¹⁰⁷

Coverage

A number of the contracts surveyed sought to disclaim the providers' responsibility for problems with the coverage of their service. For example:

“In areas that the *service* is available, it is technically impracticable for us to guarantee that: the *service* is available in each place within an area where there is coverage, ‘drop-outs’ will not occur during a call, and there will be no congestion.”¹⁰⁸

Terms of this kind have the potential to impact harshly on consumers and may be void under the ACL. Consider the application of this clause on a consumer who enters into a mobile phone contract. The consumer lives in Tasmania. The coverage map for the provider indicates that the service is available in that part of

107 Dodo *Standard Form of Agreement – Consumer Services* 7.1.

108 Aldi *Prepaid mobile terms and conditions* 1.3. Also iiNet *Customer Relationship Agreement, section B1 phone service description* 8.1; Kogan *Mobile Prepaid Plan Terms and Conditions* 1.3.1.

Tasmania. In fact, the service does not work reliably on the purchaser's property, which is in the foothills of a mountain range. On a plain reading of the term above, the consumer will be bound by the contract with no remedy or right to terminate without penalty.

However, the consumer guarantees in the ACL require services provided to a consumer to be fit for any purpose made known by the consumer to the provider, expressly or by implication. If the provider cannot provide a service that is fit for that purpose, then the consumer is entitled to a remedy, which may be a right to terminate the service without penalty should it not prove suitable. In some cases reliable coverage in a particular area will be a purpose made known to the provider, either expressly or by implication. In the above example, it can be argued that the consumer's need for coverage in an area outside Launceston was made known by the consumer's very act of telling the provider their residential address.

Even leaving aside the issue of the consumer guarantees, it may also be argued that this type of term is unfair to the extent that it does not allow the consumer to terminate the contract without penalty in the event that, notwithstanding the coverage map, the consumer is unable to obtain coverage in the area in which it wishes to use the service. In such cases, the consumer will have done what is reasonable itself to ensure the service is suitable. The consumer should not be bound if the information provided by the provider proves unreliable as a guide to the service.

Exclusion and limitation clause qualified only by references to 'consumer protection law'

It is quite common to see consumer contracts that attempt to ensure that an otherwise overreaching exclusion clause is not void under the ACL by including a catch all statement that liability is excluded 'except to the extent permitted by law'. Terms of this type will not be void under the ACL as an attempt to exclude or limit liability arising under a consumer guarantees.¹⁰⁹ They acknowledge the possibility the provider's liability. However, such terms may be misleading because most consumers are not aware of their rights under consumer law and therefore most consumers will interpret the broad exclusion clause as substantially limiting their rights of complaint.¹¹⁰

In *Trade Practices Commission v Radio World Pty Ltd*¹¹¹ a retailer displayed the following sign on its premises:

109 ACL s 64.

110 See Consumer Affairs Victoria, *Preventing Unfair Terms in Consumer Contracts: Guidelines for Businesses* (2011) 17; Office of Fair Trading (UK), *Unfair Contract Terms Guidance* (2008) 15.

111 [1989] FCA 353.

“Notice to Customers

All purchases made in this store are subject to these conditions and no variations will be allowed (except to the extent that the Trade Practices Act imposes any condition, warranty, guarantee, right or remedy which cannot be modified or excluded).

Any goods or items bought here will not be exchanged. No moneys will be refunded under any circumstances. Any goods that are faulty will be repaired under the terms and conditions set out by the manufacturers’ warranty.

Management: Radio World Pty Ltd.”

The Trade Practice Commission, now the ACCC, sought an injunction prohibiting the display of the sign, and Neave J granted the injunction. Her Honour held that in displaying the sign the retailer engaged in misleading conduct contrary to provisions equivalent to ss 18 and 29(1)(m) of the ACL. Neave J accepted the arguments of the Trade Practices Commission that:¹¹²

“The insertion of the words in parenthesis was not sufficient... to remove the misleading character of the representations which the other statements made. Counsel pointed to the positive and absolute terms in which those other statements were made, contrasting the language used with the language used in referring to the [Trade Practices] Act. The latter language would not ... have conveyed to a consumer, even an astute or intelligent consumer, any appreciation of the protection afforded to him by the Act.”

The Fine Print Project review of consumer contracts for telecommunications products identified one provider that relied in this type of approach. It qualified its exclusion clauses with the statement ‘we accept out liability to you ... for breach of any non excludable rights under consumer protection laws’¹¹³ and in another contract ‘We will accept liability if it cannot be excluded under any legislation’.¹¹⁴ Terms of this type suffer the same defects as discussed by Neave J. Without explicit reference to the ACL in the contract, and indeed an explanation of their rights, the qualification is likely to mean little to consumers. Consumers are likely to be misled into thinking that their rights to redress are more limited than in fact is the case, contrary to s 29(1)(m) of the ACL. Such terms may be unfair under Part 2-3 of the ACL for similar reasons.

112 [1989] FCA 353, [23].

113 Telstra *Our Customer Terms for Consumer Customers* 9.3. also 3.1.

114 Telstra *Foxtel on T-box Terms*.

Distinguishing between consumer and business customers?

A number of the providers surveyed distinguished between consumer and (small) business customers. This separation of customer groups may occur for a number of reasons, including that consumer customers are subject to more onerous regulatory requirements, in particular regarding disclosure under the TCP Code and substantive fairness under the ACL; business customers may have higher usage needs; and business customers are likely to suffer greater ‘consequential’ losses in the event of failures in their service.

Who is a consumer?

It is important for providers who distinguish between business and consumer customers to recognise that even business customers may still be protected as ‘consumers’ under the ACL and TCP Code. In particular, the definition of a consumer for the purposes of the consumer guarantees in the ACL is not premised on how a customer actually uses the goods or services.¹¹⁵ The threshold test for a consumer for the purposes of the consumer guarantees is based on the price of the goods or services (under \$40,000), and then on whether the goods or services were of a kind ordinarily acquired for personal domestic or household use of consumption (i.e. an objective test).¹¹⁶ Under this definition, a person who acquires goods or services for their business may still be a consumer protected by the consumer guarantees in the ACL. Providers who use a narrower definition of consumers than in the ACL will not breach the ACL provided that they acknowledge the possible application of the consumer guarantee regime to their small business contracts. All the providers who distinguished between consumer and business customers did this in their small business contracts.

Excluding business uses

The providers surveyed who distinguished between consumer and business customers expressly stated in their consumer contracts that consumer services should not be used for business purposes. One contract was particularly strident and provided that consumers should only use the service for personal use and not for any commercial purpose, including ‘any calls made for a business’.¹¹⁷ Read literally, this type of clause precluded any, even one off, use of the service for business purposes. Such terms are likely to surprise many consumers. Even where a consumer purchases a service primarily for personal purposes, it is possible that s/he may occasionally use that service for business purposes. Indeed, in the digital

115 Although in some circumstances it may be possible to limit liability for consequential losses for products not ordinarily acquired for personal, domestic or household use, see ACL s 64A.

116 ACL s 3(2).

117 Vodafone *Standard terms for the Supply of the Vodafone Mobile Telecommunications Service – Customers Commencing or Renewing on or after 1 January 2011 Section 2 7.2*. Similarly Aldi *Standard terms* 1.4.1; Dodo *Standard Form of Agreement* 10.24.

age, some overlap between business and private usage may be difficult to avoid. Consider, for example:

- a plumber who answers an emergency call on his or her personal mobile;
- a lawyer who occasionally uses the home computer to look up information; or
- a ‘mummy blogger’ who accepts a one-off fee for allowing the launch of a new baby product to be advertised on her blog.

These customers all satisfy the regulatory and common sense definitions of a consumer in their use of their telecommunications products. Yet their conduct would breach of a contractual restriction on using the service for *any* business purpose.

Contract terms precluding customers from using the service for *any* business purpose may be unfair terms under the ACL, at least where the provider can terminate the contract in response to such usage. Occasional use of a consumer service for business purposes should not constitute a reason for a provider to terminate the contract to provided consumer services to a predominantly consumer customer. Such terms are disproportionate response to the risk to the provider and the usage by the consumer. A fairer approach would be to preclude customers from using services provided for personal use *predominantly* or *primarily* for business purposes. Thus, one provider’s consumer terms applied to customers using services ‘ordinarily’ acquired for personal, domestic or household use and who were actually using the service for this ‘primary’ purpose.¹¹⁸ The reference to the *primary* purpose of the service gives a degree of flexibility to a customer who acquires the service predominantly for personal use but occasionally for engages in a business use.

4 Why the lack of compliance?

The level of non-compliance in standard form consumer contracts for telecommunications products identified in the Fine Print Project is somewhat surprising. Contract terms are easier to monitor for regulatory compliance than conduct. The core aspects of the unfair terms and consumer guarantees regimes in the ACL are not difficult to apply. Regulators have published extensive guidance on the regimes. Certainly, the review found terms about which there may be a degree of debate as to whether they were unfair, for example variation powers and restrictions on business use. However, other terms were clearly inconsistent with decisions in England, in Victoria and regulatory guidance on unfair terms, for example, entire agreement clauses, exclusive jurisdiction and some termination

clauses. There were also numerous instances of terms that were inconsistent with the consumer guarantee regime in the ACL, in particular terms that contained broad limitations of liability without acknowledging consumers' non-excludable rights under the ACL. The consumer guarantee regime was introduced to increase certainty for both consumers and providers in the mandatory quality standards applying to the supply of goods and services to consumers. Yet consumers who read their contracts are likely to remain confused and even be misled about their rights. Indeed there are good grounds to suspect that the contracts did not comply with the previous regime, as in many cases the drafting has not been updated.

Why is there such a high level of non-compliance with the ACL in telecommunications contracts? There are a number of possible explanations. One possible reason relates to the nature of telecommunications services. Many providers of telecommunications services are reselling services supplied by another provider and do not exercise control over the conditions of supply.¹¹⁹ All providers are dealing with a service that is dependent on a number of variables beyond their control. Providers may therefore consider that they need to retain optimum flexibility and minimum liability in their dealings with consumers. Another possible reason goes to the very nature of fine print and boilerplate terms.¹²⁰ Boilerplate terms are the terms at the back of the contract. They are the terms contained in the precedents of the law firms that write the contracts. They are the terms that are not negotiated and rarely read. The focus of contracting parties is rather typically on the salient features of the transaction; the product or service provided, the price and the time of supply. If neither of the parties focuses on boilerplate then its content won't change, even in the face of obvious error, such as referring to the wrong legislation or in ignoring regulatory guidance.

It is also possible that some providers of telecommunications services do not regard compliance with the consumer law regime as a priority issue. These providers may not consider that the cost of compliance is balanced by the gain of avoiding complaints from consumers and enforcement action by regulators. Compliance would impose costs in rewriting contracts and in a reduction of the rights held by providers. By contrast, the risks associated with non-compliance may be calculated as relatively low. If consumers do not read the fine print terms of their contracts, the fairness of such terms is unlikely to be a factor influencing consumers to choose one provider's product over that of a competitor. Providers may deal with complaints from consumers about particular terms made after the contract is entered into on a one off basis and consumers are in any event unlikely to litigate over claims that are relatively small in monetary terms. At least, until recently, the risk of enforcement action by regulators may have been perceived as low. As of 2013, there was almost no case law on the consumer guarantees or the

119 [2006] VCAT 1493, [50].

120 See Oren Bar-Gill, *Seduction by Contract* (2012, Oxford University Press); Margaret Jane Radin, *Boilerplate: the Fine Print, Vanishing Rights and the Rule of Law* (Princeton University Press, 2013).

unfair contract terms regimes under the ACL.¹²¹ That situation is now changing, with the ACCC taking enforcement action in respect to both regimes.¹²² How long the impact of this action takes to produce a change in the compliance culture of affected providers remains to be seen.

Does the issue really matter? Many consumers will not experience problems with their telecommunications products. The value of maintaining a good reputation in the market may provide an incentive for telecommunications providers to treat those consumers who do experience problems fairly. However, the failure of most providers to ensure their contracts comply with relevant regulatory regimes, particularly the consumer guarantee regime, in their contracts gives little reason to think that their face-to-face advice to consumers will be any better. Consumers risk continuing to be wrongly advised about their rights when they try to complain to their providers about defective or substandard products. Moreover, the incidence of unfair terms may impact most harshly on disadvantaged consumers. Such consumers may be less able to absorb the costs of harsh terms, to pursue a claim against a provider or to switch to a different provider should the terms of their original contract prove overly onerous. More generally, a disregard for an important legislative regime regulating consumer contracts risks undermining the rule of law and the sanctity of contract. Contracts are meant to be binding agreements that delineate the rights and obligations of the parties to that agreement. This is not achieved if the contracts being used contain unfair terms that undermine the essence of the parties' bargain and whose enforcement depends on whether consumers are capable of asserting their statutory rights.

5 CONCLUSION

The Fine Print review of telecommunications contracts found significant levels of non-compliance with the relevant consumer protection regimes, a finding that is consistent with the ACCC report of its industry review undertaken in 2012.¹²³ Some contracts from a small number of providers showed almost no recognition of the applicable consumer protection rules. However, importantly, contracts from all providers surveyed contained terms that did not comply with the consumer protection provisions in the TCP Code and the ACL that are supposed to promote both procedural and substantive fairness in the terms of standard form consumer contracts.

Most consumer advocates and regulators are familiar with the 'enforcement pyramid', supporting a regulatory approach that starts with consultation and

121 ACCC Media Release, 'ACCC institutes proceedings against Bytecard Pty Limited for unfair contract terms' (22 April 2013).

122 *Australian Competition and Consumer Commission v Hewlett-Packard Australia Pty Ltd* [2013] FCA 653; *Australian Competition and Consumer Commission v Bytecard Pty Limited* Consent order (P)VID301/2013.

123 Australian Competition and Consumer Commission, *Unfair Contract Terms – Industry Review* (2013).

moves to increasingly stringent enforcement measures in the event of sustained and deliberate disregard to the law by the subject of the regulation.¹²⁴ It may be that a high profile and vigilant approach to enforcement and a body of case law is now needed to promote better outcomes for consumers of the telecommunications products, a move the ACCC itself has forecast.¹²⁵ Such action is also likely to have a flow on effect to ensure better levels of compliance in other industries that make extensive use of standard form contracts in their dealings with consumers.

124 I Ayres and John Braithwaite, *Responsive Regulation* (Oxford University Press, Oxford, 1992)

125 Australian Competition and Consumer Commission, *Unfair Contract Terms – Industry Review* (2013) 2.

Transparency and Fairness in Australian and UK Regulation of Standard Terms

CHRIS WILLET

1 INTRODUCTION

When regulating standard terms in consumer contracts there is a fundamental choice.¹ On the one hand, the priority can be to protect consumers against the unfair substantive effects of the standard terms. On this approach, then, we are concerned with preventing traders from using and relying on terms that unduly favour their own substantive interests over the interests of consumers: eg terms excluding or limiting obligations or liabilities that would otherwise be owed to consumers or terms imposing onerous obligations and liabilities on consumers.

Alternatively, the priority can be transparency. In other words, unfairness in substance is routinely excused so long as the terms are reasonably transparent. In Australia and the UK, broadly, terms are considered to be transparent when they are available at the point of contract; there is a reasonable opportunity to become acquainted with them; they are in clear, jargon free language and decent sized print; the sentences, paragraphs and overall contract are well structured; and appropriate prominence is given to particularly substantively detrimental terms.² The former of these approaches is obviously more protective of consumers than the latter. This article considers where the relatively new Australian regime stands on the issue. In doing so, it uses the UK regime as a comparator, which is particularly appropriate given that, as we shall see, the regimes have similarities (although

1 On this see Chris Willett, *Fairness in Consumer Contracts: The Case of Unfair Terms* (Ashgate Publishing Limited, United Kingdom, 2007), ch 2; Chris Willett, 'The Functions of Transparency in Regulating Contract Terms: UK and Australian Approaches' (2011) 60 *International and Comparative Law Quarterly*, 355; Chris Willett, 'General Clauses and Competing Ethics of European Consumer Law in the UK' (2012) 71 *Cambridge Law Journal*, 412; and Jeannie Paterson, 'The Australian Unfair Contract Terms Law: The Rise of Substantive Fairness as a Ground for Review of Standard Form Consumer Contracts' (2009) 33 *Melbourne University Law Review*, 934.

2 Australian Consumer Law s 24(3); Victorian Fair Trading Act 1999, s 163 (3) (repealed); *First National Bank v Director General of Fair Trading* 3 WLR 1297, Lord Bingham, 1308; Office of Fair Trading, Unfair Contract Bulletin, No 4, 1997; Office of Fair Trading, Unfair Contract Terms Guidance, 2001, Analysis of Terms Breaching Regulation 7-Plain English and Intelligible Language, para 19; and C Willett, *Fairness in Consumer Contracts: The Case of Unfair Terms* (above, n 1) 2.4.2.2, 2.4.3.4 and 6.4.2.

also crucial differences) in the way that they (a) carry out the basic assessment of unfairness and (b) determine which charges escape this unfairness assessment (the ‘price term’ exclusion). Although these key regulatory concepts are similar in both jurisdictions, the argument is that in certain key ways, the Australian approach is more protective. It is more focussed on protection against unfair substantive outcomes under the general unfairness test (less inclined to allow transparency as a ‘defence’ when there is substantive unfairness).³ In relation to the price term exclusion issue, the Australian legislation makes it clear (and the UK legislation does not) that while some charges (the ‘upfront’ price) may be sufficiently core to the bargain to justify their exclusion from the general test of substantive fairness, others (in particular contingent charges) are not. Such charges should be subject to the ‘full glare’ of this test of substantive fairness.

It is argued that these Australian provisions are a sensible response to traditional judicial ethics of freedom of contract. Under regimes aiming at contractual fairness, open textured provisions may allow for judicial interpretations that minimise the protective impact. This is evident from the experience of the current UK regime and of prior Australian regimes. The current Australian provisions are drafted such as to address this, to better secure a pre-eminent role for substantive fairness. At the same time it is noted that questions remain as to the *level* of substantive fairness that will take hold.

2. Procedural and Substantive Fairness

As indicated above, one approach to regulating standard terms is to prioritise transparency. On this approach, substantive unfairness is generally acceptable, so long as there is transparency, ie the terms are available for the consumer to consult and are clearly presented. This is, in other words, about the *process* leading to the conclusion of the contract and is therefore often referred to as being about *procedural* fairness. Prioritising such procedural fairness over issues of fairness in substance can be said to be based on an underlying ethic of *self-interest/reliance*.⁴ Trader self-interest is promoted in that traders get the substantive outcomes they have provided for; as long as they act in a procedurally fair manner, ie by providing transparent documentation. Equally, there is an expectation that the transparency enables consumers to act in a *self-reliant* way to protect their interests. First, they should read and understand the terms, so that even if they immediately then enter the contract, they have done so on the basis of ‘informed choice’.⁵ They may then

3 Note that we are only concerned here with the general tests of unfairness in the UK and Australia and not with those particular cases where certain terms are rendered wholly ineffective without the need to apply a general test (e.g. terms excluding liability for negligently caused injury and for breach of implied terms as to the quality and fitness of goods: UK Unfair Contract Terms Act 1977, ss. 2 (1), 6(2) and (3) and, in Australia, Competition and Consumer Act 2010, Chapter 3 (2), s 64 (1).

4 Chris Willett, ‘General Clauses and Competing Ethics of European Consumer Law in the UK’, above, note 1

5 Chris Willett, ‘The Functions of Transparency in Regulating Contract Terms: UK and

take further self-reliant responsibility to protect their interests, eg negotiating a change in the terms or finding other traders that offer fairer terms.

On the other hand and reflecting a more protective underlying ethic, the priority may be to protect consumers against the unfair substantive effects of the standard terms, so terms that are sufficiently substantively unfair are *not* readily justified simply on the basis that they have been presented transparently. Procedural fairness is *not* necessarily enough. The fundamental priority is to protect consumers against the detrimental impact of substantively unfair terms⁶ to secure substantive fairness. This priority is driven fundamentally by the idea that the impact of substantive unfairness may be particularly severe for private consumers. So, traders are often better placed to absorb financial losses⁷ than private consumers. Further, the effect on traders (at least larger businesses) may often be essentially economic: an impact on the profitability of the business. By contrast, an economic loss⁸ might have a serious effect on the budget of the average consumer or family, and also have broader effects on family life: social inclusion, dignity etc. There may also be an impact on important 'social citizenship' rights: eg where terms allow withdrawal of services of general interest⁹ or restrictions on access to justice.¹⁰

From a protective point of view, transparency (procedural fairness) cannot be trusted to protect consumers against these detrimental consequences. The view is that self-reliance will often simply not work. Consumers will usually not read standardised information even if it is transparent,¹¹ and even if they do read it they will often find it very difficult to understand it or to assess the risks.¹² Consumers will usually choose between suppliers on the basis of what they see as the core

Australian Approaches', above note 1, 357-8.

6 This can be linked to 'need-rationality' (Thomas Wilhelmsson, *Critical Studies in Private Law* (Kluwer, 1992); and to agendas such as welfarism, social justice and distributive justice (see Roger Brownsword, Geraint Howells and Thomas Wilhelmsson, *Welfarism in Contract Law* (Ashgate, 1994)).

7 Eg through insurance, spreading losses across different divisions of the business, tax deductions etc.

8 Eg caused by a trader excluding liability for his own breach or imposing on the consumer a price escalation clause or a high charge for some form of consumer default.

9 H Micklitz, 'Universal Services: nucleus for a Social European Private Law', in M. Cremona, *Market Integration and Public Services in the European Union* (OUP, 2011).

10 Eg terms allowing very restrictive periods within which to make claims and terms or practices requiring expensive or other formalities for a claim to be made.

11 This is due to such factors as lack of time, prior psychological commitment to the purchase, 'over optimism' (Chris Willett, *Fairness in Consumer Contracts*, above note 1, 22-26, 59-62); and Jeannie Paterson, 'The Australian Unfair Contract Terms Law: The Rise of Substantive Fairness as a Ground for Review of Standard Form Consumer Contracts', above, n 1, 953-5.

12 See MJ Trebilcock, 'An Economic approach to Unconscionability', in B. Reiter and J. Swann (eds) *Studies in Contract law* (Butterworths, 1980) 416-417. This is due to the large number of terms, the complexity of the issues, lack of expertise etc (Chris Willett, *Fairness in Consumer Contracts*, above note 1, 22-26, 59-62). See also Jeannie Paterson, 'The Australian Unfair Contract Terms Law: The Rise of Substantive Fairness as a Ground for Review of Standard Form Consumer Contracts', above, n 1, 953-5 on how this applies in relation to particular types of common standard term.

aspects of the contract: the basic nature of the goods or services and the basic price they can expect to pay in the normal performance of the contract. They do *not* usually choose on the basis of the ancillary exclusions, charges etc, which are usually dealt with in the standard terms.¹³ This being the case, it is unrealistic to expect them to take the sort of self-reliant (self-protecting) action described above: reading, understanding terms, making an informed choice etc. Even if they do, they will find it hard to take any further practical self-reliant action.

They will not have the bargaining power to persuade traders to alter the terms, ie to make them fairer. In addition, they are unlikely to find alternative and fairer ancillary terms being offered by other traders. This is because, as suggested, most consumers are choosing on the basis of the core aspects of the contract. This is where there is likely to be the competitive discipline that produces choices between what is offered by different traders (not on the ancillary matters covered in the standard terms).¹⁴ So, the terms dealing with these ancillary matters must be subjected to substantive control.

3. The General Tests of Unfairness

(i) UK

(a) *Unfair Contract Terms Act*

First of all, there is the ‘reasonableness’ test under the *Unfair Contract Terms Act 1977* (UCTA). This test applies to terms excluding liability for negligence causing losses other than death or injury,¹⁵ breach of contract¹⁶ and misrepresentation,¹⁷ and to terms requiring consumers to indemnify traders¹⁸ and terms allowing traders to render a performance substantially different from that reasonably expected or no performance at all.¹⁹ In applying this test, transparency has not been paid much attention in consumer cases. In the only House of Lords (now Supreme Court) consumer decision, the focus was on the substantive effect of the term and the justifications for its use (ie whether the service in question was a particularly difficult one and who was best placed to insure); along with the procedural questions as to the relative bargaining positions of the parties and whether a reasonable choice was available to the consumer. Taking all this into

13 Chris Willett, *Fairness in Consumer Contracts*, above note 1, 22-26, 59-62; and on notions of ‘contractual’ and ‘competitive’ transparency and their recognition by the ECJ see H. Micklitz, ‘Unfair Terms in Consumer Contracts’, in H. Micklitz, N. Reich and P. Rott, *Understanding EU Consumer Law* (Intersentia, 2009), 135-138.

14 V. Goldberg, ‘Institutional Change and the Quasi Invisible Hand’ (1974) 17 *J. Law Econ*, 461, 483; Chris Willett, *Fairness in Consumer Contracts*, above note 1, 24-25. Another self-reliance option is to negotiate for changes to terms, but this can be argued to be wholly unrealistic given the limited importance of the vast majority of individual consumers to traders.

15 S 2(2).

16 S 3(2)(a).

17 S 8.

18 S 4(1).

19 S 3(2)(b).

account, the term (which excluded liability for a negligent survey) was held not to be reasonable.²⁰ The term does appear to have been relatively transparent and known about by the consumers, so it would appear that transparency was not considered to be a legitimising factor.

The above notwithstanding, the UCTA case law is of extremely limited importance for two reasons. First, UCTA is a private law regime, ie terms can only be declared ineffective in private law litigation between the parties. There is no power for courts or regulatory bodies to *prevent* traders using unreasonable terms. So, even if courts were to continue to hold that substantive fairness is the priority under the UCTA test, this would only be significant in those very few instances of individual consumer litigation that might arise. It will not result in the terms in question being cleared from the market. Secondly, UCTA only applies to terms excluding or restricting trader liabilities and not, for instance, to terms imposing unfair obligations or liabilities on consumers, eg unfair charges, price variation clauses etc. So, the approach to exemption clauses under UCTA tells us nothing as to what attitude is likely in the case of these other types of terms.

(b) The Unfair Terms in Consumer Contracts Regulations

Of much greater practical significance is the regime under the *Unfair Terms in Consumer Contracts Regulations 1999* (UTCCR).²¹ This covers exemption clauses *and* these other types of term. In addition, it has a real impact on the use of terms, as regulatory bodies are empowered to take preventive action against unfair terms.²² A very considerable body of work against unfair terms has been done by the Office of Fair Trading (OFT) using these powers.²³

Under UTCCR, a term is unfair if ‘contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer’.²⁴

It is accepted that for a term to be unfair, it must cause a significant imbalance in rights and obligations to the detriment of the consumer, *and* it must violate the requirement of good faith.²⁵ First of all, it is clear that there cannot be unfairness

20 Smith v Bush [1989] 2 All ER 514.

21 SI 99/2083, implementing the Unfair Terms in Consumer Contracts Directive, (UTD), 93/13/EEC.

22 UTCCR, regs 10-15.

23 See the Office of Fair Trading Unfair Contract Terms Bulletins 1-29 covering cases dealt with from the passing of the initial 1994 Unfair Terms in Consumer Contracts Regulations until September 2004; and see the lists of Unfair Terms cases with Undertakings that replaced the bulletins and run from October 2004 (available on the Consumer Regulation Website-<http://www.crw.gov.uk>).

24 UTD, art 3 (1)/ UTCCR, reg 5 (1).

25 DGFT v First National Bank [2001] 3 WLR 1297, Lord Bingham at 1307-8, Lord Steyn at 1313.

unless there is a ‘significant imbalance’ etc, and that this goes to the issue of *unfairness in substance*.²⁶ The accepted view, however, is that for a finding of unfairness, there must also be a violation of the good faith requirement.²⁷ The question, then, is how ‘good faith’ is to be understood. In *First National Bank*, Lord Steyn (in the then House of Lords-now Supreme Court) said that ‘[a]ny purely procedural or even predominantly procedural interpretation of the requirement of good faith must be rejected’.²⁸

This does not state explicitly, but does strongly suggest, that procedural fairness (including transparency) cannot routinely justify a term that is sufficiently unfair in substance. However, there was no positive support from the other three judges for this.

In fact, the court was not required, as such, to answer the question as to whether transparency could function as a ‘defence’ where there is substantive unfairness because it was not accepted that the term in question did actually cause a significant (substantive) imbalance in rights and obligations.²⁹ So, whether unfairness in substance could be justified by transparency did not arise.

Nevertheless, the House of Lords *did* consider that the term in *First National Bank* was in sufficiently plain language to satisfy the requirement of good faith.³⁰ The indication, therefore, is that, for the House of Lords, even if the term had been viewed as unfair in substance, it may not have been unfair (as this requires violation of good faith). In short, transparency might well have justified unfairness in substance.

(ii) Australia

Under the Australian federal law, a term is unfair if it would cause

a significant imbalance in the parties’ rights and obligations arising under the contract; and...it is not reasonably necessary in order to protect the legitimate interests of the [trader]; and...it would cause detriment...to... [the consumer] if it were to be applied or relied on.³¹

26

Ibid.

27

Ibid.

28

Ibid, 1313.

29

Ibid, Lord Bingham at 1308, Lord Steyn at 1313-4, Lord Hope at 1316 and Lord Millett at 1319.

30

Lord Bingham at 1310.

31

Australian Consumer Law 2010, s. 24 (1) and generally on the regime see Nyuk Yin Nahan and Eileen Webb, ‘Unfair Contract Terms in Consumer Contracts’, in Justin Malbon and Luke Nottage (eds), *Consumer Law and Policy in Australia and New Zealand* (The Federation Press, 2013)

We can immediately see that this contains no reference to ‘good faith’. Certainly, a simple reference to ‘significant imbalance/detriment’ without any ‘good faith’ gloss would generally be read to be referring simply to the *substantive* rights and obligations. This impression is strengthened by the reference to whether the term is ‘reasonably necessary to protect the legitimate interests of the supplier’. After all, it is surely the *substantive* content of the term that is relevant to protection of these legitimate interests. So a trader might argue, for example, that it is necessary to exclude a particular liability because otherwise he would be overly exposed to (substantive) liability. By contrast, it is hard to see how the *transparency* of a term protects the interests of a trader as such.

Nevertheless, after setting out the basic test, the new federal law goes on to provide that in determining whether a term is unfair, consideration must be given to whether it is ‘transparent’,³² ie whether it is plain language, legible, clearly presented and readily available.³³ The idea, presumably, must be that (even without good faith as part of the test) the ‘significance’ of a *substantive* imbalance is viewed as being affected by whether or not there is transparency. The question then arising is whether any such transparency can legitimise sufficiently substantively unfair terms. The government view seems to be that it cannot. It has been stated that

[t]he extent to which a term is transparent is not determinative of the unfairness of a term ... and transparency, on its own account, cannot overcome underlying unfairness in a contract term. The transparency of a term is simply a consideration that a court must take into account when considering whether a term is unfair.³⁴

The suggestion, then, seems to be that transparency cannot legitimise a term that is sufficiently unfair in substance. Presumably, the real intended function of transparency as part of the Australian test is to allow for a term to be found unfair where there is *not* the degree of substantive unfairness that would normally be required, eg where the term would not otherwise be sufficiently substantively detrimental to be found to be unfair, yet the term lacks transparency. Another possibility might be where a term is substantively unfair, but is counterbalanced by another term that is especially favourable to the consumer. Although this might be said to have restored overall substantive balance, if the counterbalancing term lacks transparency, there might (notwithstanding the overall substantive fairness) be found to be unfairness.³⁵

32 S 24(2)(a)

33 S 24(3).

34 *The Australian Consumer Law: Consultation on draft provisions on unfair contract terms* (‘Unfair Terms Consultation’), Australian Government, The Treasury, 11 May, 2009, p 12; and this view is confirmed in *A Guide to the Unfair Contract Terms Law*, Australian Competition and Consumer Commission, 2010, 12.

35 See Frank Zumbo, ‘Are Australia’s Consumer Laws Fit for Purpose?’ (2007) 15 *Trade Practices Law Journal* 227 at 237 in support of this as a likely role for transparency.

(iii) Australia-successfully drafting itself free of freedom of contract traditions

The above discussion shows an Australian approach that (relative to the UK) appears to be more focussed on protection against unfair substantive outcomes (less inclined to allow transparency as a ‘defence’ when there is substantive unfairness). Essentially, we can see that this has been achieved by two key strategic moves: leaving ‘good faith’ out of the general test and making a clear statement in the legislative guidance to the effect that transparency, on its own account, cannot overcome underlying unfairness in a contract term.³⁶

The latter was obviously needed because of the reference to transparency as a relevant factor in the test. However, omitting ‘good faith’ from the unfairness test is very much about learning from history. Good faith is clearly an open textured concept that can be interpreted in various ways. It certainly requires transparency as a minimum.³⁷ The real question is what more it requires. It can certainly be understood to require substantive fairness, ie to mean that transparency is not sufficient, is not a defence, where there is a sufficiently substantively unfair term. This was the understanding of Lord Steyn in the UKHL. However, we saw above the reluctance of the majority in the HL to make a clear statement to this effect. The doors are therefore left open in the UK for straightforward substantive control of standard form contracts to be obstructed by the raising of a ‘transparency defence’.

It seems that the Australian government could see the same risk arising in Australia if good faith was given a role in the test of unfairness. There is no space here to go into detail on the history of good faith and other fairness concepts in Australian law. However, the bottom line is this. Just as can be argued to be the case in the UK at the highest judicial levels,³⁸ there can also be argued to be a strong Australian judicial tradition of freedom of contract values. This is a tradition that is reluctant to move beyond standards of procedural fairness (eg transparency), reluctant to impose substantive fairness norms, unless there is some associated procedural unfairness. This was evident in earlier attempts to control unfair standard terms, eg through general clauses on ‘unconscionability’; and it remained a risk under the relatively recent State of Victoria experiment, which used good faith as part of the test.³⁹ In short, the point is that, just as in the UK, if judges (who are steeped in the freedom of contract tradition) are presented with open textured notions that

36 Above, n 34.

37 Jeannie Paterson, ‘The Australian Unfair Contract Terms Law: The Rise of Substantive Fairness as a Ground for Review of Standard Form Consumer Contracts’, above, n 1, 950.

38 Chris Willett, ‘General Clauses and Competing Ethics of European Consumer Law in the UK’, above, n 1.

39 Chris Willett, ‘The Functions of Transparency in Regulating Contract Terms: UK and Australian Approaches’, above, n 1, 369-371; and Jeannie Paterson, ‘The Australian Unfair Contract Terms Law: The Rise of Substantive Fairness as a Ground for Review of Standard Form Consumer Contracts’, above, n 1, 937-9.

could be interpreted to require no more than procedural fairness, the significant risk was that this is the interpretation they might choose (or at least refuse to rule out). It appears that the Australian government has recognised this risk and sought to avoid it both by leaving good faith out of the test⁴⁰ and by making express reference in the guidance to the anticipated interplay between substantive and procedural fairness.

4. The Price Exclusion

(i) UK

Insofar as a term is plain and intelligible, there can be no assessment of fairness relating to ‘...the adequacy of the price or remuneration as against the services or goods supplied in exchange.’⁴¹

So, if there is transparency (in the form of plain language), there is no review of the substantive fairness of the ‘price’ under the unfairness test. Clearly the intention is to preserve a degree of freedom of contract in relation to the price. When it comes to such a central part of the contract, trader self-interest is preserved: they may charge what they wish. All that matters is that the trader practices procedural fairness, in the form of transparency. The consumer should act in a self-reliant manner. They should take advantage of this price transparency by comparing prices, ‘shopping around’ for the best deal. In other words, the consumer should make an ‘informed choice’ on this core element of the contract. To this extent the UK regime clearly opts for an ethic of self-interest and reliance (or informed freedom of choice), over one of protection.⁴²

However, the question here is what is the intended *extent* of this freedom of contract, procedural fairness approach? The point is that, just like the general test of unfairness discussed above, the provision is very open-textured: leaving open precisely what *is* the ‘price or remuneration’. There is very limited guidance. The preamble to the Unfair Terms in Consumer Contracts Directive (UTCCD), upon which the UK regime is based, explains that what is excluded is the ‘quality/price ratio’.⁴³ But all this does is repeat the basic idea that there can be no assessment as to whether the price is too high, given the quality of the goods or services received. It does not actually tell us what the ‘price’ *is* and *which* of the various charges potentially made under a contract are intended to fall under this definition. The recent *Abbey National* case dealt with terms providing for large charges to be made in a variety of circumstances, including, for example, where consumers exceeded agreed overdraft facilities.⁴⁴ Under the terms, exceeding the overdraft

40 Jeannie Paterson, ‘The Australian Unfair Contract Terms Law: The Rise of Substantive Fairness as a Ground for Review of Standard Form Consumer Contracts’, above, n 1, 943.

41 UTD, art 4(2)/UTCCR, reg 6(2)(b).

42 See Hugh Collins, ‘Good Faith in European Contract Law’ (1994) 14 (2) OJLS 229, 238.

43 93/13/EEC, Recital 19.

44 *OFT v Abbey National and others* [2009] UKSC 6 and see S. Whittaker, ‘Unfair Contract Terms, Unfair Prices and Bank Charges’ (2011) 74 MLR 106.

facilities was not defined as a default or breach by the consumer. Rather, it was defined as an option exercised by the consumer. Following this logic through, the obligation to pay the relevant charge was not defined as compensation for a loss suffered by the bank. Rather, it was defined as a charge for the bank's *service*, ie the 'service' of allowing the payment to be made from the account.⁴⁵

For the Office of Fair Trading and the Court of Appeal, the 'price' only covered charges that the typical consumer would view as 'essential' to the bargain; or, to express this otherwise, what such a typical consumer would reasonably expect to pay in the normal due performance of the contract. Given that consumers do not normally actually plan to take an unauthorised overdraft in the normal course of things, the Office of Fair Trading and Court Appeal concluded that the charges in question were not 'price' terms'.⁴⁶

This seems to be an understanding of the 'price' concept that is grounded in a protective approach. The 'essential to the bargain' test seems to understand the price exclusion as only intended to cover those charges that, *by their substantive nature*, consumers will really focus on and that therefore have a realistic chance of being subject to market discipline. Following the analysis set out above,⁴⁷ it is not enough in itself that a term imposing a charge is formally transparent. It is only really likely to be subject to the competitive discipline of the market if it is of such a substantive nature that it is central to how consumers would perceive the bargain. If charges are subject to market discipline, there is some chance of improved choice (alternative market offerings) so that consumers might at least have some chance of acting in a self-reliant way by shopping around. In addition, the competitive discipline may mean that the charges that are fairer in substance (so that application of the unfairness test may not matter so much). If terms, by their substantive nature, are *not* central enough to the bargain to be subject to competitive discipline, then, from a protective point of view, no matter how transparent they are they should not be understood as 'price' terms. Rather, they should be exposed to a review of their substantive fairness under the test of unfairness.

The Supreme Court, however, refused to distinguish between what consumers would see as essential and non essential charges; viewing such an approach to be too complex and even to compromise the European law principle of 'legal

⁴⁵ This is to avoid any risk of the term being characterised as a 'penalty clause'; which would make it unenforceable at common law. Note also that the Court of Appeal and Supreme Court analysis was that payments by consumers were to be regarded in law as being in exchange for the 'whole package' of services offered by the banks (ibid, Lord Walker at [6], for instance).

⁴⁶ *Abbey National plc and Others v OFT* [2009] EWCA Civ 116. See also S Whittaker, above, note 44, in support of the Court of Appeal's focus on the perspective of the 'average consumer' and their 'genuine choice', the latter tallying with the analysis in the text immediately following above as to what is likely to be subject to market discipline.

⁴⁷ Above, at Part 2.

certainty'.⁴⁸ For the Supreme Court, identifying the 'price' was 'a matter of objective interpretation by the court'.⁴⁹ The Supreme Court accepted that, applying such an approach, charges flowing from consumer default were not the 'price'.⁵⁰ Beyond this, however, the Supreme Court appeared effectively to allow the technical provisions of the contract to determine what should be called the price. Basically, if the terms (as they did in *Abbey*) say that the charge is payable for services, then they are 'price' terms. In other words, the Supreme Court refused to make the sort of distinction drawn by the Office of Fair Trading/Court of Appeal, which broadly only excludes from control those charges that, by their substantive nature, are genuinely central to how the bargain would be generally perceived and which are therefore more likely to be subject to market discipline.

The UK Law Commission have recently considered the price term issue and suggest clarifying the position by emphasising that the price would only be excluded from the test of unfairness where it is expressed 'prominently'.⁵¹ There is no space here to go into the implications of this in detail. However, it seems that this is no more than a transparency requirement. By this I mean that it looks like something in the way of a 'red hand' disclosure/highlighting type rule: emphasise in some highlighted manner prior to the contract being concluded that the charge exists and this is sufficient. The difficulty with this from a consumer protection point of view is that it misses the point as to whether the charge is really one that, by its *substantive* nature, is genuinely central to how the bargain would be generally perceived, and is therefore a term that is really likely to be subject to market discipline. The risk is that if it is not such a term then no matter how prominent it is made, it will not be given great attention and it will therefore not be likely to be subjected to market discipline. Taking the example of the unauthorised overdraft charges from the *Abbey* case, if consumers do not plan to be overdrawn then (no matter how prominent is the indication of the charges that are payable in cases of unauthorised overdrafts) they will not view such charges as a core matter for concern at the time when they make the contract.

We shall now see that that the Australian law takes a much clearer legislative approach to drawing this important line between charges that are in substance central to the bargain and those that are not.

48 *OFT v Abbey National and others*, above, n 44, Lord Mance at [112] and [115].

49 *OFT v Abbey National and others*, above, n 44, Lord Mance at [116].

50 *OFT v Abbey National and others*, above, n 44, at [102] and affirming the view that the 'interest after judgment' term in *First National Bank* was correctly viewed as such a default provision.

51 English and Scottish Law Commissions, *Unfair Terms in Consumer Contracts: Advice to the Department of Business, Innovation and Skills* (2013).

ii) Australia

(a) *Substantive distinctions between what is central and what is contingent*

The Australian test of unfairness does not cover the ‘upfront price’.⁵² So, as in the case of the UK, there is clearly an agenda to preserve a degree of freedom of contract in relation to the price, in the sense that the price escapes review of its substantive fairness. However, the essential argument here is that in this word ‘upfront’ (and associated supporting provisions) lies the key difference from the UK approach. This is what makes it pretty clear that the test of unfairness (with its focus on substantive fairness) *is* intended to cover those charges that are not ‘upfront’, not really central to the bargain. This substantive fairness test is intended, in other words, to cover non-upfront price terms that consumers are unlikely to be giving any meaningful consent to and which are therefore unlikely to be subjected to market discipline. As we saw above, the UK test, at least as interpreted by the UK Supreme Court, fails to make this key distinction between upfront and non-upfront prices.

First of all, the very use of a qualifying word such as ‘upfront’ emphasises that not all charges are to be excluded from the test of unfairness. The use of such a qualification immediately indicates that there are ‘charges and charges’, some (upfront ones) are what is intended to be excluded from review under the unfairness test, while others (those that are not upfront) are intended to be covered by this test.

Second, of course, for the purposes of distinguishing between types of charge, the ‘upfront’ concept is in itself not necessarily any more principled, obvious in meaning etc, than, for instance, the ‘essential to the bargain’ test used by the Court of Appeal in the UK and rejected by the UK Supreme Court. Without more, we could debate what substantive distinction is intended between types of charge: which charges in substance are upfront and which are not? Indeed, upfront might even be equated with ‘prominent’; any charge, runs the argument, is upfront (whatever its substance), as long as it is prominent. This would, of course, bring us back to an essentially transparency based, procedural fairness approach – make the charge clear enough and thereby escape a review of substantive fairness (even if the substantive nature of the charge is such that it is not central to how consumers would view the deal and is therefore unlikely to be subject to market discipline).

Third, however, the regime does in fact go on to draw a *substantive* distinction between what does and does not count as ‘upfront’. Background guidance has said that it covers any interest payable under the contact.⁵³ An upfront price will

52 ACL, s. 26 (1) (b)

53 Commonwealth of Australia, Explanatory Memorandum to the Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010, para 229.

also include future payments or a series of future payments,⁵⁴ provided that they have been disclosed at or before the contract is entered into.⁵⁵Crucially, however, we are told that ‘upfront price’ does *not* include any contingent consideration.⁵⁶ Contingent charges are payments that are unnecessary for the supply, sale or grant under the contract, but are additional to the upfront price.⁵⁷ Vital here is the following explanation:

Other forms of consideration (that is, further forms of consideration which are not part of the upfront price) under the consumer contract that is contingent on the occurrence or non-occurrence of a particular event, is excluded from the determination of the upfront price.

Terms that require further payments levied as a consequence of something happening or not happening in the duration of the contract are covered by the unfair contract terms provisions. Such payments are additional to the upfront price, and are not necessary for the provision of the basic supply, sale or grant under the contract.⁵⁸

Of course, this means that a provision openly drafted as a default provision (ie a charge for what is clearly a breach by the consumer) cannot be the upfront price – it is dependent on ‘something happening or not happening in the duration of the contract’. But this is accepted even by the Supreme Court in the UK not to be the price.⁵⁹ The crucial point is that this Australian explanation very clearly excludes (from categorisation as upfront price) charges that are contingent on *anything* happening or not happening in the future. So, it seems clear that this also covers cases where the charge (as in the *Abbey* case in the UK) is *not* defined as being triggered by a default or breach by the consumer, but by a choice by the consumer, by an option exercised by the consumer. For the UK Supreme Court, as we have seen, such a charge counts as the price and is excluded from the fairness assessment. However, it is hard to see how this can be the case under the Australian regime. Simply, the charge depends on future action or inaction by the consumer and is therefore not the upfront price. .

This approach seems to recognise that such contingent charges (however they are technically and formalistically expressed) are simply not central to the bargain from a consumer’s point of view.

(iii) Australia again drafting itself free of freedom of contract traditions

Here, as in relation to the general unfairness test, we see an Australian approach that is more focused (than is the UK regime) on protecting consumers from unfair

54 Ibid, para 231.

55 ACL s 26(2)(b), Ibid, 2.33.

56 ACL s 26(2). In the UK there is no similar provision.

57 Explanatory Memorandum, above n 53, para 228.

58 Explanatory Memorandum, above n 53, paras 235 and 236.

59 See above, n 50 and related text.

substantive outcomes. The price exclusion issue is approached in such a way as to recognise the difference between charges that are genuinely likely to be given attention by consumers when they enter the contract and those that are not. The latter are less likely to be subject to competitive discipline and there is therefore more of a case for them to be reviewed under the general test of unfairness.

The Australian legislation has been drafted such as to reflect this important distinction. If the legislation had referred simply to ‘price’ there would have been a risk that judges steeped in freedom of contract values might be inclined to understand this to cover any charge expressed technically as a primary payment obligation. The wording of the Australian legislation seems to limit this risk significantly.

5. Concluding Comment

This article has sought, using the UK as a comparator, to assess where the Australian unfair contract terms law now stands on the issue of procedural versus substantive fairness. It has shown how open textured concepts such as ‘good faith’ and ‘price’ have been understood in the UK in ways that either do not guarantee substantive fairness or actually positively restrict the prospects of achieving it. However, the Australian regime is designed to reduce the risk of this occurring. At the same time, it must be recognised that the provisions in question do not necessarily guarantee a high standard of protection. The legislation may ensure that certain types of charge are covered by the unfairness test and that transparency is not routinely taken to be a defence when such charges (and other standard terms) are substantively unfair. However, if judges seek to limit the level of protection, they can shift the focus elsewhere. The key here is the issue of substantive fairness itself. We saw above that, in order to be unfair, the Australian test (like the UK test) requires a ‘significant imbalance in the parties’ rights and obligations arising under the contract’, this being the measure of whether there is substantive unfairness. Yet, just as ‘good faith’ and ‘price’ are open textured concepts, so too is ‘significant imbalance’. If judges are inclined to limit the level of protection they simply need to interpret this to set a low level of fairness. Putting this in another way, they need simply require a very high level of unfairness in substance before being prepared to find there to be ‘significant imbalance’. So, a key challenge for academic commentary is to carefully scrutinise how this concept is developed by courts. Is it, for example, being understood in such a way as to recognise that often the more vulnerable position of consumers relative to traders when it comes to absorbing losses?⁶⁰

60 For a full discussion of different levels of substantive fairness and the approach to this in the UK, see Chris Willett, ‘General Clauses and Competing Ethics of European Consumer Law in the UK’, above, n 1.

CHALLENGES FOR THE DEVELOPMENT OF UNFAIR CONTRACT TERMS LAW IN NIGERIA

ADEJOKE OYEWUNMI AND ABIOLA SANNI*

Many businesses operate at the moment by making a glowing statement in their marketing and trying to weasel out of them in the small print by obscure and complex jargon – Michael Furmston.¹

INTRODUCTION

In October 2012, the Lagos State Law Reform Commission set in motion the machinery for the reform of the *Law Reform (Contracts) Law*² as part of the broader objective of bringing the law of contracts in touch with the peculiar needs and challenges of modern day business transactions. One of the major areas identified as being in need of legislative intervention was the area of provision of statutory safeguards against unfair contract terms, particularly in cases involving consumer adhesion standard-form contracts that inevitably involve manifest inequality of bargaining relations between contracting parties.³ Undoubtedly, such contracts are quite pervasive in diverse aspects of trade and commerce, notably in contracts of carriage of goods and persons, sale of goods, banking and diverse other areas. Oftentimes, hapless consumers find themselves at the mercy of unfair supplier-biased terms, with little or no possibility for protesting against the insertion of terms that would substantially deprive them of the benefit of the agreement. It is, however, gratifying that in many of these cases, the Nigerian judiciary has risen to the defence of consumers through proactive interpretations of the contract terms. Such initiative began in earnest in the case of *Adel Boshalli v Allied Commercial Exporters Ltd*,⁴ where the Privy Council⁵ held that an exclusion clause could not

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1 Cheshire & Fifoot & Furmston's Law of Contract (Butterworths LexisNexis, 14th ed, 2001).

2 Law Reform (Contracts) Law, Cap L63, Laws of Lagos State, 1973 (Lagos State).

3 See A. Oyewunmi & A. Sanni, 'Consultation Paper on Reform of the Law Reform (Contracts) Law Cap L63 Laws Of Lagos State 2003', Unpublished Paper presented at the Stakeholders' Meeting organised by the Lagos State Law Reform Commission on 18th October, 2012 at the Lagos State Law Reform Commission Building, Ikeja, Lagos.

4 *Adel Boshalli v Allied Commercial Exporters Ltd* (1961) 1 All NLR 917.

5 The apex court at the time the case was decided was the Privy Council. Although Nigeria became politically independent in 1960, appeal from the Federal Supreme Court continued

avail a party in breach of a fundamental term. Consistent with the doctrine of judicial precedent, this position has been uncompromisingly applied in subsequent cases across the Nigerian courts.⁶ However, following the ‘triumph’ of the rule of law approach as the prevailing rule in the United Kingdom, in the case of *Photo Production Limited v Securicor Transport*,⁷ the Supreme Court of Nigeria in three straight decisions⁸ made statements which suggested the jettisoning of the rule of law approach in favour of the rule of construction approach. The decisions of the Supreme Court drew flak from various writers⁹ for the failure to pay due regard to local circumstances which were already skewed against consumers.

A light appeared at the end of the tunnel with statutory intervention by Anambra State, one of the 36 states in Nigeria, adopting the rule of law approach. What is more, a Bill titled ‘Consumers Contract (Unfair Terms) Bill’ was recently introduced during the Third Session of the National Assembly,¹⁰ ostensibly to address the problem on a macro (national) level. On their part, the judiciary, notably at the Supreme Court level, despite early concerns about their seeming inclination towards the rule of construction in the wake of the House of Lords decision in *Photo Productions V Securicor*,¹¹ appears to be more inclined in favour of the rule of law approach.

This paper examines developments leading to the convergence of judicial and legislative efforts in favour of the rule of law approach and evaluates the challenges for the protection of consumer rights in Nigeria. The paper is divided into six parts. Following the introduction in Part One, Part Two traces the judicial development of the doctrine of fundamental breach in Nigeria up to 1986. Part Three presents

to lie with the Privy Council in the United Kingdom until 1963, when Nigeria became a Republic under the 1963 Constitution.

- 6 Even when there was division among the judges in the United Kingdom, as demonstrated by the conflicting dicta found in the *Suisse Atlantique Societe d’Armement Maritime S.A. v Rotterdamshe Kolen Central* [1966] 2All ER 61, the position in Nigeria has been consistent.
- 7 [1980] 2 WLR 283.
- 8 The National Assembly in Nigeria consists of the Senate and the House of Representatives. See section 47 of The Constitution of the Federal Republic of Nigeria 1999 and Cap C23 Laws of the Federation of Nigeria 2004. The tenure of the Third National Assembly was between 2007-2011. The tenure of the current National Assembly will run from 2011-2015.
- 9 See *Akinsanya v United Bank for Africa Ltd*, [1986] 4 NWLR (Pt.85) 273, *Attorney-General, Bendel State v United Bank for Africa Ltd* [1986] 4 NWLR (Pt 37) 547 and *Narumal & Sons Ltd v Niger Benue Transport Corporation Ltd*. [1989] 2NWLR (Pt 108) 739.
- 10 See CK Agomo ‘Effect of the Demise of the English Doctrine of Fundamental Breach on the Nigerian Law of Contract’ (1981-83) 13 Nig. J Contemporary Law 69, CK Agomo ‘Exclusion Clauses in Contracts and the Implications for Consumer Protection in the Nigerian Law of Contract’ in OO Obilade (ed), *A Blueprint for Nigerian Law* (Faculty of Law University of Lagos, 1995) 4, FN Monye ‘The Need to Restrict the Scope of Application of Exemption Clauses’ (1991) 2 JUSTICE 19 and W Ajai ‘Recent Trends in Fundamental Breach and Exclusion Clauses in the Consumer/Commercial Transaction’ (1992-93) 16 Journal of Private and Property Law 37, IE Sagay *Nigerian Law of Contract* (Ibadan: Spectrum 2000).
- 11 (1980) AC 827

a summary of the appraisal of the existing literature and the divergent view of writers on the way forward. Part Four is devoted to the consideration of recent judicial decisions and legislative intervention aimed at protecting the interest of consumers on this subject in Nigeria. Part Five examines the challenges facing the attempt to enact the Consumer Contract (Unfair Terms) Bill into law. The paper is concluded in Part Six with suggestions.

Part 2 – Judicial Development of the Doctrine of Fundamental Breach in Nigeria

Nigerian courts have considered and applied the doctrine of fundamental breach in a number of cases. One of the earliest cases where the issue was considered was *Adel Boshali v Allied Commercial Exporters Ltd.*¹² The case involved a contract for the sale of goods, where the buyer rejected the goods on the ground of their non-conformity to sample and description. The question was whether, in the first place, there was a breach of contract and, if so, whether the exemption clause could be applied in aid of the seller. The Judicial Committee of the Privy Council held that there was a breach of contract as the clothes supplied were not in conformity with their description. On the issue of the exemption clause, it was held, overruling the Federal Supreme Court, that:

an exemption clause can only avail a party if he is carrying out the contract in its essential respects. A breach which goes to the root of a contract disentitles a party from relying on an exemption clause...

Similarly, in the case of *Ogwu v Leventis Motors*,¹³ the lorry supplied to the plaintiff under a hire purchase agreement with the defendants was at variance with the contract specification. It was in such a deplorable state that the engine soon broke down. The Court held that this involved a fundamental breach and, consequently, the defendants could not rely on the exemption clauses in the hire purchase agreement to avoid liability. In *Niger Insurance v Abed Brothers*,¹⁴ the Supreme Court held that the implied term to repair the vehicle within a reasonable time was a fundamental term of the contract of insurance. Having breached this term, therefore, the appellants could not rely on the exemption clause in the insurance policy to avoid the consequences of its breach. Other relevant cases include *Polymera Industries Ltd v Societe Recharges Etudes Applications Plastiques*¹⁵ (business to business transaction), as well as *CFAO v Animotu*¹⁶ (consumer transaction), both of which were hire purchase cases where the courts applied the fundamental breach doctrine to preclude the application of exclusion clauses.

In all these cases, the courts unequivocally applied the fundamental breach

12 (1961) All NLR (Part 4) 917.

13 (1963) NNLR 115.

14 [1976] NCLR 37.

15 (1964) LLR 176.

16 (1966) 1 ALR Commercial 289.

doctrine, regardless of whether the parties were consumers or business entities. Thus, the critical question was not about the nature of the parties, but rather, whether or not there was a breach of such nature as to render the act done by the defaulting party radically different from that contemplated under the contract. If this was answered in the affirmative, no exclusion clause, however broadly crafted, was allowed to override the obligations of the contract.

However, following the House of Lords decision in *Photo productions v Securicor*,¹⁷ the Nigerian Supreme Court was accused of having made a volte-face regarding its approach towards the application of exclusion clauses, without regard to local conditions and the interests of consumers.¹⁸ This was because of the Court's decisions in three cases which came up in quick succession before it, each of which touched on the applicability or otherwise of exclusion clauses. The cases concerned are *Akinsanya v United Bank for Africa Ltd*,¹⁹ *Attorney-General, Bendel State v United Bank for Africa Ltd*,²⁰ and *Narumal & Sons v Niger Benue Transport Company Ltd*.²¹ In all three cases, the Supreme Court alluded to the development in the *Photo productions* case as portending the demise of the rule of law in favour of the rule of construction. The Nigerian response, however, did little more than declare the new position in the United Kingdom, as none of the three cases actually turned on the issue of exclusion clause. In *Akinsanya v United Bank for Africa Ltd*, the appellant entered into a contract with the respondent bank to open a letter of credit in respect of a business transaction with a Swiss Company. The contract between the appellant and the respondent contained relevant exclusion clauses as follows:

[i] It is understood that our engagement to pay shall continue in force notwithstanding any changes in our and/or your constitution and that no responsibility is to attach to yourselves or your correspondents as to the documents, beyond seeing that they purport to be in order.

[ii] We agree to hold you and your correspondents harmless and indemnified in respect of any loss or damage that may arise in consequence of error or delay in transmission of your correspondents' messages or misinterpretations therefore or from any cause beyond your or their control.²²

The case of the appellant was that the respondent could not rely on the exclusion clauses because of its breach of the contract, occasioned by its negligent performance of its contractual obligations, to wit, not taking adequate steps to verify the identity of the payee before making the payment. The Court however, held that there was no breach by the Respondent of the conditions, and having

17 Ibid. Note 10.

18 Ibid. Note 8.

19 *Akinsanya v UBA* (1986) 4 NWLR (Pt. 39) 273.

20 (1989) NWLR (Pt.106) 730.

21 (1989) 2 NWLR (Pt.108) 739.

22 *Akinsanya v UBA*. (1986) 4 NWLR (Pt. 39) 273.

therefore performed the obligations under the contract with the appellant, the respondents were entitled to the benefit of the exclusion clauses. According to Karibi Whyte JSC,

Respondents were therefore not negligent in regard to the question of whether or not the goods were shipped on a Conference Line Vessel. Respondents have no responsibility beyond being satisfied that the information ex facie in the documents presented for payment are correct... There was nothing more for the Respondent to do other than satisfy themselves on the document before them that the ship is a conference line vessel. This they have been held to have done since nothing on the face of the document ... put them on inquiry.²³

Having held, therefore, that there was no negligence or breach of duty, the Court's subsequent statements in favour of the 'construction of the clause, following the Interpretation theory, as against the Rule of Law theory'²⁴ were mere obiter.

Similarly, the case of *Attorney-General, Bendel State & Ors. v. United Bank For Africa Ltd* involved a credit transaction in respect of a proposed purchase of an aircraft by the appellants, in respect of which an irrevocable documentary credit was opened, at their request, in favour of the seller of the aircraft.²⁵ The contract between the appellant and respondent contained similar exclusion clauses as obtained in the *Akinsanya* case. Before payment was effected, the appellants informed the respondent branch office in Benin City that the aircraft, the subject matter of the contract, and letter of credit had been sold and payment should be suspended. However, this information was only communicated by the Benin City Branch to the head office two days after the beneficiary was paid by the confirming bank. The Court found that the respondents did not conform to the stipulations of the contract with the appellant, as contained in the letter of credit and the application for the credit. On this basis, the appellants had a right to reject the documents and refuse to reimburse the bank or to recover the amount prepaid if, as in this case, the credit had been prepaid. However, rather than reject the documents, the appellants accepted the non-conforming documents and did not raise any query until a year later, when a panel of enquiry was set up to investigate the matter. It was on the basis of this inexplicable delay that the court held 'where the buyer fails reasonably to reject non-conforming documents, it is manifestly inequitable to permit him at a later date to update his own act to the detriment of the bank.' The decision in favour of the respondent bank was, therefore, not based on the application of the exclusion clause to avoid the consequences of the negligence of the respondent or breach of its obligations. As noted by the Supreme Court, the decision was not hinged on the application or otherwise of the exclusion clause, which provided that '[w]e agree to hold you and your correspondents

23 Ibid.

24 Ibid.

25 (1989) NWLR (Pt 106) 730.

harmless and indemnified in respect of any loss or damage that may arise ... from any cause beyond your control.’ This was because, in the words of the Court,

the loss in this case was not beyond the control of the defendant ... I however agree that the appellants’ delay and inaction in rejecting the payment to Stiber for a period of thirty one months after the receipt of the documents defeats their claims in this action.²⁶

Similarly, Bello JSC stated:

I would have found the Respondent liable for breach of contract or negligence but for the fact that the Appellants slept over their right for a period of over thirty months. Undue delay by a party to a credit in the exercise of his right to reject constitutes ratification or waiver of any irregularity committed by the defaulting party. Undue delay may also amount to estoppel... [T]he Appellants slept over their right for over thirty months. Their claim must fail on this ground.²⁷

In both cases, therefore, the issue of liability appear to have been determined on grounds other than the reliance on the exclusion clause. In *Narumal & Sons v Niger Benue Transport Company Ltd*,²⁸ the action was for charter fees owed by the appellants in respect of a vessel let to them by the respondents. The appellants however, counterclaimed for damages suffered by them when the goods conveyed in the vessel became soaked in sea water and, therefore, depreciated in value as a result of a fault in the vessel. The main contention of the appellant was that the vessel was not seaworthy at the commencement of the voyage, contrary to an express stipulation in the agreement. Consequently, the appellant argued that having breached this express fundamental term, the respondent could not rely on the exclusion clause. Again, the Supreme Court made statements to the effect that the rule of construction was the applicable rule and not the rule of law, holding that the latter was no longer good law. According to Oputa JSC,

there is no rule of law that an exception clause is nullified by a fundamental breach of contract or breach of a fundamental term. In each case, the question is one of construction of the contract to find out whether the exception clause was intended to give exemptions from the consequences of the fundamental breach.²⁹

The fact, however, is that there was no fundamental breach since the vessel was held to be seaworthy. Thus, subsequent pronouncements on the hypothetical scenario, that even if it was not seaworthy, the exclusion clause was broad enough

²⁶ Per Coker JSC .

²⁷ Per Bello JSC.

²⁸ Ibid.

²⁹ Per Oputa JSC at 768

to cover this contingency, having been couched in terms that the respondent ‘accepts no responsibility or liability for any damage or loss however caused to the goods’,³⁰ were mere obiter.

PART 3 Appraisal of the Existing Literature and the Divergent View of Authors

The power relation between suppliers of goods and services and consumers with regard to the scope and import of exclusion clauses began to attract the interest of Nigerian academics soon after these three Supreme Court decisions. In fact, right after the House of Lords decision in *Photo Production Limited v Securicor Transport*,³¹ CK Agomo, in an early reflection on the case,³² expressed the view that it was a setback to the consumer protectionist campaign and urged Nigerian courts to avoid the likely pitfalls of the case bearing in mind the different prevailing conditions in the United Kingdom and Nigeria. The writer concluded that ‘[g]enerally, we have to wait and see how far the Nigerian courts will be prepared to go along with the House of Lords.’³³

The subject became popular in academic write-ups following the three straight decisions of the Supreme Court that seemingly affirmed the rule of construction as the prevailing rule in Nigeria. All the writers³⁴ expressed concerns on the predominant influence of the *Photo Production* case on the Supreme Court, when the Nigerian courts were not bound to follow the decision of the House of Lords. Sagay, described the development as an ‘uncritical imitation of English law,’ stating that ‘the English decision was with respect, mechanically followed as if it was binding on the Supreme Court of Nigeria.’³⁵

Agomo rightly noted that:

In the three cases examined the question of exclusion clauses and fundamental breach were not directly in issue, which means that all the statements were made obiter... However, the facts remains that the highest court of the land deemed it important to say something concerning the issue, even if only by the way. It will therefore amount to our burying our heads in the sand like the proverbial ostrich by relying on a technicality instead of facing the reality of the situation. The rule of construction is now the applicable rule in Nigeria.³⁶

Others, like Ajai, based their concerns on the realities of the Nigerian situation,

30 Ibid.

31 Ibid.

32 Agomo, C.K., *Effect of the Demise of the English Doctrine of Fundamental Breach on the Nigerian Law of Contract*, above n 9 at pp.69-76.

33 Ibid, p 76.

34 Agomo, above n 9.

35 Ibid.

36 Ibid, p 10.

which, unlike the system in the United Kingdom, does not have in place a well-developed system of consumer protection. The insurance industry is also not well developed in Nigeria. According to Ajai:

In Nigeria, however, it is notorious fact that the practice of taking out liability insurance in commercial transaction is rare and that people have little or no confidence (and deservedly too) in the insurance industry. Conditions are therefore not the same as in the UK and our courts cannot pretend that they are.³⁷

There is a consensus that Nigeria should adopt a two-pronged approach in response to the challenge. The first is to enact a law similar to the *Unfair Contract Terms Act 1977* of the United Kingdom, while the second is for the Nigerian courts to be proactive in their approach in construing the effect of fundamental breach in consumer contracts. According to Agomo:

The Unfair Contract Term Act has no direct effect on the Nigerian law of contract, being a post January 1, 1900 statute. Indirectly however, it may come to have some effect in so far as the Nigeria courts follow English decisions in appropriate cases. The idea behind the Act is a worthy one; therefore, we hope that the Nigerian lawmakers would borrow a leaf from that piece legislation at the right time.³⁸

Ajai posited that nothing stops an activist and progressive judiciary from developing the law in this direction considering that in Nigeria, law reform is usually sluggish.³⁹ According to the learned writer:

There is the need for a law on ‘unconscionable’ or ‘unfair’ contract terms. The court should also move in that direction even before the legislature intervenes and even complements statute law...

Monye was sceptical about the prospect of having legislative intervention in this area for two important reasons. First, numerous suggestions had been made in this regard, but the legislature seemed to have turned a deaf ear to the need for such legislation. Also, one should not lose sight of the problem of implementation. She expressed the view that the rule of law principle be retained as the applicable rule. This will enable the court to decide each case on its merit. According to the learned author what is required is an effective development of the case law to take care of the lacuna left by the legislature and this can only be achieved by a positive exercise of judicial discretion to achieve a just result.⁴⁰

Perhaps Monye’s pessimism is justified, considering that over a decade after

37 Ajai, above n 9 at pp 45-6.

38 Agomo, above n 9 p 71.

39 Ajai, above n 9 at.43.

40 Monye, above n 7 at p 25.

the identification of the problem there is yet to be in most parts of Nigeria an effective consumer protection law to tackle the problem. The *Nigerian Consumer Protection Council Act*, which was promulgated in 1992 to provide speedy redress to consumers in diverse areas related to consumer protection, quite unfortunately makes no specific mention of this very important and highly pervasive problem. There are, however, some potentially valuable provisions under the Act, notably Section 31, which gives the Minister power to make regulations and may be utilised to provide succour to hapless victims of unconscionable terms in contracts.⁴¹ Things appeared to be at low ebb at the time of the three Supreme Court decisions and the future appeared dim for the doctrine of fundamental protection and consumer protection.

PART FOUR Review of Post 1989 Judicial Responses to Exclusion Clauses and Fundamental Breach

As discussed above, in the Supreme Court cases of *Akinsanya v United Bank for Africa, Attorney General Bendel State & Ors. V. United Bank of Africa and Narumal & Sons v Niger Benue Transport Company Ltd*, the pronouncements of the Supreme Court of Nigeria concerning the application of the rule of construction vis-à-vis the rule of law were mere obiter, and had nothing to do with the decisions arrived at by the Court. Furthermore, in fairness to the justices, the three cases were not consumer transactions. Rather, they were clear examples of business-to-business transactions. In the case of *Attorney-General Bendel State v United Bank for Africa*,⁴² the other party was even an agency of the state. Thus, the relative power situation can be said to be fairly balanced. Accordingly, in our view, the Court did not make any categorical statement which can be said to apply directly to consumer contracts if and when one comes up in the future. Indeed, a consideration of the cases arising in this area since that period, reveal the preparedness of Nigerian courts to look into the circumstances of individual cases to do justice to all parties, including by reverting to the rule of law in aid of the consumer or enforcing the exclusion clause against him/her, according to the circumstances of the case and in the interest of justice.

In the case of *DHL v Chidi*,⁴³ for example, the case was a business to consumer transaction pertaining to liability for non-delivery of parcel by a courier company. Edozie JCA (as he then was) held that the non-delivery of the parcel constituted a fundamental breach of the postal contract and that the exemption clause relied upon by the appellant was inoperative.

Commenting on this case, Sagay expressed the view that the case was *per incuriam* because Narumal's case was not brought to the attention of the court. The learned writer concluded by calling on the Supreme Court as follows:

41 To the best of our knowledge, no such regulations have so far been made.

42 Ibid.

43 [1994] 2 NWLR (Pt329) 720 at 742.

There is, therefore, a compelling need for the Supreme Court to give a clarifying judgment which as a matter of principle, recognizes that contracts in Nigeria are concluded and performed in a totally different socio-economic and cultural environment from that of United Kingdom.⁴⁴

On the other hand, in *Iwuoha v Nigerian Railway Corporation*,⁴⁵ which was also a consumer transaction, the circumstances were such that the Court deemed it reasonable and expedient to uphold the application of the exclusion clause. The case involved a contract of carriage, whereby the respondents undertook to transport by rail the appellant's three boxes from Aba to Bukuru. In the course of the journey, two of the boxes got lost, as a result of which the appellants claimed compensation to the tune of N40 500, being the full value of the lost goods. The respondent accepted that it received the packages from the appellant and also accepted liability for losing two of the bags. However, it denied the claim for N40 500, rather stating that the claim was limited to only N20 per box, as provided in the exclusion clause contained in the contract. The appellant had failed to declare the value and contents of the packages, as required under the *Nigerian Railway Corporation Act* and regulations, which were, in turn, incorporated by reference into the waybill issued to the plaintiff at the time of payment. The question of whether the waybill constituted an integral part of the contract between the parties and whether the plaintiff had knowledge of the clause and was bound by it were all answered in the affirmative.⁴⁶ Relevant provisions of the *Railway Act* and regulations were displayed prominently all around the railway station and the appellant was deemed to be aware of the terms. Non-conformity with these terms entitled the respondents to rely on an exclusion clause in the Act and regulations limiting the liability of the railway to only N20 per package. Liability for loss of the packages was therefore limited to N40.

This case is justified on the basis that the exclusion was not absolute, and neither was it unconscionable. It merely provided what, in our view, were reasonable conditions precedent to entitlement to recovery of the full value of loss sustained by customers of the railway company. The conditions to declare the value of the goods, and submit them for inspection for verification purposes were expedient measures to minimise fraudulent claims, which, if unchecked, can ruin the profitability and even viability of the carrier. This is a clear example of a situation where the accommodation of adhesion consumer contracts whose terms are properly incorporated in contracts is justified. This is because, as observed by Burgess, such a contract is ideally suited to provide support for mass-market institutions on which modern societal progress is based.⁴⁷ In other words, this

44 Sagay, p 201.

45 [1997] 4 NWLR (Part 500) 419.

46 This gives a little concern however, to the extent that the waybill was issued after payment.

47 See A Burgess, 'Consumer Adhesion Contracts and Unfair Terms: A Critique of Current Theory and a Suggestion' (1986) 15 Anglo-Am. L. Rev 255 at 274.

type of contract derives legitimacy from the fact that it serves the public interest.⁴⁸

In the subsequent case of *Eagle Super Pack (Nig) Ltd v African Continental Bank Plc*,⁴⁹ a business to business transaction, the issue was whether the respondent bank, which was sued for breach of contract by the plaintiff, could rely on the provisions of the Uniform Customs Practice for Documentary Credits for the purpose of excluding liability for the breach of its contract with the plaintiff. The court, however, held that in order for the provisions to be applicable, it had to have been incorporated into the contract between the parties. There was no evidence to this effect and the respondent bank was ‘caught by the well established rule in the law of contract that that a defendant relying on an exemption clause must show that the plaintiff had been made aware of the exemption clause’.⁵⁰ Having held that the exemption clause was not part of the contract between the parties, the Supreme Court however, further went on to hold that an exemption clause did not provide an absolute defence, as it may not avail a party who has been guilty of a fundamental breach of the contract.⁵¹ The Supreme Court, therefore, appeared to have reintroduced the rule of law approach, even though it had actually been established that the clause had not been incorporated into the contract.

Unlike earlier cases discussed above, the two next cases involve the interpretation and application of statutory safeguards against the abuse of exclusion clauses, which the court applied in aid of the injured party.⁵² The first of these cases was *International Messengers (Nig) Ltd v Pegofor Industries Ltd*.⁵³ Here the airway bill formed the basis of the contract of carriage by air between the appellant and respondent. By its terms, the appellants agreed to transport the respondent’s faulty machinery to Italy for repairs. The Bill contained an exemption clause limiting the liability of the appellant/carrier to N500. With the appellants having failed in their obligations under the contract to transport the machine within the agreed time or at all, the respondent ordered new parts and sued the appellants for damages for breach of contract. The appellants attempt to rely on the exclusion clause met a brick wall, as the court held that the appellant could not rely on the clause which was contrary to Section 190 of the *Contract Law of Anambra State*. The section provides that:

nothing in the foregoing shall be construed as to enable a party guilty of fundamental breach of a contract, or breach of a fundamental term to rely upon an exemption clause so as to escape liability.

This decision was followed shortly afterwards by the Court of Appeal in *Union*

48

Ibid.

49

[2006] 19 NWLR (Pt 1013) 20.

50

Per Oguntade JSC (as he then was) at p 45.

51

Per Tabai JSC at p 59

52

Anambra State Contract Law 1986, discussed below.

53

[2005] 15 NWLR (Pt 947) 1.

*Bank of Nigeria Plc v Omniproducts (Nig) Ltd & Anor.*⁵⁴ The case involved a foreign exchange transaction between the appellants and the respondents, in respect of which the appellants sought to rely on a broad exemption clause in the contract that excluded all liability. The Court however relied on section 190 of the *Contract Law, Cap 32 of Anambra State*, as well as the case of *International Messengers (Nig) Ltd v Pegofor Industries Ltd*,⁵⁵ to hold that the exemption could not exempt liability for negligent execution of contract.

In none of these cases can there be said to have been a miscarriage of justice on the basis of the application of the rule of construction, as the courts in Nigeria have made it clear that they are prepared to revert to the rule of law where the justice of the case so demands. Admittedly, however, they have been aided in achieving this objective in the latter two decisions by the existence of Anambra State law. In *Eagle Super Pack (Nig) Ltd v African Continental Bank Plc*, it might have been a little more difficult but for the fact that at the end of the day, the provisions containing the exclusion clause were found not to be part of the contract, while in *Iwuoha*, the appellant's non-conformity with the requirements of the statute regulating carriage of goods by rail jeopardised its claim and enabled the respondent benefit from the clause limiting its liability.

On the whole, the courts have been quite proactive. It can, however, only do so much. There is therefore a need for statutory intervention that mandates minimum standards of protection for consumers from unfair contract terms.

PART FIVE: Review of Pockets of Legislative Intervention

Rather unfortunately, at present, there is no consumer protection specific statute in Nigeria that comprehensively deals with the multifaceted aspects of the protection of consumers, including with regard to unfair contract terms. The *Consumer Protection Council Act*,⁵⁶ which establishes the Nigerian Consumer Protection Council to respond to diverse issues related to consumer welfare, is conspicuously silent on the issue of exclusion clauses and unfair terms in contracts.⁵⁷ However, it

54 [2006] 15 NWLR (Pt 1003) 660.

55 Above n 53.

56 The Act was promulgated in 1992. It is now in Cap C25, Laws of the Federation of Nigeria 2004.

57 See Section 2 of the Act, which provides for that the functions of the Council shall be to:

- (a) provide speedy redress to consumers complaints through negotiations, mediation and conciliations;
- (b) seek ways and means of removing or eliminating from the market hazardous products and causing offenders to replace such products with safer and more appropriate alternatives;
- (c) publish from time to time, list of products whose consumption and sale have been banned, withdrawn, severally restricted or not approved by the Federal Government or foreign governments;
- (d) cause an offending company, firm, trade, association or individual to protect, compensate, provide relief and safeguards to injured consumers or communities from adverse effects of technologies that are inherently harmful, injurious,

does give the Minister power to make regulations as necessary to give full effect to the provisions of the Act, and it is submitted, consumer protection.

Apart from the Consumer Protection Council Act, whose prospective role in the new dispensation is discussed further below, there are some provisions in other relevant statutes that, in varying degrees, touch on the issue of exemption clauses and unfair contract terms. These include the sale of goods laws of the various states,⁵⁸ the *Hire Purchase Act*,⁵⁹ the *Insurance Act*,⁶⁰ the *Weight and Measures Act*,⁶¹ and the *Standards Organisation Act*.⁶² Under the *Sale of Goods Act*, certain terms are implied into every contract of sale. These include the implied condition that the seller shall have a right to sell the goods, that the goods shall correspond with the description, that subject to certain requirements, the goods shall be fit for their purpose and shall be of merchantable quality, and also that the goods shall correspond with sample in the case of sale by sample.⁶³ The protection offered by these provisions is however, effectively negated by the fact that the provisions are only applicable in the absence of evidence of contrary intention, as the law allows the parties, including suppliers of goods to contract out of the obligations.⁶⁴ Additionally, Section 55 of the *Sale of Goods Act* provides that ‘where any right, duty or liability would arise under a contract of sale by implication of law, it may be negated or varied by express agreement or by the course of dealing between the parties, or by usage...’ The statute, therefore, affords very limited protection against unfair contract terms because, notwithstanding the inequality of bargaining power, it still holds sacred the principles of freedom and sanctity of contract.

violent or highly hazardous;

- (e) organise and undertake campaigns and other forms of activities as will lead to increased public consumer awareness;
- (f) encourage trade, industry and professional associations to develop and enforce in their various fields quality standards designed to safeguard the interest of consumers;
- (g) issue guidelines to manufacturers, importers, dealers and wholesalers in relation to their obligation under this Decree;
- (h) encourage the formation of voluntary consumer groups or associations for consumers well being;
- (i) ensure that consumers' interests receive due consideration at appropriate forum and to provide redress to obnoxious practices or the unscrupulous exploitation of consumers by companies, firms, trade association or individual;
- (j) encourage the adoption of appropriate measures to ensure that products are safe for either intended or normally safe use; and
- (k) perform such other functions as may be imposed on the Council pursuant to this Decree.

58 See for example the Sale of Goods Law Cap S2 Laws of Lagos State 2003, which is an almost exact reproduction of the Sale of Goods Act 1893.

59 Cap H4, Laws of the Federation of Nigeria 2004.

60 See the Insurance Act 2003.

61 Cap W3, Laws of the Federation of Nigeria 2004.

62 Cap S9, Laws of the Federation of Nigeria 2004.

63 See sections 13-15 Sale of Goods Law of Lagos State, Cap S2 Laws of Lagos State 2003 and the Sale of Goods Law of different states.

64 Section 13 of the Sales of Goods Law begins with the phrase ‘[i]n a contract of sale, unless the circumstances of the contract are such as to show a different intention’.

For its part, the *Hire Purchase Act* contains mandatory provisions protective of the hirer/consumer and such oppressive terms are void if included in the hire purchase transaction.⁶⁵ Similarly, Section 55 of the *Insurance Act 2003*, provides mandatory provisions protective of the interests of insured parties as consumers, to the extent that the provisions prevent spurious repudiation of liability on the part of insurers for the breach of sometimes irrelevant terms which are couched as warranties, applying the notorious ‘basis of the contract’ clause.⁶⁶ To the extent, however, that these two latter statutes with their mandatory protective provisions are only applicable in particular transactions falling within their limited scope, ie hire purchase and insurance contracts, they are of no use in the vast majority of other contractual dealings, notably those dealing with sale of goods and services, banking, carriage of goods and persons, etc. What is needed, therefore, is a broad-based statute that has a much wider reach.

To the knowledge of these writers, the first statutory intervention giving statutory basis to the rule of law approach in contracts generally came from Anambra State via its *Contract Law 1986*. The *Contract Law of Anambra State* is an attempt to codify principles of commercial contracts ranging from general principles of the *Law of Contracts*, *Sale of Goods* and *Hire Purchase*. Sections 189-190 which are directly relevant to this discourse provide thus:

189. Parties to a contract shall have the right to limit or exclude their liability for breach of contract; provided that the exemption clauses are clearly expressed and without ambiguity.

190. Nothing in the foregoing provisions shall be construed as to enable

65 Section 3 of the Hire Purchase Act, Cap H4, Laws of the Federation 2004 provides: “The following provisions in an agreement that is to say, any provision:

- (a) whereby an owner or a person acting on his behalf is authorized to enter upon any premises for the purpose of taking possession of goods which have been let under a hire-purchase agreement or is relieved from liability for any such entry; or
- (b) whereby the right conferred on a hirer by this Act to determine the hire-purchase agreement is excluded or restricted, or any liability in addition to the liability imposed by this Act is imposed on a hirer by reason of the termination of the hire-purchase agreement by him under this Act; or
- (c) whereby a hirer, after the determination of the hire-purchase agreement or the bailment in any manner whatsoever, is subject to a liability which exceeds the liability he would have been subject if the agreement had been determined by him under this Act; or
- (d) whereby any person acting on behalf of an owner or seller in connection with the formation or conclusion of a hire-purchase or credit-sale agreement is treated as or deemed to be the agent of the hirer or buyer; or
- (e) whereby an owner or seller is relieved from liability for the acts or defaults of any person acting on his behalf in connection with the formation or conclusion of a hire-purchase or credit-sale agreement; or
- (f) whereby a hirer or buyer is required to avail himself of the services, as insurer or repairer or in other capacity whatsoever, of a person other than a person selected by the hirer or buyer in the exercise of his unfettered discretion.”

66 See for example, cases like *Akpata v African Alliance Insurance Co* (1967) 3 A.L.R. (Comm.) 264 and *Northern Assurance Co v. Wuraola* (1969) NCLR 4, which were both decided under the common law freedom of contract regime, before statutory intervention..

a party guilty of a fundamental term to rely upon an exemption clause to escape liability.

While preserving the utility of limiting or exclusion clauses, provided they are clearly worded, the law codifies the rule of law approach. It is however submitted that the threshold established under section 189 is lesser than what is expected. For example, the standard of reasonableness is not made a requirement for the validity of a limiting or exclusion clause. In our view, the law should have comprehensively codified the conditions established in plethora of cases for the court to allow a party to rely on a limiting or exclusion clause. A review of the applicable cases in this regard will show that the documents containing the clause must have been an integral part of the contract and not a mere acknowledgement of payment.⁶⁷ Where the clause is contained in a signed document reasonable notice of the clause must have given,⁶⁸ the exclusion clause will be construed strictly against the party relying on it.⁶⁹

A further limitation of the law, in our view, is that it failed to define 'fundamental term'. A lack of definition of breach of fundamental term means that this will depend on the facts of each case thus negating the objective of certainty and predictability, which the legislative intervention was meant to achieve.

Under the said Anambra *Contracts Law*, certain terms are implied into every contract of sale. These include the implied condition that the seller shall have a right to sell the goods, that the goods shall correspond with the description, that subject to certain requirements, the goods shall be fit for their purpose and shall be of merchantable quality and also that the goods shall correspond with sample in the case of sale by sample. Unfortunately, these provisions are not of much practical significance where the parties are not of equal bargaining power. This is because section 257 of the *Contracts Law* allows parties to exclude any of these implied terms if they so wish.⁷⁰

The Consumer Contracts (Regulation of Unfair Terms) Bill 2010

The Consumer Contracts (Regulation of Unfair Terms) Bill 2010 (the Bill) consists of thirteen sections and four schedules. Schedule 1 contains a list of types of contracts excluded from the operation of the Bill while Schedule 2 lists the factors to be considered in determining whether a term satisfies the requirement of good faith. Schedule 3 contains a list of qualifying bodies to which consumers could lodge complaints, while Schedule 4 provides a list of terms that may be

67 *Chapleton v Barry UDC* [1940] 1 KB 532 CA, *Mc Cutcheon v David Mac Brayne Ltd.* [1964] 1 All ER 430.

68 *Parker v South Eastern Ry Co.* (1877) 2 C.P.D. 416. *Olley v Marlborough Court Ltd* [1914] 1 KB 532.

69 *Baldry v Marshall* (1925) 1 KB 260, (1924) ALL ER sep 155, *Andrew v Singers* (1934) 1 K.B. 17,

70 *Monye*, above n 9 at p 24.

considered as unfair.

The Bill applies to ‘pre-formulated standard contracts’.⁷¹ That is, any term in a contract concluded between a seller or supplier and a consumer where such a term has not been individually negotiated.⁷² A ‘consumer’ means a natural person who, in making a contract to which the Bill applies, is acting for purposes that are outside his business.⁷³ A term of a contract shall always be regarded as not having been individually negotiated where it has been drafted in advance and the consumer has not been able to influence the substance of the term⁷⁴. The onus of proving that such a term was individually negotiated lies on the seller.⁷⁵

A term is considered to be unfair when it causes, contrary to the requirement of good faith, a significant imbalance in the parties’ rights and obligations under the contract to the detriment of the consumer.⁷⁶ In determining whether a term is unfair, regard shall be had to the nature of the goods or services, all circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent.⁷⁷ In determining whether a term satisfies the requirement of good faith, regard shall be had to the tests listed in Schedule 2. Schedule 3 contains an indicative and non-exhaustive list of the terms that may be regarded as unfair. It would appear from the use of the word ‘may’ that the schedule is not meant to operate as a ‘black list’⁷⁸ of prohibited terms. The contents of the list merely raise a presumption that the terms might be unfair. It is, therefore, a question of fact to be determined based on evidence on a case-by-case basis, whether a particular term is unfair. In our view, it would have been better for the Bill to carefully identify some of the terms that are considered abhorrent and declare them as void based on public policy. This was the approach adopted in the Hire Purchase Act and Insurance Act.⁷⁹ An unfair term is declared not to be binding on the consumer.⁸⁰ This, however, does not affect the contract as a whole if the contract is able to stand on its own without the unfair term.⁸¹

Section 7 obligates the seller or supplier to ensure that the terms of a written limiting or exclusion clause is expressed in plain, readable, intelligible language, and entrenches the rule in case of ambiguities. Under Section 9, the Director, Fair Trading in Consumer Protection Council has responsibility for considering any

complaint made to him that any contract term drawn up for general use is unfair,

- 71 Section 3(4).
- 72 Section 3(1).
- 73 Section 2.
- 74 Section 3(3).
- 75 Section 3(5).
- 76 Section 4(1).
- 77 Section 4(2) and section 6.
- 78 See Michael Furmston, above n 1.
- 79 Both discussed above.
- 80 Section 5(1) and 8(1).
- 81 Section 5(2) and 8(2).

unless

the complaint appears in the opinion of the Director to be frivolous or vexatious; or

a qualifying body has notified the Director that it agrees to consider the complaint.⁸²

The above provisions seem to aim at cases before a breach has occurred. It does not, however, state who qualifies to present a complaint. It is submitted that a complainant should be extended to include non-governmental bodies for the protection of consumer interests. For example, if such a group considers a particular clause in a standard form contract in any sector, such as banking, to be unfair, there is no reason why their complaint should not be entertained. Such a liberal provision will give consumer protection a boost.

The Director may not consider the complaint where the following bodies listed in Schedule 3 have agreed to consider the complaint:

1. Electronic and Data Protection Registrar in Nigeria.
2. Managing Director, Power Holding Company of Nigeria (PHCN).
3. Executive Directors, All Communication Networks operating in Nigeria.
4. Director-General, All States Water Boards.
5. Managing Director, Nigerian Railway Regulator.
6. Every Weights and Measures authority in Nigeria.
7. Chief Executive Officers, SMEDAN.
8. Chief Executives of Associations, Department of Petroleum and Gas Resources in Nigeria.

In our view, the regulatory bodies of industries or sectors where use of standard form contracts are most prevalent ought to be included. These include banking, insurance, hire purchase, laundry, aviation contract, maritime contract, etc. The list of qualifying bodies should accordingly be expanded to include the regulatory bodies in these sectors. In fact, they should feature first and only be followed by those listed in Schedule 3.

The Director, Fair Trading or any qualifying body may apply for an injunction, including interim injunctions, if he considers it appropriate so to do.⁸³ In this regard, the qualifying body must have given the Director at least fourteen days notice and obtained the consent of the director.⁸⁴ Complaints may also be made to the

⁸² Section 9 (1).

⁸³ Section 9(2) and (3), and Section 10.

⁸⁴ Section 10(2) and (3).

Minister who may refer the matter to the Attorney-General to bring proceedings for injunction. The Minister is also vested with the power to make arrangement for the dissemination in such form and manner as they consider appropriate, such information and advice concerning the operation of the Bill as may appear to them to be expedient for public enlightenment purpose.⁸⁵ Express power is vested in the Director, the Minister and qualifying bodies to exercise the powers vested in them by the Bill.⁸⁶

There is the risk of having too many persons or officers responsible for the implementation of the regulation. It is important to guard against multiplicity of actions. It is sufficient, in our view, if only the office of Director is charged with the responsibility and given a time frame within which to respond to complaints, while any interested party is allowed to appeal against the action or inaction of the Director to the Minister. This should not be allowed to become the case of too many cooks spoiling the broth.

Section 9 envisages that the Bill, when enacted into law, shall be administered by the Director, Fair Trading in Consumer Protection Council. This is remarkable in a number of ways. First, no such position or office is expressly provided for in the Consumer Protection Council Act.⁸⁷ It is, therefore, better, in our view, to avoid being specific in terms of which officer shall do what. It is sufficient if the power is vested in the Council. Second, since the provisions of the Bill were expected to be administered by the Consumer Protection Council, it would have been better to leverage on the provisions of section 31 of the Consumer Protection Council Act to make a regulation. Section 31 provides:

The Council shall, with the approval of the Minister, have power to make regulations as may in its opinion be necessary or expedient for giving full effect to the provisions of this Act and for the administration thereof.

Section 2 provides that ‘the Council shall (a) provide speedy redress to consumers’ complaints through negotiation, mediation and conciliation. It is submitted that the object of the CPC is wide enough to accommodate this intervention. The advantage of regulation is that it is quicker and faster than the procedure for lawmaking. May we use this opportunity to call on the Consumer Protection Council to dust the Bill and prepare a regulation that shall be submitted to the Minister for approval and gazetting.

Challenges

⁸⁵ Section 11(7).

⁸⁶ See section 12.

⁸⁷ Cap C25 Laws of Federation of Nigeria 2004.

As remarkable and far reaching as the provisions of the Bill may be, it has a few downsides. First, the Bill was introduced during the Third Session of the National Assembly, whose tenure ran from 2007-2011. The Bill had received little or no publicity in the media and was unable to garner the much needed support of stakeholders. Regrettably, the Bill was not passed into law before the end of the tenure of the Third Session of the National Assembly. The implication is that the Bill will have to be reintroduced at the National Assembly to begin a fresh cycle of legislative procedure.⁸⁸ This has not been done as at the time of writing this paper.

Secondly, the Bill, if enacted into law, will apply only in the Federal Capital Territory. This is because Nigeria operates a federal system consisting of thirty-six states and a Federal Capital Territory.⁸⁹ Legislative power of the federation is divided between the Federal and State by vesting exclusive powers in the National Assembly in respect of matters listed in the Exclusive Legislative List. In this regard, section 4 (1)-(5) of the 1999 Constitution provides:

4. (1) The legislative powers of the Federal Republic of Nigeria shall be vested in the National Assembly of the Federation, which shall consist of a Senate and a House of Representatives.
- (2) The National Assembly shall have power to make laws for the peace, order and good government of the Federation or any part thereof with respect to any matter included in the Exclusive Legislative List set out in Part I of the Second Schedule to this Constitution.
- (3) The power of the National Assembly to make laws for the peace, order and good government of the Federation with respect to any matter included in the Exclusive Legislative List shall, save as otherwise provided in this Constitution, be to the exclusion of the Houses of Assembly of States.

⁸⁸ See section 58 of the 1999 Constitution provides:

- (1) The power of the National Assembly to make laws shall be exercised by bills passed by both the Senate and the House of Representatives and, except as otherwise provided by subsection (5) of this section, assented to by the President.
- (2) A bill may originate in either the Senate or the House of Representatives and shall not become law unless it has been passed and, except as otherwise provided by this section and section 59 of this Constitution, assented to in accordance with the provisions of this section.
- (3) Where a bill has been passed by the House in which it originated, it shall be sent to the other House, and it shall be presented to the President for assent when it has been passed by that other House and agreement has been reached between the two Houses on any amendment made on it.
- (4) Where a bill is presented to the President for assent, he shall within thirty days thereof signify that he assents or that he withholds assent.
- (5) Where the President withholds his assent and the bill is again passed by each House by two-thirds majority, the bill shall become law and the assent of the President shall not be required.

⁸⁹ Section 2(2) of the 1999 Constitution provides that 'Nigeria shall be a Federation consisting of States and a Federal Capital Territory'.

- (4) In addition and without prejudice to the powers conferred by subsection (2) of this section, the National Assembly shall have power to make laws with respect to the following matters, that is to say:
- (a) any matter in the Concurrent Legislative List set out in the first column of Part II of the Second Schedule to this Constitution to the extent prescribed in the second column opposite thereto; and
 - (b) any other matter with respect to which it is empowered to make laws in accordance with the provisions of this Constitution.
- (5) If any law enacted by the House of Assembly of a State is inconsistent with any law validly made by the National Assembly, the law made by the National Assembly shall prevail, and that other law shall, to the extent of the inconsistency, be void.

The foregoing provisions of Parts I and II of the Second Schedule show that the National Assembly has powers to make laws on all the subject matters on the Exclusive and Concurrent Legislative Lists. Any subject matter not listed on the Exclusive and Concurrent Legislative Lists are residual to the States. The power of the National Assembly to make laws on residual matters is limited to the Federal Capital Territory.⁹⁰ A perusal of the sixty-eight items on the Exclusive List and thirty items on the Concurrent List show that the subject matter of the Bill (consumer protection, contract or sale of goods) are not contained in either of the legislative lists. The implication is that the subject matter of the Bill falls within the residual power of the States. Therefore, even if the Bill were able to sail through the National Assembly, it would only apply in the Federal Capital Territory. There is a need for the state legislature across the country to take the initiative of reforming their laws on contracts, sales of goods and related issues to adequately safeguard consumer protection.

CONCLUSION

This paper has examined judicial and legislative developments in the area of unfair contract terms under Nigerian law. The examination reveals that in the few cases that have come before them, the courts have, to a large extent, and within the bounds of fairness and reasonableness, risen to the occasion to safeguard hapless consumers from the harsh application of unfair contract terms. To achieve this objective, and despite statements in earlier Supreme Court cases in favour of the rule of construction, the discussion has revealed a definite return by Nigerian courts to the rule of law approach. To usher in this new era was the Court of

⁹⁰ See the case of Attorney-General Lagos State v Attorney-General Federation [2002] 9 NWLR (Pt.772) 222.

Appeal decision in *DHL v Chidi*,⁹¹ while at the Supreme Court level, the case of *International Messengers (Nig) Ltd v Pegofor Industries Ltd*.⁹² charted the way for the application of the rule of law, as entrenched in the *Contract Law of Anambra State*. The reality, however, is that most consumers may not have the financial muscle to embark on litigation, perhaps up to the Supreme Court level to obtain relief, particularly where the outcome is not certain. This statute, which sets out the terms with reasonable clarity, will be helpful in providing certainty to consumers.

However, even in the absence of statutory provisions, the rule of law approach had also been applied in some of the cases emanating from other states. It is not clear whether, or to what extent, this positive development has been influenced by academic writings where alarm was raised about the danger of indiscriminately following the position in the UK *Photo Productions v Securicor Transport* case in the different socio-economic context of Nigeria. Nevertheless, there is the need to sustain the interest of academics in this area. There is also the need to revisit the issue of a statutory framework for consumer protection, preferably through the provision of regulations pursuant to the powers of the Minister under the *Consumer Protection Council Act*. As noted in the paper, this is much easier to achieve than legislation. Such regulations should also take care of the issue of the provision of suitable machinery for consumer complaints, including providing dispute resolution machinery. These measures will provide certainty, promote accessibility and allay concerns of consumers, many of whom are probably suffering in silence for fear of the uncertainties, expenses and other concerns of litigation, particularly for low cost transactions. There is also the need for vibrant NGOs to champion the cause of consumers in all ramifications. Through these various measures, consumer protection in Nigeria will be strengthened considerably.

91 Above n 43

92 Above n 53

New Zealand Moves to Prohibit Unfair Terms: A Critical Analysis of the Current Proposal

KATE TOKELEY*

This article critically analyses the current proposals in New Zealand for the introduction of a prohibition of unfair terms. The article explains the details of the proposal and compares it to the unfair terms legislation in Australia and the United Kingdom. The justifications for a prohibition on unfair terms are explained. The article then considers whether the scope of the current New Zealand proposal is adequately aligned with these justifications.

1. INTRODUCTION

Regulators in both the United Kingdom (UK) and Australia have accepted that in the case of non-core terms in standard-form consumer contracts there is an imbalance of power that favours the supplier. They have therefore legislated to prohibit unfair non-core terms from being inserted into these contracts.¹ The question of whether New Zealand should follow suit and legislate against unfair terms has been debated for several years. The New Zealand Ministry of Consumer Affairs initially voiced its support for introducing such a prohibition back in 2006 during the early stages of a comprehensive review of all New Zealand Consumer laws.² In a discussion paper

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* NOTE: on 10 December 2013, as this issue of the UWALR went to print, the Consumer Law Reform Bill passed its third reading. After it receives Royal Assent it will become law in New Zealand. The unfair terms provisions do not come into force until 15 months after the legislation is enacted. This is to give businesses time to assess their standard form terms for compliance with the new law.

1 UK unfair terms rules are currently contained in The Unfair Terms in Consumer Contracts Regulations 1999 (UK). In 2013 the UK Consumer Rights Bill was published. It aims to clarify and simplify UK consumer laws including unfair terms law. If enacted it will replace the Unfair Terms in Consumer Contracts Regulation 1999. Australian unfair terms rules are found in Parts 2-3 of the Australian Consumer Law contained in schedule 2 of the Competition and Consumer Act 2010. The Australian unfair terms law is based on recommendations from the Australian Productivity Commission, see Review of Australian Consumer Policy Framework, Inquiry report No 45 (2008) <<http://www.pc.gov.au/inquiry/consumer/docs/finalreport>>.

2 See Ministry of Consumer Affairs, Review of the Reform of the Redress and Enforcement Provisions of Consumer Protection Law — International Comparison Discussion (2006) at pp 24-28 where the Ministry proposes that the Fair Trading Act 1986 should be amended to specifically prohibit unfair terms in consumer contracts.

published in 2010 the Ministry repeated that there is a strong case for prohibiting unfair contract terms in New Zealand.³

The New Zealand consumer law review eventually culminated in the New Zealand Consumer Law Reform Bill 2011.⁴ The most striking omission from the Bill was the lack of provisions about unfair contract terms. The government had chosen not to proceed with the unfair terms prohibition and proposed instead to monitor the Australian experience over the next few years.⁵ This reluctance to adopt a prohibition on unfair terms was influenced in part by resistance from the New Zealand business community.⁶ It may also have been informed by the fact that the current consumer law review is based on the debatable premise that moving toward less regulation is an important policy goal for New Zealand.⁷

Nonetheless, during the first reading of the Bill, a new Minister of Consumer Affairs invited the Select Committee to consider examining whether unfair terms provisions should be introduced.⁸ The Commerce Select Committee reported back on the original Bill in October 2012.⁹ The Committee's report launched New Zealand back on track toward regulating unfair terms. It recommended a revised Bill that included a prohibition of unfair terms.¹⁰ The prohibition provides that suppliers are banned from including unfair terms in standard-form consumer contracts and must not apply, enforce or rely on such terms.¹¹ The new law is expected to come into force

3 See New Zealand's Ministry of Consumer Affairs, *Consumer Law Reform Additional Paper – September 2010: Unfair Contract Terms* at <http://www.consumeraffairs.govt.nz/pdf-library/legislation-policy-pdfs/CLR-Additional-paper---Unfair-contract-terms.pdf> For an examination of standard-form consumer contracts and the problem of unfair terms in general see Kate Tokeley, 'Introducing a Prohibition on Unfair Contractual Terms into New Zealand Law: Justifications and Suggestions for Reform' (2009) 23 *New Zealand Universities Law Review* 419.

4 *Consumer Law Reform Bill (No. 287–1) 2011 (NZ)*.

5 See *Cabinet Paper Consumer Law Reform (December 2010)*, 20 available at < <http://www.consumeraffairs.govt.nz/pdf-library/legislation-policy-pdfs/CLR-Cabinet-Paper-1.pdf>>. Australia, in fact, already has significant experience concerning the impact of unfair contract terms regulation, as Victoria enacted a similar scheme in 2002.

6 *Cabinet paper above n 4*, 20.

7 *New Zealand Ministry of Consumer Affairs, Consumer Law Reform; A Discussion Paper (June 2010)* 8, available at < <http://www.consumeraffairs.govt.nz/pdf-library/legislation-policy-pdfs/consumer-law-review-a-discussion-paper.pdf>>. See also Hon Bill English and Hon Rodney Hide "Government Statement on Regulation: Better Regulation, Less Regulation" August 2009 available at <www.treasury.govt.nz/economy/regulation/statement>. Jane Kelsey argues that the "better regulation, less regulation" slogan essentially advocates a light-handed pro-market approach which she contends "can no longer claim to be uncontested orthodoxy" in New Zealand. See Jane Kelsey "Regulatory Responsibility: Embedded Neoliberalism and its Contradictions" (2010) 6(2) *Policy Quarterly* 36, 39.

8 See speech by Minister of Consumer Affairs, Chris Tremain, available at <<http://www.beehive.govt.nz/speech/consumer-law-reform-bill-first-reading>>.

9 Available at <http://www.parliament.nz/en-NZ/PB/Legislation/Bills/6/f/6/00DBHOH_BILL10613_1-Consumer-Law-Reform-Bill.htm>.

10 *Consumer Law Reform Bill (No. 287– 2) 2011 (NZ)*.

11 Section 26A (to be inserted in to the Fair Trading Act 1986 by clause 11A of the NZCLR Bill).

by late 2013.

This article critically analyses the unfair terms provisions of the New Zealand Consumer Law Reform Bill (NZCLR Bill) and compares them to the unfair terms provisions of the Australian and UK unfair terms law. Part 2 of the article considers the extent to which New Zealand law already restricts the use of such terms and argues that prohibiting a contractual term on the basis of substantive unfairness is a novel and drastic move away from principles of freedom and sanctity of contract. Such a move is accompanied by the dangers of loss of certainty and the risk that a court or other decision-maker will make false assumptions about consumer preferences. Despite these dangers it is argued that a prohibition on unfair terms can be justified if it is limited to unexamined, standard-form terms in consumer contracts. These terms are not taken into account by consumers when making purchasing decisions. Market forces are therefore inoperative and there is a danger that some of these terms may be unfair. Parts 3 to 7 explain the scope and approach of the proposed unfair terms provisions in the current NZCLR Bill and assess whether these provisions will deliver a workable and justifiable intervention into freedom of contract. It is concluded that overall the provisions are a welcome and important addition to New Zealand consumer protection law. They fill a gap in the current law. However, there are some areas where the scope or details of the provisions are either confusing or fail to match well with the justifications and rationale behind the law. The provisions are also limited by setting up the Commerce Commission as gatekeeper. A term can only be found “unfair” if the Commerce Commission applies to the courts to have the term declared unfair. Consumers themselves cannot apply for this declaration.

2. UNFAIR TERMS LEGISLATION: POTENTIAL DANGERS AND JUSTIFICATIONS

Before considering the details of the proposal to regulate unfair terms in New Zealand it is important to briefly consider the dangers of regulating against unfair terms and begin to explain why such regulation is justified in certain limited circumstances.

A. The potential dangers

A prohibition on unfair terms represents a critical move away from traditional contractual doctrine. One legal academic describes the equivalent legislation in the UK as being “possibly the single most significant piece of legislation in the field of contract law.”¹² Classical contract theory is based on the notions of

12 Elizabeth Macdonald “Scope and Fairness in Consumer Contracts Regulations: *Director General of Fair Trading v First National Bank*” (2002) 65 *The Modern Law Review* 763, 763.

freedom and sanctity of contract.¹³ People should be free to enter any bargain that suits them. Once the bargain is struck our economic system is founded on the certainty that the deal will be binding and must be performed. Banning unfair terms is directly contrary to notions of freedom and sanctity of contract.

Introducing such a ban would not, however, be the first time that inroads have been made into this classical theory of contracts. During the twentieth century the equitable doctrine of undue influence and the common law doctrine of duress were developed in order to provide relief where a party did not freely give consent to the contract. The notion of a freely given consent is also behind the common law rules that require a party to give explicit notice of particularly onerous terms.¹⁴ Equity also allows contracts to be set aside on grounds of unconscionability. At no time, however, has equity or common law allowed a contract to be set aside simply because the terms themselves are deemed unfair. The focus has always been on the relationship between the parties and the conduct of the stronger party.¹⁵ In recent times, in both New Zealand and other jurisdictions, consumer protection statutes have been introduced that prohibit some specific types of unfair terms such as misleading contractual terms, oppressive terms in credit contracts and terms that attempt to limit statutory consumer guarantees.¹⁶ In addition, the New Zealand Disputes Tribunals are entitled, although not required, to set aside or vary an agreement where it considers the agreement or a term of the agreement to be harsh or unconscionable.¹⁷ There is, however, no general ban on unfair terms. Many problematic terms are not prohibited by current laws. For example, there is nothing to prevent terms that allow a supplier of goods or services to unilaterally terminate, vary or renew a contract or terms that impose unreasonable penalties on the consumer for a breach or termination of a contract.

For the New Zealand law to be reformed so as to require a contractual term to be set aside simply because a third-party (either a government agency or a

13 See *Printing and Numerical Registering Co v Sampson* (1875) LR 19 Eq 462, 465. See also P Atiyah, *The Rise and Fall of Freedom of Contract* (Clarendon Press, Oxford, UK, 1979); J Beatson and D Friedman, "From Classical to Modern Contract Law" in J Beatson and D Friedman (eds), *Good Faith and Fault in Contract Law* (Clarendon Press, Oxford, UK, 1995).

14 See, for example, *Thornton v Shoe Lane Parking Ltd* [1971] 2 QB 163; and *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] QB 433.

15 See *O'Connor v Hart* [1985] 1 NZLR 159, 171; *Nichols v Jessup* [1986] 1 NZLR 226, 235 per Somers J.

16 Part 5 of the Credit Contracts and Consumer Finance Act 2003 (allows courts to re-open oppressive credit contracts, contracting -out is prohibited under s 135), The Fair Trading Act 1986 (prohibits misleading conduct and misrepresentations in trade, the Consumer Guarantees Act 1993 s 43 (prohibits contracting out of the guarantees provided under the Act) There are also other Acts which are designed to protect consumers from unfairness in specific types of contract. See, for example, s 7 of the Door to Door Sales Act 1967 which overrides the normal rules of contract law in door to door sales involving payment by credit by allowing the consumer to cancel an otherwise valid contract within a period of seven days after the making of an agreement.

17 Disputes Tribunal Act 1988 (NZ), s 19.

court) considers it to be unfair would be a significant additional encroachment on freedom of contract. It has two disadvantages. The first is increased uncertainty. Traditionally contract law has endeavoured to provide predictability and clarity by refusing to allow people to escape from their contracts simply because they were foolish enough to enter into a bad bargain. When a Court or government agency is able to assess the fairness of terms in a concluded contract a degree of uncertainty is introduced into the law of contract. The notion of “unfairness” is inevitably subjective. It is extremely difficult to draft a statutory provision that adequately defines the concept. If people are able to escape from their obligations under a contract because they are “unfair” the law of contract becomes less certain and less predictable. It is therefore understandable that many New Zealand businesses are opposed to unfair terms regulation.¹⁸

The second disadvantage is the risk that the third-party decision-maker might unwittingly decrease overall consumer welfare. Determining whether a term is unfair often requires a complex assessment of various factors. Some suppliers might pre-emptively remove terms from consumer contracts in order to prevent future allegations of “unfair” terms. They might compensate for this by introducing new disadvantageous term, such as a price increase. Yet it is possible that most consumers would have preferred a perceived “unfair” term and a cheaper price to a less “unfair” term with a higher price.

The adoption of a ban on unfair terms needs to be carefully thought through so that it does not cause more problems than it is attempting to solve.

B. Justifications in limited circumstances

One argument in favour of a ban on unfair terms is that it would bring New Zealand into line with Australia. After all, one of the stated policy objectives of the NZCLR Bill is to achieve alignment with Australian consumer law, as appropriate, in accordance with the New Zealand government’s agenda to form a single economic market with Australia.¹⁹ However, imitating Australia is not, on its own, a theoretically sound reason for introducing such a significant law change.

Despite the dangers there are in fact strong arguments that support allowing external scrutiny of fairness in respect of unexamined terms in standard-form consumer contracts. This statement contains three elements:

- The term must be a *standard-form* term;
- The term must be an *unexamined* term;
- The term must be in a *consumer* contract.

¹⁸ Cabinet paper above n 4, 20.

¹⁹ See NZCLR Bill 2011 (NZ), General Policy Statement in the Explanatory Note, 1.

Limiting legislative intervention to only these terms reduces the risk of unnecessarily interfering with terms when there is no market failure. If there is no market failure then there is no justification for increasing uncertainty in contract law by replacing the terms that a consumer has agreed to with terms that a court or government agency considers to be fair.

Each of these three elements is included in the proposal under the NZCLR Bill. The following discussion examines why each element is crucial. It then critically examines the provisions of the Bill in order to assess how well the Bill aligns with the underlying rationale for each element.

3. STANDARD-FORM CONTRACTS

A. Reasons for limiting unfair terms law to standard-form contracts

The first element that should exist in order to justify an enquiry into the fairness is that the term should be a standard-form term. The NZCLR Bill has incorporated this restriction into its unfair terms provisions.²⁰ This follows the approach taken by the Australian and UK unfair terms legislation.²¹

Standard-form contracts are common in today's market place. Examples of products where suppliers normally use a standard-form contract include motor vehicles, mobile telephones, insurance, real estate, banking services, package holidays and gym membership. In recent years the sale over the internet of software and other products such as airline tickets has introduced another area of the market governed by the use of standard-form contracts. The terms are usually written in a scroll-down box on the screen and the consumer has to click "I agree" in order to proceed with the purchase.

The nature of the standard-form contract is such that most consumers almost always fail to read most of the terms of the contract. They typically read the terms that describe the price and the broad nature of the product but they are not likely to read all the other terms that spell out the details of the parties' contractual duties. The vast majority of people in today's world, for example, automatically click "I agree" in a software licensing agreement without scrolling down the box of terms to read them all. Even if a consumer does read all the terms they may have difficulties comprehending the meaning of some of those terms. Moreover, there is no real ability for the consumer to influence those terms.

The fact that most consumers do not bother to read most of the terms of a standard-form contract does not mean that they are lazy or irrational. Quite the contrary,

²⁰ Clause 26A.

²¹ See Competition and Consumer Act 2010, Schedule 2 (Australian Consumer Law) section 23(1)(b). The UK unfair terms law does not use the words "standard-form contract" but instead limits coverage to terms that have "not been individually negotiated", see The Unfair Terms in Consumer Contracts Regulations 1999 (UK), 5(1).

economic theorists have described consumers' behaviour as "rational ignorance"²² or as an example of "bounded rationality".²³ It makes more sense for consumers to pay heed only to the few terms that are of most importance to them, such as price and product characteristics. Moreover, most of the unread terms deal with risks that are unlikely to eventuate. For example, they specify what will happen if either of the parties defaults, or if the supplier wishes to terminate the contract or change the terms. Consumers may assume that these things won't happen to them and therefore decide not to devote the time and effort required to read and understand them.²⁴ If consumers are not making choices in respect of these terms then there is no incentive for suppliers to ensure that these terms are fair.

B. The definition of "standard form contract" under the NZCLR Bill

Neither the New Zealand nor Australian law provide a prescriptive definition of a standard-form contract. Both countries instead provide guidelines for the Court to use when determining whether a contract is a standard-form one. While this might lead to some uncertainty as to whether a particular contract is covered by the provisions it does allow for a flexible approach which captures the essence of a standard-form contract.

The NZCLR Bill provides that the court may determine that a contract is a standard-form one in any case where the terms of the contract have not been subject to effective negotiation between the parties.²⁵ It then requires that the court, in making this determination, take into account the following factors:²⁶

- (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 or more parties **before any discussion** relating to the transaction occurred with the other party or parties;

22 Randy E Barnett, "Consenting to Form Contracts" (2002–2003) 71 *Fordham L Rev* 627, 631; Todd D Rakoff, "Contracts of Adhesion: An Essay in Reconstruction" (1983) 96 *Harv L Rev* 1173; See also Friedrich Kessler, "Contracts of Adhesion — Some Thoughts about Freedom of Contract" (1943) 43 *Colum L Rev* 629.

23 Russell Korobkin, "Bounded Rationality, Standard-form Contracts, and Unconscionability" (2003) 70 *The University of Chicago Law Review* 1203. See also Wayne R Barnes, "Toward a Fairer Model of Consumer Assent to Standard-form Contracts: In defense of restatement subsection 211(3)" (2007) 82 *Washington Law Review* 227, 252-262 and Schmel I Becher "Behavioural Science and Consumer Standard-form Contracts" (2007) 68 *Louisiana law review* 117.

24 David A. Armor & Shelley E. Taylor *When Predictions Fail: The Dilemma of Unrealistic Optimism*, in *Heuristics and Biases: The Psychology of Intuitive Judgment* (Thomas Gilovich et al. eds. 2002) (reviewing literature about optimistic bias).

25 Clause 26A inserts the new section 46J into the Fair Trading Act 1986.

26 Section 46J(2) inserted into the Fair Trading Act 1986 by Clause 26A of the NZCLR Bill 2012.

- (c) Whether 1 or more of the parties was, **in effect, required either to accept or reject** the terms of the contract ...in the form in which they were presented;
- (d) The extent to which the parties had an **effective opportunity to negotiate the terms** ...of the contract;
- (e) The extent to which the terms of the contract take into account **the specific characteristics of any party** to the contract.*(emphasis added)*

Where one party to the proceedings alleges that the contract is a standard-form one then the presumption is that the contract is a standard-form contract unless another party to the proceedings can prove otherwise.²⁷

The list of factors is the same as the list used in the Australian definition of a standard-form contract.²⁸ Unlike the Australian provision, however, the New Zealand one begins with a general direction which limits the contracts to which the court may determine to be standard-form to those contracts in which the terms “have not been subject to effective negotiation between the parties”. This provision is an improvement on the Australian model in that it gives the court a clear indication as to the key feature of a “standard-form” contract. It is this lack of effective negotiation between the parties that is central to the rationale for allowing courts to scrutinise the fairness of the terms. If consumers are unable to negotiate many of the terms of standard-form contracts they are likely to remain rationally ignorant of these terms. Market forces are therefore ineffective in respect of these terms and unfair terms regulation is justified.

The wording of the general direction does not, however, make it clear what happens when the contract appears to be a standard-form one because most or all of the terms of a contract have *not* been subject to effective negotiation but the allegedly unfair term *was* subject to effective negotiation. It would be unprincipled for the legislation to cover situations where it can be proved that the consumer did in fact individually negotiate an allegedly unfair term. The Bill should make it clear that if a specific term within a standard form contract has been individually negotiated then the legislation will not apply to that term.

A further potential difficulty with both the New Zealand and Australian approach is that requirement that the unfair term to be in a standard-form contract does not cover the possibility of only one or two unfair terms being pre-formulated in a contract which is otherwise not a standard-form one. The UK unfair terms legislation is drafted more widely so that any term that has not been individually negotiated (so long as it does not relate to price or product characteristics) is subject to the legislation regardless of whether or not the entire contract can be

²⁷ Section 46J(3) inserted in to the Fair Trading Act 1986 by Clause 26A of the NZCLR Bill 2012.

²⁸ See Competition and Consumer Act 2010, Schedule 2 (Australian Consumer Law) section 27.

characterised as a standard-form one.²⁹ Interestingly, current proposals to reform the UK unfair terms rules extend the scope of the rules even further. The proposals would allow all consumer contract terms (except for exemptions relating to terms as to price terms and subject matter) to be assessed for fairness regardless of whether or not they have been individually negotiated.³⁰ This extension would allow an unjustifiably wide intervention into freedom of contract.

The current UK approach is sensible. Whenever any term has been drafted in advance so that the consumer has been unable to influence the substance of the term, that term will be regarded as having not been individually negotiated and therefore subject to the unfairness provisions. Regulation 5 of The Unfair Terms in Consumer Contracts Regulations 1999 (UK) provides that:³¹

- (1) A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.
- (2) A term shall always be regarded as not having been individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term.
- (3) Notwithstanding that a specific term or certain aspects of it in a contract has been individually negotiated, these Regulations shall apply to the rest of a contract if an overall assessment of it indicates that it is a pre-formulated standard-form contract.

The fact that the UK legislation covers even a single pre-formulated term seems appropriate given that the rationale behind regulation of unfair terms is to protect consumers in situations where the consumer is unable to influence the terms and unlikely to bother examining them. It may be true that some consumers are more likely to read one or two pre-formulated terms than they would be to read pages of pre-formulated terms. Nevertheless, unless the terms relate to an essential element of the contract, the pre-formulated nature of the terms means that consumers have little incentive to examine them in any detail or to make the effort to understand their meaning. They are unlikely to be able to change them and unlikely to take them into account when making a purchasing decision. Although a single pre-formulated term is far less common than a largely or entirely pre-formulated contract, it is desirable for the legislation to provide protection to consumers in both situations. This approach would also avoid arguments about how many terms in a contract need to be pre-formulated in order for a contract to become a standard-form covered by the legislation.

29 The Unfair Terms in Consumer Contracts Regulations 1999 (UK), 6(2).

30 See the Draft Consumer Rights Bill (2013) (UK)

31 *Ibid.*, reg 5.

4. UNEXAMINED TERMS

A. Reasons for limiting unfair terms law to “unexamined terms”

The second element that should be present in order for a term to be legitimately assessed for fairness is that the term should be an “unexamined term”. The phrase “unexamined term” means any term that is not considered important enough to make it rational for consumers to read it and take it into account in making the purchasing decision. An “examined term”, on the other hand, is a term of sufficient importance that consumers will read it and allow the term to influence their decision to purchase. Academic writers have also referred to this kind of term as “invisible”,³² “non-salient”³³ or “non-core”.³⁴ The proposed New Zealand unfair terms provisions follow the UK and Australian approach by including a limitation of this nature.³⁵

The normal workings of the market can operate effectively only in respect of the terms of a contract that are regularly examined by consumers, such as those relating to price and the characteristics of the product. While consumers may not always be able to alter these terms in standard-form contracts, they do have the option of not entering into the agreement at all. So if the product is not what they are wanting or if it is too expensive they will choose to not make the purchase. The consumer can then investigate what terms are being offered by other suppliers of that type of product. Legal intervention is unnecessary because there is an incentive for the supplier to offer the consumer favourable terms. In contrast, unexamined terms do not form part of the consumer’s purchasing decisions and so there is no incentive for the supplier to compete on the basis of them. In fact some suppliers may deliberately insert unfair terms in order to be able to increase the competitiveness of those terms which are more likely to be examined by consumers, such as price.

B. How the NZLCR Bill attempts to limit the unfair terms law to “unexamined terms”

The NZCLR Bill endeavours to restrict the scope of the unfair terms rules to those terms that are unexamined by excluding any term that:³⁶

32 See Todd D Rakoff, “Contracts of Adhesion: An Essay in Reconstruction” (1983) 96 Harv L Rev 1174.

33 See Russell Korobkin, “Bounded Rationality, Standard-form Contracts, and Unconscionability” (2003) 70 The University of Chicago Law Review 1203.

34 See Roger Brownsword and Geraint Howells, “The Implementation of the EC Directive on Unfair Terms in Consumer Contracts — Some Unresolved Questions” [1995] Journal of Business Law 243, 247.

35 See The Unfair Terms in Consumer Contracts Regulations 1999 (UK), reg 6(2); Competition and Consumer Act 2010, Schedule 2 (Australian Consumer Law) s 26.

36 See s 46K(1) inserted by clause 26A.

- (a) defines the main subject matter of the contract: or
- (b) sets the upfront price payable under the contract;

It also excludes terms required or expressly permitted by any enactment. This latter exclusion is not because the terms are likely to be examined ones but because it would clearly be unsatisfactory to allow scrutiny of the fairness of a term that is required or permitted by law.

The New Zealand exclusions (a) and (b) are an exact copy of the Australian Consumer Law exclusions.³⁷ The UK legislation is similar but worded slightly differently. Regulation 6(2) provides that:

[i]n so far as it is in plain intelligible language, the assessment of fairness of a term shall not relate

- (a) to the definition of the main subject matter of the contract, or
- (b) to the adequacy of the price or remuneration, as against the goods or services supplied in exchange.

Terms relating to price and subject matter are excluded by all three countries because they are of sufficient importance to consumers that they will examine them and make purchasing decisions on the basis of them. In principle *all* examined terms should be excluded, but to avoid uncertainty it seems reasonable to restrict the exclusion to the two main core terms that are routinely examined by consumers – price and subject matter. However, drafting the legislation in such a prescriptive manner reduces flexibility and removes the possibility of excluding other terms that might also be routinely examined by consumers.

Even with two specifically identified categories of examined term there may be uncertainty as to scope and meaning. For example, it may not always be easy to determine whether some terms as to payment should be considered terms as to “price” or are better thought of as terms relating to obligations on default or some other type of contingent fee. The UK case, *Office of Fair Trading v Abbey National plc* illustrates this potential difficulty.³⁸ In this case, UK bank customers alleged that a term that imposed unauthorised overdraft fees was unfair. Both the High Court and the Court of Appeal held that the term did not relate to “price or remuneration, as against the goods or services supplied in exchange” because it was not a “core” or ‘essential’ price term. There was therefore jurisdiction to assess the fairness of the banks’ unplanned overdraft fees. The Supreme Court reversed this and decided that the concept of “price or remuneration” covers a

³⁷ Competition and Consumer Act 2010, Schedule 2 (Australian Consumer Law) s 27(1).

³⁸ [2010] 1 All ER 667

payment that is contractually payable on the occurrence of a particular event and therefore the unfair terms legislation does not apply.³⁹ Unfortunately, this interpretation unduly restricts the concept of “price or remuneration” without giving sufficient weight to the policy underpinning the legislation. It removes terms that consumers routinely fail to examine from being subject to scrutiny for fairness. These terms are not subject to market forces and therefore have the potential to be unfair. The decision has been criticised by one academic as leaving little scope for the operation of the unfairness, and being based on an unrealistic view of the ‘average consumer’.⁴⁰

Current proposals to reform the UK unfair terms rules include a provision that terms relating to price should be exempt from review if they are transparent and prominent.⁴¹ The term would be considered “prominent” if it is brought to the attention of the consumer in such a way that the average consumer would be aware of the term. This change was recommended by the UK Law Commission to provide greater clarity to the price exemption rule.⁴² The proposal will not, however, make it any clearer what charges are covered by the concept of “price”. It also makes the dubious assumption that the average consumer will examine and make a purchasing decision on the basis of all transparent and prominent terms in standard-form contracts.

Both the New Zealand and Australian provisions include more specific guidance on how to interpret the concept of “the upfront price payable under the contract” by adding in a definition of “upfront price”. The Australian Consumer Law introduces a narrow definition thereby reducing the range of terms that can be excluded from the unfair terms rules. It defines “upfront price as the consideration that:⁴³

- (a) is provided, or is to be provided, for the supply, sale or grant under the contract: and;
- (b) is disclosed at or before the time the contract is entered into; **but does not include any other consideration that is contingent on the occurrence or non-occurrence of a particular event.** (*emphasis added*)

This definition ensures that bank charges such as those in *Office of Fair Trading v Abbey National plc* would not be excluded from review under the Australian unfair terms provisions. It is more consistent with the rationale behind unfair terms legislation than the approach taken by the Supreme Court.

39 As per Lord Mance para 104.

40 Mindy Chen-Wishart “Transparency and Fairness in Bank Charges” (2010) 126 *Law Quarterly Review* 157.

41 See clause 67 of the Draft Consumer Rights Bill (2013) (UK).

42 Law Commission UK Unfair Terms in Consumer Contracts Advice paper (March 2013) para 3.109 at page 33.

43 Competition and Consumer Act 2010, Schedule 2 (Australian Consumer Law), s26.

The drafters of the NZCLR Bill have taken the exact opposite approach from the one taken by Australia. They have widened the definition of “upfront price” in such a way that a large range of terms will not be able to be scrutinised for fairness. The “upfront price” is defined as:⁴⁴

[t]he consideration (**including any consideration that is contingent upon the occurrence or non-occurrence of a particular event**) payable under the contract, but only to the extent that the consideration is set out in a term that is transparent. (*emphasis added*).

This wording codifies the unconvincing approach taken by the Supreme Court in the UK in *Office of Fair Trading v Abbey National plc*. It significantly reduces the usefulness of the New Zealand unfair terms legislation and does not accord with the natural meaning of “upfront price”. In a broad sense all the terms of a contract are in some way related to “consideration payable under the contract” as they all form part of the bargain that is supposedly being struck between the parties. One party agrees to give *x* in return for the other giving *y*. This far-reaching exclusion does not accord with the policy underpinning the legislation.⁴⁵ It results in the exclusion of the types of terms that consumers do not routinely examine. The fact that the exclusion will not apply if the term is “transparent” does not alter the improbability of the consumer examining most of these contingent payment terms.⁴⁶ Take the example of a scroll-down box of contingent terms in a standard-form contract made online. It does not matter if the terms are in plain English, in

bold capitals and easy to scroll through. Consumers will still not examine them, will not make a purchasing decision based on them and will not try to negotiate them. Assuming that transparency will ensure that consumers routinely examine these terms before entering the contract is unrealistic. Acknowledging the reality of consumer behaviour when entering a standard-form contract lies at the heart of the rationale for unfair terms legislation.

Terms that relate to payment obligations on default, termination or variation can all be viewed as part of the consideration payable “contingent on the occurrence or non-occurrence of particular events”. Specific terms that the extended definition of “upfront price” in the New Zealand proposal might exclude from scrutiny include:⁴⁷

44 See s 46K(2) inserted by Clause 26A..

45 See, for example, Ministry of Consumer Affairs Consumer Law reform Additional Paper – September 2010 Unfair Contract Terms, 2 (the paper refers repeatedly to the problem of consumers not having the opportunity to read all the terms of standard-form contracts and suppliers therefore not being subject to competition in respect of these terms. This is cited as providing part of the justification for imposing unfair terms legislation)

46 A “transparent” term is defined in clause 6 of the NZCLR Bill as one which is expressed in reasonably plain language, is legible, presented clearly and readily available to any party affected by the term.

47 Many of these examples are taken from contracts found on the internet. Some are taken

- a term in a broadband supply agreement that imposes excessive penalties on consumers who choose to switch providers,;
- a term in a retirement home contract which states that the weekly maintenance and gardening fee may increase at any time if the retirement home makes this decision with no need to give the grounds for the increase to the consumer;
- a term in a gym membership agreement that charges an excessive fee to consumers who move out of town and cancel their membership.
- A term in a broadband supply agreement that states “If your phone line is disconnected for any reason, we will be unable to provide broadband service to you and this will mean that you have terminated our agreement for the provision of that service. If services are reinstalled, even on the same phone number, you may incur installation charges;
- A term in a software click wrap agreement which imposes monetary penalties for purchasers who publicly report an evaluation of the product;
- A term in a twelve-month magazine subscription contract that commits the customer to paying for further six months supply if the customer fails to notify the supplier that they wish to discontinue the subscription after twelve months;
- A term in a mobile telephone agreement that allows the phone company to vary charges or rates or charge to the customer any taxes or duties imposed in relation to the Services at any time without prior notice.

Confusingly, one of the examples that the Bill gives in its list of potentially unfair terms refers to terms that penalise a party for a breach or termination of the contract. The interpretation difficulties that arise from the conflict between this example and the extended definition of “upfront definition” are discussed below in Part 6(F).

The current definition of “upfront price” contained in the Bill should be removed for the reasons outlined above. The phrase “upfront price payable under the contract” should be defined as “the consideration that is provided, or is to be provided, for the supply, sale or grant under the contract and is disclosed at or before the time the contract is entered into.” This follows the wording of the first part of the definition of “upfront price” in the Australian Consumer Law. New Zealand should not, however, go so far as to follow the Australian approach of adding a blanket provision that never allows any term that relates to any contingent consideration to be excluded from the unfair terms legislation. It would be preferable instead to add a more flexible provision that establishes a presumption that such terms will not be excluded. However, if it can be proved by the supplier that consumers ordinarily read and take into account a particular term of this type then that term should be excluded from scrutiny for unfairness. Each case should be considered on its own facts. There may be some uncommon cases where a

from a list of real-life examples given by the Australian Consumers’ Association in its submission on the Trade Practices Act Review 2002 <www.tpareview.treasury.gov.au>.

term relating to consideration that is contingent, either on the occurrence or non-occurrence of a particular event, is so central to the contract that it is routinely examined by consumers. In this case the term should not be subject to scrutiny for fairness. This approach accords with the underlying policy and justifications for unfair terms legislation. The focus, of course, should always be on the reality of whether most consumers are examining the term not on an assessment of whether consumers *should* have been taking the term into account.

5. CONSUMER

A. Reasons why unfair terms legislation should be limited to consumers

The third element that should be present in order to justify a law intervening to prohibit unfair terms is that the contract should be a *consumer* contract. The New Zealand proposal follows the Australian and UK approach of limiting the unfair terms rules to consumer contracts.⁴⁸

Consumer contracts are generally regarded as those contracts entered into by individual consumers buying goods and services for private use and not for business purposes. Consumers are most at risk of not reading many of the terms of standard-form contracts and consequently market forces fail to operate on these terms. When a business enters into a standard-form contract it is more likely than a consumer to examine the terms because it usually has more power to negotiate the terms.

There has been some debate in recent years as to whether small business should be offered the same legal protection as consumers because they do not have the same degree of bargaining power as large corporations.⁴⁹ Unfortunately, attempting to draw a line between small and large businesses inevitably involves a high degree of arbitrariness. There has not yet been an attempt in any New Zealand legislation to draw a line between small businesses and large commercial entities.

48 See NZCLR Bill (NZ) Clause 11A which inserts section 26A into the Fair Trading Act 1986; The Unfair Terms in Consumer Contracts Regulations 1999 (UK), reg 4; Competition and Consumer Act 2010, Schedule 2 (Australian Consumer Law), s 23.

49 See Part 4 of the Ministry of Consumer Affairs, Review of the Reform of the Redress and Enforcement Provisions of Consumer Protection Law — International Comparison Discussion (2006); Part 5 of the UK Law Commission and the Scottish Law Commission Report, Unfair Terms in Contracts (Law Com 292, Scot Law Com 199, 2005), 78-99, available online at <www.lawcom.gov.uk> (last accessed 31 May 2009). See also Ministry of Consumer Affairs paper Consumer Credit Law Review: Part 2 (2000) part 3.2, pp 13-18 and part 4.3, p 22 for discussion on the issue of whether small businesses should be covered by consumer credit laws.

B. The definition of “consumer” under the NZCLR Bill

A definition for “consumer” can be drafted by reference to the *actual* purpose for which the product is purchased or with reference to the purposes for which the product is *ordinarily* purchased. The former approach limits “consumers” are to buyers who actually purchase for personal purposes rather than business purposes. This is the approach used in both the Australian and the UK unfair terms legislation.⁵⁰

The proposed New Zealand unfair terms legislation diverges on this point and instead uses an “ordinary use” test. “Consumer” is defined by reference to the purposes which the goods and services in question are *ordinarily* purchased and then excludes situations where these products are bought for certain business purposes. “Consumer” is defined as a person who:⁵¹

- (a) Acquires from a supplier goods or services of a kind ordinarily acquired for personal, domestic, or household use or consumption; and
- (b) Does not acquire the goods or services, or hold himself or herself out as acquiring the goods or services, for the purpose of—
 - (i) Resupplying them in trade; or
 - (ii) Consuming them in the course of a process of production or manufacture; or
 - (iii) In the case of goods, repairing or treating in trade other goods or fixtures on land.

The main argument in favour of this definition is that it is consistent with the definition used in the New Zealand *Consumer Guarantees Act 1993*, which is arguably New Zealand’s most important piece of consumer legislation to date.⁵² This statute offers consumers protection when products breach various statutorily implied guarantees such as the guarantee of acceptable quality and the guarantee as to fitness for purpose. It would be confusing and complicated for the unfair terms legislation to have a different definition of “consumer” from the *Consumer Guarantees Act*.

The chief benefit of the “actual purpose” test used in the UK and Australia is that it excludes precisely those buyers that should be excluded from the legal

50 See Competition and Consumer Act 2010, Schedule 2 (Australian Consumer Law), s 23(3); The Unfair Terms in Consumer Contracts Regulations 1999 (UK), reg 3(1). An “actual purpose” approach is also used in New Zealand’s consumer credit laws. See Credit Contracts and Consumer Finance Act 2003, s 11(1)(a)-(b) where a “consumer credit contract” is limited to credit contracts where the debtor must be a natural person who enters the contract primarily for personal, domestic or household purposes

51 The NZCLR Bill, clause 6(2).

52 See the Consumer Guarantees Act 1993 (NZ) s 2. Under s 43 the parties are entitled to contract out of the Act if the consumer is acquiring the goods or services for a business purpose.

protection, namely those buying for business purposes. The New Zealand “ordinary use” definition, on the other hand, has the pragmatic advantage of allowing suppliers who sell a product that is ordinarily supplied to businesses but, occasionally supplied to someone for personal use, to remain unfettered by unfair terms legislation. So, for example, a supplier of large photocopiers would not be required to comply with the consumer legislation which seems reasonable given the nature of the products being sold. Any fears that a small subset of people buying for personal use will be exposed to unfair terms with no legal protection are probably exaggerated. The fact that the majority of purchasers entering these standard-form contracts are businesses means that market forces are likely to operate effectively to ensure that terms are fair.

6. DETERMINING WHETHER A TERM IS “UNFAIR”

The concept of “unfair” is extremely difficult to pin down. *Director General of Fair Trading v First National Bank*,⁵³ a UK case, illustrates the inevitably subjective nature of the term “unfair”. The disputed term entitled the bank to charge a customer its contractual interest rate after a judgment for default on a credit agreement. Without this term the bank would have ceased to have a right to interest on the amount owing after judgment. The trial Judge found the disputed term to be *not* unfair. The Court of Appeal took a different view and found the term *was* unfair. On appeal, the House of Lords unanimously found that the term was *not* unfair. One academic commentator has said that the effect of the term could reasonably be described as “onerous, unexpected, disagreeable or even shocking” and protested that the House of Lords decision does little to reassure consumers that the law really works for their benefit.⁵⁴

It is important that any unfair terms legislation provides a useful definition of “unfair terms” that allows for guidance without being so restrictive that new and previously unanticipated types of unfair term are excluded. The provisions of the NZCLR Bill that establish how to determine whether a term is unfair are modelled on the corresponding provisions in the Australian Consumer Law and are similar in many respects to the UK provisions.⁵⁵ They establish a set of broad principles that define an unfair term which are followed by a list of examples of terms that may be unfair. The wide definition allows for flexibility and the list of examples increases certainty without becoming undesirably prescriptive.

53 *Director General of Fair Trading v First National Bank* [2002] 1 All ER 97.

54 Meryll Dean, “Defining Unfair Terms in Consumer Contracts — Crystal Ball Gazing? *Director General of Fair Trading v First National Bank plc*” (2002) 65 *The Modern Law Review* 773, 780.

55 See Competition and Consumer Act 2010, Schedule 2 (Australian Consumer Law) s24 and 25; The Unfair Terms in Consumer Contracts Regulations 1999 (UK), reg 5 and 6.

A term will be unfair if the court is satisfied that the term:⁵⁶

- (a) Would cause a significant imbalance in the parties' rights and obligations arising under the contract; and
- (b) Is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and
- (c) Would cause detriment (whether financial or otherwise) to a party if it were applied, enforced or relied on.

The onus is on the party who would be advantaged by the term to prove that it is reasonably necessary in order to protect the legitimate interests of that party. The advantaged party will typically be the supplier. In determining whether a term is unfair the court may take into account any matter it thinks is relevant but *must* take into account:

- (a) the extent to which the term is transparent; and
- (b) the contract as a whole.

One minor criticism is that the provisions refer to unfair terms in a "consumer contract". It would be more accurate to have referred to terms in a "standard-form consumer contract". The Bill appropriately limits scrutiny to terms in standard-form contracts and this should be reflected in the provisions that define what is unfair.⁵⁷

The following sections examine whether the general broad principles are appropriate and whether the examples given in the list are constructive.

A. Significant imbalance in the parties' rights and obligations under the contract

A term will only be unfair if it causes a significant imbalance in the parties' rights and obligations arising under the contract. This "significant imbalance" test can be found in both the UK and Australian unfair terms provisions and encapsulates the essence of what is meant by an unfair contractual term. In the UK case, *First National*, Lord Bingham explained this test of "significant imbalance":⁵⁸

The requirement of significant imbalance 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 his 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.

⁵⁶ See section 46L is to be inserted into the Fair Trading Act 1986 by clause 26A of the NZCLR Bill.

⁵⁷ See section 46H inserted to be inserted in to the Fair Trading Act 1986 by clause 26A of the NZCLR Bill.

⁵⁸ Director General of Fair Trading v First National Bank [2001] 3 WLR 1297, [17].

New Zealand has adopted the proper approach by basing the test for unfairness on an imbalance of rights and obligations.

B. Term reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term

The New Zealand and Australian provisions add a further test to the “significant imbalance” requirement that is not included in the UK provisions. They require the term to be “not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term”. This introduces imprecise and subjective notions of “reasonably necessary” and “legitimate interest” which probably do not add any more clarity to the concept of “unfair”.

The test might be used to cover situations where the supplier is using a term to protect themselves from risks inherent in the transaction (“legitimate interests”) and the term is a proportionate response to the risks (“reasonably necessary”). However, this kind of scenario can easily be taken into account in the second part of the provision where the court is authorised to consider all the matters it thinks relevant and required to take into account the contract as a whole when determining whether the term is unfair.

C. Detriment (whether financial or otherwise) to a party if the term were applied, enforced or relied on

The final test for unfairness under the NZCLR Bill is that the term would cause detriment (whether financial or otherwise) to a party, if it were enforced or relied on. This test has been imported from the Australian Consumer Law. In one respect this term is an improvement on the UK provision which requires that the imbalance in rights or obligations be “to the detriment of the consumer” but does not add in the proviso that this only needs to be “if [the term] is enforced or relied on”.⁵⁹ In the Australian and New Zealand test it is clear that it is not necessary to prove that the term was actually relied on by supplier or to show that the consumer has actually suffered harm because of an unfair term. However, in another respect the UK test is superior to the NZ and Australian test. The UK test specifies that it is “consumer” detriment that is important. The NZ and Australian provisions merely refer to detriment to “a party”. The reference to *consumer* detriment is helpful because it makes it clear that unfair terms legislation is designed to protect consumers, not suppliers, from unfair terms.

⁵⁹ See The Fair Trading Act 1999 (Vic), s 32W; The Unfair Terms in Consumer Contracts Regulations 1999 (UK), reg 5(1).

D. Good faith and transparency – procedural fairness versus substantive fairness

The definition of “unfair” given in the UK adds a reference to “good faith” in its test for unfairness. A term is to be regarded as unfair if, “contrary to the requirement of good faith”, it causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer”.⁶⁰ This “good faith” element has sensibly been omitted from the Australian and New Zealand provisions.

The reason Australia did not include the “good faith” element was because of its “uncertain application”.⁶¹ A further problem with the notion of good faith is that it is essentially a procedural issue and arguably introduces a consideration of the motives of the supplier rather than the substantive content of the terms. It is important that a prohibition on unfair terms is limited to substantive unfairness and not extended to procedural fairness. Procedural unfairness usually refers to the unfairness of the contractual process. So it can include such factors as unconscionability, undue influence, duress, terms written in confusing English, hidden terms and misleading information. It means that the way the contract was made was unfair. Substantive unfairness, on the other hand, refers to the unfairness of the content of the terms. It relates to the meaning and effect of specific terms. Procedural unfairness may, of course, increase the likelihood of substantive unfairness. In fact, the whole notion of the standard-form contract is a procedural device likely to increase the chances of substantively unfair terms. But if the substance of the contract is fair in spite of procedural unfairness then unfair terms legislation should not interfere with the contract. To mix up procedural and substantive unfairness into one concept of an “unfair term” is bound to create confusion and uncertainty.⁶² Moreover, there are other statutory, common law and equitable rules that already deal with various aspects of procedural unfairness.⁶³ Although the New Zealand and Australian legislation avoid the reference to “good faith” there is a requirement that the court take into account “the extent to which a term is transparent”. A term is transparent if it is:

60 See The Fair Trading Act 1999 (Vic), s 32W; The Unfair Terms in Consumer Contracts Regulations 1999 (UK), reg 5(1).

61 See Treasury consultation paper entitled *The Australian Consumer Law — Consultation on draft provisions on unfair contract terms* (2009) <www.treasury.gov.au> (last accessed 29 May 2009) 3.

62 See Susan Bright, “Unfairness and the Consumer Contract Regulations”, ch 9 in Andrew Burrows and Edwin Peel (eds), *Contract Terms* (Oxford University Press, UK, 2007) 173, 178-187 where Bright discusses the confusion under the UK regulations as to the extent to which either procedural or substantive issues can alone render a contractual term unfair. See also Jeannie Paterson “The Australian Unfair Contract terms Law: The Rise of Substantive Unfairness as a Ground for Review of Standard Form Consumer Contracts” (2009) *Melbourne University law review* 934, 951.

63 For example: misleading conduct under the Fair Trading Act 1986, the equitable doctrine of undue influence and the common law doctrine of duress.

- (a) expressed in reasonably plain language; and
- (b) legible; and
- (c) presented clearly; and
- (d) readily available to any party affected by the term

There is no current statutory requirement in New Zealand for transparency. However, rather than incorporating this matter of procedural fairness into a definition of an “unfair” term, it should be dealt with quite separately. A provision could be inserted into the *Fair Trading Act 1986* that requires a supplier to ensure that any written term of a consumer contract is expressed in plain, intelligible language, is readily available to the consumer and that any ambiguity is interpreted in a way that is most favourable to the consumer.⁶⁴ This would ensure that the core terms of the contract (those terms that refer to price and subject matter) are not misunderstood by consumers. Unfair terms legislation, on the other hand, regulates only the non-core terms of the contract. Incorporating the idea of transparency into the test for the unfairness of these terms is problematic in two ways.

First, it creates uncertainty and confusion by mixing up concepts of substantive and procedural fairness which require consideration of quite separate questions. Second is the danger that the legislation might be interpreted as meaning an otherwise imbalanced and disproportionate term is not unfair simply because the supplier can show that the term was highly transparent. The purpose of unfair terms legislation should be to move beyond the idea that a contract need not be fair so long as it is clear. The reason that legislation is required is that rational consumers will not read the non-core terms of standard form contracts irrespective of transparency.⁶⁵ If transparency was the problem we would not need unfair terms legislation. The legislation is needed to allow the courts to scrutinise whether these non-core terms are unfair in substance. In the Australian case of *Jetstar Airway Pty Ltd v Free Cavanough J* discussed the unfair terms rules that were at that time part of the law of Australian State of Victoria.⁶⁶ He stated that the regime:⁶⁷

64 The UK legislation includes a similar provision, see The Unfair Terms in Consumer Contracts Regulations 1999 (UK), reg 7.

65 See Mindy Chen-Wishart above n 37, 160. Chen-Wishart argues that “[c]onsumer protection law should take cognisance of the fact that rational consumers do not readily comprehend lengthy complicated standard form contracts for goods or services they need, whether or not in plain intelligible language.”

66 The Fair Trading Act 1999 (Vic), Part 2B. These provisions have now been amended to mirror the unfair contract terms provisions under the Australian Consumer Law.

67 [2008] VSC 539 (Unreported, Cavanough J, 3 December 2009) [115]. For articles that argue that consumer protection law should only be about transparency and not the reasonableness of the terms see H. E. Brander and P. Ulmer “The Community Directive on Unfair Terms in Consumer Contracts: Some Critical Remarks on the Proposal Submitted by the EC Commission.” (1991) 28 C.M.L.Rev 647 at 656-657 and Hugh Collins “Good Faith in European Contract Law” (1994) 14 O.J.L.S 229.

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.

By specifically requiring the Court to consider the transparency of the term when assessing whether the term is unfair there is a real risk that comprehensive transparency might be taken to outweigh arguments regarding substantive unfairness.

E. The contract as a whole

In addition to the “transparency of the terms” the NZCLR Bill requires the court to also take into account “the contract as a whole” when determining unfairness. The Australian unfair terms law also includes this requirement. A harsh term may be “unfair” in one contract but in another contract, where the harsh term is offset by a lower price or other term favourable to the consumer, it might not be so readily viewed as “unfair”.

All the other terms in the contract, both examined and unexamined ones, need to be considered when determining the fairness of a term. It is only when assessing the term in the broad context of the contract as a whole in this way that a rational assessment of fairness can be made. The task should require consideration of other economically viable combinations of terms and whether, taken as a whole, these would have been any less preferable for consumers. For example, if an allegedly unfair term relating to exclusion of liability had not been used it might have resulted in a much higher price being charged to the consumer. This might lead to a finding that in the context of the contract as a whole the term is not unfair. On the other hand if the harsh term has resulted in only a slight price reduction at the expense of imposing a huge potential loss on the small number of consumers ultimately affected by a supplier's misconduct then there may well be a finding of unfairness.

Some harsh terms are in fact necessary in order for the contract to be feasible. For example, a bank that lends to a high risk borrower needs a term that provides them with a high level of security. Banning this type of harsh term might not result in these contracts being re-written with more lenient terms. The outcome might instead be that these contracts are no longer available and it becomes impossible for low income consumers to get access to loans.

The UK legislation likewise requires consideration of the contract as a whole. It also gives an additional set of factors to be taken into account. It requires that the unfairness of a contractual term be assessed by taking into account.⁶⁸

68 The Unfair Terms in Consumer Contracts Regulations 1999 (UK), reg 6(1).

the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent.

The New Zealand and Australian provisions allow the court to consider “any matters it thinks are relevant”. Therefore the additional factors listed in the above UK provision could also be considered by a New Zealand court. Nevertheless, it would be preferable if the New Zealand provision was re-drafted so that “all other relevant matters/circumstances” were something that the court *must* take into account rather than something that it *may* take into account.

Obviously the assessments required for determining whether a term is unfair are not easy and involve a degree of subjectivity. It may be difficult for a court to determine what alternative combination of terms would have been used if the alleged unfair term had been removed or re-drafted. It may be difficult for a court to determine whether these alternatives would in fact have been more or less detrimental to consumers. At this stage in the analysis it is tempting to protest that there is too great a danger that a court or other decision-maker will make false assumptions about consumer preferences and that they should not therefore be tampering with these contractual terms. What needs to be remembered, however, is that although the system of an external decision-maker assessing fairness may not be perfect it is an improvement on leaving the decision to consumers in the marketplace. This is because consumers simply do not make the decision. It is irrational for them to spend the time and energy required to read, understand and make decisions based on non-core terms. It is therefore better to allow a court to intervene in regulating the fairness of these terms notwithstanding the difficulty of this task. Without such legal control, the content of these terms will, in the absence of effective market forces, be determined only by suppliers.

F. What kind of terms should be on the indicative list?

The NZCL Bill sets out a non-exhaustive indicative list of terms that might be considered unfair. This follows the approach taken in the UK and Australian unfair terms legislation.⁶⁹ The kinds of terms that may be unfair include:

- (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

⁶⁹ See schedule 2 of The Unfair Terms in Consumer Contracts Regulations 1999 (UK); Competition and Consumer Act 2010, Schedule 2 (Australian Consumer Law), s25(1).

- 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 financial services to be supplied 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; and
 - (m) a term that imposes, or has the effect of imposing, the evidential burden on one party in proceedings relating to the contract.

Both the New Zealand and Australian lists refer to terms that disadvantage "one party" without referring to whether that party is the consumer or the supplier. In contrast, the UK list refers to terms that favour the supplier to the disadvantage of the consumer. The UK approach is preferable in this respect. It makes it clear that the unfair terms legislation is intended to protect consumers. The references in the list to "one party" and the "other party" should be re-drafted to refer to the "consumer" and "supplier". This would accord more directly with the policy objectives of the legislation.

Many of the examples of unfair terms given in the list give the impression that fairness depends on whether a right given to the supplier is mirrored by a similar right given to the consumer. Perfect symmetry of rights and obligations is not, however, a requirement in order for the terms of a contract to be fair. The important question will always be whether a term is fair in the context of the contract as a whole. There may be times where a non-symmetrical term is not unfair in a particular contract because it is balanced by a beneficial term elsewhere in the contract.

One interesting aspect of the list is example (c). It states that a term may be unfair if it penalises, or has the effect of penalising, one party for a breach or termination of the contract. This type of term could be viewed as one that provides for consideration to be paid contingent on the occurrence or non-occurrence of an event. In other words, if the consumer breaches or terminates the contract (this will occur by way of the occurrence or non-occurrence of an event) then the consumer will be subject to a penalty (this is the contingent consideration that the consumer agrees to pay under the contract). This seems to be in direct conflict with the earlier provision in the Bill which excludes cover for any term that sets any consideration that is contingent upon the occurrence or non-occurrence of a particular event.⁷⁰ It is therefore surprising that one of the terms listed as an example of a possibly unfair term appears to fit within this exclusion. It has been argued above that an exclusion of this kind is not appropriate. It is not clear whether or not a term such as the one in *Office of Fair Trading v Abbey National plc* (UK) that imposed unauthorised overdraft penalty fees on its bank customers would be subject to scrutiny under the NZCLR Bill.⁷¹ On the one hand it appears to be one of the types of excluded terms under section 46(K). On the other hand it also appears to fit into sub paragraph (c) in the listed examples of potentially unfair terms. Quite apart from the question of whether this type of term should be covered by the legislation, the provisions need to be re-drafted in order to remove the current uncertainty and confusion.

7. PENALTIES AND ENFORCEMENT

A person who breaches the ban on unfair terms will be subject to existing criminal and civil remedies under Part 5 of the *Fair Trading Act 1986*. Fines are proposed to triple under the NZCLR Bill to up to \$200,000 for individuals and \$600,000 for businesses. Where it can be shown that a person has or is likely to suffer loss because of the unfair term, the court could, make a declaration that the unfair term is void, make an order that the terms of the contract are varied, or make an order that the party who used an unfair term refund money to the other party.⁷² The available civil remedies have not been drafted specifically for unfair terms. It might have been clearer to have also introduced specific remedies for breach of the unfair terms rules. These could have declared, for example, that any unfair term is not binding on the consumer and that if the contract is capable of operating without the unfair term then the contract continues to be binding on both parties.⁷³

One key difference between the Australian provisions and the New Zealand proposal is that under the New Zealand model a term will only be considered unfair if the High Court or District Court declare it as such after an application from the Commerce Commission.⁷⁴ Australia and other jurisdictions that prohibit unfair terms do not require a regulator to initiate proceedings but instead allow

70 See section 46(K)(1) and 46(K)((2) inserted into the Fair Trading Act 1986 by clause 26A of the NZCLR Bill

71 [2010] 1 All ER 667

72 Section 43(2) Fair Trading Act 1986.

73 This is the approach taken in the UK. See *The Unfair Terms in Consumer Contracts Regulations 1999* (UK), reg 8(1) and 8(2);

74 Clause 26A.

consumers to bring an action alleging that a term is unfair. It is unfortunate that New Zealand consumers will be deprived of the right to take independent legal action against suppliers who are attempting to enforce an unfair term. The proposed scheme does, however, allow consumers to ask the Commerce Commission to apply to the court for a declaration of unfairness on their behalf. Ideally the legislation would have allowed either consumers or the Commerce Commission to initiate proceedings rather than making the Commission the gatekeepers for unfair terms proceedings. Nevertheless, the role of the Commission is an important one. There will be many consumers who are unaware of their rights or do not have the time, money or energy required to resolve a dispute in the courts. The Commerce Commission will ideally, given sufficient resources, take both post-dispute action on behalf of consumers and also implement preventative strategies by working with industry groups to develop fair standard-form terms.⁷⁵

8. CONCLUSION

The inclusion of an unfair terms prohibition in the NZCLR Bill is a significant and important step forward for New Zealand consumer protection law. It represents an acknowledgement that non-core terms in standard form consumer contracts are not subject to market forces and that ordinary rules of contract law do not provide consumers with sufficient legal protection. The proposed legislation has the additional benefit of aligning New Zealand consumer law more closely with Australian consumer law.

While the New Zealand proposed legislation is to be welcomed, there are nevertheless some aspects of it that are either confusing or fail to correspond directly with the rationale for an unfair terms prohibition. For example, the proposal:

- fails to clearly exclude individually negotiated terms in standard-form consumer contracts from the legislation;
- fails to cover pre-formulated standard form terms in consumer contracts that are otherwise not standard-form contracts;
- Unduly restricts the coverage of the legislation by excluding all terms that establish consideration that is contingent upon the occurrence or non-occurrence of a particular event;
- fails to clarify that the unfairness should relate to an imbalance in rights or obligations to the detriment of the *consumer* and not the supplier;
- Adds in the confusing and arguably irrelevant concept of “transparency” into the definition of “unfair terms”.

⁷⁵ Both the UK and Victorian schemes use this preventative strategy. In the UK, the Director General of Fair Trading is given the relevant powers and in Victoria, Australia, it is the Director of Consumer Affairs.

It is crucial that unfair terms rules are carefully drafted to match, as far as possible, the parameters of the justifications for a contravention of the principles of freedom and sanctity of contract.

One further shortcoming of the New Zealand proposal is that its enforcement is left entirely in the hands of the Commerce Commission. While the involvement of a government agency such as the Commission is desirable, it is regrettable that individual consumers will not have the right to bring their own action against a supplier for breach of the prohibition on unfair terms.

Small Business – Forgotten and in need of Protection from Unfairness?

AVIVA FREILICH¹ AND EILEEN WEBB²

In light of the statutory protections that have been introduced and developed for the benefit of consumers in their contracts with commercial entities, the vulnerable position of small business in their contracts with bigger business has become even more apparent. Given the diverse nature of small businesses and the fact that small businesspeople share many characteristics with consumers, it is artificial for two individuals to suffer the same wrong but that only one is entitled to recourse. Such denial disregards the inequity of the conduct and focuses instead on a rather perfunctory classification. This article considers why the UCT provisions in the ACL should be extended to small businesses. In the likelihood that such amendments will not be forthcoming, the article considers common law and statutory alternatives for small businesses faced with unfair contract terms. First, it is suggested that common law doctrines and rules may need to be revisited and rethought so they can provide some assistance to small business, so that in their contracts they are not left entirely to the mercy of larger players. Second, the article considers whether the unconscionability provisions in the ACL may be used to provide some relief for small businesses impacted upon by unfair contract terms.

INTRODUCTION

To uphold the sanctity of contracts is doubtless a prime business of government, but it is no less its business to provide against contracts being made, which from the helplessness of one of the parties to them, instead of being a security for freedom becomes an instrument of disguised oppression.³

Conventionally, consumers and businesses tend to be regarded as mutually exclusive. Consumers are perceived to be vulnerable *vis-à-vis* business and thus require protection from the excesses of commercial exchange. Consumers benefit from special protections whatever their knowledge and experience; even experienced, ‘savvy’ consumers can take advantage of common law and statutory safeguards. In comparison, businesses tend to be perceived as well-resourced and advised commercial entities. Their common commercial character

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³ TH Green, ‘Liberal Legislation and Freedom of Contract’ (1881) in *Lectures on the Principles of Political Obligation and Other Writings* ed Harris and Morrow (1986) Cambridge University Press, Cambridge, 199.

binds them, regardless of the business's size or the education and experience of the proprietors. Being regarded as commercial 'players', it is assumed that the protections available to consumers are unnecessary.

More recently, the legislature has been cognizant that some small businesses, including retail shop lessees and franchisees, can be disadvantaged in their dealings with other, larger businesses.⁴ The scope of some consumer protection legislation is applicable to, or has been extended to apply, to dealings between small businesses and their larger counterparts.⁵ This is particularly so in the *Australian Consumer Law*⁶ where many pivotal sections are equally applicable to consumer or business plaintiffs⁷. Indeed, the ACL, through its earlier incarnation in the former *Trade Practices Act* – somewhat controversially – introduced a prohibition of unconscionable conduct in small business transactions that has subsequently been extended to all transactions involving the supply or acquisition of goods or services.⁸

It is perplexing, therefore, that Part 2-3 ACL, the prohibition of unfair contract terms (UCT), does not extend to contracts between businesses, even small businesses. While the rationale for this decision will be discussed later, at this stage it is important to note that although small businesses can seek relief under the ACL through provisions prohibiting misleading or deceptive conduct, specific false or misleading representations or conduct and unconscionable conduct, small businesses are denied relief when affected by UCTs.

Part 1 of this article outlines the statutory protections available for consumers and argues that small businesses should have comparable protection. Part 2 considers what measures could be taken to assist small businesses affected by unfair contract terms. First, it is suggested that common law doctrines and rules may need to be revisited and rethought so they can provide some assistance to small business, so that in their contracts they are not left entirely to the mercy of larger players. Second, we examine s21 ACL and consider whether that section's recent extension to the substantive performance of a contract could assist a small business affected by a UCT. The article concludes that although the common law and s21 ACL could be utilised – to an extent – to compensate for the UCT provisions inapplicability to B2B contracts, the better approach would be to extend the scope of the UCT provisions to small business contracts.

4 The House of Representatives Standing Committee on Industry, Science and Technology *Finding a Balance –Towards Fair Trading In Australia*, Canberra May 1997 (The Reid Report).

5 For example, s51AC *Trade Practices Act 1974 (Cth)* prohibited unconscionable conduct in certain B2B transactions.

6 Hereafter referred to as 'ACL'.

7 See for example s18 (misleading or deceptive conduct) and s21 (unconscionable conduct).

8 Section 51 AC TPA.

Part 1: Protections that law provides for consumers in their contracts with business

Consumer protection

Consumers in their contracts with commercial entities have a number of statutory protections which ensure a certain standard of performance in the parties with whom they contract.

- Section 18 ACL prohibits a person in trade or commerce from engaging in conduct that is misleading or deceptive or likely to mislead or deceive. Part 3 ACL also contains a number of specific prohibitions targeting various forms of false or misleading statements;
- Part 2-2 *inter alia* prohibits unconscionable conduct in relation to the supply or acquisition of goods or services;⁹
- Part 2-3 ACL introduces provisions addressing unfair contract terms in standard form consumer contracts. The effect of s23 is that an unfair contract term will be rendered void. Pursuant to s24(1), a term of a consumer contract is unfair if:
 - (a) it would cause a significant imbalance in the parties' rights and obligations arising under the contract; and
 - (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 to be applied or relied on.¹⁰
- The consumer guarantee provisions in Part 3-2 Div 1 imply certain guarantees into contracts for the supply of goods and services to consumers. These include guarantees of quality, fitness for purpose and correspondence with description. As the guarantees are non-excludable, this has meant the virtual disappearance of exclusion clauses in consumer contracts.

Contrasting consumer and small business protection

The cosseted position of consumers, protected by an armoury of legislative provisions, is to be contrasted with the plight of small business in their contracts with other commercial entities. At common law, contracting parties may rely on vitiating factors such as misrepresentation or mistake to avoid a contract. But in the absence of conduct establishing the elements of these actions, the party is

⁹ Part 2-2 will be discussed in some detail in this article.

¹⁰ See generally Nyuk Nahan, Eileen Webb 'Unfair Contract terms in Consumer Contracts' in *Consumer Law & Policy in Australia & New Zealand* (The Federation Press, 2013).

without recourse. The remedies available are also very limited. Parties may also seek the assistance of the equitable doctrine of unconscionable dealing but this provides only limited protection and is largely confined to procedural matters. It is also notoriously difficult to establish unconscionable conduct in a commercial transaction.

So far as statute is concerned, a small business person may seek relief through s18 ACL (misleading or deceptive conduct), the specific prohibitions targeting false and misleading representations and conduct in Part 3-1 Division 1 and the statutory unconscionability provisions in Part 2-2.¹¹ The utility of these provisions, however, in a matter involving an unfair contract term is likely to be constrained. As will be discussed, the scope of s21, the prohibition of unconscionable conduct may provide some relief for small businesses impacted upon by unfair contract terms although this will depend on the view taken by a court of unconscionable behaviour in relation to contractual terms and their manner of enforcement. The news does not get better for small businesses. The UCT legislation specifically has no application to contracts where both parties are in business¹². The consumer guarantees do not apply and the implied terms in the sale of goods legislation, which may apply, can be excluded¹³. Thus B2B contracts are fair game for exclusion clauses. In relation to small business lending the responsible lending provisions are inapplicable to non-consumer borrowers. Although the ASIC legislation mirrors the consumer protection provisions of the ACL, again unfair contract terms in business lending agreements are not addressed.¹⁴

Does small business warrant consumer-directed protection?

Ordinarily, contract law deems large and small businesses as one and the same thus relegating the smallest of businesses to the ‘arms-length’ category of commercial transactions. Such a distinction disregards the business’s size or the education and experience of the proprietors¹⁵ and assumes that all businesses are

11 SS 20, 21 ACL.

12 Section 23 ACL states that (1) A term of a consumer contract is void if: (a) the term is unfair; and (b) the contract is a standard form contract. Section 23(3) defines a consumer contract as a contract for: (a) a supply of goods or services; or (b) a sale or grant of an interest in land to an individual whose acquisition of the goods, services or interest is wholly or predominantly for personal, domestic or household use or consumption.

13 B2B contracts for sale of goods are governed by sale of goods legislation which will imply terms, similar to the consumer guarantees, into the contract but only if they have not been excluded by the parties; in B2B contracts for the supply of services terms implied at law can be excluded in the same way. See s54 *Sale of Goods Act* (WA). There are equivalent provisions in sale of goods legislation in all Australian states and territories.

14 *Australian Securities and Investments Commission Act 2001 (Cth)* Division 2, Subdivision BA (s12BF – 12BM). On this topic see generally: Eileen Webb ‘Extending Responsible Lending to Small Business: A ‘Consumer’ Categorization?’ in *International Responses to Issues of Credit and Over-indebtedness in the Wake of Crisis* (Ashgate Publishing Limited, 2013).

15 Miller notes that: ‘... in the absence of a meaningful definition of sophistication, courts are not actually addressing the context of the deal. Rather, they are simply reciting well-worn clichés about “sophisticated parties dealing at arms’ length”’: Meredith Miller, ‘Contract

better resourced and informed than consumers. Thus, businesses are presumed to bargain on an equal footing with each other; businesses do not need the protection of consumer-style laws because businesspeople can protect their own interests.

Such presumptions do not sit comfortably with research undertaken on the economic, societal and practical reality of many small businesses.¹⁶ For example, Professor Abril¹⁷ has explored the inequity in treating all businesses alike under the Uniform Commercial Code (UCC)¹⁸ while Jane P Mallor notes that the rate at which small businesses fail rebuts the presumption that all business people are knowledgeable, competent and experienced.¹⁹ Small-businesspersons come from a variety of backgrounds, levels of business and personal experience, financial liquidity, education and literacy. Moreover, small businesses feature a significant proportion of persons who are, in many circumstances, marginalized from the wider workforce, such as women²⁰ and migrants.²¹ Also, being a good businessperson with regard to one's own trade or profession does not automatically mean that a person is well versed in business and the law. In most cases, the future of a small business rests on the managerial expertise of an individual or small group of owners. Despite contentions from large business, many small businesses simply

Law, Party Sophistication and the New Formalism' (2010) 75 Missouri Law Review 1 available at SSRN < <http://ssrn.com/abstract=1468647>>; Blake Morant, 'The Quest for Bargains in an Age of Contractual Formalism: Strategic Initiatives for Small Businesses' (2003) 7 Journal of Small & Emerging Business Law 233.

- 16 For example, Jane Mallor, 'Unconscionability in Contracts Between Merchants' (1986) 40 SW LJ 1065, 1066; Tansel Yilmazer and Holly Schrank, 'Financial Intermingling in Small Family Business' (2006) 21 Journal of Business Venturing 726; George Haynes and R J Avery 'Family Businesses: Can the Family and the Business Finances be Separated?' (1997) 5 Journal of Entrepreneurial and Small Business Finance 61.
- 17 Patricia Abril, "'Acoustic Segregation" and the Hispanic Small Business Owner' (2007) 10 Harvard Latino Law Review 1, 3-4; Miller, 'Contract Law, Party Sophistication and the New Formalism' (n 19); see also Meredith Miller 'Party Sophistication and Value Pluralism in Contract' <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2103351> accessed 6 October 2013.
- 18 Ibid, Abril notes that the law is said to contribute to this inequity because it does not 'explicitly recognize the existence of, particularly, the disadvantages of Chamber 3 merchants'. Identifying business people as Chamber 2 merchants ('experienced business owners, educated Anglophones with Internet access, and those with the financial wherewithal to obtain legal counsel') and Chamber 3 merchants (people with 'limited access to education, business and contract-related information'). Abril notes at 3-4 that these may include 'non-English speakers, recent immigrants, the unschooled, the illiterate, and those that cannot pay for legal or business services'. Members of Chamber 3 receive little information about normative information and conduct rules. For a discussion of Abril's thesis in an Australian context see Eileen Webb, 'Unconscionable Conduct in *Australian Competition and Consumer Commission v Dukemaster Pty Ltd*' (2010) 18 Australian Property Law Journal 48.
- 19 Mallor, above n 14, 1085-6.
- 20 In June 2006, 68 per cent of Australian small-business operators were male and 32 per cent were female: Australian Bureau of Statistics, *Characteristics of Australian Business 2006* <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/0/E49E3B4DC3595C92CA2568A9001139377?OpenDocument#SELECTED>> at 13 October 2012.
- 21 In June 2006, 71 per cent of all Australian small-business operators were born in Australia, with the remaining 29 per cent born overseas. Ibid.

cannot afford the accounting, financial and legal advice which larger concerns take for granted.²²

In Australia, the vulnerability of small businesspersons, at least in the context of retail leases, franchises and small business lending was highlighted in the Reid Report and subsequent state and Commonwealth inquiries.²³ The TPA²⁴ was amended in seeming acknowledgement that small businesses may require protection from the unconscionable conduct of, in particular, larger landlords and franchisors.²⁵ *Australian Competition and Consumer Commission v Dukemaster Pty Ltd*²⁶ highlights the disadvantages some small businesspeople have in relation

- 22 This issue has been the subject of considerable research in studies of small business failure in the United States. The findings are summarised by Blum, who states:
 ‘The picture painted by these studies portrays the prototypical small business failure as an owner-managed enterprise, operating on a small scale, living from hand-to-mouth and struggling to make a profit from a position of disadvantage in the market. There is some indication that an appreciable percentage of small business failures involve start-up enterprises, but one must be cautious not to exaggerate the role played by the immaturity of the business. It seems reasonable to assume that a new business, struggling to enter the market under the control of management that may lack experience, and is undercapitalised, would be most vulnerable to failure.’
 B A Blum, ‘Goals and Process of Reorganizing Small Business in Bankruptcy’ (2000) 4 *Journal of Small and Emerging Business Law* 181, 188; B D Morant, ‘Quest for Bargains in an Age of Contractual Formalism: Strategic Initiatives for Small Businesses’ (2003) 7 *Journal of Small and Emerging Business Law* 233, 234 J Watson and J E Everett, ‘Do Small Businesses Have High Failure Rates?’ (1996) 34 *Journal of Small Business Management* (1996); D R Korobkin, ‘Vulnerability, Survival and the Problem of Small Business Bankruptcy’ (1994) 23 *Capital University Law Review* 413.
- 23 For example see The House of Representatives Standing Committee on Industry, Science and Technology *Finding a Balance –Towards Fair Trading In Australia*, Canberra May 1997; Senate Economic References Committee, *The Effectiveness of the Trade Practices Act 1974 in Protecting Small Business*, Commonwealth of Australia, March 2004 <http://www.aph.gov.au/senate/committee/economics_ctte/completed_inquiries/2002/04/trade_practices_1974/report/report.pdf> at 6 December 2009; Commonwealth Government *Response to the Senate Standing Committee on Economics, Report on the Need, Scope and Content of a Definition of Unconscionable Conduct for the Purposes of Part IVA of the Trade Practices Act 1974 (Cth)* <http://www.aph.gov.au/SENATE/committee/economics_ctte/tpa_unconscionable_08/gov_response.pdf> at 6 October 2013; Report of the Senate Economics Committee, *The Need, Scope and Content of a Definition of Unconscionable Conduct for the Purposes of Part IVA of the Trade Practices Act 1974* (3 December 2008) <http://www.aph.gov.au/Senate/committee/economics_ctte/tpa_unconscionable_08/report/report.pdf> at 6 October 2013.
- 24 Now the Australian Consumer Law, Schedule 2 *Competition and Consumer Act* 2010 (Cth).
- 25 Eileen Webb, ‘The Productivity Commission Inquiry Report: The Market for Retail Tenancy Leases in Australia’ (2009) 16 *Australian Property Law Journal* 219; Neil Crosby, Sandi Murdoch and Eileen Webb, ‘Landlords and Tenants Behaving Badly? The Application of Unconscionable and Unfair Conduct to Commercial Leases in Australia and the United Kingdom’ (2007) 33 *University of Western Australia Law Review* 207; Eileen Webb, ‘Almost a Decade On – A (Reid) Report Card on Retail Leasing’ (2006) 13 *Australian Property Law Journal* 240.
- 26 (2009) FCA 682. See generally Eileen Webb, ‘ACCC v Dukemaster: A Recognition of Acoustic Segregation in Australian Retail Leasing?’ (2010) 18 *Australian Property Law Journal* 48.

to other better-resourced and informed entities particularly in relation to language, information and/or financial acumen.²⁷

The era of standard form contracts

It is unnecessary to review the shortcomings of classical contract law in an era of standard form contracts; this has been done on many occasions by others.²⁸ Suffice to say, the ‘meeting of the minds’ required in the classical model is artificial where standard form contracts are the norm and there is little to no opportunity to negotiate terms. Furthermore, the traditional focus has been on the procedural stage of the contract and in the absence of vitiating factors, there was little recourse available in the event of unfairness in the terms of the contract itself. Today, contract scholars recognise that examining the transaction rather than simply its formation is appropriate.²⁹ Also, statute has intervened to rebalance the emphasis on procedural issues and addressed instances of substantive unfairness. This is emphasised in the interpretive principles to s21 ACL³⁰ that stipulate that the provision is not limited to equitable notions of unconscionability and is applicable to both the procedural and substantive stages of a contract.³¹

A market analysis also underscores the shortcomings of classical thinking in 2013. Although there is confidence that a competitive market will address inequities within markets, this is not the case with unfair contract terms.³² Put simply, the players within the market focus on persuading consumers to purchase their products; this is almost invariably achieved on the basis of price. Those terms in the ‘fine print’ dealing with unsavoury matters such as termination and penalties are not pivotal considerations. Indeed, even if a consumer was to compare these terms in addition to matters such as the product and the price, he or she would probably find that the terms were almost identical between dealers. Despite the many benefits of a competitive market, there is little incentive for businesses to compete on the basis of fair terms.³³

Another reason to provide small business with equivalent protection to consumers is to ensure consistency in the application of the law, particularly within the same legislation. Many provisions of the ACL are applicable to both businesses (even large businesses) and to consumers.³⁴ It is strange, therefore, that the UCT

27 Ibid 48-55

28 Howell N, (2006) ‘Catching up with consumer realities: The need for legislation prohibiting unfair terms in consumer contracts’ *Australian Business Law Review*, p 447, 449.

29 Recently, Roger Brownsword has been taking a similar ‘transactional’ view in relation to his discussions of good faith: ‘Regulating Transactions’ (2009) Paper delivered to the Consumer Law Conference, University of Manchester.

30 Section 21(4) ACL.

31 See generally Nyuk Nahan, Eileen Webb ‘Unfair Contract terms in Consumer Contracts’ in *Consumer Law & Policy in Australia & New Zealand* (The Federation Press, 2013).

32 C Field, *Current Issues in Consumer Law and Policy* (Pearson Press, 2006) 67.

33 Nicola Howell.

34 Although there must be compliance with the technical definition of consumer before the

provisions only provide protection for consumers when it has been recognised, in the form of inter alia s18 and Part 2-2, that there is a need for small business protection from unfair business conduct. As one of the authors has noted previously:

Many contracts are used by both business and by consumers: for example mobile telephones. It defies common sense for a statute which promotes, inter alia, fair trading, to have the same contract subject to unfair contract terms provisions when a well-educated, experienced consumer purchases the telephone, but not when a less experienced, small businessperson does.³⁵

Part 2: Potential protections at common law and in statute for small businesses affected by unfair contract terms

Our suggestion is that since small business is left largely unprotected by the law in relation to substantive unconscionability and is subject to the impact of unfair contractual terms, other existing legal mechanisms need to be brought into play to ensure the fairness of B2B transactions. As far as the common law is concerned, these should largely centre around the construction of any exclusion clauses that may form part of these contracts as well as the interpretation, with the help of certain implied terms, of any other express terms that appear on their face to be unfair. Also, recent High Court authority may assist small businesses that are subject to onerous penalties for non-performance.³⁶ We will also discuss the possible application of the statutory unconscionability provisions in the ACL to unfair contract terms and the possible extension of the UCT provisions to small businesses.

The Common Law Revisited

Exclusion Clauses

The legal position is that for these clauses to apply the clauses must first be incorporated into the contract. Generally if they are included in a document which is signed by the small business person they will generally be incorporated. If they are in another document that is referred to in the signed document, there may be issues of notice, and the more onerous the exclusion clause, the more notice that is required.³⁷ Some protection is thus provided where an exclusion clause is

consumer guarantees in Part 3-2 will apply, in fact both large and small businesses can enjoy their protection in a variety of contexts: eg the purchase of several floors of office furniture by a large company would be a transaction covered by the consumer guarantees

35 Eileen Webb 'Considering unfairness in retail leases - A bridge too far or justifiable extension?' (2010) 19 *Australian Property Law Journal*, 58-102.

36 *Andrews v Australia and New Zealand Banking Corporation* [2012] HCA 30.

37 It should be noted that in *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 the High Court referred to a person signing '...a document which is known by that person to contain contractual terms...[being] bound by those terms...' If the document refers to

sought to be included in a contract by stealth. If they are incorporated into the contract, the exclusion clauses then need to be construed. The rule currently is, as approved by the High Court, that they are to be interpreted according to the ordinary rules of construction and only if there is any ambiguity are they to be read down, according to the *contra proferentum* rule.³⁸

In a contract involving unequal business contractors, there is a strong case for the *contra proferentum* rule to be applied *ab initio* rather than as a second resort when the meaning of the exclusion clause is ambiguous. Historically, before the enactment of the consumer legislation we have today, particularly the non-excludable consumer guarantees of acceptable quality, fitness for purpose etc exclusion clauses were always construed strictly against the party relying on them – see, for example, *Wallis, Son & Wells v Pratt & Haynes*³⁹ which reflects a clear judicial attempt to protect the weaker of the parties to the transaction. It would seem that this approach would be entirely appropriate in contracts between small business and ‘large business’.

In the case of *Photo productions v Securicor*, Lord Wilberforce stated, after taking the circumstances of the contract into consideration, ‘*In these circumstances, nobody would consider it unreasonable that as between these two equal parties⁴⁰, the risk assumed by Securicor should be a modest one and that Photo Productions should carry the substantial risk of damage or destruction.*’⁴¹ In this case, the exclusion clause was given its ordinary meaning and this was largely based on the equality of the parties. The application of this approach to contracts involving unequal commercial parties would require a different method of interpreting exclusion clauses. This would seem to follow logically from the *Photo productions* rationale.

Our suggestion is that since small business is left largely unprotected by the law in relation to substantive unconscionability and cannot make use of the legislative regime of unfair contractual terms, other legal mechanisms need to be brought into play to ensure the fairness of B2B transactions. This should include a particular approach to the construction of any exclusion clauses that may form part of these contracts. The exclusion clause must be strictly and narrowly construed so as not to unreasonably detract from the rights of the small business.⁴²

terms elsewhere there will be an issue as to whether sufficient notice has been provided of them and the fact of the signature per se will not satisfy this.

38 In *Darlington Futures Ltd v Delco Aust Pty Ltd* (1986) 16 CLR 500 the *contra proferentum* rule requires that where, according to the ordinary rules of construction, the words of the exclusion clause are capable of having more than one meaning, they are to be strictly construed against the interests of the party relying on the clause.

39 [1911] AC 394.

40 Authors’ emphasis.

41 *Photo Productions Ltd v Securicor Transport Ltd* [1980] 2 WLR 283.

42 The four corners rule which confines the operation of exclusion clauses to events which are in the contemplation of the parties could be of use to SB. See eg *Council of City of Sydney v West* (1965) 114 CLR 481

Implication of Terms

In relation to the construction of other terms that detract from the rights of small business, eg unilateral termination clauses or variation clauses, one approach may be to require the implication of terms in fact in order to give effect to the (presumed) intentions of the parties. The Privy Council case of *BP Refinery (Westernport) Pty Ltd v Hastings Shire Council*⁴³ laid down the following conditions that must be satisfied: (1) it must be reasonable and equitable, (2) it must be necessary to give business efficacy to the contract, (3) it must be so obvious ‘it goes without saying’, (4) it must be capable of clear expression and (5) it must not contradict any express term of the contract. These tests were approved by the High Court.⁴⁴ It is arguable that where there is an unqualified termination or variation clause it would be necessary to imply a term that would require a reasonable notice period for activation of these clauses. It is arguable that these five conditions would be satisfied including the more difficult (2) necessity for business efficacy⁴⁵ and (3) ‘so obvious it goes without saying’. The rationale for the implication of a term of this nature is that the small businessperson would only have entered into the contract if the term in question were to be activated in this way.

(Apart from not reflecting the intentions of the parties, a contract containing a clause which allows a contracting party to terminate the contract at any time, for no reason is arguably unsupported by consideration – the consideration is illusory because the promisor’s obligation to perform is in effect purely discretionary⁴⁶). The difficulties of implying a term in fact may be overcome by the implication of the duty of good faith as an implied term in law.⁴⁷ Good faith has been implied into specific classes of commercial contracts rather than having a more general application. These have included building contracts⁴⁸, commercial leases⁴⁹, franchise contracts⁵⁰ and loan contracts⁵¹ What does good faith require and how can it be measured? In Australian contract law there is precedent that good faith can be equated with reasonableness and that this includes some level of consideration for the interests of the other contracting party. Although the decision of the case turned on its own facts, in *Garry Rogers Motors (Aust) Pty Ltd v Subaru (Aust)*

Where the parties are unequal, there is some potency in the argument that even if the exclusion clause is clearly worded it cannot defeat the main object of the contract. In *Photo Productions*, arguable the main purpose was defeated, but the parties were of equal bargaining strength.

43 (1977) 180 CLR 266.

44 See eg *Codelfa Construction Pty Ltd v State Rail Authority of NSW*(1982)149CLR337

45 In *Attorney General of Belize v Belize Telecom* [2009]1WLR1988[23]-[27], as Lord Hoffman stated ‘...a contract may work perfectly well in the sense that both parties can perform their express obligations, but the consequences would contradict what a reasonable person would understand the contract to mean...’

46 See *Placer Development Ltd v Commonwealth* (1969) 121 CLR 353.

47 See *Burger King Corporation v Hungry Jack’s Pty Ltd* [2001] 69 NSWLR 558.

48 *Renard Constructions(ME) v Minister for Public Works* (1992)NSWLR 234.

49 *Alcatel Australia v Scarcella* (1998) 44 NSWLR 349.

50 *Far Horizons Pty Ltd v McDonalds Australia Ltd*{2000}VSC310.

51 *Commonwealth Bank of Australia v Renstel Nominees Pty Ltd*[2001]VSC167.

*Pty Ltd*⁵² Finkelstein J accepted that a duty of good faith might be implied to restrict the exercise of a right to terminate. In this way, the implication of a term of good faith could afford some protection to small business from unfairness.

Penalties

The recent decision in *Andrews v Australia and New Zealand Banking Corporation*⁵³ saw the High Court consider the scope of the courts' jurisdiction to relieve against penalties. In summary, the court rejected recent authorities that stated such relief was only available where fees were payable upon a breach of contract and concluded that a fee payable under a contract is a penalty where the purpose of the fee is to secure performance of a primary obligation. This widens the scope of the doctrine in that fees payable under a contract may be regarded as penalties even if they are not generated by a breach. In such cases the fee must represent a genuine pre-estimate of loss or the fee will be struck down as a penalty. On the other hand, if the fee is, in fact, a charge for further services or accommodation such fee will not be regarded as a penalty.⁵⁴

Therefore, a term of a contract that compels payment of a fee, even if not triggered by a breach of contract, may be scrutinised to determine whether the fee is a penalty. The only defence to a person imposing the fee is that it was either a genuine pre-estimate of loss or it was a legitimate fee for additional services. Prior to *Andrews*, skilful drafting meant that if such terms were drafted not on the basis of fees being payable on a breach of contract but in permissive terms such fees would avoid scrutiny as a potential penalty. The situation post-*Andrews* is, with respect, a more realistic approach where the substance of the fee is examined rather than the form in which the relevant term is drafted.

The decision may provide some relief for small business persons who are subject to (arguably) unfair terms requiring the payment of considerable fees for relatively minor breaches or even in circumstances not involving breach. If a term requires payment of a fee, as long as the fee is not for additional services, it will be scrutinised to ascertain whether such fee amounts to a penalty. If the UCT provisions were available in a business context, arguably a fee imposing a considerable penalty would be an unfair contract term – it would cause a significant imbalance between the party imposing the fee and the party the fee is being imposed upon. It is also arguable that an excessive fee would not be in the legitimate interests of the party imposing the fee and would be likely to cause considerable detriment. The decision in *Andrews* would seem, however, to address this situation by another route and one that would be available to small business. Any term imposing a fee to secure a primary obligation will necessitate an examination as to whether such term is a penalty. If the fee exceeds a genuine

52 [1999] FCA 903.

53 [2012] HCA 30.

54 *Metro-Goldwyn Mayer Ltd v Greenham* [1966] 2 NSWLR 717.

pre-estimate of loss (in other words is, arguably, unfair) it will not be payable.

Using the ACL - can section 21 ACL be used as a de facto method of addressing UCT in small business contracts?

This section of our article examines whether despite the exclusion of small business from the ambit of the UCT provisions, s21 ACL can ‘fill the void’ left by the unavailability of Part 2-3. This will be addressed by considering the various interpretations of ‘unfair’ and ‘unconscionable’, the background to the introduction of the unconscionable conduct and UCT provisions and comparing the respective scope of s21 ACL and s23 ACL.

Interpretation of unfair and unconscionable

First, the various meanings of ‘unconscionable’ and ‘unfair’ must be considered. Clearly, the terms ‘unconscionable’ and ‘unfair’ involve differing standards; the former being a more onerous standard than the latter. Indeed, because the definition of unconscionable has a higher threshold than the definition of unfair it will be harder to satisfy. This creates an obvious difficulty in trying to use unconscionability to address B2B matters involving unfair terms.

‘Fairness’ can attract a variety of meanings, including just, equal, good, ethical or moral. ‘Unfairness’ attracts similarly diverse interpretations. It must be said that the interpretation of unfair under the UCT provisions is narrower than in common parlance. The elements in s24 must be established and the requirement regarding detriment has been perceived as problematic.⁵⁵

On the other hand, as Strickland notes:

‘Unconscionable’ is a strong word. It is stronger than ‘wrong’ and stronger than ‘unfair’. It connotes conduct of a kind that attracts moral obloquy or an adverse moral judgment.⁵⁶

The interpretation of section 21 and that of its predecessor has been cautious. Although the consensus seems to be that a dictionary interpretation of ‘unconscionable’ is appropriate,⁵⁷ a high standard for the wrongdoing is required to evince unconscionable conduct in a commercial transaction.⁵⁸ Recently, some courts and tribunals have embraced the ‘gloss’ of moral obloquy to prevent the interpretation of ‘unconscionable’ becoming too unwieldy and more akin to a fairness standard.⁵⁹

55 Frank Zumbo, Promoting Fairer consumer conduct: Lessons from the United Kingdom and Victoria 2006 15 TPLJ 84

56 *Hall v Kennards Storage Management Pty Ltd* [2009] VCAT 153.

57 As discussed in Chapter 2.

58 *Hall v Kennards Storage Management Pty Ltd* [2009] VCAT 153; *Transaero Pty Ltd v Goulthorpe* [2009] VCAT 2146, [92].

59 *Attorney General of New South Wales v World Best Holdings Ltd* (2005) 63 NSWLR

Establishing unconscionable conduct, especially in a business context is a hard task. The dearth of cases exhibiting a successful plaintiff in commercial matters involving s51AC and now s21 is testament to the difficulty. The interpretive principles may provide additional flexibility and scope for the unconscionability provisions but, in our view, the existing standard will not be diluted. Would extension of the UCT provisions to small business make for an easier standard to meet? Although the necessity to establish the elements in s 23 complicates the process and is likely to make unfairness under the UCT provisions a more onerous standard than a dictionary definition, it would still seem less difficult to establish than unconscionable conduct. Having said this, the narrow scope of the UCT provisions and the likely exclusion of considerations of object and effect considerably reduce the provision's potential. On the other hand, despite the more onerous standard, the wider scope of s21 would appear to provide potentially more possibilities/relief for a small business person experiencing the ramifications of onerous contract terms.

Unconscionability in small business transactions

Although the possibility of a prohibition of unconscionable conduct could have been included in the TPA as early as 1976, a provision prohibiting unconscionable conduct in consumer transactions was not introduced until 1986 and s51AA, a prohibition impacting on commercial transactions, in 1992. The latter provision had practically no success as small businesses were treated in the same way as commercial parties of far greater size, resources and, often, business acumen.⁶⁰ For example, in *Australian Competition and Consumer Commission v C G Berbatis (Holdings) Pty Ltd*⁶¹ (*Berbatis*) the majority of the High Court approached the relationship between the landlord and the tenants as being on an equal legal footing, as both were commercial parties. Gleeson CJ concluded that the tenants had no legal entitlement to a new lease, and as such a disability routinely affects tenants at the end of a lease term, it could not be said to be a 'special' disadvantage⁶² in

557, 583 per Spigelman J, applied in, inter alia, *Canon Australia Pty Ltd v Patton* (2007) 244 ALR 759, 768. Such an approach has recently been the subject of criticism. In *Canon Australia Pty Ltd v Patton* (2007) 244 ALR 759 [4], Basten JA agreed that it was inappropriate to dilute the unconscionability standard but was concerned that the use of terms such as 'high moral obloquy' simply substituted one uncertain standard for another:

[T]o treat the word 'unconscionable' as having some larger meaning, derived from ordinary language, and then to seek to confine it by such concepts as high moral obloquy is to risk substituting for the statutory term language of no greater precision in an attempt to impose limits without which the Court may wander from well-trodden paths without clear criteria or guidance.

60 For example, this comment from the Shopping Centre Council of Australia is typical: 'businesses, unlike consumers, have sufficient knowledge of the contracting subject matter, have access to legal and other specialist advice and have sufficient bargaining power to resolve these matters without intervention by government.' Ibid 5.10.

61 (2003) 214 CLR 51.

62 (2003) 214 CLR 51, [15]: 'They were at a distinct disadvantage, but there was nothing "special" about it. They had two forms of financial interest at stake: their claims, and the

the sense known to equity. Gummow and Hayne JJ acknowledged that the tenants were in a vastly inferior bargaining position when compared with the landlord, but considered they were not under a disabling condition which affected their ability to make a judgment as to their own best interests. Callinan J responded in terms of commercial choice:⁶³ the tenants had a choice, to accept the unpalatable terms but secure the lease renewal, or to not accept and be unable to sell the business. The landlord was, in Callinan J's view, merely insisting on its legal rights and could not be considered unreasonable or unconscionable.⁶⁴ In 1998, in the wake of the Reid Committee's report that identified questionable business practices impacting upon small business lessees and franchisees, s51AC was introduced to prohibit unconscionable conduct in small business transactions. Section 51AC was one of the few provisions that distinguished between business sizes and, to an extent, power. Although the monetary threshold was unwieldy, it did highlight the fact that small businesses require protections when dealing with larger counterparts

The ACL addresses unconscionable conduct in ss 20-22. Section 20 is the equivalent of s51AA TPA and, it seems, will continue to have limited utility. Of more relevance to a small business person are ss21 and 22. Section 21 states:

- (1) A person must not, in trade or commerce, in connection with:
 - (a) the supply or possible supply of goods or services to a person (other than a listed public company); or
 - (b) the acquisition or possible acquisition of goods or services from a person (other than a listed public company);

engage in conduct that is, in all the circumstances, unconscionable.⁶⁵

sale of their business. The second was large; as things turned out, the first was shown to be relatively small. They had the benefit of legal advice. They made a rational decision, and took the course of preferring the second interest. They suffered from no lack of ability to judge or protect their financial interests. What they lacked was the commercial ability to pursue them both at the same time.'

63 'Whenever parties are in a business relationship with each other and they fall out over an aspect of that relationship, it will generally not be unreasonable or indeed unconscionable for them to seek to insist upon their legal rights, or to require that one party give up some right in exchange for the conferral of a new right upon that party...there is nothing special about a situation in which a tenant without an option is anxious to obtain a fresh lease, and the landlord, conscious of that anxiety, utilizes it to obtain a business advantage, whether by way of a higher rent or otherwise.' (2003) 214 CLR 51 [38].

64 Ibid.

65 Merely instituting legal proceedings or referring a matter to arbitration in relation to the supply or possible supply, or in relation to the acquisition or possible acquisition of goods or services will not, of itself, amount to unconscionable conduct. In determining whether a person has contravened s21(1)(b) the court may have regard to conduct engaged in, or circumstances existing, before the commencement of this section but (a) the court must not have regard to any circumstances that were not reasonably foreseeable at the time of the alleged contravention.

Section 22 contains a non-exhaustive list of factors to which the court can refer when determining whether conduct is unconscionable.

Section 21 (4) is relevant to our discussion of UCT. Section 51AC TPA was plagued for many years by uncertainties regarding the scope of unconscionable conduct: was it limited to the equitable doctrine or was it a wider concept? Was the section applicable to the substantive operation of a contract or did it apply only to the procedural stage of the contract? These questions were addressed in November 2009 with the release of ‘*The Nature and Application of Unconscionable Conduct Regulation: Can Statutory Unconscionable Conduct be Further Clarified in Practice?*’ and the appointment of an expert panel by the Commonwealth government to consider options for clarifying the scope of the unconscionable conduct provisions of the TPA.⁶⁶ The Expert Panel suggested a set of interpretive principles intended to provide general guidance. These interpretive principles are found in s21(4) ACL.⁶⁷

The Expert Panel noted that the purpose of the interpretive principles is to recognise that s 51AC (now s21 ACL) was intended to go beyond the scope of the equitable doctrine of unconscionability and that certain principles could be distilled from the case law; the intention of Parliament was that the court could consider the terms and progress of a contract- the provisions may apply to systems of conduct or patterns of behaviour; and the identification of a special disadvantage is not necessary to attract the application of the provisions.⁶⁸ Of particular relevance to this article is s21(4)(c):

- (4) It is the intention of the Parliament that:
- (c) in considering whether conduct to which a contract relates is unconscionable, a court’s consideration of the contract may include consideration of:
- i) the terms of the contract; and

66 The Issues Paper and appointment of the expert panel arose out of the Commonwealth Government *Response to the Senate Standing Committee on Economics, Report on the Need, Scope and Content of a Definition of Unconscionable Conduct for the Purposes of Part IVA of the Trade Practices Act 1974 (Cth)* <http://www.aph.gov.au/SENATE/committee/economics_ctte/tpa_unconscionable_08/gov_response.pdf> at 6 October 2013; report of the Senate Economics Committee, *The Need, Scope and Content of a Definition of Unconscionable Conduct for the Purposes of Part IVA of the Trade Practices Act 1974* (3 December 2008) <http://www.aph.gov.au/Senate/committee/economics_ctte/tpa_unconscionable_08/report/report.pdf> at 6 October 2013.

67 The Expert Panel concluded that a list of examples would not improve the understanding or implementation of the unconscionable conduct provisions. For the same reason, a set of principles which would operate as rebuttable presumptions of unconscionable conduct was also rejected.

68 The Expert Panel also recommended that further test cases be pursued to draw on conduct in diverse industries and assist in the understanding of the interpretative principles recommended by the panel.

- (ii) the manner in which and the extent to which the contract is carried out;

and is not limited to consideration of the circumstances relating to formation of the contract.

Section 21(4) makes it clear that s21 is concerned with both procedural and substantive unconscionability. This is significant because, as well as a consideration of the conduct of the supplier/acquirer as to the manner and extent the contract is carried out, a consideration of the terms of the contract is emphasised.

Section 22 includes several factors relevant to an assessment of *inter alia* the terms of a contract. Section 22(1)(j)⁶⁹ and (k) are of particular interest stating:

- (j) if there is a contract between the supplier and the customer for the supply of the goods or services:
 - (i) the extent to which the supplier was willing to negotiate the terms and conditions of the contract with the customer; and
 - (ii) the terms and conditions of the contract; and
 - (iii) the conduct of the supplier and the customer in complying with the terms and conditions of the contract; and
 - (iv) any conduct that the supplier or the customer engaged in, in connection with their commercial relationship, after they entered into the contract; and
- (k) without limiting paragraph (j), whether the supplier has a contractual right to vary unilaterally a term or condition of a contract between the supplier and the customer for the supply of the goods or services...

Several other factors in s22 are also relevant to terms in B2B contracts, for example ss22 (e),(f),(g),(h) and (l).

This raises the obvious question - in the absence of UCT provisions applying to small business transactions, could s21 be used by a small business person to challenge an unfair contract term? In other words, in what circumstances can the inclusion of and/or the enforcement of an unfair contract term amount to unconscionable conduct under s21 ACL?

69 And s22(2)(j) (ii).

Unfair contract terms

Much of the background to the introduction of the UCT provisions has been canvassed elsewhere in this volume. For the purpose of this article it is instructive to note that legislation addressing UCT was regarded as necessary because, *inter alia* in many cases, unfair contract terms ‘fell through the cracks’ because the conduct did not come within the elements of other provisions in the TPA and due to doubts as to the applicability of the unconscionability provisions, especially in relation to the substantive stage of a contract. Initially, it was contemplated that the ACL would include provisions that would extend the UCT provisions to business-to-business transactions⁷⁰ because

[s]tandard-form contracts are used by parties irrespective of the legal status or nature of the party to whom the contract is presented, and without any effective opportunity for that party to negotiate the term. In such cases, it would be invidious to suggest that the same term, which may be considered unfair in relation to a contract entered into by a natural person, would not be similarly unfair in relation to a business, where neither of them is in a position to negotiate the term.⁷¹

Perhaps not surprisingly, there was a torrent of criticism from large business interests, in particular the Shopping Centre Council of Australia and some members of the legal profession⁷² and academia.⁷³ A proposal to limit the extension to small businesses⁷⁴ did not quell concerns, and the provisions were removed from the proposed legislation.⁷⁵ Therefore the UCT provisions are confined to standard form consumer contracts.⁷⁶

70 The Treasury, ‘Consultation on Draft Unfair Contract Terms Provisions’ (11 May 2009) Commonwealth of Australia, Canberra. <http://www.treasury.gov.au/documents/1537/PDF/The_Australian_Consumer_Law_Consultation_Paper.pdf> at 6 October 2013.

71 Ibid 8.

72 In particular the Trade Practices Committee of the Law Council of Australia.

73 Professor John Carter, Freehills Submission in response to ‘Consultation on Draft Unfair Contract Terms Provisions’, *ibid*.

74 In June 2009, the then Minister for Competition Policy, the Hon. Chris Bowen, announced that there would be a upfront price cap of \$2 million on the size of transactions that would be subject to the unfair contract terms ban. Later that month, however, the new Minister narrowed the provisions to business-to-consumer contracts.

75 Note comments too of Senate Economics Committee Trade Practices Amendment (Australian Consumer Law) Bill 2009 (7 September 2009) [5.18] <http://www.aph.gov.au/Senate/committee/economics_ctte/tpa_consumer_law_09/report/report.pdf> at 6 October 2013..

76 Definition of consumer contract Section 2(3): ‘A *consumer contract* is a contract for: (a) a supply of goods or services; or (b) a sale or grant of an interest in land; to an individual whose acquisition of the goods, services or interest is wholly or predominantly for personal, domestic or household use or consumption.’

The respective scope of the unconscionability and the UCT provisions

The UCT provisions have a relatively narrow focus on the unfairness of a particular *term* whereas s21 permits a broader assessment of *conduct*. The scope of s21 extends to consideration of the terms of a contract and the manner and extent to which the contract is carried out. Moreover, it is now clear that the court may consider both the procedural and substantive stages of the contract when assessing whether conduct is unconscionable.⁷⁷

Like consumer contracts, some B2B terms are objectionable on their face and the UCT provisions, if extended to B2B contracts, would be applicable. As an exemplar, we can again use, as we did above⁷⁸ a rather extreme (but existent) clause that permits a supplier to terminate a supply agreement without notice. It seems likely that such a term would offend s23: it causes a significant imbalance in the parties' positions; it would seem to be unreasonable in terms of a business's legitimate dealings⁷⁹ and would almost invariably cause detriment. The term would seem to fit within the factors in s25(1) (a) and (b) and , in appropriate circumstances, possibly (e) and (h). In such a case, the UCT would be useful to the businessperson.

However, there also seems no reason why reliance on such a term could not equally be unconscionable. Although earlier decisions doubted that merely exercising the terms of a contract agreed between two commercial parties can be regarded as unconscionable,⁸⁰ more recent authorities recognise that in the right circumstances, enforcement of strict contractual rights by one party can evince unconscionable conduct.⁸¹

Section 21 extends to the terms of the contract *and the way the terms are carried out*.⁸² Several factors in s22 support a contention that seeking to enforce an unfair term could, in the appropriate circumstances, amount to unconscionable conduct. Section 22(1)(a) permits an examination of the relative strengths of the parties' bargaining positions. 'Bargaining position' is broad and could refer to the weaker party's position vis-à-vis the other party to the contract. In comparison s24(1)(a) ACL necessitates a consideration of whether the potentially unfair term causes significant imbalance. These provisions appear to overlap as, in a consideration

77 Section 21(4).

78 Page 143

79 This is presumed to be the case so the supplier would have to rebut.

80 In *Hurley v McDonald's Australia* (2000) ATPR 41-741,[22]it was noted that:
before sections 51AA, 51AB, or 51AC will be applicable, there must be some circumstance other than the mere terms of the contract itself that would render reliance on the terms of the contract 'unfair' or 'unreasonable' or 'immoral' or 'wrong'.

81 Corones [5.65] and reference therein.

82 *Competition and Consumer Legislation Amendment Bill 2010, Explanatory Memorandum* at [2.25].

of unconscionable conduct, the more significant the difference (imbalance) in the parties' bargaining positions, the more likely it seems unconscionable conduct could have occurred. Section 22(1)(b) is very similar to section 24(1)(b), the crux of establishing an unfair contract under the ACL. Under the UCT provisions, there is a presumption that the term is not in the stronger party's legitimate interests.⁸³ This is not the case with s22 so the plaintiff must discharge the burden of proof. It has been suggested that principles of good faith and reasonableness will be relevant to an interpretation of s22(1)(b). It is uncertain if this will be the case with the UCT provisions. Indeed, if a restrained interpretation of the UCT provisions is adopted s22(1)(b) would seem to have a wider operation.

Pursuant to s22(1)(d) an improper use of a contractual term could indicate the use of unfair tactics. Unless a wider interpretation of the UCT provisions is embraced, this use would be irrelevant unless there is unfairness on the face of the term. Again, if the focus of the ACL is on the terms themselves, s21 and 22 seem to provide the opportunity for a more expansive consideration, as does s22(1)(f), which permits a consideration of the extent to which the supplier's conduct towards the business consumer is consistent with the supplier's conduct in similar transactions. A term exercised in respect of one business and not another could suggest discrimination between businesses, and after a consideration of all the circumstances there could be a finding of unconscionable conduct. Similar considerations could apply in relation to willingness to negotiate. An obvious point of comparison is section 22(1)(j) which will involve a consideration of the procedural issue of whether there was negotiation involving the clause to the term itself and the conduct engaged in by the other party. Section 22(1)(k), permits a consideration of whether the supplier has a contractual right to vary unilaterally a term or condition of a contract between the supplier and the business consumer for the supply of goods or services.⁸⁴ This would permit a wider examination of context. Finally, good faith is noted as a consideration in an assessment of unconscionable conduct.

The considerations in s22 have considerable importance as, in practice contractual terms may appear benign on the surface but the *effect* of their exercise or the *object*

83 Above n 8 [4.8]: 'It would be a huge impediment for an individual claimant to prove either of these matters, as they are unlikely to be able to bring evidence before a court without disproportionate effort and expense. A regulator would need to use intrusive and expensive coercive information-gathering powers to obtain the required information to bring a case.'

84 ***Terms permitting unilateral changes by one party to the contract***
 Paragraphs (a), (b), (d), (e), (f), (g) and (h) are examples of types of terms that allow a party to make changes to key elements of a contract, including terminating it, on a unilateral basis.
 [2.55] The inclusion of these examples does not prohibit unilateral variation terms, nor does it create a presumption that such terms are unfair. Indeed, the need for the unilateral variation of contract terms is expressly contemplated by legislation in specific contexts, including for example Parts 4 and 5 of the *Uniform Consumer Credit Code* (see also Parts 4 and 5, Schedule 1 of the National Consumer Credit Protection Bill 2009).

behind their exercise may be harsh.⁸⁵ For example, complaints from retail tenants are almost invariably in the context of a landlord's *conduct*, not the terms of the lease;⁸⁶ it is the manner in which the landlord exercises a clause or the motive behind the exercise that causes most consternation.⁸⁷ On the present drafting of the UCT provisions, it seems such factors are unlikely to be considered by a court when assessing unfairness. The Commonwealth legislature narrowed the scope of the ACL UCT provisions in comparison to that of Victorian and UK equivalents. The latter provisions provided for consideration of the object and effect of a term, a consideration of 'all the circumstances' and good faith. The absence of these factors suggests that s23 will have a narrower scope – more focussed on the term itself – rather than the potentially wider view taken elsewhere. Although the court must examine the contract as a whole, its transparency and is not limited by the factors listed in s25, the ACL is silent on how far the court can go beyond the term itself to the *effect* of the clause and certainly the *motive* behind its exercise. If this is the case, the scope of s23 may be limited only to terms that are brazenly unfair on the surface. The incidence of this will inevitably decline with a rise in awareness of the ACL and contractors will find other ways to achieve their ends. In our view, such an interpretation will artificially limit the UCT provisions preventing a court from looking beyond the term's form and considering its mode of application or the reason for its exercise. If this is the case, however, even if s23 was extended to cover small business, it would often be of limited use.

Remedies

As discussed, depending on how the courts regard cases of alleged unconscionable conduct involving the terms of a contract, s21 may provide small businesspersons some relief from the existence and effect of unfair contract terms, despite the unavailability of the UCT provisions. Interestingly, the remedies available under s21 may be of more use to a small business person than those under the UCT provisions. If a contract term is unfair it will be void. If the contract can continue without the term it will do so. If the contract cannot continue without the relevant term, the contract will be set aside. Compensation can be awarded for any loss occasioned by the operation of the term.⁸⁸ On the other hand, a contravention of the unconscionability provisions can result in a civil pecuniary penalty in addition to a variety of enforcement powers and remedies including compensatory orders under s237.

85 Eileen Webb 'Considering unfairness in retail leases - A bridge too far or justifiable extension?' (2010) 19 *Australian Property Law Journal* 58, 62.

86 *Ibid.*

87 Indeed, retail leases are highly regulated pursuant to the various state and territory retail leasing legislation so it is unlikely that a term drafted to comply with the relevant legislation would be held to be unfair.

88 Section 236

Conclusions

This article has argued that the many protections available to consumers in their contracts with commercial entities highlights the dearth of protection available to small business in B2B contracts with larger players. In our view, the diversity of size, composition and experience of small-businesses and, in many cases, the similar vulnerabilities shared with consumers renders it inequitable for only some members of what is in fact a class of ‘consumers’ to receive statutory protection. The adoption of a status driven dichotomy⁸⁹ that cuts an arbitrary legal line between consumers and business⁹⁰ distorts the perspective from which the legislature and the courts proceed.⁹¹

However, when we examine the common law and statutory provisions available to small business, this perceived lack of legal protection for small business may be more apparent than real? Indeed, under the common law there is clearly scope for established doctrines to be utilised to provide small business with some protection when they contract with their larger counterparts. In this same context, there may need to be a return to the underlying rationale of some principles of interpretation so they are true to their purpose.

Similarly, s21 ACL is likely to provide some assistance to a small businessperson in some such circumstances. Section 21(4) clarifies the scope of the statutory unconscionability provisions and it is clear that the provisions apply to terms in a contract and to the substantive performance of a contract. While this is a promising development, the lofty standard required to establish unconscionable conduct may tell against the success of a small businessperson except in the light of the operation of the most arduous term. On a positive note, the factors in s22

89 Larry Garvin, ‘Small Business and the False Dichotomies of Contract Law’ (2005) 40 *Wake Forest Law Review* 295.

90 *Ibid.*, 296. See too Rick Bigwood An example of this approach can be seen in the Australian decision, *Australian Competition and Consumer Commission v C G Berbatis (Holdings) Pty Ltd* (2003) 214 CLR 51 (*Berbatis*) where the majority of the High Court approached the relationship between the landlord and the tenants as being on an equal legal footing, as both were commercial parties. Gleeson CJ concluded that that the tenants had no legal entitlement to a new lease, and as such a disability routinely affects tenants at the end of a lease term; it could not be said to be a ‘special’ disadvantage in the sense known to equity. Gummow and Hayne JJ acknowledged that the tenants were in a vastly inferior bargaining position when compared with the landlord, but considered they were not under a disabling condition which affected their ability to make a judgment as to their own best interests. Callinan J responded in terms of commercial choice. In this respect the High Court’s approach can be likened to Garvin’s discussion of the ‘rational actor’ model. Professor Bigwood is critical of the High Court’s approach: “I criticise the majority judges’ rather perfunctory handling of the facts of the case, which was made worse by their failure to link the elements of unconscionable dealing to a sophisticated conceptual account of interpersonal exploitation in market exchange contexts”: Bigwood, ‘Curbing Unconscionability’

91 Indeed, Bigwood notes that: ‘Taken too far, those classifications can become akin to caricatures.’

provide licence to take a wider, contextual view of the contractual term. The UCT provisions seem focused on ‘discrete’ rather than relational transactions⁹² whereas the factors in s22 permit a consideration of the wider relationship of the parties and the circumstances of the term’s operation.

Also, even if the UCT provisions of the ACL were extended to small business there may be considerable limitations on their efficacy for small business. ‘Unconscionable’ is a more arduous legal standard than ‘unfair’ and the definition of UCT in the ACL has little resemblance to a dictionary definition of ‘unfair’. Also, if the interpretation of the UCT provisions is limited to an assessment of unfairness on the term’s face, many contract terms are unlikely to be sanctioned. For example, terms in a B2B contract may be justified as legitimate in a commercial environment but not in a consumer scenario. Also, if contractual terms must comply with prescribed legislation or codes of conduct, for example retail leases and franchise contracts such terms will, presumably, be regarded as fair.

With this in mind, we conclude it is logical to deal with all UCT – consumer and B2B – in one provision. In some cases, the conduct may arguably be unconscionable too and the terms or its use can be considered in that context. But, it seems unnecessary to manipulate the common law, albeit logically, and/or s21 to ‘fit’ a set of circumstances because a provision that is already in existence is inadequate. Commentators have encapsulated the numerous valid economic and moral reasons for regulating unfair contract terms.⁹³ If conduct is inappropriate – and a term of a contract is unfair – it should not matter to whom it is directed.

92 Luke Villiers, Eileen Webb ‘Using relational contract principles to construe the landlord-tenant relationship: Some preliminary observations’ (2011) 1 *Property Law Review* 1.

93 See F Zumbo, ‘Dealing with Unfair Terms in Consumer Contracts: Is Australia Falling Behind?’ (2005) 13 *Trade Practices Law Journal* 70; N Howell, ‘Catching up with Consumer Realities: The Need for Legislation Prohibiting Unfair Terms in Consumer Contracts’ (2006) 34 *Australian Business Law Review* 447.

The Applicability of Unfair Contract Terms Legislation to Franchise Contracts

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BRIEF ABSTRACT

In 2010, the Commonwealth Parliament implemented a new Australian Consumer Law (ACL).¹ This law, for the first time in Australia, regulates unfair terms in standard form contracts, but is limited to contracts classed as consumer contracts.² This article argues that it is appropriate to extend the unfair contract terms (UCT) provisions of the ACL beyond the definition of consumer under the ACL to encompass franchisees as consumers in a business context, and it explains the flaws in the principal arguments against the protection of franchisees under the UCT legislation. As discussion of the scope of UCT often centres on the 'business' versus 'consumer' distinction, this article explains why this distinction detracts from the proper focus of analysis, a focus that consists of the two principal elements of the UCT provisions: unfair terms and standard-form contracts.

INTRODUCTION

In 2010, the Australian government introduced national consumer protection laws that, for the first time, include unfair contract terms (UCT) provisions preventing enforcement of terms deemed to be 'unfair' in standard-form consumer contracts, including telecommunications, financial services, utilities, e-commerce, travel and professional services.³ The new measures represent an important step in the development of the national economic landscape to one in which economic

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1 The ACL is contained in schedule 2 of the *Competition and Consumer Act 2010* (Cth). The states and territories have agreed to introduce and enact mirror legislation applying the ACL. Council of Australian Governments, *Intergovernmental Agreement for the Australian Consumer Law* (2009) cl 3.2.

2 ACL pt 2-3.

3 The provisions are contained in the *Australian Consumer Law* ('ACL') within the *Competition and Consumer Act 2010* (Cth) and the *Australian Securities and Investment Commission Act 2001* (Cth), Schedule 2 to the *Australian Competition and Consumer Act 2010* (replacing the *Trade Practices Act 1974*).

efficiency and consumer confidence is founded on quality and trust between the contracting parties.

Despite this development in the regulation of business-to-consumer transactions, however, the new UCT regime does not apply to business-to-business interactions.⁴ Opponents to the extension of UCT legislation to franchising claim that it should not apply because franchisees are not consumers. This article argues that not only do franchisees play the role of consumers, but also the consumer/business distinction is not the proper focus of debate over the scope of the legislation. Rather, it suggests that the essence of UCT, and the proper focus of debate, is the existence of unfair terms in standard-form contracts.

Unfair terms are defined in the legislation as terms that would cause significant imbalance in the parties' rights and obligations, are not reasonably necessary in order to protect the legitimate interests of the drafting party and result in detriment to the other party.⁵ The standard-form contract, according to the legislation, is one where the drafting party has all or most of the bargaining power, and that party generally prepares the contract before any discussion relating to the transaction occurs between the parties, leaving the other party to either accept or reject the terms of the contract without substantive negotiation.⁶ Franchising is the paradigmatic example of this arrangement; unfair terms in standard-form franchise agreements like those listed in section 25 of the ACL represent the norm, rather than the exception, in franchising. The primary reason, then, why franchisees should be covered under the UCT provisions is that they are in precisely the situations that the legislation targets.

Debate over the Elements and Application of UCT Legislation in Australia

Content control legislation describes a set of prescriptive regulatory tools that are commonly used to regulate standard-form contracts, to protect the interests of a weaker contracting party who may not have the benefit of negotiating terms. Legislation dealing with UCT is a form of content control legislation, mandating compulsory rules with respect to particular terms deemed to be unfair; it is often applied to transactions with consumers in a particular trade or sector.⁷ While content control in general and UCT in particular have largely been limited to consumer protection, they can also extend to the protection of business participants, such as those in franchising.⁸ The application of the UCT legislation is, however, limited

4 Section 3 of the *Competition and Consumer Act 2010* (Cth) defines a 'consumer'.

5 *ACL* s 24.

6 *ACL* s 27.

7 *Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts* [1993] OJ L 95/29 (where 'Council' means the Council of the European Communities). See also Hugh Collins, *Regulating Contracts* (Oxford University Press, 1999) 236.

8 Though uncommon, contractual content control has been used in several jurisdictions that regulate business, including the United Kingdom's *Unfair Contract Terms Act 1977*, which prevents the unreasonable exclusion or limitation of liability for matters such as negligence

to consumer contracts as defined in the ACL s 23(3) with a focus on the use of the goods or services:

A consumer contract is a contract for: (a) a supply of goods or services; or (b) a sale or grant of an interest in land; to an individual whose acquisition of the goods, services or interest is wholly or predominantly for personal, domestic or household use or consumption.⁹

This issue has a history in Australia. In 1997, the Reid Report advocated unfair contract prohibitions to replace standards of unconscionability.¹⁰ The proposal encountered opposition at the time and the government chose to develop the doctrine of unconscionable conduct, contrary to the Report's recommendations.¹¹ A similar dynamic was repeated when UCT provisions in the ACL were proposed to be applicable to business. While both Labor and the Coalition initially seemed in favour, the Labor government withdrew its support and the inclusion of franchising as a protected interest under the UCT provisions of the new ACL was abandoned.¹²

Today, the matter is far from settled. In January 2013, the Abbott Coalition proposed to extend the UCT provisions to small business to 'ensure that big and small businesses get a "fair-go" and do the right thing by each other in their

or defective products. The German Civil Code (*Bürgerliches Gesetzbuch*) § 305 deals with contracts having 'standard business terms', § 306 prohibits circumvention, § 307 sets out when a standard business term is invalid (including if it is not clear and comprehensible), § 308 and § 309 provide a 'black list' of terms that are invalid in standard business terms but subject to § 310, which provides absolute protection for consumers but qualified protection for business having 'due regard to the customs and practices applying in business transactions'. South Africa's *Consumer Protection Act* regulates UCT in various sectors of business including franchising. See also Elizabeth Crawford Spencer, *The Regulation of Franchising in the New Global Economy* (Edward Elgar, 2011), for a discussion of UCT and other means of content control for regulating the franchise sector.

9 *ACL s 23(3)*. Note that equivalent provisions regulating unfair terms in these contracts have been introduced into the *Australian Securities and Investments Commission Act 2001* (Cth) pt 2 div 2 sub-div BA, inserted by Trade Practices Amendment (Australian Consumer Law) Act (No 1) 2010 (Cth) sch 3 item 7.

10 Recommendation 6.1 of the House of Representatives Standing Committee On Industry, Science and Technology, *Finding a Balance – towards Fair Trading in Australia*, Parl Paper No 83 (1997) 157-8 (the 'Reid Report') <<http://www.aph.gov.au/binaries/house/committee/isr/fairtrad/report/covers.pdf>>.

11 Eileen Alanna Webb, *From the Reid Committee to the Appointment of the Expert Panel: An Assessment of the Efficacy of Section 51AC Trade Practices Act 1974 (Cth) in Australian Retail Leasing* (PhD Thesis, University of Western Australia, 2010) 5.

12 Franchisees were excluded from coverage under UCT at a late stage in the legislative process. In response to an invitation to interested parties to comment on the proposed framework, Treasury received a total of 96 submissions opposing protection for small business. Reasons cited were compromise of certainty of contract (as a party to a commercial bargain could later try to get out it by alleging that the terms are unfair, increasing risk and ultimately prices), small business' capacity to understand and manage risk, and the absence of evidence of a real need or policy justification: Treasury, Australian Government, *Submissions: The Australian Consumer Law – Consultation on Draft Provisions on Unfair Contract Terms* (3 June 2009) <<http://archive.treasury.gov.au/contentitem.asp?ContentID=1547&NavID>>.

respective marketplaces, delivering real and lasting benefits to consumers.¹³ Similar uncertainty exists in international jurisdictions, with both New Zealand and the United Kingdom currently considering how to deal with UCT in a business context. This article examines whether it is indeed appropriate to exclude franchising as part of business-to-business contracts as an entire class of transactions from unfair contract protections. It does this by considering the essential components of the legislation and the applicability of these components to franchising.

Prior to the enactment of the ACL, there was debate among those in favour of and those against UCT for the franchise sector. The outcome was the exclusion of franchising from protections afforded by the UCT because a franchisee is a businessperson and not a 'consumer'. The distinction between business and consumer is problematic, however. To suggest that franchisees as businesspeople are not consumers is not legitimate and is even a red herring in a world where '[t] here is no universally accepted definition of consumer'.¹⁴ To exclude business interactions from the protection of consumer legislation on this basis is artificial; business is already subject to all kinds of legislated rule making, much of it intended to curb unfair practices. Businesses are consumers, whose confidence in efficiency, fairness and certainty are important to any economy. The idea that business contracting does not require consumer-like protections reflects the classical view of commercial contracting, but pays no regard to the wide ranges of business experience, skills and other relevant attributes of many participants in business, including but not limited to franchisees.

A franchisee's position is tantamount to that of a consumer vis-à-vis the franchisor. Indeed, the entire franchise system can be seen as a product that the franchisee is purchasing and investing in. The fact that a franchisee functions as a consumer of a franchisor's intellectual property, products and services is unquestioned; it is just the categorisation of a franchise business arrangement as a consumer transaction that has given pause. The fact that a franchisor is selling a product, a license, and a franchisee is the consumer of that product, suggests that there should be some minimum protections for the consumer of that product.¹⁵

Ironically, the protection of small business was part of the rationale behind the definition of consumer, which 'was a direct result of the Swanson Committee's recommendations which required it to fulfill three criteria: to be certain, to redress the inequality of bargaining power between suppliers and consumers

13 Liberal Party of Australia, *Our Plan: The Direction, Values and Policy Priorities of the Next Coalition Government* (26 January 2013) <http://australianpolitics.com/downloads/liberal/13-01-26_our-plan_liberal-party.pdf p 27>.

14 Aviva Y M Freilich, 'A Radical Solution to Problems with the Statutory Definition of Consumer: All Transactions Are Consumer Transactions' (2006) 33 *University of Western Australia Law Review* 110-111 <<http://www3.commonlii.org/au/journals/UWALa-wRw/2006/5.pdf>>.

15 No jurisdiction has yet instituted, nor has case law implied, statutory warranties for the sales of franchises.

and to provide protection for small business'.¹⁶ A paramount consideration in consolidating the seventeen different pieces of Federal, State and Territory consumer protection legislation into the ACL was the need to provide a national uniform set of consumer protections laws that were 'clear and consistent' for consumers and made compliance easier for businesses. That purpose is no less valid for business consumers than for other types of consumers.

The leading justifications for excluding businesses such as franchisees from UCT were the interests of certainty in contracting, the capacity of franchisees to protect themselves against risk and the lack of policy justification.¹⁷ This article takes issue with each of those arguments. First, the application of the protection would not threaten certainty of contract because the legislation directs that the offending term be severed wherever possible and that the remainder of the contract continue.¹⁸ More to the point is the question of whose certainty would be threatened: 'Certainty is desirable in the commercial sphere but should be applicable to all players.... The weaker party has little certainty about their business environment or its continuity and the contracts they sign invariably contain wide discretions which favour the stronger party.'¹⁹ It is well established that franchise contracts are drafted by franchisors such that all discretion and flexibility inheres with them, and franchisees must live with the uncertainty and increased risk that this entails. The argument that extending UCT to franchising will threaten certainty in contracting is really an argument that it will threaten certainty for one party, the franchisor, the drafting party, the party with the greater power, and the party that would be imposing the unfair term in the first place. The certainty that is threatened is the certainty of a franchisor being able to rely on terms that would ordinarily be regarded as unfair in scope or application. Surely, this is not the kind of certainty in contracting that legislators seek to reinforce.

16 Freilich, above n 14, 112: Notes that the current definition of consumer in the Act is potentially unclear and uncertain...only sometimes redresses inequalities between buyer and seller. ...and fails to live up to expectations that it would provide protection for small business. Emphasis added.

17 See Treasury, above n 12. See also Chapter 6 of the Reid Report, which also refuted these positions and in particular:

The Committee considers that primary responsibility...rests with the Parliament and that the Parliament would be neglecting its duty if it failed to deal with these injustices in the vain hope that the courts might deal with them better.

The Committee does not accept that the equitable doctrine of unconscionability embodied within Section 51AA of the Trade Practices Act is capable of dealing with the types of conduct complained about to this inquiry and considers that a broader provision is required...

The Committee believes that it is necessary to amend the Trade Practices Act 1974 to provide a general statutory standard of fairness in commerce broader than the present equitable doctrine of unconscionability. [6.21]

18 *ACL* s 23(2): The contract continues to bind the parties if it is capable of operating without the unfair term.

19 Webb, above n 11, 433 citing the Reid Report, above n 11, [6.35], [6.70].

Secondly, small business operators such as franchisees do not necessarily have a greater capacity than consumers to understand and manage risk. A great deal has been written on the shifting of risk to franchisees and their lack of capacity to protect against, or indeed to even comprehend, that risk:

[A] significant body of existing empirical research [refutes] the assumption that franchisees consider all relevant information before signing a franchise contract and make a well-informed choice. ... New franchisees that join a franchise network normally lack prior business ownership experience [that] presents significant cognitive obstacles for novice franchisees when attempting to consider all of the relevant information before acquiring ownership of a franchise unit. Such cognitive obstacles—contrary to the franchisor advocates' view—often lead franchisees to ignore franchise disclosure documents, avoid conducting a comparison between various franchise contracts and disclosure documents, and neglect to consult with a specialized franchise attorney prior to signing the franchise contract. Given this reality, theoreticians and legislators interested in creating franchise laws that protect novice franchisees from possible opportunism by franchisors must cast doubt on the assumption that franchisees are well-informed business people and incorporate into their analyses a more representative conception of franchisee characteristics.²⁰

Finally, there is an important policy justification for the inclusion of small business under the UCT legislation. The principle, stated repeatedly in the regulation of business-to-business transactions, is to support small business, the 'engine room of the economy', by ensuring that unfair practices do not destabilize the efficient conduct of ordinary business activities.²¹ Whether contract terms are unfair is in no way dependent upon an arbitrary determination of the status of a person as a 'consumer' or as a 'business', and such categorisation should not be used to explain away egregious conduct or to exclude small business from the protections afforded by the appropriate legislated measures. Reliance on disclosure in the regulation of the franchise sector has been unsuccessful, as is evidenced by the ongoing inquiry and debate into market inefficiencies and unfairness. These issues are raised repeatedly yet remain unresolved, perhaps because so many recommendations made over the last 20 years to improve the regulation of the sector have not been adopted by Government. The Reid Report (1997), the Matthews Review (2006), the Senate Standing Committee Recommendations (2010), not to mention various State inquiries, considered and rejected recommendation to change.²² The publicly

20 R Emerson and U Benoliel, 'Are Franchisees Well-Informed? Revisiting the Debate over Franchise Relationship Laws' (2013) 76(1) *Albany Law Review* 193-216, 194.

21 Reid Report, above n 10, v.

22 Reid Report, above n 10; Report to the Hon Fran Bailey MP Minister for Small Business and Tourism, *Review of the Disclosure Provisions of the Franchising Code of Conduct* (31 October 2006) ('Matthews Report') <http://www.innovation.gov.au/Section/SmallBusiness/Documents/Franchising_Code_Review_Report_2006_FINAL_06120720070205134250.pdf>; Inquiry into Franchising by the Parliamentary Joint Committee on Corporations and

available submissions made to the current Wein Review into franchising suggest that the same abuses that were reported decades ago continue unabated today.²³ The fact that unfair conduct continues to impact on the performance of small business is the policy imperative for more effective regulation.

Perhaps the most significant problem with the assertion that regulatory measures such as UCT are inappropriate for a franchisee is that a franchisee's consumer attributes should not be determinative of the need for UCT protections. It was only at a late stage in the legislative process that the 'consumer-only' element was included, no doubt due to the political exigencies of the process, including the submissions to that process, predominantly from trade associations and other medium-to-large business interests. Whether a party has consumer-like attributes, however, need not constitute an essential element of the UCT provisions.²⁴

Independent of the consumer requirement, the determinative elements of UCT under Australian law are 1) unfair terms and 2) a standard-form contract. To exclude franchisees from unfair contract terms protections is to ignore the compelling justifications for their inclusion. It is to focus on the wrong point, whether a franchisee is a 'consumer', and to ignore the weight of more important factors, namely that franchise contracts are standard-form agreements and that they exhibit unfair terms. Both of these factors are clearly exhibited in the franchise contracting relationship. Further, the entire list of examples of unfair contract terms in the legislation at s 25 are the kinds of terms that are commonly found in franchise contracts.

Why Franchising Should Be Covered in the Unfair Contract Terms Legislation

The UCT law is based on recommendations of the Productivity Commission in its 2007 Review of Australia's Consumer Policy Framework, where the emphasis is clearly on the unfair terms in standard-form contracting that causes detriment, to be interpreted taking into account all the circumstances of the contractual relationship. The Final Report Recommendation 7.1 states that the national law should have a provision that prohibits unfair terms and that the preferred approach would have the following features:

[A] term is established as 'unfair' when, contrary to the requirements of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract; there would need to be material

Financial Services, *Opportunity Not Opportunism: Improving Conduct in Australian Franchising* (1 December 2008).

23 Department of Industry, Innovation, Climate Change, Science, Research and Tertiary Education, *Submissions Made to the 2013 Review of the Franchising Code of Conduct* <<http://www.innovation.gov.au/SmallBusiness/CodesOfConduct/Pages/Submissions-made-to-the-2013-review-of-the-Franchising-Code-of-Conduct.aspx>>.

24 See Freilich, above n 14.

detriment to consumers (individually or as a class); it would relate only to standard-form, non-negotiated contracts; ...and it would require all of the circumstances of the contract to be considered, taking into account the broader interests of consumers, as well as the particular consumers affected.²⁵

Looking at these factors separately, we first consider the standard-form nature of the franchise agreement.²⁶ In its 2008 report, the Productivity Commission in Australia found, '[u]nfair terms appear to be commonplace in standard-form contracts,²⁷ and that:

terms of the kind described as unfair... are common in many contracts across many industries ... their existence is widespread globally where regulatory mechanisms do not discourage this. ...In Europe, prior to the introduction of measures against them, market studies revealed the ubiquity of unfair terms in standard-form contracts. Despite the benefits of the standard-form contract in reducing transactional costs and ensuring a uniformity of terms for the delivery of goods or services, its prevalence has led to a reduction in the classical form of contract, that is a meeting of minds where both parties negotiate the terms of the contract as equals.²⁸

Standard-form contracts typically allow one party to impose terms upon the other on a 'take it or leave it' basis. Where the relative bargaining position of the parties is unequal or other market forces affect the ability of one party to negotiate effectively, a real risk of unfair conduct arises.

In Australia, business-to-business contracts were originally contemplated in the UCT legislation in large part because of the ubiquity of the standard-form. The rationale was summarised in the Treasury's discussion paper:

Standard-form contracts are used by parties irrespective of the legal status or nature of the party to whom the contract is presented, and without any effective opportunity for that party to negotiate the term. In such cases it would be invidious to suggest that the same term which may be considered unfair in relation to a contract entered into by a natural person would not be similarly unfair in relation to a business where neither of them is in a position to negotiate the term.²⁹

A franchisee is vulnerable to unfair terms in standard-form contracts as much as, and often more than, a consumer would be and so should have similar legislated

²⁵ Productivity Commission, *Review of Australia's Consumer Policy Framework*, Inquiry Report No 45 (2008) <<http://www.pc.gov.au/projects/inquiry/consumer/docs/finalreport>>.

²⁶ *ACL* s 27.

²⁷ Productivity Commission, above n 25, 430 <http://www.pc.gov.au/__data/assets/pdf_file/0008/79172/consumer2.pdf>.

²⁸ *Ibid.*

²⁹ Treasury, Australian Government, *The Australian Consumer Law: Consultation on Draft Provisions on Unfair Contract Terms* (2009) 8.

protections. In franchise contracts it is typically the case that the franchisor has most, if not all, of the bargaining power relating to the transaction.³⁰ A franchisee is not an effective and informed participant, but rather is involved in a standard-form contracting relationship. The contract is always prepared by the franchisor before any discussion relating to the transaction occurs between the parties; it is a requirement of the Franchising Code that a copy of the franchise agreement in the form it is to be executed is given to the prospective franchisee as part of disclosure.³¹ A franchisee is, in effect, required either to accept or reject the terms of the contract without any effective means to negotiate the terms of the contract. Rarely in franchising are the terms of the contract altered to take into account the specific characteristics of another party or the particular transaction. The synergistic effects of the standard-form and relational qualities of the franchise contract lead to the erosion of bargained-for-exchange, increased imbalance of power and increased uncertainty for a franchisee.

The other essential element of UCT protection under the legislation is the finding of an unfair term.³² As noted above, a term is unfair if it would cause significant imbalance in the parties' rights and obligations under the contract, is not reasonably necessary in order to protect the legitimate interests of the drafting party, and results in detriment to the other party.³³ In franchising, imbalance may be considered necessary,³⁴ but it is not, by itself, considered to be unfair. For example, the conditions upon which the franchisor will offer the use of its intellectual property (the franchise system) are, and should be, within the franchisor's discretion. The franchisor has a vested interest in maintaining the integrity and commercial viability of the franchise system, and this results in the franchisee necessarily being subject to varying degrees of control, legitimate or otherwise.

The franchise contract is, by its very nature, heavily weighted in favour of the franchisor. A survey of contract terms in franchising provides examples of imbalance of rights and obligations in the contractual relationship.³⁵ The 'scope of grant' clause delineates and effectively limits the rights of a franchisee, while specifically reserving rights, such as use of the intellectual property and discretion to a franchisor. Most grants are not exclusive and there is often little or no protection for a franchisee against a franchisor's right to encroach. A franchisor's contractual

30 There are exceptions. In some cases franchisees are experienced, substantial and savvy businesspeople. These attributes would be taken into account in the kind of contextual analysis this article advocates.

31 *Trade Practices (Industry Codes — Franchising) Regulations 1998* (Cth) pt 2 div 2.2 s 10(c) ('Franchising Code of Conduct').

32 *ACL* s 24.

33 *ACL* s 24.

34 Inquiry into Franchising by the Parliamentary Joint Committee on Corporations and Financial Services, above n 22, 8.3.

35 Elizabeth Spencer (2008) *The Regulation of the Franchise Relationship in Australia: A Contractual Analysis*, (PhD Dissertation, Bond University, 2008) <<http://epublications.bond.edu.au/theses/spencer>>.

obligation to promote the brand typically accords to a franchisor discretion that contributes to the risk of franchisor opportunism and to uncertain conditions for its franchisees; franchisees pay but have no say in franchisor promotional activities and do not have any assurance that the money they contribute will be directly applied for their benefit. Other examples of contract terms where the balance is usually in favour of a franchisor, with concomitant uncertainty for a franchisee, include terms of supply, franchisee minimum performance and reporting, transfer, termination and collective agreement clauses. The result is that

[f]ranchise contracts reflect and reinforce asymmetries already inherent in the franchise relationship. The relational and standard-form qualities of the contract, independently and in combination, contribute to greater power to a franchisor and greater uncertainty and risk for a franchisee.³⁶

Often these terms are legitimate in the interests of the franchisor's control over and responsibility for the system as a whole. While the terms contained in the franchise contract may be necessary in the interests of the system as a whole, however, it is the use (or abuse) of the discretionary powers contained in the franchise contract that result in the provision not being reasonably necessary to protect the legitimate interests of the franchisor.

For example, many franchise contracts require that the franchisee conform to the brand and image of the franchise system at its own expense, including any change to or update of the brand. An argument that the franchisor's requirement to update the premises is unreasonable arises where the expense results in the franchised business becoming financially unviable. A related issue arises when the franchisee is unable to afford (or obtain financing) for such an update, leading the franchisor to terminate the franchise contract for non-compliance. In an attempt to reduce the potential for unfair conduct, disclosure requirements have been extensively amended under the Code.³⁷ However, disclosing the potential of, for example, a possible future payment is unlikely to reduce risk of opportunism, while it does often increase confusion.

Because of a franchisor's responsibility to maintain the brand, so to have discretion and control in the interests of the system as a whole, a franchise agreement cannot be determined to be 'unfair' simply because a significant power imbalance exists. The best franchise systems use this power judiciously and such use generally accrues to the benefit of all parties. It is the unchecked exercise of discretion that causes detriment to franchisees. Detriment can take the form of, for example, encroachment of company stores on franchisees' territories, franchisor opportunism, inadequate franchisor support and inadequate investment (shirking)

³⁶ Spencer, above n 8.

³⁷ Franchising Code of Conduct, above n 31, annexure 1, 13A.1. Whether the franchisor will require the franchisee, through the franchise agreement, the operations manual (or equivalent), or any other means, to undertake unforeseen significant capital expenditure that was not disclosed by the franchisor before the franchisee entered into the franchise agreement.

by the franchisor in brand maintenance. It may be related to site selection issues, conflicts with respect to training and technical issues, and/or vulnerability at renewal, sale or termination.³⁸

What needs to be addressed is franchisor exercise of this legitimate discretion/ power in ways that unduly harm the interests of individual franchisees with a more particular calculus of when the use of power is legitimate and when it is not. The question in each case is whether the harm to a franchisee in the exercise of the power afforded by the term can be justified by the benefit to a franchisor or the brand, and also whether this harm is beyond the reasonable expectations of the parties, not only in entering the contract, but also because these contracts are long-term, relational contracts.

The test under s 24(1)(b) is whether the imbalance is ‘reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term.’ In order to comply, terms must be drafted carefully to ensure that they are no broader than is reasonably necessary. The balancing that is required can only be achieved by considering the relationship as a whole and weighing the relative merits and benefits of actions detrimental to a franchisee. The benefit of s 24(2) in directing courts to consider the ‘contract as a whole’ makes this provision indispensable in the franchising context. As franchise contracts are widely drafted in favor of the franchisor’s discretion, almost every term imposed upon a franchisee (whether through the contract itself or, just as commonly, by way of an associated document such as an operations manual) may be associated with a potential detriment to a franchisee, but will not always cause that detriment.

In contrast to discrete contracts, relational franchise contracts are noted for being flexible to the point of being vague, necessitating contextual interpretation of the contract ‘as a whole’ and not confined to the ‘black letter’ rules.³⁹ Franchise business relationships are controlled by mechanisms outside the letter of the contract, an almost incalculable interaction of variables that may exist in a dynamic business environment between two (or more) parties who are seeking to advance their disparate interests. In order to comprehend the scope of the contractual obligations, a Court must be able to look first at the contract terms, which are, as has been stated, primarily in favor of the franchisor; but a Court must also be able to consider the actions of the parties and any extrinsic or associated material that modifies, clarifies or implements the broad intentions of the parties as set out in the franchise agreement. In some ways such an approach is the antithesis of classical contract law, yet the well-documented failings of the current regime underscore the need for this approach.

In determining whether a contract term is unfair, it is also necessary to consider whether the obligations contained in the contract are ‘transparent.’ Section 24(3)

38 For a discussion of these issues and the alignment of franchisor and franchisee interests, see Spencer, above n 35.

39 Spencer, above n 8.

of the ACL provides that a term is transparent where it uses plain language, is legible, presented clearly and readily available to affected parties. This requirement indicates a physical and linguistic accessibility, but does not appear to extend to accessibility in terms of comprehension, which is where the greater problem lies.

Transparency is problematic in franchising given that it is not possible to fully define a business relationship that may endure for decades. Where the franchisor has control over the drafting of the contract and withholds (often with good reason) full pre-contractual disclosure of the business model, it is not possible for a prospective franchisee, without any experience in the industry, to understand the full implications of the franchisor's system. The fact that the franchisor, through its intellectual property and systems, provides the means for the franchisee to 'bootstrap' itself to a level of competence it could not otherwise achieve within a set time frame reinforces the notion that, at the time of entering the contract, the average franchisee lacks a full comprehension of the franchisor's business model. Without a contextual framework of this business model with which to compare franchise contracts, full transparency at the point of entry into the franchise obligation is not possible. To further complicate matters, the meaning of many terms may not be discernible from the wording of the contract itself, but rather may require consideration of ancillary or associated documents or arrangements, such as leases or operations manuals. Similarly, even where a term may appear to be readily interpreted in the contract, the obligations contained in an associated document may call into question the 'fairness' of the clause.

Transparency in the contract itself cannot be assumed in a franchise relationship. It may even be counterproductive to fix the meaning of a particular term, as such a measure would prevent the franchise system from adapting to changes in business conditions. It is far more likely that contractual obligations regarding operational matters will not be fully detailed or if they are, such as in an operations manual, then such terms will not form part of the formal contract. Transparency depends upon context; the wide discretions that franchisors grant to themselves cannot be, by their very nature, transparent, although the conditions that give rise to the exercise of the discretion may be ascertainable.

Certain transparencies are considered necessary and have been incorporated into the compulsory disclosure document, as representing the minimum necessary information for a prospective franchisee to make an informed decision about entering into a franchise system.⁴⁰ If disclosure of any item is not complete in itself then, at least, such disclosure is intended to prompt the seeking of further information. However, disclosure can never be fully transparent. Consider, as one example, s 13A of the Franchising Code of Conduct, which raises the question of how an unforeseen expense can be disclosed if it is genuinely unforeseen.⁴¹

40 Franchising Code of Conduct, above n 31, Annexure 1.

41 Ibid s 13A.

The Competition and Consumer Act s 25: Examples of Unfair Contract Terms

The examples of potentially unfair contract terms legislation listed in s 25 are virtually all commonly used in franchising contracts and constitute perhaps the most convincing evidence of all that franchise contracts contain potentially unfair contract terms. Table 1 sets out the examples contained in the ACL s 25 alongside typical terms in franchise agreements and so demonstrates that franchise agreements meet almost every example the legislation provides of potentially unfair terms.

Table 1: ACL s 25/s42 Grey List as Compared with Typical Franchise Terms

Example in <i>ACL</i> s 25 ⁴³	Nature of term in franchise agreements
(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;	<p>Most franchise contract terms are written to bind franchisees and to ensure flexibility for franchisors. They specify performance of precise franchisee obligations, eg ‘a franchisee must’, while franchisor obligations are drafted in permissive terms, eg ‘a franchisor may.’ Consider also unilateral amendment clauses.</p> <p>In most franchise agreements, the obligations of the franchisor are vague and/or limited and without recourse being specified for breach, whereas franchisee obligations are comprehensive and breach will give rise to wide discretions on the part of the franchisor to limit performance (eg withhold supply) or avoid the agreement.</p>

<p>(b) a term that permits, or has the effect of permitting, one party (but not another party) to terminate the contract;</p>	<p>A term of this nature is in fact enshrined in the Franchising Code at clauses 21-23, whereby the right of the franchisor to terminate for specified breaches is protected (and provides the process to prosecute other breaches), whereas there is no reciprocal right for franchisees.</p> <p>Most franchise agreements only permit ‘one way’ terminations, ie by the franchisor, and do not address a franchisee’s right to terminate for a breach by a franchisor (although it is worth remembering that the franchisor’s obligations are limited, making a breach less likely).</p>
<p>(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;</p>	<p>A common example is the requirement that a franchisee continue to make royalty payments until the end of the then current term, even if the franchise agreement has been terminated due to conditions caused by the franchisor, such as franchisor insolvency.</p> <p>This issue may have an even wider impact as a result of the comments of the High Court in <i>Andrews v Australia and New Zealand Banking Group Ltd</i> [2012] HCA 30 (6 September 2012), which recasts the ‘doctrine of penalties’ into wider terms.</p>
<p>(d) a term that permits, or has the effect of permitting, one party (but not another party) to vary the terms of the contract;</p>	<p>Franchisors commonly enjoy a right to alter unilaterally the terms of the contract. They can also effectively alter the nature of the contractual agreement through the Operations Manual and other means.</p> <p>This issue is so common that in the 2010 changes to the Code a specific disclosure requirement was included regarding the ability of the franchisor to vary unilaterally the franchise agreement and the extent to which they had done so within the preceding three years.</p>

<p>(e) a term that permits, or has the effect of permitting, one party (but not another party) to renew or not renew the contract;</p>	<p>Although many franchise agreements do contain a renewal ‘right’, on closer examination the renewal is better described as a first option for the franchisee to continue the business on the terms of the franchisor’s then current franchise agreement, which may be substantially different from the existing terms.</p> <p>If the franchisee does not accept the ‘then current’ form of the franchise agreement, the franchisor can choose not to grant the ‘extension’. The terms of the ‘then current’ franchise agreement are solely within the discretion of the franchisor, giving them the effective means of denying a renewal without having to provide reasons for denying a request.</p> <p>Again, the impact of this issue has resulted in changes to the Code by the 2010 inclusion of disclosure requirements about renewal.</p>
<p>(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;</p>	<p>Most franchise agreements give the franchisor the ability to alter royalty rates, product charges, contributions to co-operative/marketing funds and to impose new fees and charges as the franchise system is modified over time.</p> <p>In one sense, this ability is at the heart of the franchise offering (to adapt the business model to its most efficient form as the business environment changes), however it can also change the ‘headline’ price of the franchise dramatically.</p> <p>Another instance, the subject of ongoing controversy, is the ability of franchisors to require capital amounts to be spent during the franchise without having previously disclosed them. Although Code disclosure now requires the franchisor to identify ‘unforeseen capital expenditure’, the obvious problem is that if the expense is genuinely unforeseen, it cannot be disclosed.</p> <p>This has not limited the ability of franchisors to require significant and sometimes crippling expenditure by franchisees in order to comply with their obligations under the franchise agreement or as a condition of renewal.</p>

<p>(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;</p>	<p>Terms of this nature are almost universally included in franchise agreements, but again they are directly relevant to the value of the franchise concept. Franchise systems must ‘adapt or die’ and it is equally in the interest of franchisees that the franchise system be modified to take advantage of new products or services as part of the franchise brand.</p>
<p>(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;</p>	<p>Franchise agreements generally specify the franchisee’s breaches and contain no reference to breaches by the franchisor.</p> <p>Generic obligations – such as to comply with the Operations Manual as published from time to time, or not to bring the system into disrepute – are entirely within the control and interpretation of the franchisor.</p>
<p>(i) a term that limits, or has the effect of limiting, one party’s vicarious liability for its agents;</p>	<p>Many franchise agreements contain limitations upon liability for the actions of their agents, servants, contractors or employees and specify the extent of the remedy available (such as the re-supply of goods or services only and excluding any consequential or associated loss or damage).</p>
<p>(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;</p>	<p>Franchisors usually reserve the right to assign their interest in the agreement (or the system) without reference to the franchisee.</p> <p>The rights of franchisees to assign the agreement are circumscribed and subject to extensive franchisor discretion.</p> <p>The extent of this issue is such that it forms a specific section in the Code disclosure document.</p>

<p>(k) a term that limits, or has the effect of limiting, one party's right to sue another party;</p>	<p>Franchise agreements often include choice of jurisdiction that is non-negotiable and require that the franchisee must pay the franchisor's legal costs (sometimes regardless of the outcome). 2010 amendments to the Code now require disclosure with respect to this issue.</p> <p>Many agreements also purport to limit the franchisor's liability, however, the Code proscribes a general release from being included in an agreement.</p>
<p>(l) a term that limits, or has the effect of limiting, the evidence one party can adduce in proceedings relating to the contract;</p>	<p>Often found in franchising in the form of a 'Prior Representations Deed', a separate document to the franchise agreement that purports to specify the representations made to the franchisee prior to entering into the franchise to those matters specifically stated in the Deed and limiting any action to those matters only (or if none are included, which is common, to plead the Deed in bar to any action for misrepresentation).</p> <p>Most, if not all, franchise agreements include an 'all terms' clause that provides that the agreement (together with any Deed, if applicable) represents the entire agreement between the parties and that the franchisee entered into the franchise agreement without relying upon any representations made by the franchisor, its servants, agents or employees.</p>
<p>(m) a term that imposes, or has the effect of imposing, the evidential burden on one party in proceedings relating to the contract;</p>	<p>The 'Prior Representation Deed' shifts the onus to the franchisee to establish that some representation was made that was not included in the Deed (and to explain why it was not included – which is often relevant to reliance).</p>

Franchise contracting was, at the eleventh hour, excluded from the application of the ACL. Paradoxically, all of the examples of potentially unfair contract terms provided in the legislation are commonly found in franchise agreements. This can be taken as evidence that the use of potentially unfair contract terms is rife in franchising, and so needs to be controlled. It also can be taken as evidence that such terms are legitimate and normal in the franchising context. The fact is, both are correct. Terms such as those listed in s 25 are legitimate and commonly used terms in franchising. It is also true that they lend themselves to abuse and

commonly do cause imbalance that overreaches what is reasonably necessary to protect the franchisor's legitimate interests, resulting in detriment to some, often many, franchisees.

Section 25's grey list of examples suggests that franchise contracts may not be amenable to protection by this legislation in its current form. For business consumers, a broader approach could streamline the UCT provision and relieve it from unnecessary detail that defeats its purpose.⁴³ It may be that 'a term will be reasonably necessary to protect the legitimate interests of the trader only where the term represents a proportionate response to the risk it addresses.' Such an approach 'may require courts to consider other possible ways of protecting the trader's interests that would be less burdensome to the consumer.'⁴⁴

A franchisor has a legitimate interest in employing the terms of the sorts that are offered as examples in s 25. Therefore, if the UCT legislation were to apply to franchise agreements, the burden should not be shifted to a franchisor. Australian Consumer Law s 24(4), which provides that '[f]or the purposes of subsection (1) (b), a term of a consumer contract is presumed not to be reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term, unless that party proves otherwise', is not appropriate for the regulation of franchising. The burden of proof in the franchise context properly remains with the franchisee to show that the term is not reasonably necessary to serve the legitimate interests of the franchisor.

As noted above, reliance on disclosure in the regulation of the franchise sector has been unsuccessful; the same abuses that were reported decades ago continue today.⁴⁵ As Paterson observes, 'The insights of behavioural economics suggest that there are significant limitations on the decision-making processes of consumers relating to "rational, social, and cognitive factors", which are not necessarily improved by consumers being provided with more information about the incidental terms of their contracts.'⁴⁶

Misleading or deceptive conduct has been a useful provision for franchisees, but it is, like disclosure, another tool targeted principally at formation of the contract. The tension between regulatory measures that operate on a procedural level as opposed to the need for substantive measures persists, are 'measures aimed at addressing the information asymmetry between traders and consumers, for

43 Webb, above n 11, 435.

44 J Paterson, 'The Australian Unfair Contract Terms Law: The Rise of Substantive Unfairness as a Grounds for Review of Standard Form Consumer Contracts' (2009) 33 *Melbourne University Law Review* 934, 945.

45 Department of Industry, Innovation, Climate Change, Science, Research and Tertiary Education, *Submissions Made to the 2013 Review of the Franchising Code of Conduct* <<http://www.innovation.gov.au/SmallBusiness/CodesOfConduct/Pages/Submissions-made-to-the-2013-review-of-the-Franchising-Code-of-Conduct.aspx>>.

46 J Paterson, 'The Australian Unfair Contract Terms Law: The Rise of Substantive Unfairness as a Grounds for Review of Standard Form Consumer Contracts' (2009) 33 *Melbourne University Law Review* 934, 956.

example transparency in the terms of the contract or notice of unusual terms... sufficient to ensure that a term is fair'⁴⁷

Good faith continues in its role as the perennial bridesmaid, often considered but never chosen to fill the gap. The amendment to the Franchising Code in 2010 to the effect that the Code does not limit any obligation imposed by the unwritten law on parties to a franchise agreement to act in good faith⁴⁸ achieves little. In contrast to jurisdictions such as the United States and Germany, where good faith is a part of broader contract and commercial codes, good faith is not part of the legal traditions of the UK or Australia. The duty of good faith was not incorporated into the Trade Practices Act 1974, nor does it exist as a discrete requirement in its successor legislation, the Competition and Consumer Act 2010 (Cth). Considerations to which a court may have regard in determining unconscionable conduct include the extent to which parties acted in good faith, but the principle has languished in this context⁴⁹ and it offers little promise in the near future as '[t]he scope and content of the duty in the unwritten law to act in good faith... remain uncertain.'⁵⁰

Conclusion

Labels offer an attractive shorthand for the task of rule making, but labels create a new layer of complexity in definition and interpretation. Instead of using the business/consumer distinction, which is ambiguous at best, to draw lines in UCT, and instead of basing its application on often-misleading shorthand for the status of the parties, this article has suggested that courts should look at the contracting relationship itself in the fullness of its context. What is important in the franchising context is to take full account of the attributes and legitimate interests of the parties, considering the balance of rights and obligations and, ultimately, fairness, in light of these factors.

An extension of UCT to franchisees provides a means to address problems in franchising that have not been solved by ongoing attempts to regulate, principally through disclosure.⁵¹ Certainty of contracting can be promoted more equally

47 J Paterson, 'The Australian Unfair Contract Terms Law: The Rise of Substantive Unfairness as a Grounds for Review of Standard Form Consumer Contracts' (2009) 33 *Melbourne University Law Review* 934, 956.

48 Franchising Code of Conduct, above n 31, pt 2 div 2.2 s 23A.

49 *ACL* s 22(2)(1).

50 Alan Wein, Department of Industry, Innovation, Climate Change, Science, Research and Tertiary Education, *Discussion Paper: Review of the Franchising Code of Conduct* (2013) <<http://www.innovation.gov.au/SmallBusiness/CodesOfConduct/Documents/2013ReviewDiscussionPaper.pdf>>.

51 It is widely accepted that prospective franchisees should receive sufficient and transparent disclosure in order to make an informed decision about their investment, as is reflected by the disclosure requirements of the 'Franchising Code of Conduct'. It is presumed that once disclosure has been made, the prospective franchisee is sufficiently informed to make a decision about the business, regardless of their education, experience or even capacity to understand what has been disclosed to them. Repeated inquiry into and amendments to the Code disclosure process suggest that this is not the case.

for all parties, rather than principally on behalf of the drafting party's interests. Franchisees' inability to comprehend fully the nature of the interaction *ex ante* and the constraints on their ability to protect themselves against risk can be addressed, and government policy to reduce risk and ensure a healthy environment for small business will be served.

This article has argued that franchisees should be covered under the UCT provisions because they fall precisely within the situations that the legislation is designed to control. Amendment would be required, however, to the form of UCT as it currently applies to consumers, such as a removal of s 24(4) for the franchise context and a streamlined formulation of the legislation to ensure that the whole of the franchise relationship is considered in context.

In asking the question of whether a term has been drafted in such a way as is reasonably necessary to protect the legitimate interests of the drafting party, this article supports a guiding principal that 'unfairness should not be assessed from the traditional contractual perspective of arm's-length commercial dealing, but through a relational approach'.⁵² In weighing the interests of the franchisor and the system (franchisor and franchisees collectively) versus the cost/risk/detriment to individual franchisees, UCT legislation can and should accommodate the context of the interaction. The future of franchising could, as a result, be one where contracts are drafted with greater precision and fairness, while preserving a franchisor's legitimate need for control and discretion.

52 Webb, above n 11, 6.

The Contract for the Supply of Educational Services and Unfair Contract Terms: Advancing Students' Rights as Consumers

LISA GOLDACRE*

Extensive consumer protection legislation has existed in Australia for nearly four decades. The new Australian Consumer Law ('ACL')¹ is the most significant change to consumer rights since the introduction of the *Trade Practices Act 1974* (Cth) ('TPA'). Over a corresponding period of time, the landscape of the higher education sector has been transformed into a culture of consumerism with the student at the centre as the consumer.² However, students have seldom sought

* Curtin Teaching and Learning, Curtin University. This article is based on the thesis submitted for my MPhil (Curtin), conferred April 2013. I would like to dedicate this article to my supervisor, the late Professor Pauline Sadler, without whom the completion of my thesis was unlikely. She is greatly missed by many.

1 Schedule 2 of the *Competition and Consumer Act 2010* (Cth), formerly the *Trade Practices Act 1974* (Cth) as amended *Trade Practices Amendment (Australian Consumer Law) Act (No.1) 2010* (Cth) and *Trade Practices Amendment (Australian Consumer Law) Act (No.2) 2010* (Cth). The first tranche of reforms received assent on 14 April 2010, operative from 1 July 2010. The second Bill was passed on 24 June 2010 and took effect on 1 January 2011.

2 There is a significant body of literature on this issue. A detailed consideration is beyond the scope of this article. See, eg, Stephen Corones, 'Consumer Guarantees and the Supply of Educational Services by Higher Education Providers' (2012) 35(1) *University of New South Wales Law Journal* 1; Helen Fleming, 'Student Legal Rights in Higher Education: Consumerism Is Official, But Is It Sustainable?' (Paper presented at Sustainable Education, Schools, Families and Communities Education Law and Policy Perspectives, Australia and New Zealand Education Law Association Conference, Darwin, 2011) 115; Lynden Griggs, 'Knowing the Destination Before the Journey Starts — Legal Education and Fitness for Purpose' (2007) *Murdoch ELaw Journal* 315 https://elaw.murdoch.edu.au/archives/issues/2007/1/eLaw_knowing_destination.pdf; Patty Kamvounias and Sally Varnham, 'Getting What They Paid For: Consumer Rights of Students in Higher Education' (2006) 15 *Griffith Law Review* 306; Tim Kaye, Robert D Bickel and Tim Birtwistle, 'Criticizing the Image of the Student as Consumer: Examining Legal Trends and Administrative Responses in the US and UK' (2006) 18(2–3) *Education and the Law* 85; Bruce Lindsay, 'Student Subjectivity and the Law' (2005) 10(2) *Deakin Law Review* 628; Mike Molesworth, Elizabeth Nixon and Richard Scullion, *The Marketisation of Higher Education and the Student as Consumer* (Routledge, 2011); Mike Molesworth, Elizabeth Nixon and Richard Scullion, 'Having, Being and Higher Education: The Marketisation of the University and the Transformation of the Student into Consumer' (2009) 14(3) *Teaching in Higher Education* 277; Francine Rochford, 'The Contested Product of a University Education' (2008) 30(1) *Journal of Higher Education, Policy and Management* 41; Francine Rochford, 'The Relationship Between The Student and The University' (1998) 3(1) *Australian & New Zealand Journal of Law & Education* 28; Margaret Thornton, 'The Law School, the

redress in relation to infringement of their rights as consumers under consumer protection legislation and if they have, they are rarely successful. A number of barriers are faced by students seeking redress before the courts. First, claims relating to academic matters are almost without exception non-justiciable. Second, even if students have been able to establish their claim, proving loss or damage has been problematic. In relation to claims made against higher education institutions ('HEIs') in consumer protection litigation specifically, the principal barrier has been difficulties with categorising the provision of educational services as being a service supplied in 'trade or commerce'.

It has been recognised by courts and commentators that some rights do accrue to students as consumers of educational services under the ACL, principally with regard to promotional activities³ of HEIs.⁴ It is not certain that the ACL can provide effective protection for students as consumers of educational services beyond this known application to address issues regarding the nature of the service provided. This article is specifically concerned with whether the introduction of an Unfair Contract Terms ('UCT')⁵ regime in the ACL overcomes identifiable barriers faced

Market and the New Knowledge Economy' (2007) 17(1–2) *Legal Education Review* 1; Sally Varnham, 'Liability in Higher Education in New Zealand: Cases for Courses?' (1998) 3(1) *Australian & New Zealand Journal of Law & Education* 3; Sally Varnham, 'Straight Talking, Straight Teaching: Are New Zealand Tertiary Institutes Potentially Liable to their Students under Consumer Protection Legislation?' (2001) 13(4) *Education and the Law* 303.

3 Despite judicial affirmation that the provision will apply to the promotional activities of a HEI, claimants have had limited success in proving their case in the higher courts, see, eg, *Plimer v Roberts* (1997) 150 ALR 235 ('*Pilmer*'); *Fennell v Australian National University* [1999] FCA 989 ('*Fennell*'); cf *Shahid v Australasian College of Dermatologists* (2008) 248 ALR 267 ('*Shahid*'). There has been mixed success at the tribunal level, see, eg, *Kwan v University of Sydney Foundation Program P/L (General)* [2002] NSWCTTT 83 ('*Kwan*'); cf *Jones v Academy of Applied Hypnosis P/L (General)* [2005] NSWCTTT 841 ('*Jones*'); *Cotton v Blinman Investments P/L & Blinman (General)* 2004 NSWCTTT 723 ('*Cotton*'). See also Phillip Clarke, 'University Marketing and the Law: Applying the Trade Practices Act to Universities' Marketing and Promotional Activities (2003) 8 *Deakin Law Review* 304; Jim Jackson, 'The Marketing of University Courses under Section 52 and 53 of the *Trade Practices Act 1974* (Cth)' (2002) 6 *Southern Cross University Law Review* 106; Kamvounias and Varnham, 'Getting What They Paid For' above n 2.

4 The nomenclature 'higher education institution' ('HEI') is adopted as this is seen as a broad definition consistent with policy and international literature. The use of HEI is also consistent with the terminology used in the *Bradley Review of Australian Higher Education December 2008*: see Denise Bradley, Peter Noonan, Helen Nugent, Bill Scales, *Review of Australian Higher Education Final Report*, 2008 Australian Government (28 September 2010) <http://www.deewr.gov.au/HigherEducation/Review/Pages/ReviewofAustralianHigherEducationReport.aspx> chapter 1, nn 1, 2, 1–2. The phrase 'higher education' encompasses associate degrees and diplomas. It is also used by the Department of Education, Employment and Workplace Relations ('DEEWR') and academic commentators in the UK in the field of higher education law, a less developed area of specialty in Australia. The legal status of HEI in Australia also bears a resemblance to that of the UK (with the exception of Cambridge and Oxford), particularly since the commencement of the *Education Reform Act 1988* (UK) and *Higher Education Act 2004* (UK). See generally Oliver Hyams, *Law of Education* (Jordans, 2nd ed, 2004).

5 Unfair contract terms provisions are contained in Schedule 2 of the *Australian Consumer*

by students using consumer protection as a means to ensure they receive services as promised and to advance their rights as consumers. Importantly the analysis will identify any connection between the UCT provisions regarding substantive unfairness and the protection this affords students in the context of the provision of educational services, such as the design and delivery of courses, as distinct from promotional activities.

Of academic independence and other concerns (or the special position of universities)⁶

The legal relationship between the student and HEI is multifaceted, overlaid by principles at common law and under statute.⁷ Similarly, claims made by students against HEIs are varied in their diversity of causes of action, reflecting the complex nature of the relationship.⁸ Frequently claims brought against HEIs by students can be categorised as ‘omnibus litigation (there being an unwieldy bundle of claims)’.⁹ Two significant studies have recently been undertaken to determine the nature of student litigation against HEIs and the outcomes and trends in this regard.¹⁰ These

Law (ACL) ch 2 pt 2–3. Existing contracts are only affected to the extent that the renewal or variation is made after 1 July 2010. See *Trade Practices Amendment (Australian Consumer Law) Act (No. 2) 2010, (No. 103, 2010)* s 3 and sch 7 item 8 quoted in Russell Miller, *Miller’s Australian Competition and Consumer Law Annotated* (Thomson Reuters, 34th ed, 2012) editor’s note, 1697.

6 *Griffith University v Tang* (2005) 221 CLR 99, 156–7 [165]–[166] (KirbyJ).

7 See generally Dennis Farrington and David Palfreyman, *The Law of Higher Education* (Oxford University Press, 2nd ed, 2012); Jim Jackson and Sally Varnham, *Law for Educators: School and University Law in Australia* (LexisNexis Butterworths, 2007); William P Hoyer and David Palfreyman, ‘Plato vs Socrates: The Devolving Relationship Between Higher Education Institutes and their Students’ (2004) 16(2–3) *Education and the Law* 97; J Stephen Kós and Russell McVeagh, ‘The View From the Bottom of the Cliff—Enforcement of Legal Rights Between Student and University’ (1999) 4(2) *Australian & New Zealand Journal of Law & Education* 18; Bruce Lindsay, ‘Complexity and Ambiguity in University Law: Negotiating the Legal Terrain of Student Challenges to University Decisions’ (2007) 12(2) *Australian & New Zealand Journal of Law & Education* 7; Sam Middlemiss, ‘Legal Liability of Universities for Students’ (2009) 12(2) *Education and the Law* 69; Rochford, ‘The Relationship Between The Student and The University’, above n 2; Simon Whittaker, ‘Public and Private Law-Making: Subordinate Legislation, Contracts and the Status of Student Rules’ (2001) 21(1) *Oxford Journal of Legal Studies* 103; Suzanne Corcoran, ‘Living on the Edge: Utopia University Ltd’ (1999) 27(2) *Federal Law Review* 265.

8 See especially Hilary Astor, ‘Australian Universities in Court: Causes, Costs and Consequences of Increasing Litigation’ (2008) 19(3) *Australasian Dispute Resolution Journal* 156; Hilary Astor, ‘Why do Students Sue Australian Universities?’ (2010) 21 *Australasian Dispute Resolution Journal* 20; Patty Kamvounias and Sally Varnham, ‘Legal Challenges to University Decisions Affecting Students in Australian Courts and Tribunals’ (2010) 34 *Melbourne University Law Review* 141; Patty Kamvounias, and Sally Varnham, ‘In-House or in Court? Legal Challenges to University Decisions’ (2006) 18(1) *Education and the Law* 1; Whittaker, ‘Public and Private Law-Making’, above n 7.

9 *Hanna v University of New England* [2006] NSWSC 122, [2] (‘Hanna’).

10 Jim Jackson, Helen Fleming, Patty Kamvounias and Sally Varnham, ‘Student Grievances and Discipline Matters Project: Final Report to Australian Learning and Teaching Council,

studies also report an increase in the number of cases being brought before courts and tribunals by students.¹¹

Many of the claims brought before the courts do not involve consumer protection legislation. Lindsay¹² has considered in detail the legal framework applying to the student–HEI relationship and the causes of action available to students with respect to HEIs. Students can seek reparation either internally through the domestic procedures of the HEI,¹³ or possibly judicial review of the same,¹⁴ or bring their grievance before the relevant Ombudsman.¹⁵ Students also have significant private rights, albeit complex.¹⁶ Students’ rights are also reinforced by the considerable ancillary and supporting statutory frameworks around the regulation of the higher education sector,¹⁷ and more general statutory rights, such as freedom of information legislation or anti-discrimination legislation. International students in particular now have specific protections in place.¹⁸ Consequently a claim under

(May 2009) epublications@scu; Astor, ‘Why do Students Sue Australian Universities?’, above, n 8; Astor, ‘Australian Universities in Court’, above n 8; For a comparative study see Lelia Helms, ‘Comparing Litigation in Higher Education: The United States and Australia in 2007’ (2009) 14(2) *International Journal of Law & Education* 37.

11 Astor, ‘Australian Universities in Court’, above n 8. Astor reports that ‘the number of Universities has doubled and the number of students tripled but the levels of the litigation have increased about eightfold’: at 166.

12 Lindsay, ‘Complexity and Ambiguity in University Law’, above n 7.

13 All universities within the sector are special purpose statutory corporations with their own enabling acts, see, eg, the *University of Western Australia Act 1911* (WA). The university Visitor has been abolished for all but ceremonial functions in every state in Australia with the exception of Western Australia, see, eg, *Murdoch University Act 1973* (WA) s 9. Thus there may be difficulties for students in Western Australia bringing claims against universities, as the jurisdiction of the Visitor is exclusive. *Murdoch University v Bloom* [1980] WAR 193: at 116. See generally J L Caldwell, ‘Judicial Review of Universities—the Visitor and the Visiting’ (1982) 1 *Canterbury Law Review* 307. See also below n 124. HEIs have significant by-laws and rules dealing with matters such as student discipline and academic progression.

14 *Griffith University v Tang* (2005) 221 CLR 99. See generally Bruce Lindsay, ‘University Hearings: Student Discipline Rules and Fair Procedures’ (2008) 15 *Australian Journal of Administrative Law* 146; Patty Kamvounias and Sally Varnham, ‘Doctorial Dreams Destroyed: Does *Griffith University v Tang* Spell the End of Judicial Review of Australian University Decisions?’ (2005) 10(1) *Australia & New Zealand Journal of Law & Education* 5; Kamvounias and Varnham, ‘Legal Challenges to University Decisions Affecting Students’, above n 8, 157–71; Francine Rochford ‘Claims Against a University: The Role of Administrative Review in Australia and the United Kingdom’ (2005) 17(1–2) *Education and the Law* 23, 37.

15 Astor, ‘Australian Universities in Court’, above n 8; Kamvounias and Varnham ‘Legal Challenges to University Decisions Affecting Students’, above n 8, 150, nn 61–72. See also Bronwyn Olliffe and Anita Stuhmcke, ‘A National University Grievance Handler? Transporting the UK Office of the Independent Adjudicator for Higher Education (OIA) to Australia’ (2007) 29(2) *Journal of Higher Education Policy and Management* 203.

16 See, eg, Simon Whittaker, ‘Judicial Review in Public Law and in Contract Law: The Example of “Student Rules”’ (2001) 21(2) *Oxford Journal of Legal Studies* 193.

17 See, eg, the various state Higher Education Acts and Commonwealth funding legislation *Higher Education Support Act 2003* (Cth); *Higher Education Funding Act 1988* (Cth); *Tertiary Education Quality and Standards Agency Act 2011* (Cth) (‘TEQSA Act’).

18 *Educational Services for Overseas Students Act 2000* (Cth). See Jim Jackson, ‘Regulation

the ACL by a student against their HEI for an alleged failure in the provision of educational services is only one option open to the student.

However, in relation to all causes of action available to students, the impediment remains that claims made by students in relation to academic matters are not justiciable. Historically courts have been reluctant to disturb decisions that have been seen as within the domain of the learned academic.¹⁹ Ordinarily, claims concerned with the nature of the educational service provided are considered matters that involve questions of academic judgement.²⁰ This includes claims relating to course content, design and delivery; the standards of teaching; or the merits of an academic decision in the assessment of the standard of students' work or academic progression. Subject to few exceptions,²¹ academic activities involving the exercise of academic evaluation by an academic or the standard of the academics' professional services (as opposed to the process by which an academic decision is reached) will not be interfered with by the courts.²² Interestingly the issue of judicial review of academic matters does not often arise in cases where claims are made under consumer protection legislation.²³ The focus is often whether the conduct complained of was in 'trade or commerce' and a consideration of the factual evidence. The issue of justiciability in relation

of International Education: Australia and New Zealand' (2005) 10(2) & (2006) 11(1) *Australia & New Zealand Journal of Law & Education* 67. Overseas students have their own Ombudsman. See Overseas Students Ombudsman (6 August 2012) <<http://www.oso.gov.au/>>.

- 19 *Clark v University of Lincolnshire and Humberside* [2000] 3 All ER 752 ('Clark'). Generally adopted by the courts in Australia *Griffith University v Tang* (2005) 221 CLR 99, (Gummow, Callinan and Heydon JJ) 121 [58], (Kirby J) 156, [165]; *Hanna* [2006] NSWSC 122; *Walsh v University of Technology Sydney* [2007] FCA 880. Cf the matter of *Mathews v University of Queensland* [2002] FCA 414 ('Mathews'). Similarly in New Zealand see *Norrie v Auckland University Senate (1984)* 1 NZLR 129 cf *Grant v Victoria University of Wellington* [2003] NZAR 186 ('Victoria University').
- 20 *Clark* [2000] 3 All ER 752; in *Griffith University v Tang* (2005) 221 CLR 99 Kirby J 156, [165]. See also Mark Davies, 'Challenges to "Academic Immunity"—The Beginning of a New Era?' (2004) 16(2–3) *Education and the Law* 75; Kamvounias and Varnham, 'Legal Challenges to University Decisions Affecting Students', above n 8, 159–60.
- 21 An emerging area of law where it would appear the courts are prepared to examine the merits of an academic decision is in 'admissions law'. *Humzy-Hancock, Re* [2007] QSC 34; *Re Legal Profession Act 2004; re OG* [2007] VSC 520 (Unreported Warren CJ, Nettle JA and Mandie J, 14 December 2007); see generally J Joy Cumming, 'Where Courts and Academe Converge: Findings of Fact or Academic Judgement' (2007) 12(1) *Australian and New Zealand Journal of Law and Education* 97; Francesca Bartlett, 'Student Misconduct and Admission to Legal Practice—New Judicial Approaches' (2008) 34(2) *Monash University Law Review* 309; Mary Wyburn, 'Disclosure of Prior Student Academic Misconduct in Admissions to Legal Practice: Lessons For Universities and the Courts' (2008) 8(2) *Law and Justice Journal* 314, 338–9.
- 22 *Griffith University v Tang* (2005) 221 CLR 99, 156 [165] (Kirby J); Davies, 'Challenges to "Academic Immunity"', above n 20; Kamvounias and Varnham, 'Legal Challenges to University Decisions Affecting Students', above n 8, 159–60.
- 23 *Fennell* [1999] FCA 989; *Shahid* (2008) 248 ALR 267. Cf *Chan v Sellwood* [2009] NSWSC 1335 'disputes between students and establishments of learning are ordinarily unsuitable for adjudication in the courts and ought to be resolved by internal procedure' at [25]–[26] (Davies J).

to academic matters, although forming part of the factual basis of the students' claims, is not usually considered by the court specifically.²⁴

Outside of the consumer tribunals,²⁵ there is no Australian precedent to indicate that the courts will look to matters of quality and standards in the supply of educational services the same way as it will for other professional services. It is arguable that this may not be so easily overlooked by the higher courts.²⁶ This is, and continues to be, a significant hurdle for students seeking redress for what they perceive to be poor quality educational services.²⁷ Success is more certain if the basis of the claim rests on a challenge that relates to a lack of procedural fairness in the decision making process. It is clear that courts are prepared to review decisions of a HEI on the basis that those decisions have been procedurally unfair or there has been an error of law.²⁸ Students may well be concerned that decision making processes are fair, but this is not mutually exclusive of claims in relation to substantive matters.

It is contended that it is issues relating to academic matters that go to the heart of the provision of the educational service with which the student will be concerned.²⁹ It is suggested that claims regarding the nature of the educational service provided by a HEI under the UCT provisions are not as limited by notions of academic

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- 24 Similarly, in his recent article on the application of the new consumer guarantees in the ACL to the provision of educational services, Corones does not consider the intersection of the jurisprudence regarding the justiciability of academic matters and the requirement to render educational services with 'due care and skill': Corones, above n 2. He focuses instead on the specific legislative requirements of the ACL, such as the requirement that the service be supplied in 'trade or commerce' and the impact of the regulators new standards.
- 25 *Kwan* [2002] NSWCTTT 83. The small claims tribunals have reviewed the merits of academic matters involving private providers concerning the admission of unsuitable fellow students into the course *St Clair v College of Complimentary Medicine Pty Ltd* (General) [2008] NSWCTT 1309 ('*St Clair*'); the learning environment, including staff-student ratios and the condition of premises and pre-existing knowledge of students *Qayam v Shillington College* (General) [2007] NSWCTT 620 ('*Qayam*'); teaching methodologies *Cui v Australian Tesol Training Centre* (General) [2003] NSWCTT 329 ('*Cui*'); assessment of students' suitability for study based on age, workload *Evans v Australian Institute of Professional Counsellors* (General) [2004] NSWCTTT 108 ('*Evans*'); qualifications and experience of teaching staff *Cotton* [2004] NSWCTTT 723; the quality and amount of tuition given and an award of fail grade in academic assessment *Jones* [2005] NSWCTTT 841.
- 26 *Griffith University v Tang* (2005) 221 CLR 99. See especially Kamvounias and Varnham, 'Legal Challenges to University Decisions', above n 8, 179.
- 27 See Jackson et al, above n 10, especially student survey results at 26. The most common type of complaint was about assessment, followed by inadequate or poor quality teaching, followed by inadequate or poor quality services or facilities.
- 28 See, eg, *Griffith University v Tang* (2005) 221 CLR 99; Kamvounias and Varnham, 'Legal Challenges to University Decisions Affecting Students', above n 8, 164, 152-169; Astor, 'Why do Students Sue Australian Universities?', above n 8, 30. See generally Lindsay, 'University Hearings', above n 14.
- 29 Jackson et al, above n 10. The authors state 'complaints about the quality of teaching or supervision were the second largest category': at 32. Cf Astor, 'Why do Students Sue Australian Universities?', above n 8, 24.

immunity as other causes of action. As the UCT looks to the substantive fairness of terms, the provisions rely less on an adjudication of the quality and standard of educational services supplied by reference to analogous principals from other areas of law, such as professional negligence,³⁰ and focus instead on the essence of the term. The legislation prevents a HEI from relying on a term in the student–HEI contract that is unfair. As will be seen below, this goes beyond issues of procedural fairness to matters that are substantive in relation to the supply of educational services. This, it is suggested, circumvents the principle that academic matters are non-justiciable, thus advancing students’ rights as consumers.

Are educational services supplied in ‘trade or commerce’?

Prior to the introduction of the ACL, one significant barrier for students bringing claims under consumer protection legislation had been the view that the services supplied by the HEI may not be supplied in ‘trade or commerce’.³¹ Promotional activities³² have been identified by courts³³ and commentators as clearly being activities in ‘trade or commerce’.³⁴ In many cases the issue does not arise for discussion, but is assumed to apply by the complainant, provider and the court. If considered, the application is often a cursory one³⁵ and there is disparity in the approach taken by the courts across the jurisdictions in which these cases are

30 Davies, ‘Challenges to “Academic Immunity”’, above n 20; David Palfreyman, ‘£400K for Educational Malpractice by University Academics’ (2006) 18(2–3) *Education and the Law* 217; David Palfreyman, ‘HE’s “get-out-of-jail-free card”’ (2010) 14(4) *Perspectives: Policy and Practice in Higher Education* 114.

31 *Fasold v Roberts* (1997) 145 ALR 548; *Plimer* (1997) 150 ALR 235; *Quickenden v O’Conner* (2001) 184 ALR 260 (‘*Quickenden*’). See generally Francine Rochford, ‘Traders of the Lost Ark—Lecturers and Liability’ (2001) 13(2) *Education and the Law* 127.

32 Jackson, ‘Regulation of International Education’, above n 18, 76–7. These activities include activities such as statements made in prospectuses, advertisements in all forms of media including social networking sites, and open days. Common statements made in the course of these activities to attract students can include claims in relation to facilities, cost, accreditation status, graduate employment prospects, recognised prior-learning credit, additional support services, size of classes and how long it takes to complete the course.

33 *Pilmer v Roberts* (1997) 150 ALR 235; *ACCC v Black on White Pty Ltd* (2001) 110 FCR 1. See especially Rochford, ‘Traders of the Lost Ark’, above n 31. See also above n 3 and accompanying text.

34 See, eg, Clarke, above n 3; Jackson, ‘The Marking of University Courses’, above n 3, 114; Kamvounias and Varnham, ‘Getting What They Paid For’, above n 2, 315–21; Lynden Griggs, ‘Tertiary Education, the Market and Liability “In Trade or Commerce”’ (2004) 12 *Competition & Consumer Law Journal* 1, 6, 8; Judith Bessant, ‘Legal Issues in Higher Education and the Trade Practices Act’ (2004) 26(2) *Journal of Higher Education Policy and Management* 251, 256–7; Varnham, ‘Straight Talking, Straight Teaching’, above n 2, 308; Lindsay, ‘Complexity and Ambiguity in University Law’, above n 7, 12. See, eg, Allan Fels, ‘The Impact of Competition Policy and Law on Higher Education in Australia’ (Paper presented at the Australasian Association for Institutional Research 1998 International Conference, Australia, 24 November 1998) 4–5.

35 See *ACCC v Black on White Pty Ltd* (2001) 110 FCR 1, 21.

heard, notably the lower courts³⁶ and consumer tribunals.³⁷ One could speculate that this is influenced by the complex nature of student litigation,³⁸ and many of the decisions relate to interlocutory applications, strike out applications or applications for summary judgment³⁹ against in-person litigants.⁴⁰

It is clear that some academic activity will not be considered to be conduct in ‘trade or commerce’, but is instead considered to be internal to the student–HEI relationship, for example, statements made in public lectures.⁴¹ The test in *Concrete Constructions*⁴² was applied in the Full Court of the Federal Court of Australia in *Plimer v Roberts* (1997) 150 ALR 235 (*‘Noah’s Ark’*). Justice Lindgren found that the statements of Dr Roberts in the course of giving his lecture did not constitute conduct in ‘trade or commerce’ according to the test formulated in *Concrete Constructions*.⁴³ The ‘delivery of the lectures was not inherently a trading or commercial activity’ and would not ordinarily be in ‘trade or commerce’.⁴⁴ Therefore, although this type of activity was conduct that may relate to the overall trade or commerce of a HEI, it was not within the scope of the legislation as conduct *in* trade or commerce.

In order to attract the UCT provisions, the contract for educational services must be ‘provided, granted or conferred in trade or commerce’.⁴⁵ Thus this article is concerned only with whether the student–HEI contract is a service supplied in

- 36 In *Mathews* [2002] FCA 414 claims regarding particular academic activities were struck out, largely on the basis that they were not conduct in ‘trade or commerce’. See also *Dudzinski v Kellow* [1999] FCA 390 at [26].
- 37 The following cases specifically considered this issue: *Kwan* [2002] NSWCTT 83; *Shu Fen Li v Jia Cheng International Pty Ltd* (General) [2008] NSWCTT 944; *Lan v The International College of Management, Sydney P/L* (General) [2007] NSWCTT 299; *Evans* [2004] NSWCTTT; *Cotton* [2004] NSWCTTT 723; *Qayam* [2007] NSWCTT 620; *Nguyen v Anderson* (General) [2009] NSWCTT 278. Cf the following cases where it was simply assumed to apply: *St Clair* [2008] NSWCTT 1309; *Cui* [2003] NSWCTT 32; *Navarro v Academies Australasia P/L* (General) [2003] NSWCTTT 678 (*‘Navarro’*); *Jones* [2005] NSWCTTT 841. See also above n 3 and accompanying text.
- 38 See Megumi Ogawa, ‘The Courts’ Jurisdiction Over Student/University Disputes in Australia’, (2012) 2(1) *International Journal of Public Law and Policy* 96; Astor, ‘Why do Students Sue Australian Universities?’, above n 8 ,28
- 39 See, eg, *Hanna* [2006] NSWSC 122, [36].
- 40 See, eg, *Ogawa v University of Melbourne* [2005] FCA 1139, ‘I am mindful of the need to ensure that an impecunious student is not shut out by a potential liability for costs from pursuing an apparently meritorious claim against a large and wealthy corporation like the University’: at [95] (Ryan J); *Fennell* [1999] FCA 989.
- 41 *Fasold v Roberts* (1997) 145 ALR 548; *Plimer* (1997) 150 ALR 235; *ACCC v Black on White Pty Ltd* (2001) 110 FCR 1. See especially Rochford, ‘Traders of the Lost Ark’, above n 31, 133.
- 42 *Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 169 CLR 594 (*‘Concrete Constructions’*), 602–4.
- 43 *Plimer* (1997) 150 ALR 235, 257.
- 44 *Ibid* 258.
- 45 ACL ch 2 pt 2-3 s 23(3) where the contract must be a supply for services; ACL s 2 (definition of ‘services’) means that the services must be supplied granted or conferred ‘in trade or commerce’; ACL s 2 (definition of ‘trade or commerce’).

‘trade or commerce’, as opposed to a broad range of conduct engaged in by a HEI and its employees that might be subject to other provisions in the ACL, such as misleading or deceptive conduct. This is therefore a narrower inquiry than a consideration of the extensive range of individual academic activities that could arguably be conduct in ‘trade or commerce’ for the purpose of other protections available under the ACL.⁴⁶

The difference is illustrated in the matter of *Monroe Topple & Associates Pty Ltd v Institute of Chartered Accountants in Australia* (2002) 122 FCR 110 (*‘Monroe Topple’*). Here the provision of education services for professional development and accreditation was held to be in ‘trade or commerce’. This issue was considered at length by Lindgren J at first instance.⁴⁷ His findings were upheld on appeal.⁴⁸ Lindgren J found that the provision of the educational service by the Institute included ‘devising of the CA Program modules and of the methods of assessment appropriate for them were closely interrelated activities’.⁴⁹ Justice Lindgren distinguished the particular facts of the *Noah’s Ark* case⁵⁰ and found that the educational services provided to students by the Institute were for ‘a very substantial monetary return on a highly organised, systematic and ongoing basis’⁵¹ sufficient to be conduct in ‘trade or commerce’. His Honour also held that these functions could occur in ‘trade or commerce’ notwithstanding the fact that the objects of the organisation had other characteristics, or public or professional obligations.⁵² On the basis of the particular factual scenario in the *Noah’s Ark* case and the decision of *Monroe Topple*, it is arguable that in some circumstances academic activities of the modern HEI are conduct in ‘trade or commerce’, even under the *Concrete Construction* test, when what is under consideration is the provision of educational services to students for reward ‘on a highly organised, systematic and ongoing basis’. In those circumstances it could be said that activities or transactions between the student and the HEI pursuant to a contract for the supply of educational services of their nature, bear a trading or commercial character.⁵³

46 Such as the Consumer Guarantees contained in ACL ch 3 pt 3-2 div 1 sub-div A-D ss 51–68. See especially Corones, above n 2.

47 *Monroe Topple and Associates Pty Ltd v Institute of Chartered Accountants in Australia* [2001] FCA 1056.

48 *Monroe Topple & Associates Pty Ltd v Institute of Chartered Accountants in Australia* (2002) 122 FCR 110. Only Heerey J (with whom Black CJ agreed) specifically addressed the issue in relation to the question of whether the Institute’s supply of education and training in connection with its CA Program was a provision of services in ‘trade or commerce’ 130–1, [76]–[79].

49 *Monroe Topple* [2001] FCA 1056 [132]–[133].

50 *Monroe Topple* [2001] FCA 1056, [139].

51 *Ibid* [139] Lindgren J applied the construction taken *Concrete Constructions*.

52 *Ibid* [147].

53 See Griggs, ‘Tertiary Education, the Market and Liability’, above n 34 for a detailed consideration of the application of the requirement of in ‘trade or commerce’ to the higher education sector and individual academic activities See also Varnham, ‘Straight Talking, Straight Teaching’, above n 2, 309–11.

Significantly, the ACL contains a new extended definition of ‘trade or commerce’.⁵⁴ It is suggested that the effect of the new definition is to bring the contract for the supply of educational services as an activity occurring in ‘trade or commerce’. The definition of the ACL adopts the wording of that found in former state fair trading acts⁵⁵ and introduces the notion that ‘trade or commerce’ includes any ‘business activity’ or any ‘professional activity’ whether or not for profit.⁵⁶ It is suggested that the addition of the words ‘any business activity’ will add very little to the test as formulated in *Concrete Construction*.⁵⁷ However, the addition of the words ‘any professional activity’ will arguably impact on the application of the ACL to providers of educational services.

This supposition is borne out by the decision in *Shahid v Australasian College of Dermatologists*⁵⁸ (*‘Shahid’*). This case concerned the matter of a general medical practitioner seeking to obtain further qualifications in the speciality of dermatology. Shahid claimed that the College had engaged in misleading or deceptive conduct in contravention of the TPA. Alternatively, Shahid pleaded that the College had breached the mirror provisions of the *Fair Trading Act 1987* (WA) (*‘FTA’*). The activities considered by the Court in relation to whether the conduct of the College was in ‘trade or commerce’ included statements in the published handbook regarding the appeal process and record-keeping procedures, programme assessments, the substantial fees for textbooks, course materials and right to sit the examination.⁵⁹

All members of the Court of Appeal in *Shahid* were in agreement regarding the meaning of the words ‘professional activity’ and its effect on extending the definition of in ‘trade or commerce’.⁶⁰ Justice Jessup considered at length the meaning of the phrase ‘any professional activity’ in the context of the extended definition of ‘trade or commerce’ in both the NSW and WA Fair Trading Acts.⁶¹ In particular he rejected the argument that the phrase ‘professional activity’ was a qualification to ‘trade or commerce’.⁶² Rather, in his opinion it was clearly an addition⁶³ and that ‘the introduction of a further limitation, that the professional

54 ACL s 2 (definition of ‘trade or commerce’).

55 See, eg, *Fair Trading Act 1987* (NSW) s 42(1) and s 4 (definition of ‘business’).

56 ACL s 2 (definition of ‘trade or commerce’).

57 *Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 169 CLR 594, 603; *Fasold v Roberts* (1997) 145 ALR 548, 558. In *Monroe Topple* [2001] FCA 1056, [148] the concept of ‘business’ and ‘trade or commerce’ was used interchangeably.

58 *Shahid* (2008) 248 ALR 267.

59 *Shahid* (2008) 248 ALR 267, 277 (Jessup J), 270 [2] (Branson and Stone JJ).

60 *Shahid* (2008) 248 ALR 267, 270, 323. Justices Branson and Stone (Jessup J dissenting) found the College had engaged in ‘trade or commerce’ within the meaning of the TPA pursuant to the test set out in *Concrete Constructions*: at 275.

61 *Shahid* (2008) 248 ALR 267 at 316–319.

62 *Shahid* (2008) 248 ALR 267 at 319. His Honour casts doubts on the reasoning in *Prestia v Aknar* (1996) 40 NSW 165 and that Court’s consideration of the phrase ‘any professional activity’ and the narrow construction given therein: at 317–18.

63 *Ibid* 323.

activity must bear a trading or commercial character, would bring confusion'.⁶⁴ His Honour saw no reason why the jurisprudence of *Concrete Constructions* and *Noah's Ark* could not inform the construction of the expression of 'professional activities' in the same way it did 'trade or commerce'.⁶⁵ The Court held that the relevant test under the extended definition in relation to professional activities is whether 'the activities and transactions are unequivocally and distinctly characteristic of the carrying-on of the profession'.⁶⁶ This concept is not limited to the engagement of professional practice.⁶⁷ If the activities are characteristic of the carrying on of a profession, then those activities will occur in 'trade or commerce'.

His Honour held that the activities of associations of professionals such as the College were not excluded from the expression 'any professional activity'.⁶⁸ Five particular points⁶⁹ were critical to his finding that the conduct of the College was a 'professional activity' and these can be extrapolated to HEIs more generally. First, academics and their institutions are likely to regard themselves as a profession, or a collection of professionals.⁷⁰ Second, HEIs are institutions whose main concern is to advance knowledge and to maintain standards of learning for many disciplines and often in accordance with accrediting bodies' approval. Third, the establishment of standards of learning and the enforcement of those standards are significant elements of a HEI's overall activities and are not merely incidental.⁷¹ Fourth, transactions with students in relation to the delivery of educational services occur as an instrumental act of the HEI. The academic activities are directed to and involve the cohort of persons with whom the HEI intends to have dealings. Fifth, the entrance into and the provision of education services are tightly organised, systematic and ongoing activities of a HEI. Many academic activities that make up the supply of educational services will thus be unequivocally and distinctly characteristic of the carrying on of the profession and therefore come within the extended meaning of 'trade or commerce' under the ACL.

Commentators support the view that the market culture in the higher education sector has the resulting effect that the consumer protection legislation applies to

64 Ibid 322, 324.

65 Ibid 323.

66 Ibid 268, 323.

67 Ibid 324.

68 Ibid.

69 Ibid 325.

70 See generally Justice John Mansfield, 'Professional Men, They Have No Cares: Whatever Happens, They Get Theirs' (Speech delivered at the Nineteenth Annual Workshop of the Competition Law and Policy Institute of New Zealand, 2 August 2008); David Warren Piper, 'Are Professors Professional?' (1992) 46(2) *Higher Education Quarterly* 145; Kevin Williams, 'Troubling the Concept of the "Academic Professional" in 21st Century Higher Education' (2008) 56 *Higher Education* 533; Mark Davies, 'Universities, Academics and Professional Negligence' (1996) 12(4) *Tolley's Professional Negligence* 102.

71 This is strengthened by the development of learning and teaching standards in the higher education sector: TEQSA Act; Corones, above n 2, 11–14.

educational services,⁷² although some note the potential issues with the Higher Education Contributions Scheme ('HECS').⁷³ The decision in *Quickenden v O'Connor, Commissioner of Australian Industrial Relations Commission* (2001) 184 ALR 260 ('*Quickenden*') has been seen as indicating that activities or conduct in relation to HECS students do not fall within the TPA as they are potentially not activities undertaken in 'trade or commerce', although it was not necessary to decide this point.⁷⁴ The dicta in the separate judgment of Carr J in *Quickenden* should also be considered in relation to the nature of the trading activities of a HEI and students in receipt of HECS. His Honour was of the view that dealings with students under the HECS could be regarded as a trading activity on the part of the University.⁷⁵ In his recent article, Corones is of the view that changes to the funding arrangements under the *Higher Education Support Act (2003)* (Cth) has meant that since 1 January 2005, universities have operated in 'trade or commerce' in respect of HECS students within the meaning of the legislation.⁷⁶

It is the proposition of this article that to the extent that there is a student-HEI contract, this is a transaction that is properly considered to be 'in trade or commerce' as required by the ACL. Following *Monroe Topple* and the majority in *Shahid*, it is arguable that the supply of educational services falls within the definition of 'trade and commerce' as determined by *Concrete Constructions*. Even more probable is that many of the activities of the modern HEI will be a professional activity and within the extended definition of 'trade or commerce' under the ACL. This interpretation of the professional activities of HEIs aligns the sector with other professions, their activities being subject to the consumer protection provisions of the ACL.⁷⁷ To the extent that academic activity forms part of the student-HEI contract it will be subject to the ACL provisions regulating unfair contract terms. It is arguable that this supply in 'trade or commerce' includes Commonwealth funded students.

72 Above n 3 and accompanying text.

73 Pursuant to the *Higher Education Funding Act 1988* (Cth) now *Higher Education Support Act 2003* (Cth). See, eg, Clarke, above n 3, 17; Jackson, 'Regulation of International Education', above n 18; cf Bessant, above n 34; Corones, above n 2; Griggs, 'Knowing the Destination', above n 2; Kamvounias and Varnham, 'Getting What They Paid For', above n 2, 315.

74 *Quickenden* (2001) 184 ALR 260. See, eg, *Hughes v Al-Hidayah Islamic Education Administration Inc.* (2009) WAIRC 00967 at [12].

75 *Quickenden* (2001) 184 ALR 260, 272.

76 The change in the funding model has allowed 'Universities to determine their own student contribution fees, which may be up to 30 per cent more than the HECS fees set by the Commonwealth. This is, in effect, a discretionary tuition fee rather than a statutory charge.' Corones, above n 2, 6.

77 See especially Guzyal Hill, 'The New Consumer Legislation and the Legal Profession' (2012) 20 *Australian Journal of Competition and Consumer Law* 18.

The nature and terms of the student–HEI contract for educational services

Legal commentators in Australia and other common law jurisdictions have acknowledged the coexistence of statutory and contractual rights as regards the relationship between the HEI and student.⁷⁸ It is settled law in the United Kingdom that a student–HEI contract exists.⁷⁹ There is very little direct Australian authority⁸⁰ on this particular issue, but some commentators go so far as to say that it is now beyond debate that a student–HEI contract exists in Australia.⁸¹ The matter presents no difficulties in relation to ‘fee-paying students’,⁸² particularly if supplied by a private provider of higher educational services or postgraduate training.⁸³ The ease of acceptance of a student–HEI contract is even more apparent when one considers the cases that have come before the consumer based tribunals.⁸⁴

The situation regarding a Commonwealth-funded student is more complex.⁸⁵ In these circumstances, students agree to pay back to the Federal Government, with interest, a fee for their course. In turn the government pays an amount to the HEI for that particular place. The principles in relation to privity of contract might prevent a student from enforcing the contractual promise as it is the

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- 78 Rochford ‘The Contested Product’, above n 2, 42. See also Martin Davis, ‘Students, Academic Institutions and Contracts—A Ticking Time Bomb?’ (2001) 13(1) *Education and the Law* 9; Kós and McVeagh, above, n 7, 26 where Kós and McVeagh acknowledge the coexistence of statutory powers and contractual rights in other aspects of New Zealand law, notably companies formed under the NZ Companies Act; Whittaker, ‘Public and Private Law-Making’, above n 7.
- 79 *Clark* [2000] 3 All ER 752, 756 (Sedley LJ); *Moran v University College, Salford* [1994] ELR 187 (*Moran*). See generally Farrington and Palfreyman, above n 7, chapter 12; Tim Birtwistle and Melissa Askew, ‘The Teaching and Higher Education Act 1998—Impact on The Student Contract’ (1999) 11(2) *Education and the Law* 89, 95; Davis, above n 78; Hoye and Palfreyman, above, n 7; Middlemiss, above, n 7; David Palfreyman, ‘*Phelps ... Clark ... and now Rycotewood?* Disappointment Damages for Breach of the Contract to Educate’ (2003) 15(4) *Education and the Law* 237.
- 80 The accepted authority in the Australian context is *Bayley-Jones v University of Newcastle* (1990) 22 NSW 424 (*Bayley-Jones*); in *Shahid* (2008) 248 ALR 267. Justice Jessup held that there was a mutual intention to create legal relations: at 332 [216].
- 81 See Kamvounias and Varnham, ‘In-House or in Court?’, above n 8, 10; Griggs, ‘Knowing the Destination’, above n 2; Lindsay, ‘Complexity and Ambiguity in University Law’, above, n 7, 10–11.
- 82 *Clark* [2000] 3 All ER 752.
- 83 See, eg, *Monroe Topple* (2002) 122 FCR 110.
- 84 See, eg, *Kwan* [2002] NSWCTTT 83. Often the supply of services under a contract to educate is readily recognised and the tribunals focus on determining the contents of the contract and what loss, if any, has been suffered by applicants. See, eg, *St Clair* [2008] NSWCTTT 1309; *Qayam* [2007] NSWCTTT 620 (17 October 2007); *Cotton* [2004] NSWCTTT 723 (13 December 2004); cf *Navarro* [2003] NSWCTTT 678 (4 October 2003); *David Joseph Crook v Holmesglen Institute of TAFE* (Civil Claims) [2010] VCAT 1808; *Chan v Sellwood* [2009] NSWSC 135.
- 85 The UK decision of *Clark* above is seen as authority for the existence of a contract between the HEI and the fee-paying student. The meaning of what is a ‘fee-paying’ student is not considered in any detail in *Clark*.

Federal Government who provides the consideration,⁸⁶ although the submissions made by UWA in *Quickenden* support the notion of obligations and liability imposed on the institution and the student upon acceptance of a place, even if a Commonwealth-funded student.⁸⁷ The changes made in 2012 to the structure and nature of the payment system for Commonwealth-funded places also adds weight to the idea of sufficient consideration on behalf of the student, as in the absence of quotas, funding travels with the student.⁸⁸ The increasing overlay of regulation has also been seen as crystallising the formal elements required to constitute an enforceable contract, including the issue of intention.⁸⁹ It has also been suggested that the inability of students to individually negotiate the contract supports the view that there is in fact an intention to be legally bound and would certainly negate any argument a provider of higher education would make in relation to that point.⁹⁰ Furthermore, it is arguable that there is sufficient consideration simply in the student declining another place and thereby suffering a detriment should the HEI not meet its contractual obligations.⁹¹

However, even if it can be said that the contract does exist, there is some debate about whether the contract for the supply of educational services consists of one or two contracts. Proponents of the two contract theory suggest that the first contract between the student and the HEI is a contract ‘to admit’.⁹² That is, the prospective student in receipt of an offer and upon acceptance of that offer has a contractual entitlement to take up a place at the HEI and enrol.⁹³ The second contract, the contract ‘to educate’ (alternately a contract for tuition or matriculation),⁹⁴ arises upon enrolment. The process in Australia in relation to application for Commonwealth-funded places (largely by school leavers) through

86 *Price v Easton* (1833) 4 B& Ad 433. See Rochford, ‘The Relationship Between The Student and The University’, above n 2, 36; Davis, above n 78, 14; Lindsay, ‘Student Subjectivity’, above n 2, 634.

87 *Quickenden* (2001) 184 ALR 260, 266; See also Bernard McCabe, ‘Concrete Constructions Turns 15’ (2005) 13 *Trade Practices Law Journal* 6.

88 See generally Department of Industry, Innovation, Science, Research and Tertiary Education, *Higher Education Support Act 2003 (Cth) Guidelines* (13 August 2012) <<http://www.deewr.gov.au/highereducation/resources/hesupportact2003guidelines/Pages/Home.aspx>>. See also Corones, above n 2, 6.

89 Griggs, ‘Knowing the Destination’, above n 2, 320, n 30; Middlemiss, above n 7, 72.

90 Griggs, ‘Knowing the Destination’, above n 2, 320, n 30; Birtwistle and Askew, above n 79, 94.

91 This is consistent with the decision in *Moran* [1994] ELR 187. See Griggs, ‘Knowing the Destination’, above n 5, 320, nn 30–1; Farrington and Palfreyman, *The Law of Higher Education*, above n 4, 337–8 [12.08]–[12.09]; Davis, above n 78. See also Rochford, ‘The Relationship Between The Student and The University’, above n 2, 35.

92 *Moran* [1994] ELR 187; See generally Farrington and Palfreyman, above n 7, 336–350 [12.08]–[12.240]; Davis, above n 78; but see Middlemiss, above n 7, 85; Birtwistle and Askew, above n 79.

93 Indeed the initial relationship between the prospective student and the HEI can only be based in contract as the prospective student is not yet a member of the HEI. Farrington and Palfreyman, above n 7, 336 [12.08].

94 *Moran* [1994] ELR 187. See generally Farrington and Palfreyman, above n 7; Davis, above n 78; but see Middlemiss, above n 7; Birtwistle and Askew, above n 79.

a centralised system supports the idea in practice of the formation of two separate contracts, one to admit and one to educate,⁹⁵ with the terms of the first contract rolling into or as part of the second, as described by Davis.⁹⁶ Difficulties do arise in the Australian context with particular regard to the issue of second round offers.⁹⁷ It is suggested that the second round offer is a condition subsequent to the initial contract to admit.⁹⁸ The second contract is then formed upon the student completing the enrolment process in relation to the preferred offer.

As this article is concerned with the UCT regime in the ACL, the contract for the supply of educational services must also be a 'service' within the meaning of the legislation.⁹⁹ The definition of 'services' provides an inclusive definition of various contractual arrangements under which rights, benefits,¹⁰⁰ privileges or facilities are conferred. The only specific exclusion is in relation to a contract of employment.¹⁰¹ For the purpose of the ACL, the contract for the supply of educational services,¹⁰² whether comprised of one or two contracts, is a 'service' as required by the legislation.

The general consensus amongst commentators is that while it may be comparatively straight forward to establish the existence of a contract between the student and the HEI, the determination of what the terms of that contract are is less certain and a far more complex process.¹⁰³ Guidance from the case law on the content of the contract is limited. Counsel involved in the landmark New Zealand case of *Victoria University*¹⁰⁴ remarked: 'It is difficult to imagine any other major service provider taking so relaxed and chaotic an approach to defining the duties and responsibilities of a contractual relationship.'¹⁰⁵ It is worth noting

95 *Moran* [1994] ELR 187.

96 Davis, above n 78, 11.

97 Rochford, 'The Relationship Between The Student and The University', above n 2, 36.

98 This may be a *Masters v Cameron* (1954) 91 CLR 353 situation, although it is more likely a condition subsequent. Therefore the initial contract to admit would be said to have a term stipulating that if a second offer occurs, and is accepted by the student then either the student or HEI can bring the contract to an end: *Head v Tattersall* (1871) LR 7 Ex 7. This is preferable to a classification of a condition precedent, because if the second round offer did not eventuate it is possible that the first contract to admit is unenforceable: *Perri v Coolangatta Investments Pty Ltd* (1982) 149 CLR 537; Stephen Graw, *An Introduction to the Law of Contract* (Thompson Law Book Co, 5th ed, 2005) 388.

99 ACL s 2 (definition of 'services').

100 Ibid. See also *Griffith University v Tang* (2005) 221 CLR 99, 110 where Gleeson CJ refers to the conferment of a benefit under the relationship.

101 ACL s 2 (definition of 'services').

102 While the idea of the 'product' in higher education being a positional good has been noted by a few commentators, see, eg, Simon Marginson, 'Competition in Higher Education in the Post-Hilmer Era' (1996) 68(4) *Australian Quarterly* 23, it is unlikely that the attainment of further education, typically a degree or associate degree, will be seen as the supply of a good at law. See generally Rochford, 'The Contested Product', above n 2.

103 Lindsay, 'Complexity and Ambiguity in University Law,' above, n 7, 10–11.

104 *Grant v Victoria University of Wellington* [2003] NZAR 186.

105 Kós and McVeagh, above n 7, 28. See also *WU, Mr Ying Ching* [2003] MRTA 8095 (28 November 2003) [77]–[78] where Member Hurly stated 'Strangely, the Tribunal is yet to

that a significant number of universities in the UK and New Zealand now have formal written student contracts, the most notable being the Oxford University student contract.¹⁰⁶

Although important, a detailed consideration of the entirety of the terms of the contract for the supply of educational services, both express and implied, are beyond the scope of this article. Commentators have suggested that the contract for educational services is potentially broader than merely the ordinances and statutes of a HEI.¹⁰⁷ The express terms of the contract arising on enrolment ‘would appear to comprise not only the various charters,¹⁰⁸ codes¹⁰⁹ and other HEI “regulations”¹¹⁰ usually referred to explicitly (and in writing) at the time a student enrolls’,¹¹¹ but also published course handbooks.¹¹² Implied terms of the contract could include pre-contractual information such as the promotional information contained in the

see a sound written contract (leaving aside enrolment forms and what can be inferred out of them) between a student and an education provider’ as cited in Jackson, ‘Regulation of International Education’, above n 18, 80.

- 106 *Oxford Student Contract* (13 August 2012) <http://www.st-annes.ox.ac.uk/fileadmin/STA/Documents/University_Contract.pdf> Annexure 2; Formal student contracts are used extensively in the UK, see, eg, University of Bristol <<http://www.bris.ac.uk/secretary/studentrulesregs/agreement.html/>>; University of Leeds, Taught Student Contract, (13 August 2012) <<http://www.leeds.ac.uk/ssc/studentcontract.htm>>. There are even professional development courses that can be taken in this area, see, eg, JISC Legal Information (UK) <<http://www.jisclegal.ac.uk/ManageContent/ViewDetail/ID/1866/ARMED--Student-contract-and-charters.aspx>>. Some examples of formal student contracts in New Zealand are Massey University, Student Contract (13 August 2012) <<http://www.massey.ac.nz/massey/about-massey/calendar/statutes-and-regulations/student-contract.cfm>>; University of Victoria, Wellington, *Student Contract*, (13 August 2012) <<http://www.victoria.ac.nz/home/admisenrol/enrol/studentcontract>>; Canterbury Christ Church University, *Student Agreement* (13 August 2012) <<http://www.canterbury.ac.uk/courses/about/student-agreement.pdf>>. The only formalised agreement that could be found for an Australian HEI was in relation to HDR degrees at the University of New England in NSW (13 August 2012) <http://www.une.edu.au/research-services/forms/student-supervisor-agreement.pdf>. See also Julia Pedley, ‘The Development of a Student Contract and Improvement in Student Disciplinary Procedures at Massey University’ (2007) 12(1) *Australian & New Zealand Journal of Law & Education* 73; Kamvounias and Varnham, ‘Getting What They Paid For’, above n 2, 313.
- 107 Kaye, Bickel and Birtwistle, above n 2, 114. But see Rochford, ‘The Relationship Between The Student and The University’, above n 2, 33.
- 108 Davis, above n 78, 15. See generally Simon Smith, ‘Customer Charters the Next Dimension in Consumer Protection?’ (1997) 22(3) *Alternative Law Journal* 138; Ruth Gaffney-Rhys and Joanna Jones, ‘Issues Surrounding the Introduction of Formal Student Contracts’ (2010) 35(6) *Assessment & Evaluation in Higher Education* 711 at 719.
- 109 See, eg, Australian Vice-Chancellors’ Committee, *Provision of Education to International Students Code of Practice and Guidelines for Australian Universities*, 2005; Curtin University Codes of Conduct for both students (21 September 2011) <<http://students.curtin.edu.au/rights/conduct.cfm>> and staff (21 September 2011) <<http://policies.curtin.edu.au/local/docs/Code%20of%20Conduct%20-%20Approved%2030%20June%202009.pdf>>.
- 110 Including policies of a HEI, see, eg, Curtin University, *Legislation, Policies and Procedures* (12 July 2012) <<http://policies.curtin.edu.au/home/>>.
- 111 Davis, above n 78, 15.
- 112 *Ibid* 18; Kwan [2002] NSWCTTT 83; Gaffney-Rhys and Jones, above n 108, 714, 719.

prospectus and the like.¹¹³ Difficulties arise in relation to the determination of when the terms of the contract for educational services are complete; whether the contract is informed by pre-admission promises¹¹⁴ or varied over the course of the entire period of study¹¹⁵ (as opposed to discharge and creation of new contracts upon each re-enrolment with each new academic study period).¹¹⁶

However, it is the terms of any ‘standard form’ contract with which this paper is concerned, as the UCT provisions only apply to ‘standard form’ contracts.¹¹⁷ There is no definition of ‘standard form contract’ in the ACL,¹¹⁸ although section 27(2) provides a list of matters a court *must* take into account when considering whether the contract is standard form (and other matters it thinks relevant). The accepted view of the government regulator is that it will ordinarily be a standard form contract if it is prepared by one party with no negotiation on the terms and offered on a ‘take it or leave it basis’.¹¹⁹ If a student were to allege that the contract is a ‘standard form’ contract, it would be presumed to be so unless the supplier HEI was able to prove otherwise.¹²⁰ It is suggested that the only contract capable of being a ‘standard form’ contract arises during the enrolment process, specifically the express terms of the contract arising on enrolment. It is therefore the express terms agreed to in the enrolment process that will be considered.

Enrolment processes and documents across Australian HEIs are strikingly similar. Typically the enrolment process occurs online and not necessarily in person on campus.¹²¹ Below is the student declaration used in the online enrolment process

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- 113 Birtwistle and Askew, above n 79, 95; Middlemiss, above n 7, 85.
- 114 As has been argued in a number of cases, see, eg, *Fennell* [1999] FCA 989; *Victoria University* [2003] NZAR 186; and especially in matters before the consumer tribunals, see, eg, *Kwan* [2002] NSWCTTT 83.
- 115 Kós and McVeagh, above n 7, 28; Davis, above n 78, 21.
- 116 Davis, above n 78, 21.
- 117 ACL s 23(1)(b).
- 118 ACL s27. Economics Legislation Committee, The Senate (Cth), Trade Practices Amendment (Australian Consumer Law) Bill 2009 [Provisions] September 2009, 18–20.
- 119 Australian Attorney-General, *The Australian Consumer Law: A Guide to Provisions*, 2010, 8; Dan Jerker B Svantesson and Loren Holly, ‘An Overview and Analysis of the National Unfair Contract Terms Provisions’ (2010) 24(3) *Commercial Law Quarterly* 3 at 5; Sirko Harder, ‘Problems in Interpreting the Unfair Contract Terms Provisions of the Australian Consumer Law’ (2011) 34 *Australian Bar Review* 306, 31.
- 120 ACL s 27(1). The rationale for the use of the rebuttable presumption is based on the fact that it is likely that the respondent (supplier) is best placed to bring evidence in relation to the nature of the contract used. Explanatory Memorandum, Trade Practices Amendment (Australian Consumer Law) Bill 2009 (Cth) (‘EM1’) 29 [2.88]. Note the submission received by the Senate from Mr Tonking SC highlighting the potential problem that while particular terms may be beyond dispute as unfair, whether or not the contract is a ‘standard form’ contract may remain in dispute: Economics Legislation Committee, above n 118, 19.
- 121 Interview with Deb Greenwood, Manager Student Central—Admissions, Curtin University, (Perth, 28 September 2011); Curtin University, *How to enrol*, (13 August 2012) <<http://students.curtin.edu.au/administration/enrolment/howto.cfm>> where the webpage speaks to the University moving to ‘self-management’ in re-enrolment and ‘large numbers’ of students use the online enrolment process.

at Curtin University,¹²² which is typical of online student declarations used at many HEIs.¹²³ The words and phrases underlined are indicative of a hyperlink:

Student Declaration

- I understand it is my responsibility to ensure that my enrolment is correct.
- I have sought appropriate academic counselling in relation to my enrolment.
- I agree to be bound by the Statutes, Rules and Policies of the University as amended from time to time and agreed to pay all fees, levies and charges directly arising from my enrolment.
- I consent to receiving information electronically from the University.
- I agree to access OASIS (student portal) at least once a week to receive official communications from the University (unless approval for exemption is granted).
- I am aware of the conditions under which I am permitted to use University (computer) facilities (refer to the ICT Policy).
- I acknowledge that I have read and understood the information regarding Guild Membership.
- I acknowledge that I have read and understood the University's Privacy Statement.
- I acknowledge that any expense, costs or disbursements incurred by the University in recovering any monies owing by me shall be the responsibility of the debtor, including debt collection agency fees and solicitor's costs on the amount outstanding and all other reasonable costs incurred in the recovery of outstanding monies.

Importantly, in this example, the student agrees to be bound by the 'Statutes, Rules and Policies' of the University. This has the effect of incorporating a myriad of Statutes, Rules and Policies as express terms of the contact,¹²⁴ available on a website accessed through a hyperlink.¹²⁵ This is common practice by all Australian HEIs.¹²⁶ The numerous policies cover diverse subjects from facilities to research,

122 As at January 2012, hard copy provided by Greenwood above n 121.

123 For example, the process is similar to the University of Adelaide and their checklist includes the following information: 'Declaration Read this information carefully before you select "I Agree"' as this indicates that you agree to be bound by the statutes, regulations, rules and policies of the University and the release of information to statutory authorities, as required by law': University of Adelaide, *University Enrolment* (12 July 2012) <<http://www.adelaide.edu.au/enrol/steps/step4.html>>.

124 Incorporated by reference *L'Estrange v F Graucob Ltd* [1933] 2 KB 394 and the 'ticketing cases', see, eg, *Thompson v London, Midland and Scottish Railway Co* [1930] 1KB 41; *Sydney City Council v West* (1965) 114 CLR 481. See also Aviva Freilich and Eileen Webb, 'The Incorporation of Contractual Terms in Unsigned Documents—is it Time for a Realistic, Consumer-Friendly Approach?' (2009) 34 *University of Western Australian Law Review* 261.

125 Curtin University, *Legislation, Policies and Procedures*, above n 162.

126 See, eg, La Trobe University (12 July 2012) <<http://www.latrobe.edu.au/policy/all-policies>>; Bond University (12 July 2012) <<http://www.bond.edu.au/student-resources/>>

to library services, student discipline, and teaching and learning matters.¹²⁷

In the absence of a clear definition of the meaning of ‘standard form contract’, when determining whether the contract for the supply of educational service is a ‘standard form contract’ regard is had to the matters listed for consideration in sections 27(2). The HEI has all or most of the bargaining power.¹²⁸ In relation to the contract of admission (whether to accept the place or not), the power between the parties may be more balanced as Commonwealth funding now travels with the individual student. The enrolment documentation however is prepared by one party, the HEI, prior to any discussion¹²⁹ with the enrolling student, which that student has to accept on a ‘take it or leave it’ basis.¹³⁰ There is no real opportunity for an enrolling student to negotiate individual terms of the contract¹³¹ that take into account their specific characteristics.¹³² Any impression of negotiation is illusory.¹³³

The ACL consultation paper released by the Federal Government specifically states that a contract for ‘publically and privately provided vocational training and professional development services’ is a type of contract covered by the UCT regulation.¹³⁴ It is suggested that the qualification of the type of educational services affected reflects the uncertainty surrounding whether the provision of educational services by a HEI is in ‘trade or commerce’. As maintained above, the provision of educational services by HEI is in ‘trade or commerce’. It seems that it has been accepted in the UK that the student–HEI contract does have the appearance of the standard form contract.¹³⁵ As early as 1970, despite the division in views regarding the appropriateness of classifying the student–university relationship as

student-administration/policies-procedures-guidelines-and-forms/index.htm>.

127 It is understood that at Curtin University since the beginning of 2012, 14 policies have been amended, 10 procedures have been amended, and 56 policies and procedures have been rescinded. Email from Naomi Yellowlees, Director of Legal and Compliance Services, Curtin University, to all Curtin Staff, 27 June 2012. There remain over one hundred policies in existence in addition to more than 30 statutes and rules available on the University website. Again this is common to all Australian universities.

128 ACL s 27(2)(a). As discussed above, there are many factors supporting this, including, as observed by Griggs, significant regulation in the sector and the prescription of contractual documents and terms by the stronger party, resulting in the court using these factors to assist the weaker party, the student: Griggs, ‘Knowing the Destination’, above n 2, 320, n 30. See also Birtwistle, and Askew, above n 79, 94.

129 ACL s 27(2)(b).

130 Ibid s 27(2)(c).

131 Ibid s 27(2)(d).

132 Ibid s 27(2)(e). Even equity students are governed by ‘standard form’ policy in that regard. Any negotiation is limited to other potential terms of the contract outside of the contract arising on enrolment: Francine Rochford, ‘The Relationship Between The Student and The University’, above n 2, 35.

133 Lindsay, ‘Student Subjectivity’, above n 2, 364;

134 Minister for Competition Policy and Consumer Affairs, Australian Government, *An Australian Consumer Law Fair Markets—Confident Consumer* (2009) 33.

135 Farrington and Palfreyman, above n 7, 338 [12.10]; Kaye, Bickel and Birtwistle, above n 2, 118–19; Birtwistle and Askew, above n 79, 96.

a contractual one, it was accepted that if it were to be so, it was ‘much closer to a *contrat d’adhesion* than to the classic type of contract on a consensual basis’.¹³⁶ Similarly in Australia, when the matters listed in section 27(2) of the ACL are examined, the contract for the supply of educational services (at least the contract arising on enrolment) bears the traits of a standard form contract.

‘Consumer contract’—the student as consumer¹³⁷

In order for students to avail themselves of the protections available under the UCT provisions in ACL, the contract for educational services must be a consumer contract¹³⁸ for the ‘supply of goods or services ... to an individual whose acquisition of the goods, services or interest is wholly or predominantly for personal, domestic or household use or consumption’ as defined in section 23(3). The meaning of ‘acquisition’ is defined in section 2 and in relation to services means ‘accept’.¹³⁹ This is expanded in section 11 of the ACL so as not to limit ‘acquisition’ to ‘purchase’.¹⁴⁰ As this can include a reference to an agreement to supply services, this is of assistance to Commonwealth-funded students in the event of any debate as to whether they ‘acquire’ services.

The other definitions of ‘consumer’ within the ACL are based on objective tests determined on the facts.¹⁴¹ However, the definition of a ‘consumer contract’ pursuant to section 23(3) is subjective.¹⁴² Therefore, the definition of a consumer contract for the purposes of the UCT provisions refers to the use that the goods

136 J W Bridge, ‘Keeping the Peace in the Universities: The Role of the Visitor’ (1970) 86 *The Law Quarterly Review* 531, 548.

137 As noted in above n 2, there is a significant body of literature as regards this issue outside of the legislative definitions in the ACL.

138 ACL s23(3). Previously the definition of consumer was contained in s 4B of the TPA (now CCA). This definition has not been repealed and remains relevant for any use of consumer outside of schedule 2 of the CCA, the ACL, or in Pt XI of the CCA. See CCH, *Competition and Consumer Law Commentary 2-000* (6 December 2011). For the purpose of this article, only the definition relevant to UCT will be considered. Thus, the more widely known definition of ‘consumer’ in now ACL s 3, replete with two threshold steps going to the amount payable and failing that, whether the goods or services were of ‘kind ordinarily’ used in a personal way, will not be considered in this paper.

139 It should be noted that while there is an expanded definition of the meaning ‘acquiring goods as a consumer’ in ACL s 3, this is not relevant to the UCT provisions. This definition is important for a number of Parts of the ACL, including s 18 (misleading or deceptive conduct) and consumer guarantees (pt 3-2 div1).

140 ACL s 11; Miller, above, n 5, 1537 [1.S2.2.10].

141 For a consideration of previous or other legislative definitions of ‘consumer’ see Griggs, Lynden, Aviva Freilich and Eileen Webb, ‘Challenging the Notion of a Consumer: Time for Change’ (2011) 19 *Competition and Consumer Law Journal* 52; Lindsay, ‘Complexity and Ambiguity in University Law,’ above, n 7, 12; Kamvounias and Varnham, ‘Getting What They Paid For’, above n 2, 322–3.

142 The unfair contract terms were based on the experience in the Victorian jurisdiction and the *Fair Trading Act 1999* (Vic). The definition in the Victorian Act was slightly different and required an objective finding a fact also. See *Director of Consumer Affairs Victoria v AAPT Ltd* [2006] VCAT 1493 cited in Miller, above n 5, 1699 [1.s2.23.30].

or services *are put to*, not, as in the other definitions of consumer, ‘of a kind ordinarily used or put to’.¹⁴³ This means that the test of whether the services are within the definition of consumer contract for the purpose of the UCT sections is in fact far more subjective than the other consumer definitions elsewhere in the legislation, focusing on the actual intention of the acquirer of the services.¹⁴⁴ An educational service for the attainment of an undergraduate or higher degree is clearly predominately a service that is put to personal use by the student.¹⁴⁵ While there is an absence of case law directly on point, it is difficult to imagine any scenario where educational services would not be viewed as for personal use, even if an employer had contributed to the payment of the fees.¹⁴⁶ It would seem clear that a contract for the provision of educational services would indeed be a consumer contract under the legislative definition.

Unfair Contract Terms and the student–HEI contract

It is suggested that the UCT provisions attempt to deal with not just the procedural unfairness of terms but indeed the substantive unfairness of terms.¹⁴⁷ The courts’ reluctance to interfere with contractual terms on the basis of unfairness has a long tradition founded on the guiding principle of ‘freedom to contract’ and concepts of voluntariness in entering into contractual relations.¹⁴⁸ It is the accepted view that courts have hitherto confined their examination to matters concerning procedural fairness in the formation of the contract.¹⁴⁹ It can be said:

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- 143 ACL s 3.
- 144 Harder, above n 119, 310; Jeannie Marie Paterson, ‘The Australian Unfair Contract Terms Law: The Rise of Substantive Unfairness as a Ground for Review of Standard Form Consumer Contracts’ (2009) 33(3) *Melbourne University Law Review* 934, 940. See also Aviva Freilich, ‘A Radical Solution to Problems with the Statutory Definition of Consumer: All Transactions are Consumer Transactions’ (2006) 33 *University of Western Australia Law Review* 108; John W Carter, ‘The Commercial Side of Australian Consumer Protection Law’ (2010) 26 *Journal of Contract Law* 221.
- 145 Corones is of this view even under the object test of consumer in ACL s3: Corones, above n 2, 5.
- 146 See Kamvounias and Varnham, ‘Getting What They Paid For’, above n 2, 322; Corones, above n 2, 5. See generally the commentary by Freilich in relation to the current difficulty in relation to judicial guidance on this issue in the context of the objective test in other sections, as to what is meant by personal, domestic or household use and irreconcilable cases: Freilich, above n 144, 115–16.
- 147 See Jeannie Paterson, ‘The Australian Unfair Contract Terms Law’, above n 144, 937–9 particularly in the distinction between procedural and substantive unfairness; Peter Doherty, ‘Unequal Bargaining Position’ (Paper presented at Law Summer School 2011, University of Western Australia Law School, Perth, 25 February 2011) 65; Australian Attorney-General, above n 119.
- 148 Paterson, ‘The Australian Unfair Contract Terms Law’, above n 144, 937–8. See generally, Andrew Robertson, ‘The Limits of Voluntariness in Contract’ (2005) 29 *Melbourne University Law Review* 179.
- 149 The focus has been on the conduct of parties in the negotiation and formation of contracts and procedural fairness. See Paterson, ‘The Australian Unfair Contract Terms Law’, above n 144, 937–9; Svantesson and Holly, above n 119, 4; Lynden Griggs, ‘The [Ir]rational Consumer and Why We Need National Legislation Government Unfair Contract Terms’ (2005) 13 *Competition & Consumer Law* 1, 11; Chris Willett, ‘The Functions

Substantive unfairness in contractual dealings refers to an objective assessment of the fairness of individual contract terms agreed to between parties. This is in contrast to procedural unfairness which is concerned with factors which may erode the ability of one of the contracting parties to give a fully informed consent to the terms.¹⁵⁰

The UCT regime in the ACL is concerned with both. Notions of transparency, accessibility and legibility are matters to be taken into account in the determination of whether a term is substantively unfair.¹⁵¹ The terms need to be balanced, so that they are a proportionate response to a legitimate risk of the supplier.¹⁵² In the higher education context this poses some challenges, not least because of the difficulty in ascertaining the terms of the contract. Further, what comprises the higher education sector market and thus the legitimate interests of the suppliers of those services is a complex question.¹⁵³ There are also parallels in student litigation regarding the division of substantive and procedural fairness. As discussed above, the notion that claims going to procedural fairness are justiciable¹⁵⁴ but those relating to the substance of academic judgement are not reviewable is a common theme in student claims. It is arguable that the examination of the substantive fairness of contractual terms under the UCT provides some measure of advancement in the rights of students as consumers of educational services.

Exemptions

Before considering the test required to ascertain whether a term is unfair and potential examples in contracts for educational services, it is important to have regard to any relevant exemptions to the UCT regime. Section 26 of the ACL excludes from the operation of section 23 terms that define the ‘main subject matter of the contract’ or ‘sets the upfront price payable’.¹⁵⁵ The definition of ‘upfront price’ includes future payments and it seems clear that this provision is aimed at ensuring that consumers cannot challenge the adequacy of the consideration

of Transparency in Regulating Contract Terms: UK and Australian Approaches’ (2011) 60(2) *International and Comparative Law Quarterly* 355, 369–70; James Davidson, ‘Unfair Contract Terms and the Consumer: A Case for Proactive Regulation?’ (2007) 15(1) *Competition & Consumer Law Journal* 74, 84. Cf Anthony Gray, ‘Unfair Contracts and the Consumer Law Bill’ (2009) 9(2) *Queensland University of Technology Law and Justice Journal* 155. He comments that the distinction between procedural and substantive unfairness in the existing doctrines is artificial because substantive unfairness may be evidence of procedural unfairness, therefore intertwined and somewhat circular: at 166.

150 Davidson, above n 149, 84.

151 ACL ss 24(2) and 24(3); Jeannie Marie Paterson, ‘The Elements of a Prohibition on Unfair Terms in Consumer Contracts’ (2009) 37 *Australian Business Law Review* 184, 188. See generally Willett, above n 149.

152 Paterson, ‘The Elements of a Prohibition on Unfair Terms’, above n 151, 184.

153 See, eg, Roger Brown (ed), *Higher Education and The Market* (Routledge, 2011); Kathryn McMahon, ‘Universities and Market Discourse’ (2001) 27(1) *Monash University Law Review* 105.

154 See generally Lindsay, ‘University Hearings’, above n 14.

155 ACL s 26(1)(2).

provided in accordance with accepted common law principles.¹⁵⁶ This is unlikely to be an issue in the context of the student–HEI contract, although the definition does require that there is disclosure at or before the time the contract is entered into. It is possible that there may be dispute over the veracity of the disclosure provided in relation to price, particularly when the complexity of the Commonwealth funding documents is taken into consideration.¹⁵⁷ It is clear however that students will be unable to use the UCT provisions to mount a challenge on the basis that they didn't receive 'value for money'.¹⁵⁸

A potentially significant issue for the student consumer is that the 'main subject' of the contract is the entirety of the contract for educational services, that is the delivery of a specified course of study, and therefore outside the ambit of the UCT provisions. Thus any terms relating to the provision of that course of study may be specifically excluded from the operation of the UCT regime. Some commentators have indicated that with respect to the legislative provisions in the UK, the 'main subject matter' relates to the overall focus of the course or composition of courses offered within the degree programme.¹⁵⁹ Other UK scholars are of the view that the potential impact of the UCT regulation is not so limited and its application is potentially very wide.¹⁶⁰ The basis for the carve out of the main subject matter from the operation of the UCT provisions was to ensure that a party could not challenge a term on the basis of unfairness, simply because they had changed their mind as regards their purchase.¹⁶¹ As with other exemptions, it is arguable that the section should be interpreted narrowly to protect the student acquirer.¹⁶² It may be possible for the student to argue that any choice relates to the choice for the contract of admission only, rather than the contract to educate more generally. Thus the 'main subject matter' of the standard form contract for the supply of educational services is the acceptance of the 'place'. What is chosen as the 'purchase' is an acceptance of the overall focus of the course or composition of courses offered within the programme.

So, for example, a student who chooses to undertake studies in physiotherapy at a particular HEI could not challenge a term preventing a change of enrolment to

156 See 'EM1' 26 [2.70]; Harder, above n 119, 313–16; Australian Attorney-General, above n 119, 10.

157 Paterson, 'The Elements of a Prohibition on Unfair Terms', above n 151, 198, upfront price may be unfair if there is not transparent disclosure; Australian Attorney-General, above n 119, 10.

158 Whittaker, 'Judicial Review', above n 16, 209; Farrington and Palfreyman, above n 7, 413 [12.102] where the authors state that in the UK there can be no review of the basis of price-quality ration as per Reg 3(2) of the UCTCCR.

159 Farrington and Palfreyman, above n 7, 'the main subject matter being those aspects the typical consumer (student) will have regard to ... when deciding whether to enter into the contract (accept the offer of a place)': at 413 [12.102]. See also Whittaker, 'Judicial Review', above n 16, 209.

160 Kaye, Bickel and Birtwistle, above n 2, 119; Davis, above n 78, 20.

161 EM1, 25 [2.65].

162 See Harder, above n 119, 315–16 in relation to the interpretation of 'upfront price'.

engineering on the grounds that it was unfair as the term regarding the acceptance of a place in the physiotherapy course is the ‘main subject’ of the contract. It is submitted that it cannot realistically be said that a student chooses freely (in the sense of a voluntary bargain) in relation to the service provided beyond this initial choice. There is no genuine negotiation.¹⁶³ The rationale of this carve out is to prevent a consumer challenging a term as unfair simply because they changed their mind.¹⁶⁴ This is less clear when having regard to the other terms of the contract of enrolment.

The final exclusion in section 26(1)(c) is also especially relevant in a higher education context. A term is unaffected by the UCT provisions if it is a ‘term required, or expressly permitted by a law of the Commonwealth, a State or a Territory’.¹⁶⁵ Regard is had to the specific wording of the legislation and the reference to ‘required’ and ‘expressly permitted’. It has been suggested that ‘a legislative permission is required rather than a mere lack of prohibition.’¹⁶⁶ This is very relevant to the terms of the contract for educational services. As outlined above, generally it is an express term of the contract of enrolment that any statutes and rules of a HEI are incorporated as terms of the contract. The statute and rules of public universities in particular are at the very least permitted if not required by law. This matter has been considered at length by English commentator Simon Whittaker in the context of ‘student rules’ or by-laws.¹⁶⁷ He considers both the express contractual term that the student is bound by, the by-laws, and the contents of the rules themselves.¹⁶⁸ In his opinion the exclusion¹⁶⁹ is:

... likely to be held to apply only to terms whose content is determined by law and not merely to those made by a body which has been authorized by law to make the term or require that a certain term be used. While a university may enjoy statutory or common law powers to require the use of a particular contract term in its dealings with students, as regards the student such a term would not be required by the law itself. The Regulations would require contract terms within their ambit to be fair

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- 163 *Director of Consumer Affairs Victoria v Craig Langley Pty Ltd & Matrix Pilates and Yoga Pty Ltd* (Civil Claims) [2008] VCAT 482.
- 164 Australian Attorney-General, above n 119, 9.
- 165 ACL s26(1)(c).
- 166 Fiona Wallwork and Georgia White, ‘Consumer Law: Bolstering Consumer Protection Nationally Against Unfair Terms in Standard Form Contracts’ 63 (5) *Keeping Good Companies* 295 (15 August 2012) <<http://search.informit.com.au/documentSummary;dn=109762129105942;res=IELBUS>>, 297.
- 167 Whittaker, ‘Public and Private Law-Making’, above n 7; Whittaker, ‘Judicial Review’, above n 16.
- 168 Whittaker, ‘Judicial Review’, above n 16, 209 where he notes that where the rules are made under charter or statutory powers, they do not possess the status of inferior legislation. It may be that the rules only take effect by way of contract.
- 169 A very similar exclusion exists in the *Unfair Terms in Consumer Contracts Regulations 1999* (UK) Reg 4(2)(a). Terms are excluded if they ‘reflect mandatory statutory or regulatory provisions’. It is suggested that the use of the words ‘mandatory’ and ‘expressly’ is of the same effect.

and plain and intelligible.¹⁷⁰

Therefore, while it is possible to say that the ordinances of a HEI may be excluded by operation of this provision as required for the establishment of the HEI, it is submitted that the exemption should be interpreted such that the rules of the HEI are not required or expressly permitted by law¹⁷¹ and will not be excluded.¹⁷²

Unfair Terms

Pursuant to section 24 of the ACL, a term will be unfair in a consumer contract if it would cause a significant imbalance in the parties' rights and obligations;¹⁷³ is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term;¹⁷⁴ and it would cause detriment (whether financial or otherwise) to a party.¹⁷⁵ Therefore the term of the contract is only unfair if all three parts of section 24(1) are satisfied.

Significant imbalance

The accepted view is that the 'significant imbalance' in the obligations and rights accruing under the contract is concerned with the substantive fairness of the term.¹⁷⁶ This is a factual enquiry¹⁷⁷ and it has been suggested that the assessment will include a consideration of whether the term detracts from rights held at common law or departs from the reasonable expectations of the consumer.¹⁷⁸

The precise meaning of the term 'significant imbalance' is unclear. The matter of *Jetstar Airways Pty Ltd v Free* [2008] VSC 539 (*Jetstar*) dealt with similar provisions in the Victorian UCT legislation and considered the meaning of this phrase at length. The Court looked to the counterbalancing effect of the substantial

170 Whittaker, 'Judicial Review', above n 16, 210.

171 They operate in the terms described by Whittaker, 'Judicial Review', above n 16, 210; See generally the incorporation of student rules into the contract and coexistence and relationship with public law: Whittaker, 'Public and Private Law-Making', above n 7.

172 The situation may be less clear for Western Australian university students where the office of the Visitor remains operational and the jurisdiction exclusive. An argument may arise where the exclusive jurisdiction of the Visitor is said to be required or expressly permitted by the law and any term relating to that office, including rules, may be exempt from the UCT.

173 ACL s 24(1)(a).

174 Ibid, s 24(1)(b).

175 Ibid s 24(1)(c).

176 Willett, above n 149, 363; Paterson, 'The Australian Unfair Contract Terms Law', above n 144.

177 EM1, 19 [2.3]; Miller, above n 5, 1701 [1.S2.24.15]; Paterson, 'The Elements of a Prohibition on Unfair Terms', above n 151, 190.

178 Miller, above n 5; Paterson, 'The Elements of a Prohibition on Unfair Terms', above n 151, 191 n 19–20 citing Chris Willett, *Fairness in Consumer Contracts: The Case of Unfair Terms* (Ashgate, 2005) 47–8; Paterson, 'The Australian Unfair Contract Terms Law', above n 144, 944; Freilich and Webb, above n 124, 267; Willett, above n 149, 363.

price discount and the availability of airline tickets on other terms and conditions allowing for such changes, albeit at a more expensive price, at the time of entering into the contract. The Court found that the Tribunal should have assessed the effect of the imposition of the charges on the rights and obligations of the parties in the context of the whole contract rather than independently,¹⁷⁹ as is required under the ACL.¹⁸⁰ Justice Cavanough was of the view that ‘significant’ means “‘significant in magnitude”, or “sufficiently large to be important”, being a meaning not too distant from “substantial”.’¹⁸¹ In the context of students and HEIs, it is possible that terms may be drafted in a manner that will cause a significant imbalance in the rights of the parties in favour of the HEI. This is particularly so if one considers the nature of the bureaucracy and size of the institutional organisation compared to individual students and the fact that the terms of the contract are drafted by the HEI prior to the making of any ‘offer’ to students.

Reasonably necessary to protect legitimate interests

What will be considered here is the response by the supplier to the ‘risks inherent in the transaction’.¹⁸² The inclusion of the word ‘reasonably’ indicates that the term must be a ‘proportionate response to the risks it seeks to address’.¹⁸³ It is also the ‘actual effect of the term’ that is relevant to the inquiry.¹⁸⁴ Section 24(4) of the ACL shifts the onus of proof to the party advantaged by the term, here the HEI supplier, to show that the term is reasonably necessary in order to protect the legitimate interests of the HEI. It is expected that the party seeking to rely on the term would lead evidence of the same.¹⁸⁵ The HEI of course may well be able to show that any particular term is reasonably necessary to protect its legitimate interests. The most obvious example is the potential unfairness of a term that allows a unilateral variation to a course or even an entire degree programme by the HEI without consultation or notice to the student. The HEI would clearly want to argue that it needs to retain the flexibility to alter its offerings so as to respond to change in student demand and/or public funding arrangements.¹⁸⁶ What will be important is how proportionate the term is to the risk. The courts may well consider if there were in fact other ways of protecting the HEIs’ interests that were

179 *Jetstar Airways Pty Ltd v Free* [2008] VSC 539, [127]–[135] (‘*Jetstar*’); *Contra* the outcome of the counterbalancing effect in *Kucharski v Air Pacific Ltd* (General) [2011] NSWCTTT 55, [36].

180 ACL s 24(2)(b).

181 *Jetstar* [2008] VSC 539, [105]. See also Doherty, above n 147, 75 [5.12]–[5.13].

182 Paterson, ‘The Elements of a Prohibition on Unfair Terms’, above n 151, 193; Paterson, ‘The Australian Unfair Contract Terms Law’, above n 144, 945.

183 Paterson, ‘The Elements of a Prohibition on Unfair Terms’, above n 151, 193; Paterson, ‘The Australian Unfair Contract Terms Law’, above n 144, 945.

184 Harder, above n 119, 318.

185 EM1, 19 [2.32] and the provision would require the HEI to establish, at the very least, that it’s legitimate interest is sufficiently compelling on the balance of probabilities to overcome any detriment caused to the consumer student; Wallwork and White, above n 166; See also Australian Attorney-General, above n 119, 11.

186 Varnham, ‘Liability in Higher Education in New Zealand’, above, n 2, 12.

not so burdensome to the student.¹⁸⁷

Detriment

In relation to the third limb of the test for unfairness, the meaning of detriment is not limited to simply financial detriment, or actual detriment, just the substantial likelihood of detriment relating to the application of or reliance on the term.¹⁸⁸ It is any form of detriment suffered, or likely to be suffered, by the party disadvantaged by the ‘practical effect of the term’.¹⁸⁹ As discussed below, one of the problems for students in relation to their claims have been the difficulties in demonstrating quantifiable loss. The UCT provisions clearly allow the court to take into account other forms of detriment, including delay or distress suffered as a consequence of the unfair term.¹⁹⁰

Other matters: the contract as a whole and transparency

In determining whether a term is unfair, the court must also have regard to the contract as a whole and the extent to which a term in question is transparent.¹⁹¹ The reference to the court having regard to the contract a whole is to take into consideration any counterbalancing measures within the contract. This presumably is to prevent a term that taken on its own and perhaps out of context could be classified as being unfair when on balance it is in fact not so,¹⁹² as noted above in the *Jetstar* case. It is possible that when considering the contract for educational services, a court will take account of the ‘special nature of the educational and degree-endowing services’¹⁹³ of the HEI when making a determination of fairness, as a consumer contract of ‘a somewhat unusual character’.¹⁹⁴ It is possible that the degree of notice, explanation and transparency of the terms will in fact be of greater consequence in these circumstances.¹⁹⁵

The issue of transparency does not stand alone and is linked to the threshold requirements in section 24(1). The role of ‘transparency’ has been considered in detail by noted commentators in this field.¹⁹⁶ Paterson observes that the requirement

187 Paterson, ‘The Australian Unfair Contract Terms Law’, above n 144, 945; Doherty, above n 147, 76.

188 EM1, 20 [2.39], [2.41].

189 EM1, 20 [2.39], [2.41].

190 Australian Attorney-General, above n 119, 3. See also the reference to the December 2007 research paper ‘Unfair Contract Terms in Victoria’ as quoted in Doherty, above n 147, 77, n 20 where the Department of Consumer Affairs, Victoria states that emotional and social detriment flowing from the unfair contract term is evidence of detriment for the purposes of the Victorian legislation.

191 ACL s 24(2).

192 Paterson, ‘The Australian Unfair Contract Terms Law’, above n 144, 949.

193 Whittaker, ‘Judicial Review’, above n 16, 211.

194 *Ibid.*

195 *Ibid.*

196 Paterson, ‘The Australian Unfair Contract Terms Law’, above n 144, 955; Willett, above n 149; Harder, above n 119.

of transparency is a result of ‘information asymmetry between parties to standard form consumer contracts’,¹⁹⁷ where consumers commonly do not read the detail of the terms, nor may the terms be available to the consumers at the time the contract is made.¹⁹⁸ Pursuant to section 24(3), a term is transparent if it is expressed in reasonably plain language, is legible, presented clearly and is readily available to any party affected by the term. A lack of transparency of the terms of consumer contract ‘may be a strong indication of the existence of the significant imbalance in the rights and obligations of the party under the contract’.¹⁹⁹ In the contract for educational services, the lack of transparency in the enrolment contract may be an indication of significant imbalance of the parties’ rights and obligations, especially in the actual express term incorporating the rules and policies (by reference or accessible by hyperlinks). This could of itself be unfair, with the result that the rules and policies would not be binding as contractual terms,²⁰⁰ especially if the scale, complexity and nature of the rules and policies is considered.²⁰¹ There would be some doubt that terms presented in this manner could be said to be ‘readily available’, as it is common for hyperlinks not to work satisfactorily, or they continue to take students on a never-ending series of layers of information.

Additionally when the demographic of the student is considered,²⁰² a court is unlikely to find that terms expressed in the rules and policies are in ‘plain language’, ‘legible’ or ‘presented clearly’.²⁰³ Reference is had to the example of the enrolment document described above. As is common in many HEIs across Australia, enrolment occurs largely in an online context. In the student declaration described, a box is ticked by the student acknowledging they have had regard to the HEI statutes, rules and policies. The magnitude and level of detail of policies at the modern HEI are significant. There is also a noteworthy use of legal jargon in the incorporated documents, notably the statutes and rules.²⁰⁴ Presumably this would be quite overwhelming for a first time student attempting to read and comprehend their meaning. In the context of the online enrolment document, the ability of the individual student to process large amounts of information is likely to be exacerbated if there are distractions in the decision making process.²⁰⁵

197 Paterson, ‘The Australian Unfair Contract Terms Law’, above n 144, 949.

198 Ibid.

199 EM1, 21 [2.45].

200 Because they would be void, but still operative as ordinances and public law. Whittaker, ‘Judicial Review’, above n 16, 213.

201 Jackson et al, above n 10, 76 [11.2] regarding conclusions from a review of universities’ websites and processes where the authors conclude the information is not accessible, is not in plain language, and inconsistent.

202 See Freilich and Webb, above n 124, 266 where the authors consider the decision of *eBay International AG v Creative Festival Entertainment Pty Ltd* (2006) 170 FCR 450. In this matter the Court specifically considered ticket sales for the ‘Big Day Out’ and notice of onerous terms in context of young people not experienced in the commercial world.

203 Jackson et al, above n 10, 77 [11.2.3].

204 Ibid.

205 Paterson, ‘The Australian Unfair Contract Terms Law’, above n 144. Paterson suggests the need to look more closely at behavioural economics in relation to the factors that impact on decision making by individuals. She specifically refers to the impact of advertising: at

Furthermore, in the event that any term or clause within the rules and policies is especially onerous or unusual, this process is unlikely to provide sufficient notice of those terms.²⁰⁶ Issues of notice, unusual or onerous terms, and transparency overlap and are part of the overall consideration of whether a term may be considered unfair.²⁰⁷

Another issue is whether transparency can cure an otherwise ‘unfair term’. The Explanatory Memorandum would suggest not.²⁰⁸ This would have the effect of procedural fairness being able to rectify any substantive unfairness.²⁰⁹ After examining the UK legislation and case law and the position in Australia, Willett suggests:

... transparency cannot legitimize a term that is sufficiently unfair in substance; but... a lack of transparency can render a term unfair where the term would not otherwise be sufficiently detrimental to be found to be unfair.²¹⁰

Paterson observes that another relevant matter the court may consider in determining whether a term is unfair or not is whether the consumer has had a reasonable opportunity to consider the information and has sought professional advice.²¹¹ This is interesting given the term in the enrolment example above where students ‘tick’ a box acknowledging that they have sought academic counselling in relation to their choices prior to enrolment. In practice it is unclear how in fact the professional advice sought is actually given, especially when students are increasingly enrolling online²¹² without even having to have come to campus or contact staff by other means.

Potentially unfair contract terms in the higher education sector.

Section 25 of the ACL sets out examples of potentially unfair contract terms.²¹³

954.

- 206 For example, fines or penalties for not following HEI processes. In relation to the relationship between substantive unfairness, transparency and notice see Paterson, ‘The Australian Unfair Contract Terms Law’, above n 144, 951–6, including an analysis of behavioural economic theory that suggests complex information presented in these circumstances is difficult for consumers to assimilate.
- 207 See Paterson, ‘The Australian Unfair Contract Terms Law’, above n 144, 951–6; Freilich and Webb, above n 124, 270–2 in the context of notice in retail leases.
- 208 EM1, 21 [2.46].
- 209 See Paterson, ‘The Elements of a Prohibition on Unfair Terms’, above n 151, 188–9.
- 210 Willett, above n 149, 373, but see his comments that this is uncertain as currently drafted: at 384.
- 211 Paterson, ‘The Australian Unfair Contract Terms Law’, above n 144, 950.
- 212 Curtin University, *How to enrol*, above n 121.
- 213 For examples from the UK ‘grey list’ in higher education setting see Farrington and Palfreyman, above n 7, 413 [12.101]; Birtwistle and Askew, above n 79, 95. There are notable differences in the UK list and Australia, notably that there seems to be more clarity in the UK list due to the amount of detail, see Gray, above n 149, 171–3; Carter, above n

As indicated in the Explanatory Memorandum, these ‘examples provide statutory guidance on the types of terms which may be regarded as being of concern’.²¹⁴ There is however no presumption that a term corresponding to one in the indicative list is unfair,²¹⁵ although concerns have been expressed that this will be the effect in practice.²¹⁶ It is also not clear whether in the event of ambiguity in the impugned term it is to be read *contra proferentum*.²¹⁷

Three main areas of concern arise in relation to the contract of enrolment. The first is any terms that may limit or avoid performance of the contract, such as disclaimers or exclusions. The second is those terms that allow for unilateral variations. The third involves the imposition of penalties for breach of the contract. This will be demonstrated by reference to the enrolment example discussed above. Space does not permit a detailed consideration of every term, thus the analysis will be confined to illustrations that are indicative of terms likely to be common at Australian HEIs.

Terms that allow one party but not the other to limit or avoid performance: section 25(1)(a)

Terms in the enrolment documents that operate as disclaimers may be open to scrutiny as unfair.²¹⁸ Course handbooks are expressly incorporated as enrolment documents, which characteristically require a student to agree that their enrolment is correct. This can only be done with reference to the course handbooks. The following statement appears in the Curtin Course Handbook 2013 for the Bachelor of Commerce:

Course Structure Disclaimer

Curtin University reserves the right to alter the internal composition of any course to ensure learning outcomes retain maximum relevance. Any changes to the internal composition of a course will protect the right of students to complete the course within the normal timeframe and will not result in additional cost to students through a requirement to undertake additional units.²¹⁹

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- 144, 238–9.
- 214 EM1, 23 [2.52].
- 215 EM1, 23 [2.55].
- 216 Carter, above n 144, 238.
- 217 Harder, above n 119, 322, n 66, whereas the position in relation to this is clear in the UK under UTCCR Reg 7(2).
- 218 They are also likely to be in breach of other parts of the ACL dealing with consumer guarantees (ACL s64(1)) as noted by Corones, above n 2, 28. The disclaimer itself could be a breach of ACL s 29(1)(m), giving rise to civil pecuniary penalties up to \$1.1 million for a body corporate: at s 151.
- 219 Curtin University, *Courses Online Handbook 2013*, (17 June 2013) <<http://handbook.curtin.edu.au/courses/13/130099.html>>.

Some parts of this term counterbalance what might appear to be the ‘significant imbalance’ between the parties. The term could be said to be reasonably necessary to protect the legitimate interests of the HEI. It allows the HEI to operate effectively in the higher education market and change offerings over the course of time or as necessary due to other factors such as funding shifts, government policy changes, course demand and staffing patterns, so as not be unfair. Students rights to complete the course in the ‘normal time frame’ are maintained, as is the concern that any change should not add to the cost (or debt) incurred. However, notably, this doesn’t speak to the impact or effect to substantive changes to course content and knowledge acquisition. The clause simply refers to ‘the course’. It is suggested that clauses such as these may still be drafted too broadly.

In the enrolment contract example above, a student agrees ‘to be bound by the Statutes, Rules and Policies of the University as amended from time to time.’ Interestingly the Curtin legislation website (which includes the rules as well as the statutes and is hyperlinked in the enrolment contract) contains a broad disclaimer limiting the University’s liability in relation in accuracies, including any loss suffered as a result of reliance on the information contained therein.²²⁰ This disclaimer clause is very wide and purports to exclude non-contractual causes of action such as negligence, even if the University has been advised of the possibility of any such loss, damage or injury. It is difficult to ascertain the corresponding offset for the student in similar terms to the *Jetstar* case. The limitation of liability clause is similar in width to those found to be unfair in the matter of the *Director of Consumer Affairs Victoria v Trainstation Health Clubs Pty Ltd* (Civil Claims) [2008] VCAT 2092. It is suggested that clauses of this type are vulnerable to challenge on the grounds of unfairness. Exclusion clauses clearly detract from the common law rights of the consumer. The need for counterbalancing terms and transparency are problematic for exclusion clauses.²²¹

Unilateral variations: sections 25(1)(d) and (g)

Particularly relevant in relation to the provision of educational services by the HEI to the student are unilateral terms that allow the HEI to alter the delivery of the course or content, or even to terminate the course in its entirety. It is submitted that these types of terms, common in contracts of enrolment, are potentially void as unfair terms. In particular, reference is had to the example in section 25(1)(g), which is a term that ‘permits, or has the effect of permitting, one party unilaterally to vary the characteristics of the ... services to be supplied ... under the contract’. One example of a potentially unfair term in relation to course handbooks is given above.²²²

220 Curtin University, *Legislation, Policies and Procedures*, above n 110, *Disclaimer and definitions*.

221 See Paterson, ‘The Elements of a Prohibition on Unfair Terms’, above n 151, 198.

222 Or sometimes the exact terms regarding course requirements may be more difficult to locate, including any provisions allowing for changes to course structures. See, eg, the Handbook for the University of Sydney; University of Sydney, *Handbooks Online* (12 July

There are a number of examples in HEI policies where terms unilaterally varying the service supplied seek to ensure that there is a counterbalance of the corresponding rights and obligations of students and the HEI. The ‘Discontinuing Courses Policy and Procedures’²²³ at Curtin University is such an example. In circumstances where the University determines that it will discontinue a course or major because it is no longer viable or of strategic importance, there are clear provisions dealing with how this will be communicated to students currently enrolled. This includes written notice as soon as possible after the decision has been made. Students are given the option of transferring to another suitable course or major ‘without significant disadvantage’. If students choose not to transfer they ‘shall be given reasonable opportunity to complete’ the original course or major, within a set time frame.²²⁴

However, there are a plethora of policies within all HEIs governing the provision of the educational service as contracted.²²⁵ Many of these policies allow variation or discontinuance of individual units or stated graduate attributes without notice or consultation with the student consumer.²²⁶ It is possible that these policies, which are expressly incorporated as terms of the standard form contract, are unfair terms as they permit the HEI to unilaterally vary the characteristics of the services supplied. This is especially so for students whose course of study can be comprised of a selection of units from various providers, as in the case of Open Universities Australia.²²⁷ The effect of the policies is not expressed clearly nor in a manner that is readily accessible. Further, all of the policies may be vulnerable to an interpretation of unfairness because of the lack of transparency. It is hard to determine exactly how the terms of each policy interrelate,²²⁸ even the ones that are ‘fair’. It is suggested that the HEI supplier cannot, through reliance on a complex maze of policies and rules, unilaterally vary the terms of the contract so

2012), <<http://sydney.edu.au/handbooks/>> where the web page states:

Handbooks Online is the University of Sydney’s central source of official information for students undertaking study. The handbook and its updates, along with the Policy Register form the official source of information relating to study at the University of Sydney.

All handbook information should be read together with *the University of Sydney (Coursework) Rule 2000* (as amended), the *University of Sydney (Higher Degree by Research) Rule 2011* and *University of Sydney (Student Appeals against Academic Decisions) Rule 2006*.

223 Curtin University, *Legislation, Policies and Procedures*, above n 110, *Discontinuing Courses Policy and Procedures*.

224 *Ibid* cl 7.

225 Typically each HEI will have policies and legislation page, linking to increasing layers of policies and rules. See, eg, University of Queensland (12 June 2013) <<http://www.uq.edu.au/study/?page=12450>>.

226 These policies are usually able to be unilaterally amended by Academic Boards, Pro-vice chancellors or other staff. See, eg, Deakin University, *Higher Education Courses Policy, Schedule A: Deakin Graduate Learning Outcomes*, (12 June 2013) <http://theguide.deakin.edu.au/TheGuide/TheGuide2011.nsf/W2POLAZ?OpenForm&StartKey=H>.

227 Open Universities Australia scheme (20 September 2011) <<http://www.open.edu.au/public/home?gclid=CNmfgdz1q6QCFQdLbwod2EmCcA>>.

228 Jackson et al, above n 10, 77 [11.2.5].

as to alter the essential characteristics of the service it has agreed to supply.

Imposition of a penalty: section 25(h)

The use of penalty clauses is also constrained at common law and must be a genuine pre-estimate of the loss likely to be suffered in the event of a breach.²²⁹ The Federal Government guidelines indicate that ‘a term may be considered unfair if it threatens sanctions over and above those that can be imposed at law’ and that any penalty imposed ‘should bear a reasonable relationship to the loss likely to be suffered by the business as a result.’²³⁰ Willett refers to these as terms that allow for ‘onerous and disproportionate enforcement by a trader’.²³¹ There are two common terms in contracts of enrolment that are likely to be unfair on this basis.

In the contract of enrolment example above, there is a term whereby the student agrees that ‘any expense, costs or disbursements incurred by the University in recovering any monies owing by me shall be the responsibility of the debtor, including debt collection agency fees and solicitor’s costs on the amount outstanding and all other reasonable costs incurred in the recovery of outstanding monies.’ The Victorian Tribunal considered a clause of similar import to be unfair because of its breadth.²³²

The other is the very common rule made under university legislation regarding the imposition of academic sanctions for failure by a student to pay any charge imposed by the HEI. Sanctions typically include suspension from the university, withholding of results, cancellation of enrolment, or deferring conferral of a degree. The sanctions can be imposed as a result of non-payment of a fee, charge, fine or penalty imposed by the university in relation to such things as overdue library loans or parking fines, student amenities and services levies or even the costs associated with processing a late payment fee.²³³ This is clearly not proportionate to the risk of the transaction and is very likely unfair under the ACL. The imposition of the extreme academic sanctions (such as withholding conferment of the degree) unlimited in time for a late payment of any charge, which may well be incidental to the students’ studies, seems entirely too wide.²³⁴

229 EM1, 24 [2.60].

230 Australian Attorney-General, above n 119, 16.

231 Willett, above n 149, 374 discussing the types of terms that might or should be subject to outright bans.

232 *Director of Consumer Affairs Victoria v Backloads.com Pty Ltd* (Civil Claims) [2009] VCAT 754, [330]–[334].

233 Edith Cowan University, *University Fee Rules*, (13 June 2013) http://www.ecu.edu.au/_data/assets/pdf_file/0010/378334/fee_rules.pdf.

234 See *Director of Consumer Affairs Victoria v AAPT Pty Ltd* [2006] VCAT 1493 where the imposition of a variation clause was too wide as it permitted the telecommunications company a right to vary for any cause.

Other potential unfair terms

Examples in section 25(1)(h) and (k) may have relevance in relation to assessment and disciplinary procedures common at HEIs. Under section 25(h), one party is not permitted to unilaterally determine whether the contract has been breached or determine its meaning. Similarly the example in section 25(k) refers to a term that limits, or *has the effect* of limiting one party's right to sue another.²³⁵ This can include the presentation of the term in a manner that might deter, even though there is no intention to exclude.²³⁶ This is interesting in two respects. There are a number of policies and rules common to HEIs that state that the relevant academic committee is the sole adjudicator for disputes, although most HEIs provide for numerous procedures for students to be heard in accordance with administrative law principles. It is suggested that statements to the effect that 'the decision of the Student Discipline Appeals Board is final'²³⁷ following the description of a lengthy appeals process in relation to a finding of academic misconduct, or that the right to external appeal is with a particular designated external provider, such as an Ombudsman,²³⁸ may have the effect of hindering the student consumers' right to take legal action.²³⁹ It is suggested that general statements, such as 'a student who has exhausted the avenues of appeal available within the University may pursue their case through any appropriate government body or official'²⁴⁰ are preferred.

235 In New Zealand, where there is no UCT regime, the student contract from Massey University at cl 12 states: 'Any dispute arising out of or in connection with this Contract, or otherwise relating to the performance by the University or its staff of their responsibilities to the Student shall be resolved through the Grievance Procedures prescribed by the *university calendar*, which shall be the exclusive procedures for the resolution of such a dispute': Massey University, *Student Contract* (13 August 2012) <<http://www.massey.ac.nz/massey/about-massey/calendar/statutes-and-regulations/student-contract.cfm>>. See also Julia Pedley, 'The Development of a Student Contract and Improvement in Student Disciplinary Procedures at Massey University' (2007) 12(1) *Australian & New Zealand Journal of Law & Education* 73. Terms such as these are likely to be unfair in Australia now.

236 Australian Attorney-General, above n 119, 21.

237 *Curtin University of Technology Act 1966* (WA), Statute No. 10—Student Discipline, Curtin University, *Statute and Rules* cl 4.6(7) (23 May 2012) <http://policies.curtin.edu.au/local/docs/statute_no_10_2010.pdf>.

238 See, eg, Curtin University, *Assessment and Student Progression Manual*, cl 37.12, above n 110. This type of clause may suggest to the student consumer that they are required to take their dispute exclusively to the Ombudsman. The only way in which a clause in this regard might not be considered unfair is if it falls within the exemption under section 26(1)(c) where this is expressly permitted by law of the Commonwealth, state or territory. Therefore students in Western Australia may well be precluded from alleging such a term is unfair because the statutory jurisdiction of the university Visitor remains alive in that state.

239 See Carter, above n 144. He observes that the UK provisions have much clearer reference points in relation to this type of term: at 239.

240 University of Western Australia, *Appeals Process in the Case where there is Dissatisfaction with an Assessment Result, Outcome of an Application for Special Consideration and/or Progress Status* (approved by Senate Resolutions—49/04 and 68/05; amended by Academic Council R83/07 Legislative Committee R/12), cl 49, <<http://calendar.publishing.uwa.edu.au/latest/part/appeals?childfx=on>>.

It is worth noting here the experience in the UK higher education sector, particularly when the UCT regulations initially came into operation.²⁴¹ At that time the UK Office of Fair Trading ('OFT') identified²⁴² training and education institutions as 'problem sectors'.²⁴³ A number of reports from the OFT deal with HEIs, but typically in relation to university residence and issues concerning student property and accommodation.²⁴⁴ Of particular interest is the case report for Southbank University²⁴⁵ where the enrolment declaration for that University was examined and a number of terms were considered to be unfair. These terms included the right to change the regulations, hidden administration fees, exclusion of liability for breach of contract, and exclusion of liability for poor services. The term in relation to the University's right to change their regulations was amended so that changes could only occur at the beginning of the next academic year and only for the benefit of the students. In relation to the exclusion of liability for breach of contract, that term was changed to ensure that the student indemnity only covered matters within the students' control. The exclusion of liability for poor services was deleted.²⁴⁶

Redress for the student consumer.

The effect of section 23 is that if a term in a standard form consumer contract is unfair it will be void. An application for a declaration that a term is unfair pursuant to section 250 can be sought by a party to the contract or by the regulator.²⁴⁷ A declaration that a term is an unfair term is not a contravention of the provisions of the Competition and Consumer Act 2010 ('CCA'), unless a party were to continue to rely on the term subsequent to the declaration.²⁴⁸ Consequently no civil penalties apply if a consumer contract contains an unfair term unless relied on after such a declaration.²⁴⁹

241 Davis, above n 78, 21.

242 Unlike the position in the UK and the previous Victorian legislation, the role of the regulator in Australia is based on an 'ex post model' where they can only intervene after the detriment has been suffered: Gray, above n 149, 165.

243 Office of Fair Trading, *Unfair Contract Terms Bulletin 6* (1999) <<http://www.oft.gov.uk/OFTwork/publications/publication-categories/guidance/unfair-terms-consumer/>>, 8 [1.15].

244 Office of Fair Trading, *Unfair Contract Terms Bulletin 5* (1998) <<http://www.oft.gov.uk/OFTwork/publications/publication-categories/guidance/unfair-terms-consumer/>>; Office of Fair Trading, *Unfair Contract Terms Bulletins 27 and 28* (2004) <<http://www.oft.gov.uk/OFTwork/publications/publication-categories/guidance/unfair-terms-consumer/>>.

245 Office of Fair Trading, *Unfair Contract Terms Bulletin 6*, above n 244, 72.

246 Ibid.

247 Jurisdiction is conferred on the Federal Court by CCA s 138 pursuant to the *Federal Court of Australia Act 1976 (Cth)*, EM1, 32 [2.101]–[2.102]. See Corones, above n 2, 22–3 for a detailed discussion of the conferral of jurisdiction in proceedings in the state courts and tribunals.

248 ACL s 224; EM1, 33 [2.104]–[2.105].

249 ACL s 224; EM1, 33 [2.106] where orders in those circumstances may include exemplary damages.

To the extent that the contract is capable, the contract continues to operate to bind the parties without the unfair term.²⁵⁰ A finding that the actual term incorporating the rules and policies of the HEI is unfair may prove problematic as regards the student–HEI contract. In these circumstances it may be difficult to say that the contract for educational services can continue to operate. Indeed this outcome may have a deleterious effect on students’ rights as consumers because the ordinances of the HEI would continue to operate as a matter of public law. As discussed above, students’ rights to substantive fairness in public law judicial review are limited to issues of a procedural nature. The risk for the HEI would be that in the event of the contract ceasing to operate, they may not be able to collect outstanding fees, at least in relation to full-fee paying students.²⁵¹

Upon a declaration being made that a term is unfair,²⁵² pursuant to section 237, an application for compensatory orders may be made by either the ‘injured person’²⁵³ or by the regulator.²⁵⁴ Under this section,²⁵⁵ compensation orders can be sought within six years from the date of declaration.²⁵⁶ Furthermore, the ACL now allows the regulator to seek orders to redress any loss or damage, or likely loss or damage suffered by non-party consumers.²⁵⁷ Non-party consumers are the class of persons who have or are likely to suffer loss or damage and are not a party to enforcement action in relation to the declared term.²⁵⁸ In effect this provides for class actions and substantially strengthens students’ potential for redress, who as a class of persons are largely impecunious and not as well-resourced or powerful as HEIs.²⁵⁹

The compensatory orders that can be made in relation to unfair terms are very wide in their scope. A court can make ‘such orders as the court thinks appropriate against the person’ who relied, or purported to rely on the unfair term.²⁶⁰ The types of orders that a court can make in addition to monetary damages are listed

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- 250 ACL s 23(2).
- 251 See *ACCC v Yellow Pages Marketing BV* (No2) (2001) 195 FCR 1 cited in Sarah Russell, ‘The Australian Consumer Law: The New Enforcement Powers and Remedies—The Story So Far’ (2012) 20 *Australian Journal of Competition and Consumer Law* 6, 16 where this meant that the supplier could not collect some \$6 million dollars in payments outstanding under the contracts.
- 252 See also ACL s 242 whereby an application can be made under s 237 or s 239 in relation to the term in consumer contract even if the proceeding for the declaration has not been instituted.
- 253 Ibid s 237(1)(a)(ii).
- 254 Ibid s 237(1) (1)(b).
- 255 Cf ACL s 236, which is an order for actual loss suffered.
- 256 ACL s 237(3)(b).
- 257 Ibid s 239(1)(a)(ii) for unfair terms.
- 258 Ibid ss 239(1)(b) and (c); Australian Attorney-General, above n 119, 24. Orders for non-party consumers are made in accordance with ACL ss 240–1 and impact on the orders a court may make under ACL s 239.
- 259 Ogawa, above n 38; Kamvounias and Varnham, ‘Getting What They Paid For’, above n 2, 324–6. See also Corones, above n 2, 27. He suggests that this amendment to the ACL addresses this issue in relation to representative actions for consumer guarantees.
- 260 ACL s 237(1).

in section 243 and provide for significant judicial discretion. In particular, the court is able to make orders for specific performance, vary the contract, refuse to enforce any part of the contract, or declare part or the whole of the contract void.²⁶¹ Injunctions are available pursuant to section 232(2).²⁶²

Any order for the payment of damages to compensate for loss²⁶³ will be in accordance with the general principles for assessment of damages under the CCA.²⁶⁴ Thus a causal connection between the reliance on the unfair contract term (the conduct) and the loss will need to be established, although ‘the amount recovered is not necessarily limited by drawing analogies with either the law of contract or tort.’²⁶⁵ In relation to damages, a claimant like the student in *Fennell v Australian National University* [1999] FCA 989 will still have difficulties; however, the new compensation orders allow for compensation on the basis of more than just demonstrated economic loss. Section 13 of the ACL, like its predecessor section 4K of the TPA, states that for the purpose of the ACL, loss or damage ‘includes a reference to injury’.²⁶⁶

Therefore, it is suggested that redress pursuant to a claim under the ACL, specifically the UCT, is more effective than remedies available students in other causes of action, including contract law. The case law and commentary is clear that the capacity of students to recover damages for breach of contract or otherwise demonstrate loss is extremely difficult.²⁶⁷ It is the intangible nature²⁶⁸ of the loss sought to be recovered that is problematic.²⁶⁹ The success of claims for damages by students for more than direct losses, such as a refund of fees,²⁷⁰ appears to be

261 Ibid s 243.

262 These provisions are in contrast to the range of orders available at common law or in equity, where courts are unlikely to order specific performance or a mandatory injunction to that effect. As noted in Lindsay, ‘Complexity and Ambiguity in University Law’, above n 7, 11, n 50–3.

263 ACL s 237(2).

264 See generally Miller, above n 5, 1919–20 [1.S2.237.10]–[1.S2.237.80].

265 Miller, above n 5, 1921 [1.S2.237.40] citing *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* (2002) 210 CLR 109.

266 The clear reference to compensatory orders for an injured person in ACL s 237 makes obvious the legislatures’ intent that an award can be provided for more than financial loss or detriment. See generally EM2, ch 15.

267 See, eg, *Fennell* [1999] FCA 989; *Mathews* [2002] FCA 414. In both matters the students failed to demonstrate any cause or link between the alleged misrepresentations and/or breach of contract and any loss suffered: See also *Victoria University* [2003] NZAR 186, 191–2 where the Court noted that the damages claimed may appear excessive or remote, but this was a matter for resolution at trial, not in interlocutory proceedings; Ogawa, above n 38, 97.

268 Rochford, ‘The Relationship Between the Student and the University’, above n 2, 34; Francine Rochford, ‘Suing the Alma Mater: What Loss Has Been Suffered?’ (2001) 13(4) *Education and the Law* 319.

269 Related to these difficulties is the courts’ reluctance to review matters of academic judgement and in fact sit in the shoes of an assessor. Middlemiss, above n 7, proposes an example where students might claim that inadequacies in the teaching or assessment in breach of the contract contributed to their poor results: at 72.

270 Lindsay, ‘Complexity and Ambiguity in University Law’, above n 7, 11, nn 50–3 regarding

reliant on courts likening their claims to cases where the subject matter of the contract is the experience itself, the so called ‘holiday cases’.²⁷¹ It is apparent from the case law that even if a student is able to establish a breach of contract, it is very difficult to establish a causal link to the losses claimed,²⁷² or alternatively to be able to prove loss at all.²⁷³ To a lesser extent this is so even in the consumer tribunal matters.²⁷⁴

The contrast between a claim for damages for breach of a contract for educational services at common law and under consumer protection legislation was considered in the *Shahid* case.²⁷⁵ Shahid claimed damages for anxiety and distress in relation to the College’s failure to adhere to the promised appeals process.²⁷⁶ Her claim for damages for anxiety and distress was unsuccessful in contract. She was, however, successful in relation to anxiety damages under the state consumer protection legislation. The Court found that the anxiety and distress experienced by the appellants amounted to an ‘injury’ under the statute,²⁷⁷ and the conduct of

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- the quantification of damages. See also Kamvounias and Varnham, ‘In-House or in Court?’, above n 8.
- 271 *Baltic Shipping Co v Dillon* (1993) 176 CLR 344; *Jarvis v Swan Tours Ltd* [1973] 1 All ER 71. One of the few reported decisions where students have been successful in this regard is *Rycotewood* (re damages: 28/2/2003, Warwick Crown Court, His Honour Judge Charles Harris QC, OX004341/42, *Buckingham v Rycotewood College* (26/3/2002, Oxford County Court, OX004741/OX004343). See Palfreyman, ‘*Phelps ... Clark ... and now Rycotewood?*’, above n 79.
- 272 *Mathews* [2002] FCA 414. Mr Mathews claimed damages in excess of \$400 million, which included diminished prospects of an academic career and the lost opportunity to undertake his PhD in Logical Equivalence of Legal Decisions, which would have been commercialised as a computer program. The Court identified that the significant problem for the applicant student was his inability to establish a causative link between the conduct that was alleged to have breached the TPA or contract and any damage or loss suffered by him. Mr Mathews failed to show reasonable cause of action against the University and the proceedings were struck out as frivolous and vexatious.
- 273 *Davis*, above n 78, 22. See, eg, *Harding v University of New South Wales* [2001] NSWSC 301 where the breach of contract was made out, but no remedy could be awarded because she was unable to establish loss caused by the University’s actions. In *Fennell* [1999] FCA 989, a former MBA student brought a claim under the TPA alleging that he had been induced by false representations to enrol in an MBA with the University. In relation to his loss, he failed because he had in fact graduated with his MBA and was employed in a new position that paid substantially more than his employment as engineer prior to completing his MBA.
- 274 See, eg, *Cotton* [2004] NSWCTTT 723 (13 December 2004). This matter concerned a claim for breach of contract and false representations in relation to the qualifications and experience of the respondent’s teaching staff at the Strand College of Beauty Therapy. The applicant was unable to demonstrate on the balance of probabilities that the level of teaching provided was at a level that amounted to a breach of contract or that there was a breach of the implied warranty that the services would be rendered with due care and skill. The Tribunal did find however that the respondent had falsely represented the availability of a particular teacher and awarded \$400 as fair and equitable compensation for the unavailability of the particular teacher.
- 275 *Shahid* (2008) 248 ALR 267.
- 276 *Ibid* 336 [221].
- 277 *Ibid* [230]. Under the TPA s 4K expanded the reference to loss or damage (s 87 and s 82) to include injury.

the College had caused the loss as claimed.²⁷⁸ Justice Jessup took an expansive view of the meaning of ‘injury’ in the consumer protection legislation: ‘Injury’ ‘is not confined to personal injury, but may extend to any detriment’²⁷⁹ and should not be limited to actions for recovery of economic loss.²⁸⁰ The decision in *Shahid* is clearly important in the context of assessment of damages for loss sustained in relation to a claim made by a student based on the UCT provisions.

What loss may a student claimant suffer as a result of reliance by a HEI on an unfair term? Reference is had to the examples of potentially unfair terms considered above. A calculation of loss in relation to the imposition of a penalty is fairly straight forward, although the ‘injury’ suffered as a result of a HEI unfairly withholding conferment of a degree may not be so straight-forward. There is clearly the likelihood of an order compelling conferment, a claim for anxiety damages and possibly compensation for loss of opportunity in relation to future employment. Likewise, an order for compensation regarding an unfair variation that results in the change of the characteristics of the educational service could include similar orders that go beyond a refund of course fees. Unfair variations to the educational service are most likely to cause delay (and possibly increased debt) and attending anxiety and distress. This applies equally to claims made in relation to terms that have the effect of unfairly limiting or hindering legal rights. It is clear that the potential for students to successfully claim damages as a person ‘injured’ by reliance of the HEI on a UCT pursuant to the ACL has better prospects when compared to a claim in damages for breach of contract.

The impact of the UCT regulation on the higher education sector is potentially significant. The examination of examples of terms of the standard form contract of a typical university revealed a substantial number of potentially unfair terms, particularly in regard to terms that impose penalties, overly-wide exclusion and disclaimer clauses, and terms that unilaterally allow the HEI to vary the characteristics of the agreed service. The UCT regime will require a change in practice by providers of higher education who rely heavily on a myriad of ordinances and policies to regulate their relationship with the student consumer in a manner that is not transparent. The purpose of the law is to provide clarity, certainty and better informed contractual consent.²⁸¹ It is recommended that HEIs in Australia review their contracts of enrolment to ensure the absence of unfair terms. Outside of terms that are inherently unfair, such as the imposition of disproportionate penalties or very wide exclusion clauses (which should be amended as a matter of some urgency), the area of most concern is the impact of the lack of transparency and notice of a large number of terms of the contract

278 Ibid 336 [230].

279 Ibid 335 [225], 336 [227].

280 Ibid 335 [226]. The appellant was awarded damages for the ‘injury’ suffered within the meaning of the Act in the sum of \$2500.

281 Whittaker, ‘Judicial Review’, above n 16, 214; EM1, 6. See generally Australian Government, *An Australian Consumer Law Fair Markets*, above n 134, ch 6.

for the supply of educational services. Transparency will not assist to legitimise fundamentally unfair terms, but it will assist with terms that are otherwise fair and are reasonably necessary to protect the legitimate interests of the supplier. It is recommended that Australian HEIs adopt the use of formal student contracts common in other jurisdictions and drafted in a manner that complies with the requirements of transparency under the ACL.²⁸² It is difficult to see how a HEI might otherwise overcome the difficulties of transparency and notice. Greater transparency and improved notice may also have the consequence of improving students' awareness of their rights as consumers.

Conclusion

The provisions of the UCT are enlivened in relation to the supply of educational services. The contract for the supply of educational services is at least a dealing or transaction that bears a commercial or trading character. Alternatively it is an activity that is unequivocally and distinctly characteristic of the 'carrying on' of the profession of the HEI so as to be in 'trade or commerce' within the new extended definition of the ACL. This includes the contract with Commonwealth-funded students. The contract arising on enrolment bears the traits a standard form consumer contract, to which the ACL attaches. Students clearly acquire educational services for their personal use. The exemptions available under the ACL will not operate to exclude HEIs beyond the upfront price or the main subject matter of the contract (the acceptance of a 'place' to undertake a particular course of study).

The significance of the UCT provisions is that rather than just focusing on procedural unfairness, they attempt to deal with substantive unfairness. In the context of the student–HEI relationship and provision of educational services, the UCT provisions have the potential to ensure that the student–HEI contract does not contain terms that are substantively unfair. This, it is suggested, circumvents the principle that academic matters are non-justiciable, as it is the substantive effect of the term that is reviewed, not the academic judgement executed in the supply of the service. As the UCT looks to the substantive fairness of terms, the provisions rely less on an adjudication of the quality and standard of educational services supplied by reference to analogous principles from other areas of law, such as professional negligence, and focus instead on the essence of the term. Additionally, the compensation orders and remedies available for students pursuant to the ACL upon the declaration that a term in a contract is unfair are more extensive and wide-ranging than those available at common law and other legislative schemes. The UCT provisions in the ACL provide effective protection for students regarding the nature of educational services supplied and advances their rights as consumers to receive services as promised.

282 The model contract with accompanying explanatory notes developed by leading UK scholars Farrington and Palfreyman is an appropriate precedent. Farrington and Palfreyman, above n 7, 443.

Regarding Unfair Terms In Financial Services Contracts

GAIL PEARSON*

Financial services contracts are central to the wellbeing of Australian financial citizens. There is a large jurisprudence on the entry into such contracts, centred largely on issues of unconscionability and unjustness. The content of financial services contracts has received less judicial scrutiny and this may change as the still new unfair terms legislation impacts on patterns of litigation. Disclosure rules, rules to protect the consumer prior to entry into the contract, and content rules are all designed to guard against behavioural biases and protect financial citizens from irrationality.¹ Unfair terms in a financial services contract which disadvantage the consumer are not just a matter between the provider and acquirer. Unfair terms also advantage the provider vis a vis providers of similar products and services. This impacts on economic efficiency just as do matters of available information and choice of product, and circumstances of entry into a contract. As referred to in the New South Wales Court of Appeal, Finn J said extra judicially if parties are held to a bargain once it is made, the law should promote the conditions necessary to make the freedom of contract effective, free and just.² Now, in certain circumstances, the law will not hold parties to the entirety of their bargain if the content of that bargain is unfair. For standard form consumer contracts it promotes an assessment of whether aspects of the bargain are fair.

For financial services the national unfair terms regime is in the Australian *Securities and Investments Commission Act 2001* (Cth) (ASIC Act) and shortly the *Insurance Contracts Act 1984* (Cth).³ The first is in virtually identical terms to legislation in the Australian Consumer Law, which covers other sectors of the economy. The proposed insurance provisions are designed to fit within a specialised regime for the allocation of risk between the contracting parties. The proposed modifications will perpetuate the unique status of insurance. In the ASIC Act, the unfair terms provisions apply to a contract for a financial product or to

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1 On behavioural biases see Kahneman, D *Thinking Fast and Slow* New York, Farrer Straus and Giroux 2011. For a discussion in the context of unfair terms see the Law Commission and the Scottish Law Commission *Unfair Terms in consumer contracts: A New Approach? Issues paper* 2012 pp 24 - 26

2 *Tonto Home Loans Australia Pty Ltd v Tavares* (2011) ASC 155-107 at [269]

3 Until it is amended *Insurance Contracts Act 1984* (Cth) s 15 excludes relief under other Acts including the *Australian Securities and Investment Commissions Act 2001* (Cth) ASIC Act.

a contract for the supply or possible supply of financial services.⁴ The provision does not use the language of ‘in relation to’ or ‘in connection with’. This narrows the reach of the provisions as it is unlikely all attendant contracts will be amenable to assessment for unfairness.⁵

Financial services and financial products are widely defined.⁶ Broadly, a financial product is a facility by which a person makes a financial investment, manages financial risk or makes non-cash payments. It includes products and services.⁷ The definition also encompasses products which will come into existence in the future.⁸ Financial services include providing financial product advice, dealing in a financial product, operating a registered scheme and providing a custodial or depository service.⁹ Potentially contracts concerning financial advice, advice about borrowing, savings and deposit accounts, cheque accounts, credit, foreign exchange contracts, investments in securities and managed funds, superannuation and insurance all fall within these definitions¹⁰ and without more would be amenable to scrutiny of their terms for unfairness.

Yet there are a number of carve outs and exclusions. The operation of a regulated superannuation fund does not fit within the definition of a custodial or depository service and is not the provision of a financial service.¹¹ Entitlement to superannuation is as a beneficiary of a trust which is different from a contractual right.¹² There is a contractual element to superannuation and this is in the employment contract. This is about the obligation of the employer to pay qua the employee. If superannuation monies are taken as a lump sum rather than an income stream, individuals may enter financial services contracts with respect to those monies that are assessable for fairness. The unfair terms regime does not apply to the constitution of a corporation or a managed investment fund, meaning that a unit trust financial product will not be covered by the scheme.¹³ Until the proposed legislation is passed the unfair contract terms regime does not apply to insurance contracts.¹⁴ Other potential exclusions such as contracts for investment

4 ASIC Act s 12BF (1) (c)

5 For instance a contract for stay of execution subsequent to a loan agreement would not be likely to be amenable. This type of contract was at issue in *Wolfe v Permanent Custodians [2012] VSC 275* where in any case it was not a standard form document as it was negotiated.

6 Australian Securities and Investments Commission Act 2001 (Cth) s12BAB, s 12 BAA

7 ASIC Act s12BAA (1)

8 *Australian Securities and Investments Commission v Australian Lending Centre* (2012) ASC 155-108 per Perram J at [176] The issue here was an unadvanced loan.

9 ASIC Act s 12BAB (1)

10 For the positive list of things that are financial products see ASIC Act s 12BAA (7). Note that unlike the *Corporations Act, 2001* (Cth) credit falls within the ASIC Act definition: s 12BAA (7) (k)

11 ASIC Act s 12BAB (14) (c)

12 The obligations of the trustee for superannuation are set out in the *Superannuation Industry (Supervision) Act 1993* (Cth) s 52.

13 ASIC Act s 12 BL

14 Insurance Contracts Amendment (Unfair Terms) Bill 2013, amending *Insurance Contracts Act 1984* (Cth). The proposals apply to “ certain standard form consumer contracts of gen-

are discussed below.

If a term in a financial services contract is judged unfair, the term is void and provided the contract can stand without that term, it persists.¹⁵ The financial services provider will still be bound but will not have the advantage of that void term.

In order to commence the enquiry into whether any particular term in a financial services contract is unfair the contract must be a standard form contract and a contract with a consumer.¹⁶

Who is a consumer?

The definition of who is a consumer for the purposes of regulating unfair terms is identical between the Australian Consumer Law and the ASIC Act. Both require the consumer to be an individual person. In contrast with the definition of a consumer for other purposes within the two sets of legislation which takes an objective approach to the kind of goods or services being acquired, the unfair terms definition rests on a subjective approach to the purpose for which goods or services are acquired. A consumer contract is one where the individual acquires goods or services wholly or predominantly for personal domestic or household use or consumption.¹⁷ This is also the proposed definition for amendments to the *Insurance Contracts Act 1984* (Cth).¹⁸ It is possible that a person who is otherwise a wholesale client for financial services law due to the assets test, may still acquire financial services for personal, domestic or household use.¹⁹ It is clear, that for unfair terms, it is the uses of the individual consumer which are tested.

The purposes of individuals in acquiring financial products or financial advice will be examined carefully. The language of the section is important. It refers to “whose acquisition of what is supplied under the contract is...use or consumption.”²⁰ This focuses on what the acquisition is for. This language should forestall the situation that arose in interpreting a not dissimilar provision in the old Consumer Credit Code where conflicting lines of authority developed as to whether in judging purpose one looked to intention or the substance of the resulting transaction.²¹ The reference to “acquisition” accompanied by “use” suggests the approach should be to examine the resulting transaction rather than any intention of the consumer in order to ask if it is for personal, domestic or household use.

eral insurance” see proposed s 15 (3)

15 ASIC Act s 12BF

16 ASIC Act s 12BF(1); s 12BF(1) b)

17 ASIC Act s 12BF (3); *Competition and Consumer Act 2010* (Cth) Schedule 2 s 23(3)

18 See Insurance Contracts Amendment (Unfair Terms) Bill 2013 s 15A (4)

19 *Corporations Act 2001* (Cth) s 761G

20 ASIC Act s 12 BF (3)

21 For an account see Pearson, G *Financial Services Law and Compliance* Cambridge University Press 2009 pp 414; see also *Knowles v Victorian Mortgage Investments Limited* [2011] VSC 611

It is unclear if investment will be regarded as falling within personal, domestic or household use.²² There is no provision in the unfair terms part of the legislation that says investment is not for household use. Investment is to use money to acquire property in order to obtain a return.²³ Investment to generate income for personal or domestic purposes should be for such use. A better approach would be to contrast personal, domestic or household use with business use.²⁴

If the distinction is between personal and business use, consumers should be wary of signing any documentation which indicates their acquisition is for a business purpose (unless it clearly is) as this will take their contract out of the unfair terms regime. In credit legislation, knowing or recklessly giving false or misleading information in the course of engaging in a credit activity now engages a criminal penalty.²⁵ In general, the person engaging in credit activity will be the broker or the lender.²⁶ This provision should forestall any remaining practices where a broker takes blank declarations or alters declarations to circumvent the application of protections in the legislation.

In *Tonto Home Loans Australia Pty Ltd v Tavares*²⁷ the Court of Appeal did not have to decide whether the credit and mortgage were for domestic purposes. The relevant test here was “ordinarily acquired”. The Court noted that such an enquiry was “not straightforward.” The Lodic loans in this case were for “a home”, or “an investment property or to access equity for personal or investment reasons.” The Court said:

“Judicial notice can be taken of the wide investment in the community for the provision of retirement saving. Such borrowing for such purposes is not infrequently undertaken for the personal use of saving for one’s retirement. To a degree that is a business use; to a degree it is a personal or household use – for personal savings. - - -
Looking here at the characteristics of this so-called financial product, were it necessary to decide, I would conclude that “ordinarily” such loans are used for the personal use of investment saving.”²⁸

In the Federal Court in *Oliver v Commonwealth Bank of Australia (No 1)*²⁹ Perram

22 Lenders have been concerned at this. See for instance Bank of Queensland Limited Submission on the Trade Practices Amendment (Australian Consumer Law) Bill 2009 to the Senate Economics Legislation Committee 21 July 2009

23 *Will of Sherriff; In the Will of Lawson* [1971] 2 NSWLR 438.

24 On the distinction between investment and business purposes see Pearson, G and Batten, R *Understanding Australian Consumer Credit Law* CCH 2010 pp 33,34

25 *National Consumer Credit Protection Act 2009* (Cth) (NCCPA) s 160D (2)

26 *Ibid* s 6, s 7

27 [2011] NSWCA 389

28 *Ibid* per Allsop J (with whom Bathurst CJ and Campbell J agreed) at [296], [298]. The Court at [297] affirmed the approach in *Bunnings Group Limited v Laminex Group Limited* [2006] FCA 682.

29 [2011] FCA 1440

J stated that while sympathetic to the view that a margin loan is not for household or domestic purposes, *Leveraged Equities v Goodridge* [2011] FCAFC 3; (2011) 191 FCR 71 is not authority for the proposition that borrowing money to buy securities is not for household purposes, as in that case, the borrower signed a business purpose declaration. Further, Perram J said that a business purpose declaration is not conclusive of the purpose.³⁰ In *Leveraged Equities* the evidence that the funds were invested to provide for retirement was treated as not relevant due to the business purpose declaration.³¹ The Court in *Richards v Macquarie Bank (No 3)* 2012 FCA 1523 did not appear unfavourably disposed to treat borrowing for margin loans as for a domestic purpose. Reeves J said:

“I consider there is sufficient logical connection between, on the one hand, the evidence of the Ensors’ personal circumstances, including their lack of experience with matters of business and investment and interrelated factors such as their education and, on the other hand, the probability of the existence of the “consumer” fact in issue.”³²

There are inconsistencies in the applicability of the protective provisions of the *National Consumer Credit Protection Act 2009* (Cth) and the unfair terms provisions. The consumer credit legislation requires credit to be provided or intended to be provided wholly or predominantly for personal domestic or household “purposes”.³³ Additional provisions extend this to credit for residential property for investment purposes.³⁴ Investment is specifically excluded from being a personal, domestic or household purpose suggesting that without this specific exclusion credit for investment purposes might fall within “personal, domestic or household.”³⁵ This may lead to the possibility that the disclosure and responsible lending provisions of credit regulation do not govern a credit contract, yet the contract may still be regarded as a consumer contract for unfair terms assessment.

Under the old Consumer Credit Code borrowers were afforded some protection by the form of words required for a valid business purpose declaration.³⁶ There is no similar protection for any declarations of use in regard to the application of the unfair terms laws. In *Australian Securities and Investments Commission v Australian Lending Centre*³⁷ it was held that borrowers who signed letters stating

30 *ibid* at [86] – [88]

31 *Leveraged Equities Limited v Goodridge* [2011] FCAFC 3 at [416]

32 *Richards v Macquarie Bank (No 3)* 2012 FCA 1523 at [13]. This matter, resulting from the collapse of Storm Financial, was settled. See *Richards v Macquarie Bank (No 4)* 2013 FCA 438

33 *National Consumer Credit Protection Act 2009* (Cth) Schedule 1 s 5 (b) (i)

34 *ibid* Schedule 1 s 5 (b) (ii), (iii)

35 *ibid* Schedule 1 s 5(3). Note that borrowing for the purchase of shares by way of a margin loan is regulated separately in the *Corporations Act 2001* (Cth)

36 See for example *Australian Securities and Investments Commission v Australian Lending Centre* (2012) ASC 155-108 at [190]

37 [2012] FCA 43

their loan was for a business purpose were at a special disadvantage for the purpose of an enquiry into unconscionability. This was on the basis that a business loan in association with the broking contract with a large termination fee meant they risked being forced into a loan without the protection of the credit legislation.³⁸ If a statement by the acquirer of the use of a financial product or financial service can be treated as a term of the contract, such a term may in turn be assessable for unfairness, unless it is characterised as a main subject matter term.

The enquiry as to the whole or predominant use of the financial product or services will be important in many instances. “Wholly or predominantly” played a role in assessing the purpose of credit under the old Consumer Credit Code. This may become a critical enquiry in cases of financial advice and investments.

Standard Form Contracts

A further hurdle is whether the contract is a standard form contract.³⁹ These are contracts that in general have not been negotiated and are in a take it or leave it form at the time of contemplation of entry into the contract. The contract is presumed to be a standard form contract unless proved otherwise.⁴⁰ The legislation sets out a list of factors the court may take into account if the question of it being a standard form contract is contested.⁴¹ The proposed amendments to the Insurance Contracts Act are in similar terms.⁴² There are some differences as a contract of general insurance is specifically a standard form contract.⁴³

Many financial services contracts are standard form contracts. This is the case for loans, margin loans, mortgage broker, stock broker, and financial planner contracts.⁴⁴ Whether the additional costs of negotiation as a means of avoiding the legislation would be worthwhile is moot.⁴⁵ ASIC says it will not treat “trivial or token negotiated” terms as indicative of a non standard form contract.⁴⁶ In UK law, which is drafted differently from the Australian legislation, a term is regarded as not being negotiated if it has been drafted in advance and the consumer has been unable to influence the substance of the term.⁴⁷

38 *ibid* at [192], [194],[203], [229]

39 ASIC Act s 12BK

40 ASIC Act s 12 BK (1); proposed Insurance Contracts Act 1984 (Cth) s 15E (1)

41 These relate to bargaining power, discussion and negotiation, and whether the terms take into account the specific party or transaction characteristics. ASIC Act s 12BK (2)

42 Insurance Contracts Amendment (Unfair Terms) Bill 2013 s 13A (3) ; s 15E

43 *ibid* s 15A (3) (b)

44 For instance the loan and security agreement for a margin loan was in a standard form in *Leveraged Equities Limited v Goodridge* [2011] FCAFC 3 at [48]

45 This is put forward as a strategy that may be adopted in Nahan, N Y and Webb, E Unfair Contract Terms in Consumer Contracts in Malbon, J and Nottage, L *Consumer Law and Policy in Australia and New Zealand* The Federation Press 2013 p 150

46 ASIC, Regulatory Guide 220 *Early termination fees for residential loans: Unconscionable fees and unfair contract terms* August 2011, RG 220.57

47 *Unfair Terms in Consumer Contracts Regulations* UK Reg 5 (2)

Financial products are sold with Product Disclosure Statements (PDS). This is a document that is in a standard form for different products. In *Macquarie Capital Advisers Ltd v Brisconnections Management Co Ltd*⁴⁸ it was held that a Product Disclosure Statement is not contractual.⁴⁹ However, in *Andrews v Australian and New Zealand Banking Group Limited*⁵⁰ the Product Disclosure Statement was treated as contractual. This PDS stated that it contained terms and conditions. As Gordon J said “That description was, however, not determinative of whether a particular provision in the PDS was a term or condition or was capable of giving rise to a breach.”⁵¹ An application form and confirmation letter taken together will constitute a binding contract to acquire a financial product as held in *Basis Capital Funds Management v BT Portfolio*⁵². Such documents are likely to be standard form documents. *Basis Capital*⁵³ concerned the acquisition of an interest in a unit trust.

Credit is not provided with a Product Disclosure Statement as it does not fall within the financial services regime of the *Corporations Act 2001* (Cth). The relevant document for consumer credit is the National Credit Code precontractual disclosure document which may be separate from but may also be the contract itself.⁵⁴ This document will contain information about interest rates, credit fees and charges, whether these can be changed and when they can be imposed.⁵⁵ Other documents associated with the provision of credit are the Credit Guide and the suitability assessment, which must be provided on request, though will not be contractual. Undertaking the suitability assessment is a statutory obligation not a contractual obligation, as is the potential debtor’s obligation to provide information for that suitability assessment.

Excluded Terms

Neither “up front price” nor “subject matter of the contract” terms can be assessed as unfair.⁵⁶ Consumers are expected to bear the risk of choosing to enter into a contract for any particular subject matter at the relevant price. There are extensive disclosure obligations to assist consumers with this. The implied terms of due skill and care and fitness for purpose are available if required for post contract assessment of the subject matter of the contract.⁵⁷

48 [2009] QSC 82

49 Ibid at [60]

50 [2011] FCA 1376; (2011) ASC 155-106

51 Ibid at [9] The contractual nature of the PDS was not at issue in the High Court *Andrews v Australian and New Zealand Banking Group Limited* [2012] HCA 30; (2012) ASC 155-109.

52 [2008] NSWSC per Austin J at [101]

53 Ibid

54 *National Consumer Credit Protection Act 2009* (Cth) Schedule 1 s 16 (5)

55 ibid Schedule 1 s 17

56 ASIC Act s 12BI; Insurance Contracts Act 1984 (Cth) proposed s 15D

57 ASIC Act s 12ED

Main Subject Matter

“To the extent that” a term “defines the main subject matter of the contract” it cannot be assessed for unfairness.⁵⁸ The converse of this is that a term which is incidental to the subject matter of the contract, without more, can be assessed.

This may not be straightforward for some financial services contracts. Not all required disclosure will fall within defining the main subject matter. If the Product Disclosure Statement is contractual, it is unlikely that every term will define the main subject matter. Mandatory information about the benefits to a holder of a product and other significant characteristics or features of the product (if contractual) may in part define the main subject matter.⁵⁹

There is an issue as to whether “cover” should be the main subject matter of an insurance contract. The extent to which exclusions from accepted risk define the main subject matter of the contract has been examined in the UK. The insurance industry there argued that “terms which define or circumscribe the insured risk and the insurer’s liability” should not be assessable for unfairness.⁶⁰ In the English case *Bankers Insurance Co v South*⁶¹, a travel insurance policy term that excluded compensation for accidents involving possession of motorised waterborne craft was not assessable. When the UK Law Commissions examined the approach of the Financial Services Authority they found that terms excluding damages for “settlement, shrinkage or expansion”, and treatment of pets that was not “reasonable or necessary” were treated provisionally as main subject matter terms.⁶² The extent to which an exclusion or limitation of liability clause defines the main subject matter of the contract will require judicial interpretation. Courts may look to the general law on defining the principal obligation of the contract.

A not dissimilar issue may arise with respect to financial advice. The practice of the industry has been to provide comprehensive financial plans. The intent of the Future of Financial Advice legislation is to encourage scaleable advice, advice limited to certain objectives.⁶³ If the insurance approach is adopted, any terms which circumscribe the advice may be main subject matter terms.

UPFRONT PRICE TERMS

The Australian legislation excludes “the upfront price” from consideration for

58 ASIC Act s 12BI (1) (a); Insurance Contracts Act 1984 (Cth) proposed s 15D (1) (a)

59 On the PDS see *Corporations Act 2001* (Cth) s 1013D (1) (b); s 1013D (1) (f)

60 The Law Commission and The Scottish Law Commission *Unfair Terms in Consumer Contracts: A New Approach? Issues Paper July 2012* p 69

61 [2003] EWHC 380 (QB) [2004] Lloyd’s Rep IR 1

62 The Law Commission and The Scottish Law Commission *Unfair Terms in Consumer Contracts: A New Approach? Issues Paper July 2012* p 70

63 *Corporations Act 2001* (Cth) s 961B

unfairness.⁶⁴ This is the consideration for the supply under the contract that is disclosed at or before entry into the contract, but does not include “any other” contingent consideration.⁶⁵ The Australian approach is not concerned with the adequacy of the price, nor its intelligibility.⁶⁶ This contrasts with the UK rules which do not exclude contingent fees from the upfront price.⁶⁷ The Australian rules on price terms should overcome some of the uncertainty issues faced in UK Courts as to whether any particular price term was assessable. There may still be an issue with contingent fees.

The Product Disclosure Statement requires information about the cost of the product and amounts that “will or may be” payable after the acquisition of the product.⁶⁸ This is disclosed before entry into the contract. Amounts that will be payable should form part of the upfront price. Amounts that may be payable may be payable contingent on the occurrence or non-occurrence of a particular event and should be excluded from the upfront price. The premium of an insurance contract will be the upfront price. Interest for a loan will be the upfront price and other fees may be included.⁶⁹

Terms in residential loan contracts may include early termination fees, payable if the borrower ends the contract prior to the expected time. These are distinct from discharge fees payable whenever the loan comes to an end. Early termination fees include deferred establishment fees and break fees for fixed rate loans. Such fees should be disclosed in the contract or precontractual statement as an amount or as a method of calculation.⁷⁰ Some termination fees are prohibited.⁷¹ ASIC has provided guidance to its treatment of early termination fees for unfairness. It says it will treat terms imposing early termination fees and deferred establishment fees as assessable, that is they do not form part of the upfront price.⁷²

Exception fees, other fees and charges such as honour fees, dishonour fees, over-limit fees, non-payment fees and late payment fees are currently the subject of litigation in *Andrews v Australian and New Zealand Banking Group Ltd*.⁷³ A similar sort of fee for unauthorised overdrafts was at issue in *Office of Fair*

64 ASIC Act s 12BI (1) (b)

65 ASIC Act s 12BI (2)

66 Contrast with Unfair Terms in Consumer Contracts Regulations 1999 Reg 6(2)

67 The extent to which contingent fees can be included as part of the up front price in Australia, if at all, will require judicial decision. For an analysis see Paterson, J *Unfair Contract Terms in Australia* Thomson Reuters 2011 at 4.120. See also the subsequent discussion of the type of terms that may be included as part of the upfront price.

68 *Corporations Act 2001* (Cth) s 1013D (1) (i) (ii)

69 Application fees and establishment fees are not interest. *Director of Consumer Affairs v City Finance Loans (Credit)* [2005] VCAT 1989 but may also be part of the upfront price.

70 National Consumer Credit Protection Act 2009 (Cth) Schedule 1 ss 16, 17

71 National Consumer Credit Regulations 2010 Reg 79A

72 ASIC, Regulatory Guide 220 *Early termination fees for residential loans: Unconscionable fees and unfair contract terms* August 2011, RG 220.63, RG 220.64

73 *Andrews v Australian and New Zealand Banking Group Ltd* [2011] FCA 1376 ; *Andrews v Australian and New Zealand Banking Group Ltd* [2012] HCA 30

*Trading v Abbey National plc.*⁷⁴ The fee there was tested against UK legislation. The Australian approach is closer to that of the High Court and Court of Appeal in *Office of Fair Trading v Abbey National plc*⁷⁵ which was ultimately rejected in the Supreme Court. The Lower Courts held charges on unauthorised overdrafts were not part of the core bargain and would not have been recognisable as part of the price of the overdraft. In the language of the Australian legislation they were not part of the upfront price, and further they were contingent on the event of an unauthorised overdraft. This would mean they would have been assessable for unfairness. This was not the approach adopted in the Supreme Court.⁷⁶

The fees in *Andrews* are also contingent fees. The honour and dishonour fees depended on the customer being overdrawn and the discretion of the bank in honouring or dishonouring the payment instruction. The overlimit fees on credit cards also depended on the customer's payment instruction and the bank's acceptance of that instruction. The late payment fee on credit card accounts was imposed if the customer failed to make the payment by the stipulated time.⁷⁷

It is possible that some commissions if disclosed up front and part of the transaction could be included as part of the upfront price of the product or service. Under credit assistance and credit contract legislation methods of calculation of fees and commission must be disclosed to the prospective party to the contract.⁷⁸ The issue for the unfair terms legislation will be at what point statements about fees become contractual, if at all. Brokerage commissions on the sale of shares generally involve a minimum fixed cost and secondly a percentage of proceeds which decreases according to the sale price or volume. That part of any commission which is contingent should not be part of the upfront price. In the UK a commission payable on the completion of the sale rather than entry into the contract was assessed for unfairness.⁷⁹ Ongoing fee arrangements paid for instance to a financial planner must be disclosed and the client given a choice every two years.⁸⁰

Is the term unfair?

74 [2009] UKSC 6 [2010] 1 AC 696

75 [2008] EWHC 873; [2008] EWHC 2325

76 Above at [74]

77 Above at [73] per Gordon J at [15], [17], [19], [22]. Whether or not they were contingent was not at issue. The question was whether there had been a breach of contract that is whether the fees were payable on breach of contract.

78 *National Consumer Credit Protection Act 2009* (Cth) Schedule 1 s 17(14); *National Consumer Credit Protection Act 2009* (Cth) s 113 (2) (e), 136 (2) (e), 158 (2) (e), 114 (2) (d), 121 (2), (c) (d). For an example of undisclosed mortgage broking commissions see *Steve Karamihos and Aristeia Karamihos v Bendigo Bank and Adelaide Bank Limited v Steve Karamihos and Aristeia Karamihos* [2013] NSWSC 172

79 *Foxtons v O'Reardon* [2011] EWHC 2946 (QB). This concerned land rather than financial services.

80 *Corporations Act 2001* (Cth) ss 962G, 962H, 962K, 962L. Note s 962CA

Just because a term is assessable for unfairness does not make it unfair. The test of unfairness requires consideration of any significant imbalance between the parties, whether the term was necessary to protect the legitimate interests of the supplier, and if relied on whether the term would cause detriment to the acquirer.⁸¹ These three prongs are tested along with consideration of the contract as a whole and the transparency of the term.⁸²

This test for unfairness has some similarity with statutory unconscionability with respect to conduct as found in the *ASIC Act* and the unjust contract enquiry provided for in the *National Consumer Credit Protection Act*. As pointed out in *Wolfe v Permanent Custodians*⁸³ the equitable doctrine echoed in one of the ASIC Act statutory provisions is limited to entry into the transaction.⁸⁴ Under the National Credit Code scheme certain fees and charges can be reviewed for unconscionability.⁸⁵ Such fees cannot be examined for unjustness.⁸⁶ In *West v AGC Advances*⁸⁷ McHugh J famously said “a contract will not be...unjust unless the contract or one of its terms is...unfair...”⁸⁸ However there is no identity between a conclusion of unjust or unfair. ASIC suggests however that if an early termination fee is found to be unconscionable for credit legislation it will also be unfair.⁸⁹

Insurance contracts are contracts of utmost good faith. The proposed legislation will make both a declaration that a term in a general insurance contract is unfair and an attempt by an insurer to rely on such a term a breach of the duty of utmost good faith.⁹⁰ Arguments for and against the introduction of unfair terms legislation for insurance contracts ranged from the argument that the reciprocal statutory obligation of utmost good faith would already render any unfair clause void⁹¹ to enumeration of instances unfair terms in insurance contracts.⁹² The latter included unhighlighted exclusion from liability for the main driver of the vehicle, exclusion of liability for home insurance for damage caused by an invitee, claims

81 ASIC Act s 12BG (1)

82 ASIC Act s 12BG (2)

83 [2012] VSC 275

84 *ibid* at [327]-[331]

85 These are changes to the annual percentage rate, establishments fees, early termination fees, and prepayment fees. National Consumer Credit Protection Act 2009 (Cth) Schedule 1 s 78 (1)

86 National Consumer Credit Protection Act 2009 (Cth) Schedule 1 s 76 (6)

87 (1986) 5 NSWLR 610

88 *Ibid* at [622]

89 ASIC RG 220.65;

90 Insurance Contracts Act 1984 (Cth) proposed s 15A

91 Insurance Council of Australia 28 August 2009, Submission to the Senate Economics Legislation Committee Trade Practices Amendment (Australian Consumer Law) Bill 2009. http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Committees?url=economics_ctte/completed_inquiries/2008-10/tpa_consumer_law_09/submissions.htm

92 Treasury. Corporations and Financial Services Division. *Unfair Terms in insurance contracts: Options Paper*. 17 March 2010

refusal under a no fault motor vehicle policy for failure to take ‘all precautions to avoid the incident’.⁹³

Transparency

ASIC has indicated that just because a term is transparent it will not automatically be fair.⁹⁴ Unfairness for failure to be transparent, that is use plain language, be legible, present the term clearly and have it readily available,⁹⁵ has been justified as promoting consumer choice and promoting competition.⁹⁶ The standard of transparency for unfair terms is similar to the standard of mandatory financial services disclosure which is “clear concise and effective”.⁹⁷ In credit regulation, the emphasis is on “clear explanation”.⁹⁸ However, meeting mandatory disclosure will not automatically equate with the unfair terms standard of transparency.⁹⁹ An ongoing issue for financial products is that while many products, responding to PDSs, and Key Facts, are now relatively transparent, many complex and sophisticated products are not transparent.

Three Prongs and a List

As well as the tests of significant imbalance in the parties rights and obligations, no necessity to protect the legitimate interests of the advantaged party, and detriment to a party, the legislation sets out a grey list of unfair terms.¹⁰⁰ The unfair terms enquiry is not dissimilar to an unconscionability enquiry. ASIC suggests that if a fee is found unconscionable it is likely that a significant imbalance will exist.¹⁰¹ ASIC suggests that in the case of fees, costs of processing, costs to the lender for early termination of a contract unrecovered establishment costs, are likely to be legitimate while seeking to recover cost that have already been recouped, making a profit from a fee and penalising a customer are likely to be illegitimate.¹⁰² The regulators have taken a wide view of what is detriment to the consumer noting that no actual detriment must be proved.¹⁰³

93 Ibid p 3

94 ASIC, Regulatory Guide 220 *Early termination fees for residential loans: Unconscionable fees and unfair contract terms* August 2011, RG 220.132

95 ASIC Act s 12BG (3); Insurance Contracts Act 1984 (Cth) proposed s 15B (3)

96 The Law Commission and The Scottish Law Commission *Unfair Terms in Consumer Contracts: Advice to the Department for Business, Innovation and Skills* March 2013p ixf, p17f

97 *Corporations Act 2001* (Cth) s 715A

98 See for example National Consumer Credit Protection Regulations 2010 Reg 28E.

99 ASIC, Regulatory Guide 220 *Early termination fees for residential loans: Unconscionable fees and unfair contract terms* August 2011, RG.133

100 ASIC Act s 12BH; Insurance Contracts Act 1984 (Cth) proposed s 15C

101 ASIC, Regulatory Guide 220 *Early termination fees for residential loans: Unconscionable fees and unfair contract terms* August 2011, RG 220.74

102 ASIC, Regulatory Guide 220 *Early termination fees for residential loans: Unconscionable fees and unfair contract terms* August 2011, RG 220.79, RG 220.78

103 ASIC, Regulatory Guide 220 *Early termination fees for residential loans: Unconscionable fees and unfair contract terms* August 2011, RG 220.82

The treatment of terms that give a provider the unilateral right to vary the contract will need to be resolved. The National Credit Code contemplates unilateral variation of fees and charges by regulating the way notice must be given to the debtor.¹⁰⁴ The unfair terms grey list includes the example of a term that gives one party but not the other the right to vary the contract.¹⁰⁵ As Paterson points out, this reference to a change in fees and charges in the credit legislation is not required by law, therefore it does not fall within the exclusion of terms required or expressly permitted by a Commonwealth law.¹⁰⁶ ASIC says that complying with the credit legislation notification requirements of a variation will not automatically mean that a term is fair.¹⁰⁷

Penalties are currently on the agenda. The High Court in *Andrews v Australian and New Zealand Banking Group Limited*¹⁰⁸ decided that a term may be a penalty even if it had not been breached.¹⁰⁹ This leaves the way open to assess a term as imposing a penalty in a wider range of circumstances. This raises the question of the relationship between an assessment of a term as a penalty and as unfair. Since a penalty is a “collateral or accessory” stipulation which imposes a detriment, in older language a punishment,¹¹⁰ it will create a significant imbalance and detriment and as it is not limited to cost recovery will not be necessary to protect the legitimate interests of the supplier. The pleadings in *Andrews* raised the Victorian unfair terms legislation. There is as yet no judicial consideration of this. If a term is judged as a penalty it should also be unfair. It does not follow that an unfair term will always be a penalty.

CONCLUSION

There is greater clarity around the application of unfair terms legislation to credit products than to other financial services products. It will be necessary to resolve the relationship between the upfront price and contingent payments as these are a feature of many financial products and services. Variation of credit contracts should be assessed. The biggest issue that will need to be resolved is whether investment is an acquisition for personal reasons. If it is not, many financial products and services accessed by retail clients will not be accorded the protection of the unfair terms regime. The Australian Securities and Investments Commission should consider bringing a test case to resolve this.

104 NCCPA Schedule 1 s 66

105 ASIC Act s 12BH (1) (d)

106 Patterson, J op cit 4.190

107 ASIC, Regulatory Guide 220 *Early termination fees for residential loans: Unconscionable fees and unfair contract terms* August 2011, RG 220.106

108 [2012] HCA 30

109 Ibid at [78]

110 Ibid at [9], [10]

Unfair Contract Terms: Termination for Convenience

ANTHONY GRAY*

INTRODUCTION

One of law's key challenges is to explain the circumstances in which parties should not be held to their bargains. We have recognised the illusion of certainty promised by freedom of contract principles. On the other hand, there is concern with a principle allowing courts to do whatever an individual judge might think is fair in relation to a particular contractual dispute. This article will consider what the relevant principles should be. It will use a current very topical example as a lens through which these principles should be viewed, that of clauses granting one party to the contract the right to terminate the contract at their convenience, recognising however that much of the content of the article is relevant to the bigger question of the circumstances in which courts should relieve parties from a bargain they have made.

There is an increased trend in business contracts to allow at least one contracting party to terminate the contract upon their convenience, or at will. This is a departure from the traditional approach to termination whereby a contract could only be terminated for cause, leading to the distinction between conditions and warranties, since the courts determined that a contract could validly be terminated for breach only of a term of the contract that fell within the former category. This traditional approach has been largely sidelined by a modern approach allowing one party, not surprisingly often the party that drew up the contract, to terminate at will. Through clauses such as this, the parties have effectively attempted to 'contract out' of the law of contract, or at least that part of contract law that traditionally determined the ability of contracting parties to validly terminate the contract.

Termination for convenience is contemplated by standard form contracts common in industry, such as Australian Standard (AS) 2124 (General Conditions of Contract),¹ AS4000 (General Conditions of Contract),² and AS4300 (Design and Construct Contract),³ all of which allow the principal of the contract to vary the extent of work that the contractor is to do, including terminating the contract at their

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1 (1992) cl 40 deals with variations, including the client reducing the scope of work after the contract has been completed. If this occurs, there is provision for an adjustment to the contract price, including an amount for loss of profit and overhead relating to the works deleted from the contract.

2 (1997) cl 36 deals with variations in a way like cl 40 of AS2124, but providing for an adjustment to the contract price including an amount for loss of profit, but not overhead.

3 (1995) cl 40, in terms virtually identical to cl 40 of AS2124.

convenience.⁴In-house contracts are typically more direct. The author has also seen a range of in-house contracts used by, for example, big players in the mining⁵ and construction⁶ sector (obviously pivotal to the economy of Western Australia and Australia more generally), that allow the principal (or head contractor) to unilaterally end a contract with a contractor (or sub-contractor). Such clauses also appear in other contractual situations, for example employment contracts, agency/distribution, consulting and franchise agreements, as represented by the cases to which I refer below.

This article considers how, if at all, courts should respond to such clauses, in the context of a business/business contract. Should it enforce such clauses, on the basis of freedom of contract and that the price of the parties' bargain, and other terms, reflect a careful assessment by the parties to it of the relative risks and benefits of it, such that it should not be lightly disturbed by a court? Alternatively, should the court be prepared to intervene, and if so what legal doctrine/s are available and applicable to such clauses? How can demands for certainty and fairness be reconciled in such a contract environment?

Obviously, the question of the extent to which courts should relieve parties from their contractual obligations is a very broad one. As indicated, this article will focus on the particular example of termination for convenience clauses, but obviously the principles discussed are applicable more broadly.

Termination for Convenience

It is understandable that, in the name of flexibility and with economic uncertainty present, businesses ('the client' or 'the principal')⁷ might wish to enter into contracts that allow them to re-assess the commitment they have made in the contract to the other contracting party ('the contractor').⁸ There is some anecdotal evidence from industry that the use of such clauses has grown further since the so-called global financial crisis in 2008, when funding for many projects became more uncertain. Some industries are affected by the high Australian dollar, the

4 This is subject to the superintendent's approval. The superintendent is typically appointed by the client.

5 This clause is taken from a firm in the mining industry: 'The company will have the right at any time to terminate the services in whole or part for any reason by giving the contractor five business days' notice in writing'.

6 This clause is taken from the standard form contract of a major Australian construction company: 'The contractor may terminate the agreement at any time in its absolute discretion by written notice to the supplier in which case, and provided there have been no defaults by the supplier, the supplier will be entitled to (a) the value of all goods supplied in accordance with the agreement to the date of termination and (b) all reasonable direct costs incurred by the supplier as a result of termination (subject to an obligation of the supplier to mitigate such costs)'.

7 Some contracts use the word 'principal' to refer to this organisation.

8 I will use this phrase for ease of reference; it can include a regular contractor, and a head contractor, with contracts with both the client (principal), and sub-contractors.

carbon tax and the mining tax, and there is ongoing uncertainty regarding the regulatory environment that business will face in the medium to long term.

On the other hand, the contractor may be greatly reliant on a particular contract for their economic survival. They often make investments in capital equipment or machinery, or in human capital, based on an assumption that a contract to which they are a party will be binding on the other party, and will provide some kind of guarantee of work, at least for a finite term, if they meet their obligations under it. They may be surprised to learn, if they read the contract, that it allows the client to escape from the commitment implicit in the contract. If they did read the contract and raised their concerns with the client, it is possible that they might be able to negotiate some changes, dependent on their market position. However, it is more likely that these are provisions of a standard form contract prepared for the client and not surprisingly protective of the client's interests, and it is likely that the contractor will be informed that the conditions, including the termination for convenience clause, are non-negotiable, and that if the contractor is not willing to accept the work on this basis, the client will find another provider that will. This observation is based on the author's twelve years of experience in relation to contracting in the construction and mining industry.

Freedom of Contract

Of course, a classic freedom of contract position, most dominant in the late 19th century and in line with then-dominant theories of legal positivism, would offer little assistance to the contractor in such a situation. The words of Sir George Jessel MR are apposite here:

If there is one thing which more than another public policy requires it is that men of full and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of Justice. Therefore you have this paramount public policy to consider – that you are not lightly to interfere with this freedom of contract.⁹

Some argue that freedom of contract is strongly supported by economic principles, allowing parties to make choices that improve their welfare and promoting efficiency in the allocation of resources.¹⁰ It embraces the economic notion of an individual as a rational, utility maximiser who is best placed to make decisions regarding what is in their best interest. The primary role of contract law is to recognise when a legally binding contract has been made, and to enforce promises.

⁹ *Printing and Numerical Registering Co v Sampson* (1875) LR 19 Eq. 462, 465.

¹⁰ Richard Posner *Economic Analysis of Law* (1992, 4th ed) p89-96; Paula Baron 'Shells of Steel and Bodies of Pulp: Commercial Man, Commercial Morality' (1999) 11 *Law in Context* 3, 11; 'certainty in contractual obligations freely assumed is an economically valuable feature of a modern market economy': *Tanwar Enterprises Pty Ltd v Cauchi* (2003) 217 CLR 315, 351 (Kirby J).

A less well known statement from Wills J is to the same effect and is considered particularly appropriate in the current context:

Any right given by contract may be exercised against the giver by the person to whom it is granted, no matter how wicked, cruel or mean the motive may be which determines the enforcement of the right.¹¹

Notions of freedom of contract continue to pervade the Australian case law¹² and academic commentary¹³ in this area.

However, this idea (or perhaps ideal) of the sanctity of a contract, conceived in the era of economic liberalism, came to be challenged. Mason and Deane JJ summed up developments succinctly in *Legione v Hateley*:

In the early part of this (20th) century overriding importance attached to the concept of freedom of contract and to the need to hold parties to their bargains. These considerations, though still important, should not be allowed to override competing claims based on longstanding heads of justice and equity.¹⁴

Recently, all members of the High Court dismissed ‘the idea that laissez faire notions of an untrammelled freedom of contract provide a universal legal value’.¹⁵

As with all economic theories, sometimes unspoken assumptions must always be borne in mind, to test their accuracy and applicability today. Freedom of contract assumed that the parties to the contract were relatively equal in strength of

11 *Allen v Flood* [1898] AC 1, 46.

12 *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516, 575-576 urging great caution in considering the implication of terms into a contract, on the basis of economic freedom of contract; *Esso Australia Resources Pty Ltd v Southern Pacific Petroleum NL and Ors* [2005] VSCA 228, [4] ‘where commercial leviathans are contractually engaged, it is difficult to see that a duty of good faith will arise’; ‘the courts should not be too eager to interfere in the commercial conduct of the parties, especially where all of the parties are wealthy, experienced, commercial entities able to attend to their own interests’: Rogers CJ Comm D in *GSA Group v Siebe PLC* (1993) 30 NSWLR 573, 579; *Royal Botanic Gardens and Domain Trust v South Sydney City Council* (2002) 240 CLR 45, 75 (Kirby J) and 94 (Callinan J).

13 Geoffrey Kuehne ‘Implied Obligations of Good Faith and Reasonableness in the Performance of Contracts: Old Wine in New Bottles?’ (2006) 33 *University of Western Australia Law Review* 63, 98 ‘commercial contracts are likely to be the product of extensive negotiation and advice, representing an allocation of risks and interests too nuanced to be reconciled with a general, mandatory obligation of good faith or reasonableness [103]... uncertainty of meaning (referring to reasonableness) is particularly problematic when imported into a commercial contract between parties who may have differing views as to what is reasonable’; Adam Wallwork ‘A Requirement of Good Faith in Construction Contracts?’ (2004) 20 *Building and Construction Law* 257, 265

14 (1983) 152 CLR 406, 448-449.

15 *Andrews v Australia and New Zealand Banking Group Ltd* [2012] HCA 30, [5](French CJ, Gummow, Crennan, Kiefel and Bell JJ).

bargaining power, were able to negotiate a contract that was in their best interests, that parties understood the nature and content of the agreement. In addition, and of particular relevance to termination for convenience clauses, it assumed that the contract price arrived at would reflect a ‘true’ price given the relative allocation of risks and responsibilities, because the parties understood the scope of the relative risks they were taking.¹⁶

If these assumptions ever were correct, it has been recognised in more recent times that they no longer reflect the reality of contracting today.¹⁷ There is wide disparity of bargaining power, some involved in contracting have more power than others, often contracts are not the product of negotiation between the parties, but reflect primarily or totally the will of one party, to which the other party has had to submit, and many parties to a contract don’t read them or don’t understand or don’t fully understand the terms of engagement. Equitable principles, and more recently, statutory intervention has sought to reflect some of these realities, though the extent to which both of these do in practice curb, or should curb, freedom of contract is a matter of ongoing debate, as witnessed, for instance, in doubts about the applicability of good faith to contracts governed by Australian law, restrictive interpretation of principles such as unconscionability and unjust enrichment, and (arguably) some timidity in statutory regulation, and timidity in interpretation of that regulation.

In the specific context of termination for convenience clauses, I turn now to consider ways in which courts have, or ways in which courts could, limit or regulate the increased use of such clauses. Implicit in this discussion is my assumption that, at least in some cases, the exercise by one contracting party of a unilateral right to terminate the contract without cause could be (for want of a better term) ‘unfair’, accepting the subjectivity involved in such a notion. However, recognition of this point by the courts has been relatively rare.

(a) *Unfair Contract Terms – Australian Consumer Law*

Section 23 of the *Australian Consumer Law* voids unfair contract terms in standard form contracts. A termination for convenience clause often appears in a standard form contract. In deciding whether it is ‘unfair’ in terms of s24 and s25, such a clause could meet the requirements of s24.¹⁸ It seems directly

16 Liam Brown ‘The Impact of Section 51AC of the Trade Practices Act 1974 (Cth) on Commercial Certainty’ (2004) 28 *Melbourne University Law Review* 589, 593.

17 Eileen Webb ‘Considering Unfairness in Retail Leases – A Bridge Too Far or Justifiable Extension?’ (2010) 19 *Australian Property Law Journal* 58, 59 and 68-69.

18 These consider whether the clause causes significant imbalance in the parties’ contractual obligations, whether it was necessary to protect the parties’ legitimate interests, and the extent of detriment caused to the other party. The same conclusion is reached by Amanda McBratney and Myles McGregor-Lowndes ‘Fair Government Contracts for Community Service Provision: Time to Curb Unfettered Executive Freedom?’ (2012) 20 *Australian Journal of Administrative Law* 19, 30.

within the contemplation of s25(1)(b) which gives as an example of an unfair term one which permits one party but not the other to terminate the contract. This is typically exactly what a termination for convenience clause does. However, the argument is precluded because s23(3) limits the application of the unfair contract terms provisions of the *Australian Consumer Law* to ‘consumer’ contracts. As finally passed,¹⁹ the provisions do not apply to business/business contracts. As a result, this remedy will not be considered further.²⁰

(b) *Good Faith*

The aim of any mature system of contract law must be to promote the observance of good faith and fair dealing in the conclusion and performance of contracts...²¹ (people) must be able to assume that those with whom they deal in the general intercourse of society will act in good faith.²²

The acceptance of this doctrine as part of Australian law continues to await High Court approval.²³ However, in a series of decisions, courts at the state appellate level have accepted the applicability of principles of good faith in relation to contracts to which Australian law applies.²⁴ Good faith has been recognised

19 Eileen Webb notes that originally the provisions were to apply to business/business contracts, and there was recognition that whether the contract was business/consumer or business/business, there was potential for both to include unfair terms, both to involve lack of negotiation etc. However, lobbying to remove business/business contracts from the purview of the unfair contract terms provisions succeeded: ‘Considering Unfairness in Retail Leases – A Bridge Too Far or Justifiable Extension?’ (2010) 19 *Australian Property Law Journal* 58,69; Aviva Freilich ‘A Radical Solution to Problems With the Statutory Definition of Consumer: All Transactions Are Consumer Transactions’ (2006) 33 *University of Western Australia Law Review* 108; and see Meredith Miller ‘Contract Law, Party Sophistication and the New Formalism’ (2010) 75 *Missouri Law Review* 493, rejecting the simplistic distinction between sophisticated and unsophisticated contracting parties that arguably underpins the definition of consumer, and at least traditionally, the reach of the common law notion of unconscionability.

20 For the record, I believe that such provisions should be extended to apply to business/business contracts.

21 Lord Steyn ‘The Role of Good Faith and Fair Dealing in Contract Law: A Hair-Shirt Philosophy’ (1991) 6 *Denning Law Journal* 131, 131; Lord Atkin ‘business men habitually ... trust to luck or the good faith of the opposite party’: *Phoenix Insurance Co v DeMonchy* (1929) 141 LTR 439, 445 (House of Lords).

22 Roscoe Pound *An Introduction to the Philosophy of Law* (1922) p188.

23 On occasion, the High Court has appeared displeased by attempts by lower courts to develop the law in somewhat novel ways: *Farah Constructions Pty Limited v Say-Dee Pty Limited* (2007) 230 CLR 89, 149 (Gleeson CJ Gummow Callinan Heydon and Crennan JJ); however the High Court has had opportunities, and declined, to cast judgment on the doctrine of good faith one way or another: *Royal Botanic Gardens and Domain Trust v South Sydney City Council* (2002) 240 CLR 45, on the basis that it was an inappropriate case in which to consider it (63 (Gleeson CJ Gaudron McHugh Gummow and Hayne JJ), 75-76 (Kirby J) and 94 (Callinan J). An opportunity may arise shortly, with the The High Court declined special leave to appeal the decision in *Cordon Investments Pty Ltd v Lesdor Properties Pty Ltd* [2012] NSWCA 184, a decision based partly on good faith.

24 *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR; *Burger*

in international legal instruments as being fundamental to contracting,²⁵ and is of ancient vintage, being traceable to Roman law.²⁶ To the extent that we see contracts in economic terms, there are sound economic reasons for its recognition. It has been recognised that recognition of such a doctrine does or would reduce the economic costs of contracting, reducing costs associated with gathering information on an organisation's prospective contracting partners, negotiating and drafting contracts, and reducing future risk.²⁷ There is debate regarding whether the requirement of good faith is to be implied as a term at law, in fact, or instead is an underlying contractual principle which requires no implication.²⁸

Obviously, to a large extent commercial law was extensively based on the practice of merchants, this practice being evident in England since at least the 17th century.²⁹ In this light, there is an interesting literature that traditional rules of contract law, emphasising freedom of contract over notions like good faith, serve to perpetuate a kind of adversarial, non-trusting environment that is at odds with most business contracting.³⁰

King Corporation v Hungry Jack's Pty Limited [2001] NSWCA 187; *Alcatel Australia Ltd v Scarcella and Ors* [1998] NSWSC 483; *United Group Rail Services Limited v Rail Corporation New South Wales* [2009] NSWCA 177; *Cordon Investments Pty Ltd v Lesdor Properties Pty Ltd* [2012] NSWCA 184; *Strzelecki Holdings Pty Ltd v Cable Sands Pty Ltd* [2010] WASCA 222; less strongly *Esso Australia Resources Pty Ltd v Southern Pacific Petroleum NL and Ors* [2005] VSCA 228.

- 25 *Uniform Commercial Code* (US)(section 1-203), *Restatement (Second) of the Law of Contracts* (US)(s205), *United Nations Convention on Contracts for the International Sale of Goods* (Article 7(1)); Article 242 of the BGB (Germany), Article 1134(3) of the *French Civil Code*, Article 1.7 of the *UNIDROIT Principles of International Commercial Contracts*. Lord Steyn says the international context 'demonstrate(s) that in the hard school of litigation and international commercial arbitration, (good faith has been shown to be a) perfectly workable and sensible technique for the imposition of legal duties in many legal systems': 'The Role of Good Faith and Fair Dealing in Contract Law: A Hair-Shirt Philosophy?' (1991) 6 *Denning Law Journal* 131, 140.
- 26 *Justinian's Digest*, II XIV 27.3: SP Scott *The Civil Law, Translations of Roman Legal Texts* (1932); Suzanne Corcoran 'Good Faith as a Principle of Interpretation: What is the Positive Content of Good Faith?' (2012) 26 *Australian Bar Review* 1, 3-4.
- 27 Steven Burton 'Breach of Contract and the Common Law Duty to Perform in Good Faith' (1981) 94 *Harvard Law Review* 369, 393.
- 28 Elisabeth Peden 'Incorporating Terms of Good Faith in Contract Law in Australia' (2001) 23 *Sydney Law Review* 222, 224-231; Bill Dixon 'Good Faith in Contractual Performance and Enforcement – Australian Doctrinal Hurdles' (2011) 39 *Australian Business Law Review* 227.
- 29 Patrick Devlin 'The Relation Between Commercial Law and Commercial Practice' (1951) 14 *Modern Law Review* 249, 250.
- 30 Girard 'Good Faith in Contract Performance: Principle or Placebo?' (1983) 5 *Supreme Court Law Review* 309, 326.

Jurists such as Macaulay³¹ and Macneil³² engaged in important empirical work on the attitudes and experiences of contracting parties. Broadly, they found a high degree of trust and commitment to long-term contractual relationships, including acceptance of norms that commitments are to be honoured in almost all situations, and that reputation and long-term contractual relationships are all-important.³³ Freedom of contract, to the extent it assumes individuals are rational, utility maximisers fails to capture this reality.

These findings would be consistent with the application of good faith principles in contracting.³⁴ It is considered important that law, including commercial law, be harmonious with, and not antagonistic towards, the nature of the relationships which it purports to regulate.³⁵ If business people generally act with an attitude of good faith towards others with whom they contract, and expecting good faith in contract performance is a reasonable expectation that contracting parties have,³⁶ it does not seem so problematic to apply notions of good faith to such an

31 Stewart Macaulay 'Non-Contractual Relations in Business: A Preliminary Study' (1963) 28(1) *American Sociological Review* 55; Alex Johnson 'Correctly Interpreting Long-Term Leases Pursuant to Modern Contract Law: Toward a Theory of Relational Leases' (1988) 74 *Virginia Law Review* 752; Matthew Lees 'Contract, Conscience, Communitarian Conspiracies and Confucius: Normativism Through the Looking Glass of Relational Contract Theory' (2001) 25 *Melbourne University Law Review* 82.

32 Ian Macneil 'Contracts: Adjustments of Long-Term Economic Relations Under Classical, Neoclassical and Relational Contract Law' (1978) 72 *Northwestern University Law Review* 854; 'Relational Contract Theory: Challenges and Queries' (2000) 94(3) *Northwestern University Law Review* 877; Irish Bohnet, Bruno Frey and Steffen Huck 'More Order With Less Law: On Contract Enforcement, Trust and Crowding' (2001) 95(1) *American Political Science Review* 131; Scott talks of the 'incongruence of simple rules and complex relationships': Robert Scott 'The Death of Contract Law' (2004) 54 *University of Toronto Law Journal* 369, 372.

33 'many people behave in a reciprocal manner that deviates from purely self-interested behaviour': Robert Scott 'The Death of Contract Law' (2004) 54 *University of Toronto Law Journal* 369, 383.

34 Stewart Macaulay 'The Real and the Paper Deal: Empirical Pictures of Relationships, Complexity and the Urge for Transparent Simple Rules' (2003) 66 *Modern Law Review* 44, 44: 'if we want our courts to carry out the expectations of the parties to contracts, both those that they express in writing and those that are left unrecorded or even unspoken, we must accept a contract law that rests on standards rather than on clear, quantitative rules. Contract law will then talk of good faith, duties of cooperation or within limits set by commercial reasonableness'.

35 'relational contract law should generally track the relational behaviour and norms found in the relations to which it applies': Ian Macneil 'Relational Contract Theory: Challenges and Queries' (2000) 94(3) *Northwestern University Law Review* 877, 903; Devlin referred to the 'constant danger' that the ideas of lawyers and of business people are asynchronous: Patrick Devlin 'The Relation Between Commercial Law and Commercial Practice' (1951) 14 *Modern Law Review* 249, 263.

36 The High Court has accepted the principle that courts should apply a business-like approach to the interpretation of contracts: *International Air Transport Association v Ansett Australia Holdings Ltd* (2008) 234 CLR 151, 160 and 174; reference to the need for contract law to reflect parties' reasonable expectations appears in *First Energy (UK) Ltd v Hungarian Investment Bank Ltd* [1993] 2 Lloyd's Rep 194; Steyn LJ 'Contract Law: Fulfilling the Reasonable Expectations of Honest Men' (1997) 113 *Law Quarterly Review* 433.

environment,³⁷ despite what some judges have found.

How does this apply in the current context? As Warren CJ noted, the exercise of a termination for convenience clause is often seen as an example of ‘bad faith’ conduct. Duke makes the same point. After pointing out relational aspects of contracting and that the written contract reflects only a rough indication of how the parties intend their relationship to work, they add:

In order to ensure parties honour their contractual relationships, courts must acknowledge realities such as those discussed above rather than permitting parties the unqualified right to enforce or terminate an agreement by reference to terms that are almost certainly going to be incomplete as well as out of sync with the expectations the parties have about the nature of their evolving exchange relationship and the co-operative spirit underpinning that relationship. When these realities are taken into account, it becomes clear that rather than overriding the intentions of the parties, the implied duty of good faith can be seen as effecting the intentions and reasonable expectations of the parties from their entire exchange relationship.³⁸

A precise definition of good faith is notoriously elusive. It might be better to identify specific strands of the concept, as Sir Anthony Mason did.³⁹ Some of these strands are relevant to the current context; some are not. For instance, some argue that good faith means honesty.⁴⁰ I will not dwell on this strand here, because I am not suggesting that a party exercising a termination for convenience clause is acting dishonestly. Further, some argue that good faith means that one party will not prevent the other party to the contract from enjoying the benefit of the

37 Bathurst CJ (with whom Ipp JA and Macfarlan JA agreed) concluded that good faith ‘has been an underlying concept in the law merchant for centuries’: *United Group Rail Services Limited v Rail Corporation New South Wales* [2009] NSWCA 177, [58]

38 Arlen Duke ‘A Universal Duty of Good Faith: An Economic Perspective’ (2007) 33 *Monash University Law Review* 182, 196-197.

39 Of the four strands to which I refer, Mason identified the first, second and fourth in ‘Contract, Good Faith and Equitable Standards in Fair Dealing’ (2000) 116 *Law Quarterly Review* 66, 69.

40 *United Group Rail Services Limited v Rail Corporation New South Wales* [2009] NSWCA 177 the Court discussed good faith in terms of honesty and ‘fidelity to the bargain’ [70] (Allsop P, with whom Ipp JA and Macfarlan JA agreed); *Strzelecki Holdings Pty Ltd v Cable Sands Pty Ltd* [2010] WASCA 222; *Dura (Australia) Constructions Pty Ltd v Hue Boutique Living Pty Ltd* [2012] VSC 99, [422]; Elisabeth Peden ‘When Common Law Trumps Equity: The Rise of Good Faith and Reasonableness and the Demise of Unconscionability’ (2005) 21 *Journal of Contract Law* 226, 235. Article 1-201 of the Uniform Commercial Code defines good faith to mean honesty in fact in the conduct or transaction concerned, although see Article 2 (below). Others suggest that while not wrong to say that good faith includes honesty, it is wrong to *confine* good faith to honesty: Robert Summers ‘Good Faith in General Contract Law and the Sales Provisions of the Uniform Commercial Code’ (1968) 54 *Virginia Law Review* 195, 204; Suzanne Corcoran ‘Good Faith as a Principle of Interpretation: What is the Positive Content of Good Faith?’ (2012) 36 *Australian Bar Review* 1, 3.

contract by making it difficult or impossible for the other to meet their obligations under the contract.⁴¹ Similarly, I do not suggest that this strand of good faith is particularly relevant to the exercise of a termination for convenience clause.

A third strand would prevent a power in a contract from being used for a purpose beyond the understanding of the parties at the time at which the contract was executed.⁴² Burton uses this concept in exploring what he considers the proper limits of the good faith doctrine. He would not allow the use of discretion in provisions of the contract, including for relevant purposes the termination for convenience option, where to do so is an attempt by the party exercising it to ‘recapture foregone opportunities’. On the other hand, a party acts in bad faith by exploiting an option under the contract for reasons other than for which it was given to them. There are several difficulties in applying this line of cases, and this academic theory, to termination for convenience clauses. Firstly, the reason or reasons why a termination for convenience clause has been included in the contract are usually not expressed – indeed, part of their appeal is their open-ended nature. There are obvious difficulties in going behind the express terms of the contract to determine what motivated the parties’ inclusion of such a clause in their contract. Further, Burton would not allow the use of a termination right where to do so would be an attempt to recapture foregone opportunities. In a sense, arguably every termination for convenience clause would meet this description. When two parties engage contractually, they have made a choice among a host of alternative options, presumably deciding this contract is best for them. By contracting with one party, they forego the opportunity to contract for the same product or service from another. This might mean that Burton would not allow one party to use a termination for convenience right.⁴³

41 *McKay v Dick* (1881) 6 App Cas 251, 263.

42 *Godfrey Constructions Pty Ltd v Kanagra Park Pty Ltd* (1972) 128 CLR 529, 551-552 (Stephen J); *Burger King Corporation v Hungry Jack’s Pty Limited* [2001] NSWCA 187, [185]; *Alcatel Australia Ltd v Scarcella* (1998) 44 NSWLR 349, 368. This kind of conduct was referred to by judges in *Legione v Hately* as providing grounds of (equitable) relief, though they did not use the language of good faith to describe equity’s intervention in such cases: (1983) 152 CLR 406, 449 (Mason and Deane JJ); *Esso Australia Resources Pty Ltd v Southern Pacific Petroleum NL and Ors* [2005] VSCA 228, [25] ‘it may be appropriate to import .. an obligation (of good faith) to protect a vulnerable party from exploitive (sic) conduct which subverts the original purpose for which the contract was made’ (Buchanan JA, with whom Osborn AJA agreed); Steven Burton ‘Breach of Contract and the Common Law Duty to Perform in Good Faith’ (1981) 94 *Harvard Law Review* 369, 386.

43 Steven Burton ‘Breach of Contract and the Common Law Duty to Perform in Good Faith’ (1981) 94 *Harvard Law Review* 369. Burton applauds the decision in *Fortune v National Cash Register Co* 364 N.E. 2d 1251 (1977), where a court read in to an employment contract expressly conferring the employer’s right to terminate at will a requirement of good faith. Alternatively, it might mean that termination for convenience clauses can only be used, for example, where the basis underlying the contract has changed. For instance, in the United States such clauses began to be used in wartime because the United States government was not sure of what its future commitments might be, so needed flexibility in service delivery. In such a context, it might be okay for the client to use such a clause because the war has in fact ended, but not to use it when the war is still going, but the government has found a cheaper contractor to do the required work.

The most applicable strand of good faith doctrine to the current situation, and the most contentious of the strands, is the idea that contractual remedies must be exercised in a way that is ‘reasonable’.⁴⁴ According to Farnsworth, good faith in its original conception, back in Roman times, applied to performance of contractual obligations, and in that context good faith encompassed an aspect of reasonableness.⁴⁵ He writes that it was only later that the concept came to be applied in the context of what he calls ‘good faith purchase’, and that was the context in which concepts of honesty came to be associated with good faith, or to be more precise, that the suggestion appeared that good faith was *limited* to honesty. However, its original meaning encompassed notions of reasonableness.⁴⁶ He suggested that the reasonableness standard should apply to all contexts in which good faith is raised.⁴⁷ Given the close historical and ongoing links between the practice of merchants and commercial law as alluded to above, a requirement of ‘reasonableness’ in applying notions of good faith appears workable, given that the content of this obligation will reflect commercial practice and the expectations of individuals in that field.⁴⁸

- 44 Article 2- 103(1)(b) defines good faith as honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade. The Comment to c1205 of the *Restatement of Contracts (Second)* refers expressly to reasonableness in explaining the duty of good faith. Many of the United States cases refer to concepts of reasonableness in their good faith discussion. See for example *Questar Builders Inc v CB Flooring LLC* 978 A 2d 651, 672 (2009), *Krygoski v Construction Company Inc v United States* 94 F. 3d 1537, 1544 (1996), *T and M Distributors Inc v United States* 185 F 3d 1279, 1284 (1999), *R A Weaver and Associates Inc v Asphalt Construction Inc* 587 F 2d 1315, 1322 (1978); *Carrico v Delp* 141 Ill App 3d 684 (1986); reasonableness was referred to by Sir Anthony Mason in his description of good faith as embracing three principles: ‘Contract, Good Faith and Equitable Standards in Fair Dealing’ (2000) 116 *Law Quarterly Review* 66, 69;. The inclusion of concepts of reasonableness in relation to good faith doctrine has been trenchantly criticised: John Carter and Elisabeth Peden ‘Good Faith in Australian Contract Law’ (2003) 19 *Australian Journal of Contract Law* 155 who would confine good faith to honesty, which would include the concept of reasonableness only to the very limited extent of whether no reasonable person could regard the contracting party’s conduct as reasonable in the circumstances (borrowed from administrative law); Elisabeth Peden ‘When Common Law Trumps Equity: The Rise of Good Faith and Reasonableness and the Demise of Unconscionability’ (2005) 21 *Journal of Contract Law* 226, Elisabeth Peden ‘The Meaning of Contractual Good Faith’ (2002) 22 *Australian Bar Review* 235; cf Lord Steyn ‘good faith has a subjective requirement: the threshold requirement is that the party must act honestly ... But good faith additionally sets an objective standard, viz the observance of reasonable commercial standards of fair dealing in the conclusion and performance of the transaction concerned: ‘Contract Law: Fulfilling the Reasonable Expectations of Honest Men’ (1997) 113 *Law Quarterly Review* 433, 438.
- 45 This position is supported by Roscoe Pound: ‘the parties were bound to perform what could be required fairly and reasonably under the circumstances of the case’: *Jurisprudence Volume 1* (1959) p414.
- 46 Allan Farnsworth ‘Good Faith Performance and Commercial Reasonableness Under the Uniform Commercial Code’ (1963) 30 *University of Chicago Law Review* 666, 668-670.
- 47 678.
- 48 ‘The usages and practices of dealings in those disparate fields will be prime evidence of what is reasonable’: Steyn LJ ‘Contract Law: Fulfilling the Reasonable Expectations of Honest Men’ (1997) 113 *Law Quarterly Review* 433, 434.

This idea long pre-dated what is generally considered to be the leading case on the good faith doctrine in Australia, *Renard Constructions*, about which more is said below. Recognition in Roman law has been noted. If we confine ourselves to the 20th century in Australia, for instance, in the 1910 case of *Gardiner v Orchard*, Isaacs J stated that the ability of a contracting party to exercise a right to terminate the contract was limited by the requirements of good faith and reasonableness.⁴⁹ A suggestion that a contractual power might need to be exercised in a reasonable manner also appears in a unanimous High Court decision in 1953.⁵⁰ In 1972 members of the High Court in two different cases decided that the vendor's expressed right of rescission in the contract had to be exercised in a reasonable manner.⁵¹ There is also express reference in these cases to good faith as either an alternative doctrine or as encompassing⁵² the requirement of reasonableness.⁵³ In the leading modern Australian case on good faith in contracting, *Renard Constructions*, the contract allowed the principal to terminate the contract if the party in default had not responded adequately to a notice to remedy breach (show cause notice). The court was concerned that the principal's power could be used in relation to trivial breaches of the contract:

For the principal, in such circumstances, to be able then to exclude the contractor from the site and/or cancel the contract would be, in my opinion, to make the contract as a matter of business quite unworkable ...

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- 49 (1910) 10 CLR 722, 739-740 (citing *Woolcott v Peggie* (1889) 15 App Cas 42).
- 50 In *Carr v J A Berriman Pty Ltd* (1953) 89 CLR 327, Fullagar J (with whom Dixon CJ Williams Webb and Kitto JJ expressed agreement), in discussing the contractual power of an architect to take work out of the hands of the original contractor, and give it to someone else, stated: 'a power in the architect to hand over at will any part of the contract to another contractor would be a most unreasonable power, which very clear words would be required to confer'.
- 51 *Godfrey Constructions Pty Ltd v Kanagra Park Pty Ltd* (1972) 128 CLR 529, 546 (Walsh J), 547 (Gibbs J) and 552 (Stephen J); *Pierce Bell Sales Pty Ltd v Frazer* (1972) 130 CLR 575, 589 (Barwick CJ, 'I am not convinced that it would be unreasonable ... on the part of the respondents to exercise their right of rescission, with whom McTiernan J agreed), 591 (Gibbs J ('it remains to consider whether the action of the respondents, in seeking to rescind, can be said to have been ... unreasonable')). In neither case did the contract expressly state that the power of termination could only be used 'reasonably'.
- 52 In *Burger King*, the New South Wales Court of Appeal noted the Australian cases had made no substantial distinction between an implied term of reasonableness, and an implied term of good faith: [169]. In *Renard*, however, Priestley J stated that the two concepts had much in common (263). In *Vodafone Pacific Ltd v Mobile Innovations Ltd* (2004) NSWCA 15, Giles JA referred to an implied term that Vodafone would 'act in good faith and reasonably' (198). Others have claimed the concepts are materially different, it being possible to act in good faith but unreasonably, or in other words that the requirement of reasonableness imposes a more exacting standard (*Minster Trust Ltd v Traps Tractor Ltd* [1954] 1 WLR 963, 973; Jane Stapleton 'Good Faith in Private Law' (1999) 52 *Current Legal Problems* 1).
- 53 *Godfrey Constructions Pty Ltd v Kanagra Park Pty Ltd* (1972) 128 CLR 529, 552 (Stephen J); *Pierce Bell Sales Pty Ltd v Frazer* (1972) 130 CLR 575, 590 (Gibbs J, 'there was no evidence that the respondents, in exercising their right of rescission, were acting in bad faith'). In neither case did the contract expressly state that the power of termination could only be used in good faith.

no contractor in his senses would enter into such a contract under which such a thing could happen. The reasonable contractor, the reasonable principal and the reasonable onlooker would all assume that such a result could not come about except with good reason. The overriding purpose of the contract from the contractor's and the principal's point of view is to have the contract work completed by the contractor in accordance with the contract, in return for payment by the principal in accordance with the contract. The insertion of the (show cause clause) not to the restraint of reasonable use by the principal is quite inconsistent with all the main contractual promises by each party to the contract with the other. The contract can in my opinion only be effective as a workable business document under which the promises of each party to the other may be fulfilled, if the subclause is read in a way I have indicated, that is as subject to a requirement of reasonableness.⁵⁴

Obviously, if these judges were concerned that the termination power could be enlivened after a trivial breach of contract, they would be even more concerned that a termination power could be used in the absence of any breach at all. They would presumably be prepared to condition the use of such power the requirement of 'reasonableness'.

Similar sentiments appear in the New South Wales Court of Appeal decision in *Burger King Corporation v Hungry Jack's Pty Limited*,⁵⁵ involving, among other things, a power of the former to terminate contracts with the latter. The Court accepted that the exercise of such a power was subject to requirements of good faith and/or reasonableness. It noted the case for implication of such terms was stronger in the context of standard form contracts, and stronger when contracts contained a general power of termination.⁵⁶ These comments are directly relevant to cases of termination for convenience clauses which often appear in standard form contracts, as indicated. The Court again noted here that unless the power to terminate was conditioned by a requirement of reasonableness, the party with that power could for the slightest of breaches terminate very valuable contractual rights of the other party.⁵⁷ Again, if the court is concerned the power of termination could be used for trivial breaches, it must be concerned the power of termination

54 *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 233, 258 (Priestley JA, with whom Handley JA agreed (279)); see also *Hughes Aircraft Systems International v Airservices Australia* [1997] FCA 558, p39-40, *GEC Marconi Systems Pty Limited v BHP Information Technology Pty Limited* [2003] FCA 50, [918]-[920].

55 [2001] NSWCA 187 (Sheller JA, Beazley JA, Stein JA, joint reasons); *Alcatel Australia Pty Ltd v Scarcella* (1998) 44 NSWLR 349; *Esso Australia Resources Pty Ltd v Southern Pacific Petroleum NL and Ors* [2005] VSCA 228, per Warren CJ [2] 'a duty of good faith is no more than a duty to act reasonably in performance and enforcement', Buchanan JA [28](with whom Osborn AJA agreed) applied the test of reasonableness in assessing the validity of a provision.

56 [163]; see also *Garry Rogers Motors Aust Pty Limited v Subaru (Aust) Pty Ltd* [1999] FCA 903.

57 [183]

could be used where there is no breach at all. The requirement of reasonableness in the exercise of termination rights has also been applied in more recent cases.⁵⁸ Chief Justice of the Supreme Court of Victoria Warren has noted that use of a termination for convenience clause is often characterised as being an act of bad faith.⁵⁹ On the other hand, some courts have decided that an express termination for convenience clause leaves no room for the application of implied notions of good faith, because it would be inconsistent with the express contractual right.⁶⁰ Carter and Stewart were also dismissive of the application of good faith, at least to the extent that it encompasses reasonableness, in this context:

If a contract says that a party has a discretion to do something, such as to terminate a contract, the conception of good faith as an overlay of reasonableness means that the discretion is qualified, so that, for example, a party can only exercise a right of termination if it is objectively reasonable for it to do so. In our view this is contrary to the principles

58 *Cordon Investments Pty Ltd v Lesdor Properties Pty Ltd* [2012] NSWCA 184, [145], [167] (Bathurst CJ, Macfarlan JA and Meagher JA agreeing)(special leave to appeal to the High Court granted)(existence of good faith obligation conceded); *Robert McGill Freier and Anor v Australian Postal Corporation* (No 2)[2012] NSWSC 61, [23](court considered whether Australia Post's offer of compensation following exercise of a termination for convenience option was 'reasonable'); *John Tumminello v TAB Limited* [2011] NSWSC 1639, [55]; in *Kellogg Brown and Root Pty Ltd v Australian Aerospace Ltd* [2007] VSC 200 Hansen J found there was a serious question to be tried regarding the applicability of notions of good faith to the exercise of a termination for convenience clause power, and whether it breached good faith requirements, [61]. In *BAE Systems Australia Ltd v Cubic Defence New Zealand Ltd* [2011] FCA 1434, Besanko J denied that the client's exercise of a termination for convenience right was subject to a duty of co-operation, which is a strand of good faith: [72]. The judge applied the test of reasonableness and good faith to the use of a termination for convenience clause in an employment contract in *Moloney v Rural Council of Murray Bridge* [2012] SADC 126, [302], [305], though the defendant there conceded the applicability of notions of good faith to such exercise; the court in *Silverbrook Research Pty Ltd v Lindley* [2010] NSWCA 357 implied a doctrine of reasonableness to the exercise of an unqualified, but criterion-based, right of the other party to determine a contractual bonus payment; good faith and reasonableness were accepted and applied in *Alstom Ltd v Yokogawa Australia Pty Ltd and Anor* (No 7)[2012] SASC 49, [595]-[598](Bleby J). I have referred earlier in the article to United States decisions which also refer to reasonableness in the context of consideration whether exercise of termination for convenience rights was in good faith, the most recent example being *Questar Builders Inc v CB Flooring LLC* 978 A 2d 651 (Md 2009).

59 'Good Faith: Where Are We At?' (2010) 34 *Melbourne University Law Review* 344, 356.
60 *Trans Petroleum (Australia) Pty Ltd v White Gum Petroleum Pty Ltd* [2012] WASCA 165, [155]: 'implication of (a duty of good faith) would be inconsistent with the terms of the bargain agreed upon by the parties' (containing a termination for convenience clause)(Buss JA, with whom Pullin JA and Murphy JA agreed); Foster J in *Sundararajah v Teachers Federation Health Limited* [2011] FCA 1031, [64] to like effect; *Vodafone Pacific Ltd v Mobile Innovations Ltd* [2004] NSWCA 190, [33](Ipp JA, Mason P and Giles JA agreeing), *Beerens v Bluescope Distribution Pty Ltd* [2012] VSCA 209, [167](Tate JA, with whom Redlich JA agreed); *Rumsfeld v Freedom New York* 329 F 3d 1320, 1331 (2003). Edelman J in *Hampton v BHP Billiton Minerals Pty Ltd* (No2)[2012] WASC 285 recently stated that contractual powers that can be exercised at the sole discretion of one party may exclude the implication of a term of reasonableness, before acknowledging that a requirement of reasonableness could mitigate a broad power of termination: [263]-[264].

of commercial construction because implication of a requirement of reasonableness may second guess the bargain.⁶¹

This currently contentious issue,⁶² whether the good faith requirement is confined to (subjective) honesty, or whether it includes (objective) reasonableness,⁶³ matters greatly in the current context. It would be virtually impossible to argue that the exercise of a termination for convenience clause right was dishonest. It is much easier to argue that the exercise of such a clause was, in the circumstances, unreasonable. As a result, it is hoped that the High Court appeal from the decision of one of these cases will resolve this conflict, providing the High Court with the perfect opportunity to clarify the boundaries of the good faith doctrine.

The author favours the inclusion within the principle of good faith the concept of reasonableness. Sir Anthony Mason favoured this view. It has clear historical support in terms of the original conception of good faith. The High Court itself has read in requirements of reasonableness in relation to apparently open-ended termination or forfeiture rights. It reflects the expectations of commercial business people, and is consistent with the relational view of contracting, as opposed to the adversarial, discrete model traditionally favoured by the law of contract. Concerns that this introduces unnecessary uncertainty into contract law are misconceived. The law of contract, and the law generally, already refers to concepts of ‘reasonableness’ in many different contexts. This principle has proven itself to be quite workable in practice.

An Analogy with Good Faith in Insurance Contracts?

The role of Lord Mansfield in the development of the common law of merchant, as reflective of actual business practice, needs no elaboration. Lord Mansfield himself noted in 1766 that good faith was ‘the governing principle ... to all contracts and dealings’.⁶⁴ The law of the United Kingdom did not in fact generally develop in this direction, preferring instead (at least in the 19th century, and according to the common law rather than equity) freedom of contract. In the 1990s, the House of Lords continued to reject the notion of good faith as applied

61 John Carter and Andrew Stewart ‘Interpretation, Good Faith and the True Meaning of Contracts: The Royal Botanic Decision’ (2002) 18 *Journal of Contract Law* 182, 192.

62 The New South Wales Court of Appeal appears divided: in *United Group Rail Services Limited v Rail Corporation New South Wales* [2009] NSWCA 177 in favour of honesty and fidelity to the contract (Allsop P, Ipp JA and Macfarlan JA); in *Cordon Investments Pty Ltd v Lesdor Properties Pty Ltd* [2012] NSWCA 184 in favour of honesty, co-operation and reasonableness (Bathurst CJ, Macfarlan JA and Meagher JA). It is hoped the High Court appeal in *Cordon Investments* will clarify this conflict at state appellate level.

63 As indicated, there are other formulations of precisely what good faith means, but a decision as between these two understandings is critical in the current context.

64 *Carter v Boehm* (1766) 3 Burr. 1905, 1909 (97 ER 1162, 1164); see also Lord Kenyon ‘in contracts of all kinds, it is of the highest importance that courts of law should compel the observance of honesty and good faith’ (*Mellish v Motteux* (1792) Peake 156, 157 (170 ER 113, 114)).

to contracts as being ‘unworkable’.⁶⁵

There was one area, however, where the courts continued to apply Lord Mansfield’s notion of good faith regarding contracting, that being insurance contracts. Every law student learns that contracts of insurance are contracts of the utmost good faith, perhaps without being asked to consider why it is that such contracts are said to be governed by the doctrine, but not others. One justification that is often given is that some matters with respect to the risk the subject of the insurance policy are only known to, or knowable by, the insured. The insurer cannot reasonably be expected to investigate such matters. The economic logic is that if the insurer cannot properly assess the risk, they cannot properly price the insurance contract.⁶⁶ The law works economic justice by imposing a duty of disclosure on the insured as part of a good faith obligation, since it is only through disclosure of such relevant information that the parties can reach true agreement, and at a ‘fair’ price, since information asymmetries have been removed.

If this argument is accepted as a justification for imposing good faith in the context of insurance contracts, there is surely a sound argument for imposing good faith in the exercise of a termination for convenience clause. The existence of a such a clause also creates ‘contract pricing’ difficulties. Remember in the context of freedom of contract, we noted that the classical economic model of contracting stated that parties were the best judges of the trade-off involved in different clauses. They were best able to decide for themselves whether the contract made them better off, after assessing the risks and rewards contained in the contract. This was why the court should not intervene.

However, this argument is very difficult to apply in the context of termination for convenience clauses. The contractor has no control over whether the clause will be exercised or not; this occurs independently of the contractor being at fault in any way. The contractor cannot know the likelihood that the client will exercise this option. This makes it impossible to do as the traditional freedom of contract doctrine would have us do, which is to price in the risk.⁶⁷ In economic terms,

65 *Walford v Miles* [1992] 2 AC at 128,138: ‘the concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations ... a duty to negotiate in good faith is as unworkable in practice as it is inherently inconsistent’; cf *United Group Rail Services Limited v Rail Corporation New South Wales* [2009] NSWCA 177, where good faith obligations were applied in a negotiation setting.

66 Sir Anthony Mason notes as another instance of good faith doctrine that the vendor of property is also obliged to disclose details of the property to be sold to a purchaser, where the purchaser has no means of discovering such details, citing *Carlish v Salt* [1906] 1 Ch 355: ‘Contract, Good Faith and Equitable Standards in Fair Dealing’ (2000) 116 *Law Quarterly Review* 66, 73.

67 Smith says that the law is justified intervening on the basis of ‘substantive unfairness’ where the actual contract price deviates significantly, both in absolute and relative terms, from the ‘normal’ price: Stephen Smith ‘In Defence of Substantive Fairness’ (1996) 112 *Law Quarterly Review* 138, 154. If one of the parties is unable to price the contract properly because they are unable to assess the risk that the other party will exercise the

it is a market failure. So even if the general principle of good faith is not held applicable to all contracts, it is argued that it should be applicable to the exercise of a termination for convenience clause because, just as with insurance contracts where the doctrine is applied, one party is at an informational disadvantage through no fault of their own and which they cannot reasonably rectify. This means they are not able to accurately price risk that the hands-off, freedom of contract principles assume, so that rationale for non-imposition of good faith is not applicable.

(c) ***Unconscionability – Australian Consumer Law and the Common Law***

Section 20 of the *Australian Consumer Law* prohibits unconscionable conduct within the meaning of the common law.⁶⁸ The High Court's interpretation of the common law principle of unconscionable conduct has been relatively narrow, requiring proof that the claimant was at a special disadvantage, which was known to the stronger party, and which the strong party exploited to obtain a benefit.⁶⁹ The Court has emphasised that the disadvantage must be special, seriously affecting the ability of the innocent party to judge what is in their best interests,⁷⁰ or resulting in their will being overborne.⁷¹ As a result, inequality of bargaining power will not be sufficient.⁷²

Further, traditionally courts have been reluctant, in applying common law unconscionability, and thus flowing through to previous s51AA of the *Trade Practices Act 1974* (Cth) and now s20 of the *Australian Consumer Law*, to consider substantive unconscionability, as opposed to procedural unconscionability, as falling within the doctrine.⁷³ In other words, the court has been prepared to consider the steps leading up to the making of the contract to ensure fairness in that process, but not the fairness of the clauses in the contract themselves.

termination for convenience option, this could lead to the kind of deviation to which Smith refers.

68 This was previously s51AC of the *Trade Practices Act 1974* (Cth), and the provisions are substantially identical.

69 *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447; *Blomley v Ryan* (1956) 99 CLR 362. This has been criticised as unduly narrow, excluding cases where the weaker party had a lack of fair opportunity: Rick Bigwood 'Curbing Unconscionability: *Berbatis* in the High Court of Australia' (2004) 28 *Melbourne University Law Review* 203, 222-224; Bryan Horrigan 'The Expansion of Fairness-Based Business Regulation – Unconscionability, Good Faith and the Law's Informed Conscience' (2004) 32 *Australian Business Law Review* 159, 176.

70 *ACCC v Berbatis Holdings Pty Ltd* (2003) 214 CLR 51, 77 (Gummow and Hayne JJ); .

71 *ACCC v Berbatis Holdings Pty Ltd* (2003) 214 CLR 51, 108 (Callinan J).Rick Bigwood 'Curbing Unconscionability: *Berbatis* in the High Court of Australia' (2004) 28 *Melbourne University Law Review* 203.

72 *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447, 462 (Mason J); *ACCC v Berbatis Holdings Pty Ltd* (2003) 214 CLR 51, 64 (Gleeson CJ).

73 *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447, 459 (Gibbs CJ), 466 (Mason J) and 474 (Deane J); *Hurley v McDonald's Australia Ltd* (2000) ATPR 41-741 .

These things combined lead to the conclusion that s20 would not be of much use to a party complaining about the unfair use of a termination for convenience clause. It would be virtually impossible for a commercial party to argue that they were under the kind of ‘special disadvantage’ contemplated in cases like *Amadio*. Rogers J noted this in a case involving two large international companies:

The emphasis on the wealth and standing of the defendants and their ready access to the best of advice is to displace the operation of the concepts of unconscionable conduct which underlie decisions such as ... *Amadio* ... For a successful and wealthy international conglomerate to appeal to the safeguards the law provides for the elderly, the illiterate and the financially oppressed is to move into a totally inappropriate field of discourse.⁷⁴

In the specific context of forfeiture of contractual interests, with obvious relevance to the current context of termination for convenience clauses, the High Court has recognised that exercise of legal rights in a contract may amount to unconscionable conduct.⁷⁵ Relief was in fact granted in that case against forfeiture of a contractual interest, even when the party seeking relief was in fundamental breach of the contract.⁷⁶ The argument might be that in cases when the party seeking relief had not in fact breached the contract, a claim for unconscionable conduct on the ‘terminator’s’ part might be stronger.

Even if this obstacle could be overcome, Australian courts have traditionally not been prepared to consider whether particular clauses in the contract work unfairness in relation to ‘unconscionability’ in the unwritten law. Thus s20 would not provide a remedy in this instance.

(d) **Unconscionability– Section 21 and 22 *Australian Consumer Law***

Section 21 proscribes unconscionable conduct in connection with the supply or possible supply, or acquisition or possible acquisition, of goods or services. There is no reference to the need for these goods to have been supplied, or acquired, for personal use. Sub-section four of s21 specifically states Parliament’s intention that the court in considering the section can take into account the terms of the contract, how the contract is carried out, and is not limited to circumstances leading to the formation of the contract. These sections are expressly not confined to the non-

⁷⁴ *Qantas Airways Ltd v Dillingham Corporation* [1987] A.C.L 35-692.

⁷⁵ *Legione v Hately* (1983) 152 CLR 406, 444 (Mason and Deane JJ); *Stern v McArthur* (1988) 165 CLR 489, 513 (Brennan J)

⁷⁶ However, in a subsequent case a narrower approach to unconscionability was evident in this context: *Tanwar Enterprises Pty Ltd v Cauchi* (2003) 217 CLR 315, where the joint reasons dismissed the argument regarding unconscionability on the basis that the ‘terminator’ had not caused or contributed to the breach by the party seeking relief (Gleeson CJ McHugh Gummow Hayne and Heydon JJ, 335).

written law understanding of unconscionability, so their application is *potentially*, and intentionally, broader than that of s20. That phrasing is considered necessary because in relation to their predecessors, s51AB and s51AC of the *Trade Practices Act 1974* (Cth), the courts generally took quite a conservative view of their ambit. Specifically, courts were often reluctant to find unconscionability under these sections included substantive unconscionability, at least unless there was also evidence of procedural unconscionability.⁷⁷

On the other hand, there is some judicial recognition of the fact that the requirements of then s51AC are, or should be, quite different than the requirements of then s51AA and the unwritten law of unconscionability.⁷⁸ As a result, it is hoped that courts interpreting s21 and s22 will not take an overly narrow view of the sections, reading into them requirements of procedural unconscionability in order for the sections to operate. The fact that the sections now specifically state that it is Parliament's intention that their interpretation not be limited by the common law of unconscionability,⁷⁹ and that the court in assessing the applicability of the section can look at the terms of the contract, and is not limited to aspects relating to contract formation,⁸⁰ should help, although one can never be entirely sure until the precedents have been set. It remains to be seen whether the comments in *Hurley* regarding the need to look beyond the terms of the contract (in the context of former s51AA, AB and AC) will be held applicable to the new regime, although it is hoped this does not occur given the new wording.⁸¹

The Courts generally applied s51AB and s51AC quite strictly, requiring a finding of serious misconduct before the sections were breached:

77 For example, the Full Federal Court in *Hurley v McDonald's Australia Ltd* found that 'before s51AA, s51AB or s51AC will be applicable, there must be some circumstance other than the mere terms of the contract itself that would render reliance on the terms of the contract 'unfair' or 'unreasonable' or 'immoral' or 'wrong': (2000) ATPR 41-741, 29-31; see also Nicholson J in *Australian Competition and Consumer Commission v Lux Pty Ltd* [2004] FCA 926, [94]. This overt focus on procedural rather than substantive unconscionability has been criticised: Stephen Corones and Sharon Christensen *Comparison of Generic Consumer Protection Legislation* (2007) p128; Zipser 'Unjust Contracts and the Contracts Review Act' (2001) 17 *Journal of Contract Law* 76; Frank Zumbo 'Promoting Ethical Business Conduct: The Case for Reforming Section 51AC' (2008) 16 *Trade Practices Law Journal* 132, 133-134; Anthony Gray 'Unfair Contracts and the Consumer Law Bill' (2009) 9(2) *QUT Law and Justice Journal* 155, 161-163.

78 *Tonto Home Loans Australia Pty Ltd v Tavares* [2011] NSWCA 389, [291]; *Australian Securities and Investment Commission v National Exchange Pty Ltd* (2005) FCAFC, [30].

79 S21(4)(a).

80 S21(4)(c).

81 Interestingly, Russell Miller in his *Australian Competition and Consumer Law Annotated* (2012) p1693 refers to the *Hurley* comments in the annotations to new s22, despite the insertion of the provisions of s21(4) stating that Parliament's intentions are that the section can include consideration of the terms of the contract etc. In *ACCC v Simply No-Knead (Franchising) Pty Ltd*, the Court was prepared to consider substantive unconscionability in assessing breach of s51AC: (2000) 104 FCR 253.

For conduct to be regarded as unconscionable, serious misconduct or something clearly unfair or unreasonable must be demonstrated ... Whatever unconscionable means in sections 51AB and 51AC, the term (means) ... actions showing no regard for conscience, or that are irreconcilable with what is right or reasonable ... The various synonyms used in relation to the term 'unconscionable' import a pejorative moral judgment.⁸²

Section 22 sets out matters that the court may have regard to for the purposes of s21.⁸³ Those considered particularly relevant to the context of termination for convenience clauses include subsections (a) the relative strengths of the bargaining position of the parties; (b) the extent to which the party complained about was willing to negotiate terms and conditions; (c) the terms and conditions; (d) the conduct of the party complained about in complying with contractual terms and conditions, including after the contract was formed; (e) whether the party complained about has a contractual right to vary unilaterally a term or condition of the contract between the supplier and the customer;⁸⁴ and (f) the extent to which both parties acted in good faith.

Other Arguments

Detailed consideration of the doctrine of unjust enrichment as another ground upon which termination for convenience clauses might be challenged will not be pursued here. The High Court has on one view discouraged the development of such a doctrine as a unifying concept in itself.⁸⁵ On the other hand, there are some references in High Court authority to the use of such a concept in deciding upon relief.⁸⁶ It remains unclear whether the principle has any extra application

82 *Hurley v McDonalds Australia Pty Ltd* (2000) 22 ATPR 41-741, 40 585 (Heerey, Drummond and Emmett JJ); *Cameron v Qantas Airways Ltd* (1994) 55 FCR 147, 179; *Qantas Airways Ltd v Cameron* (1996) 66 FCR 246, 283-284; *Attorney-General (NSW) v World Best Holdings Pty Ltd* (2005) 63 NSWLR 557, Spigelman CJ spoke of unconscionability as involving a kind of 'moral obloquy' rather than mere unfairness or unjustness: [121].

83 Subsection (1) applies where the argument is that the supplier has engaged in unconscionable behaviour, subsection (2) where the argument is that the purchaser has engaged in unconscionable behaviour. In the United States, s2-302 of the *Uniform Commercial Code* embraces the notion of unconscionability as being applicable to terms of the contract, not just circumstances leading to formation.

84 In the ACCC's *Guide to Unfair Contract Terms* (2010) it states that a unilateral variation clause would be more acceptable if it were reciprocal and provided reasons for its exercise, rather than being available at will: p14. This was in the context of the unfair contract provisions, and is not from a court, but these sentiments may prove useful in interpreting new s22.

85 *Farah Constructions v Say-Dee Pty Ltd* (2007) 230 CLR 89, 156 (Gleeson CJ Gummow Callinan Heydon and Crennan JJ).

86 Eg *Stern v McArthur* (1988) 165 CLR 489, 527 per Deane and Dawson JJ explaining unconscionable conduct in terms of a person taking advantage of another's special vulnerability 'for the unjust enrichment' of themselves, references to a 'windfall' to the terminator as a reason for relief (529); *Tanwar Enterprises Pty Ltd v Cauchi* (2003) 217 CLR 315, 349 (Kirby J), 365 (Callinan J).

beyond the realms of conduct from which equity would traditionally regard as being deserving of relief. It is also difficult to deal with issues surrounding termination for convenience clauses by arguing that the parties are in a fiduciary relationship with one another. The courts are particularly reluctant to impose fiduciary obligations in standard contractual arrangements,⁸⁷ for good reason. The recognition that a relationship is fiduciary in nature means that the fiduciary is expected to subjugate their private interests in favour of the beneficiary. It is problematic to apply this concept to the vast majority of commercial contracting relationships, where it is expected that parties act in their own best interests. Nor will I press here an argument that if one party has a unilateral power of termination, they have not actually promised anything to the other, leading to problems with consideration.⁸⁸

Summary of Findings and Conclusion

In sum, my discussion of possible remedies for a party against whom a termination for convenience clause has or might be exercised has found the following:

- s23 of the *Australian Consumer Law*, the unfair contract term provisions, won't help;
- good faith may help, particularly if the fourth understanding of the term is applied (reasonableness)(see below), maybe if the third understanding of the term is applied (preventing a party using a contractual power other than the purpose for which it was conferred)(see below), but probably not if the first understanding of the term is applied (honesty)(see below). The second understanding of the term, preventing the other from meeting their obligations under the contract, doesn't apply.
- non-statutory unconscionability won't help because it traditionally won't consider substantive unconscionability, which is what a termination for convenience clause would be argued to be, and the party complaining in a business context can't meet the special disadvantage test the courts apply
- statutory unconscionability, particularly s21 and s22 of the *Australian Consumer Law*, can and should be applied (see below)
- of the other possible arguments, there is some argument regarding unjust enrichment if a party exercises a termination for convenience clause arbitrarily, and that such a clause undermines consideration (these won't be further considered as there is limited support in the case law), but not in relation to fiduciary duties.

87 *Hospital Products v United States Surgical Corporation* (1984) 156 CLR 41.

88 One example of this finding is *Torncello v United States* 681 F.2d 756, 768-772 (1982) (Bennett J)(Court of Claims).

Examples

I will conclude the article by considering some of the examples of the exercise of a termination of convenience clause that I have seen in practice, to see the extent to which any of the above principles might be applicable. A relevant consideration here might be the reason/s why the client/principal is exercising their right of termination, so the examples will posit different reasons to see whether the application of the above principles might lead to different results depending on why the terminating party exercised the option.

Scenario One: The principal/client can terminate at their convenience, subject to payment to the terminated contractor for all work completed up until the date of termination, as well as demobilization costs associated with early termination.

The principal/client is not acting dishonestly here, in the narrow sense of good faith. Arguably, they are not acting unreasonably either, at least in terms of their willingness to pay appropriate, though minimal, compensation to the terminated contractor. It is difficult to argue this conduct involves the kind of ‘serious misconduct’ or ‘clearly unfair or unreasonable’ conduct that would attract s21 of the *Australian Consumer Law*.

Scenario Two: The principal/client can terminate at their convenience. No compensation is payable to the contractor in that event.

The author is not aware of a case where a court has considered the validity of such a clause. The terminator is not acting dishonestly here, so good faith would not apply if that concept is applied narrowly. There may be an argument that a failure to compensate the contractor, at least for the work done up until the time of termination and associated demobilisation costs, is unreasonable and contrary to good faith in the broader sense of the word. There is academic support for the suggestion that in such cases the court should require the terminator to pay the terminated contractor some compensation, at least to the extent of the work done until the date of termination and reasonable demobilisation expenses.⁸⁹ This may also be a case where the court would view the contractual clauses here as ‘clearly unfair or unreasonable’, taking into account the fact it is a right to unilateral variation, and probably reflective of the client’s superior bargaining power. This could lead to the kind of ‘windfall’ or ‘unjust enrichment’ that has concerned some of the judges in the unconscionability cases to date.

Scenario Three: The principal/client can terminate at their convenience. They do so because they have found a new contractor who is quoting a cheaper price than the current contractor.

⁸⁹ Charles Tiefer ‘Forfeiture by Cancellation or Termination’ (2003) 54 *Mercer Law Review* 1031, 1076.

There are good arguments to be made that such conduct is contrary to good faith. Here, the definition of good faith becomes critical. If good faith is confined to honesty, these actions would not fall foul of it – there is nothing dishonest in what the terminator is doing. However some, including the author, would argue that when the broader definition of good faith is applied, including notions of reasonableness, it is unreasonable for the terminator to exercise their right in such circumstances. The terminator is seeking to take an opportunity foregone by the entry into the contract, the conduct seems contrary to the spirit of the contract. Some would view this behaviour as immoral.⁹⁰

This may also be viewed as unconscionable within s21 of the *Australian Consumer Law*, involving ‘moral obliquity’ or ‘clearly unfair or unreasonable’ behaviour, in seeking to take back foregone opportunities, where the context in which the contract was developed has not particularly changed. This is a unilateral right to terminate and probably again reflects disparity in bargaining position.

Scenario Four: The principal/client can terminate at their convenience. They were genuinely committed to the project at the time of signing, but an event like the global financial crisis occurred, throwing out their project plans ie capital is more expensive, more difficult to secure etc.

A good faith argument is difficult to make here. There is no suggestion of dishonesty. It would be open to a court to find here that the exercise of the termination power is reasonable in the circumstances. The terminator is not acting for a purpose contrary to the contract, has not failed to co-operate to achieve the contract’s objectives, and is not seeking to take advantage of opportunities foregone when the contract was executed. Some support for this approach can be taken from the American case law. In one of the leading cases, *Torncello v United States*, the court rejected blanket acceptance of the validity of termination for convenience clauses, finding limited justification for them in terms of situations where the expectations of the parties had substantially changed.⁹¹ For similar reasons, it is hard to argue that s21 unconscionability exists here, with the lack of serious misconduct or clearly unfair or unreasonable behaviour on the client’s part.

90 Summers uses a similar example of a purchaser who has an unqualified right to reject goods tendered by the supplier, who exercises that right to reject goods because they have found a cheaper alternative supplier. He considers this conduct to be commercial bad faith: ‘Good Faith in General Contract Law and the Sales Provisions of the Uniform Commercial Code’ (1968) 54 *Virginia Law Review* 195, 206.

91 681 F.2d 756, 763 (1982)(Court of Claims): it was noted that this was consistent with the original context in which the use of such clauses arose, namely government contracting during wartime, where the government needed flexibility due to the unpredictable world situation, and their need for services from contractors; *Russell Motor Car Co v United States* 261 US 514 (1923).

Scenario Five: The client can terminate at their convenience. They are a head contractor, and a termination for convenience clause appears in their contract with the principal (for example, the Western Australian Government calls tenders to build a new rail line in the State. John Holland is appointed head contractor, and they appoint various sub-contractors. John Holland makes the clause 'back to back' ie inserts the clause in contracts with their sub-contractors, in case the WA Government exercises their option. John Holland does not want to be left 'in the lurch' contractually, if their contract with the Western Australian government falls over.

Again, it would be difficult to argue that the head contractor is acting in bad faith. There is again no suggestion of dishonesty. It is open for a court to find the exercise of the termination power reasonable in the circumstances. The terminator is not acting for a purpose contrary to the contract, failed to co-operate to achieve the contract's objectives, and is not seeking to take advantage of opportunities foregone when the contract was executed. Similarly, it is difficult to make out an allegation of 'serious misconduct' or 'clearly unfair or unreasonable' behaviour on the client's part.

Legitimate Interests and Unfair Terms: the other threshold test

ANTHONY HEVRON*

Abstract: The Australian Consumer Law provides protection to Consumers against unfair terms. The rule includes elements that are a familiar part of the common law of contract in the rule against the restraint of trade. The case law and academic writing on restraint of trade focuses on the reasonableness of the protection provided by the term. Whereas the other part of the rule: the legitimacy of the protected interest, receives less attention. Given the relatively smaller impact of consumer transactions it is suggested that the legitimacy of the protected interest is a more important test under the unfair terms rule.

INTRODUCTION

The Australian Consumer Law (“ACL”) is the product of a long review process that attempted to address many issues in the regulation of consumer transactions. One of the many issues that the process and the ACL was intended to address was the creation of a new standard in consumer transactions¹: unfairness, in the unfair terms rule (the “UFT”)². The objective was to create a clear rule that would prevent the creation of unfair terms before harm was caused to a consumer, rather than wait until the damage is done to provide the consumer with a remedy, and the business with a penalty.³ The problem with new standards and particularly with one as context dependant as unfairness, is creating a definition that can provide, or at least allow for “[c]lear objectives, with observable outcomes”.⁴ If the rule is to be effective, it must be one that can generally be understood by both businesses and consumers. If the rule can be easily understood then businesses either will not create unfair terms, or if the terms are created they will use with caution as the business will be aware that regulators and consumers can easily recognise a term that infringes the UFT. The formula that was chosen was based in part on a rule that is familiar: the rule against restraint of trade. However, many of the

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1 Productivity Commission, *Review of Australia’s Consumer Policy Framework* (Productivity Commission Inquiry Report, 2008), Recommendation 3.1 discussed further in Chapter 3 of the review, and Recommendation 7.1 discussed in Chapter 7.

2 Part 2-3 of the Australian Consumer Law, enacted by the Competition and Consumer Act 2010 (Cth), Schedule 2.

3 Productivity Commission, *Review of Australia’s Consumer Policy Framework* (Productivity Commission Inquiry Report, 2008), 165-168.

4 Productivity Commission, *Review of Australia’s Consumer Policy Framework* (Productivity Commission Inquiry Report, 2008), 39.

cases decided under that rule are in circumstances that do not relate easily to consumer transactions. The purpose of this paper is to reexamine some of these cases for guidance on the limits of the UFT. The cases show an approach that is very useful in the context of consumer transactions where the rule should protect the vulnerable on both sides of the transaction fairly, to encourage fair trade and limit and discourage unfair trade.

The common law doctrine against restraints of trade has ancient origins⁵, and was clearly intended to democratise commercial opportunity. It is a rule that enables the training of apprentices and other employees, and the sale of businesses as continuing enterprises. It is therefore a rule that promotes the interests of the weak and the strong alike with a view to improving the immediate parties and the betterment of the community generally. The rule against restraints of trade has been applied in different ways over time, and much has been written about it.⁶ The restraint of trade cases apply elements expressly employed in the UFT. The interest to be protected must be “legitimate” and the protection must be “reasonable”. The cases tend to focus on the reasonableness of the protection, afforded by the clause. This paper will focus on the other side of the formula, specifically: what can the restraint of trade cases tell us about the legitimacy of the protected interest?

It is suggested that while a general idea of unfairness may be unfamiliar in Australian contract law, this version of unfairness is one that is well established and one that could be usefully applied more liberally than the current provision allows.

Parties

In the interests of simplicity this paper will refer to the person who drafts the terms and provides the goods or services as the “Vendor”, and the person who passively accepts the terms and receives the goods or services as the “Consumer”. The claimant will therefore be the Consumer and the person who seeks to protect their interests by enforcing the term is the Vendor. Though we should note that the UFT’s protection is not restricted to that unidirectional relationship, it is likely that Vendors seeking relief against the discretion of Consumers will be rare cases.

5 *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] AC 269, 317: Lord Hodson suggests that the origin of the rule may be in the Magna Carta, referring to *Mitchell v Reynolds* (1711) 1 P Wms 181, 188 (Lord Parker CJ).

6 Harlan M Blake, *Employee Agreements not to Compete* (1960) 73 *Harvard Law Review* 625; John Dyson Heydon, *The Restraint of Trade Doctrine* (Butterworths, 3rd Ed, 2008); Michael Trebilcock, *The Common Law of Restraint of Trade: A Legal and Economic Analysis* (Law Book Company, 1986) among others.

UNFAIRNESS AND LEGITIMATE INTERESTS

Part 2-3 of the ACL provides relief to a person who can marshal the various elements of the UFT. Broadly, the term (or the contract it is found in) must be:

1. A consumer contract⁷; and
2. A standard form contract⁸; and the term must
3. Create, or document, a significant imbalance in the parties' rights or obligations⁹; and
4. Cause a detriment to a party¹⁰; except if
5. the term defines the subject matter¹¹ of the contract, or the upfront price¹²; or (relevantly) if
6. the term is not reasonably necessary for the protection of the legitimate interests of the party who has the benefit of the term¹³.

Based on these elements, we can see that even with the protection provided under the UFT, a Vendor can use a standard form contract, that provides a significant imbalance between the parties and which may cause detriment to the Consumer as long as it is either in the basic bargain between the parties (the subject matter, or what is provided to the Consumer, compared to the “upfront price”) or if it is for the “reasonable protection” of “legitimate interests” of the Vendor. This question matters because commerce has a built in feedback mechanism. While the regulation of consumer transactions is often presented as the unilateral protection of Consumers, Vendors can and generally do, fund the protection of one Consumer by raising the prices for all Consumers.¹⁴ That may be beneficial to the complaining Consumer, but it is not beneficial to the community of Consumers generally. The question therefore is what interests can the Vendor protect over the objection of the complaining Consumer: localising the cost of the complaint to the Consumer rather than taxing the community of Consumers generally? The answer is: a legitimate interest.

LEGITIMATE INTERESTS

The UFT uses the term “legitimate interest” without defining it. The restraint of trade cases generally also ignore this question.¹⁵ However, while the cases often pass over the legitimacy of the protected interest, they do generally at least give us an account of the interests that have been found to be worthy of

7 ACL s23(1).

8 ACL s23(1)(b).

9 ACL s24(1)(a).

10 ACL s24(1)(c).

11 ACL s26(1)(a).

12 ACL s26(1)(b).

13 ACL s24(1)(b).

14 Productivity Commission, *Review of Australia's Consumer Policy Framework* (Productivity Commission Inquiry Report, 2008), 155.

15 John Dyson Heydon, *The Restraint of Trade Doctrine* (Butterworths, 3rd Ed, 2008), 269.

protection, and therefore impliedly “legitimate”. It is the subsequent attention to the reasonableness of the protection that we must accept as proof that the interest was legitimate.

In the few cases where the nature of the interest has been considered, beyond the fact of the existence of the interest, parts of the following test have been applied:

1. The interest must be not illegitimate¹⁶; but otherwise
2. It must be determined based on the evidence and common knowledge of:
 - a. the instant businesses, and its relationships; and
 - b. the industry generally.¹⁷
2. The determination is made on what the parties:
 - a. are entitled to do; not
 - b. actually do; or
 - c. intend to do.¹⁸
3. The public interest: is the public interest either in the:
 - a. policy implication of the private interests of the parties; or
 - b. the community’s interest in the arrangement between the parties; and the courts also have regard to
4. Reasonableness.

Not illegitimate

An interest cannot be a legitimate interest, and therefore be protected, if it is illegitimate. Illegitimacy can be divided into two classes, interests that are against:

1. Law, including statutory law; or
2. Public Policy.

Against Law

The leading cases in this area are now some decades old and in the years since they were decided parliaments have been at work on statutory rules that regulate commercial parties and their conduct to enhance the operation of the market or otherwise benefit the community generally or some part of it. In this country the Trade Practices Act 1974 (Cth), now the Competition and Consumer Act 2010 (Cth) among others are important. This legislation now limits or prohibits contracts and other conduct that were previously lawful and enforceable.¹⁹ Such interests are not legitimate.

16 *Esso Petroleum Co Ltd v Harper’s Garage (Stourport) Ltd* [1968] AC 269 and *Nordenfelt v Maxim Nordenfelt Co Ltd* [1894] AC 535.

17 *Esso Petroleum Co Ltd v Harper’s Garage (Stourport) Ltd* [1968] AC 269, 301 (Lord Reid).

18 *Curro v Beyond Productions Pty Ltd* (1993) 30 NSWLR 337, 344 (Meagher JA, Handley and Cripps JJA).

19 for example: *Dunlop Pneumatic Tyre Company Ltd v New Garage and Motor Company Ltd* [1915] AC 79 and *Petrofina (GB) Ltd v Martin* [1966] 1 Ch 146.

The inverse does not automatically follow. In *Vancouver Malt and Sake Brewing Co Ltd v Vancouver Breweries Ltd*²⁰ (the “Vancouver Brewing Case”) the Privy Council noted that while Vancouver Malt and Sake Brewing Co Ltd had a legal right to brew beer, that right had never been used and that the legal right, without a business was not a legitimate interest that could be protected.²¹

Against Public policy

The restraint of trade cases provide an interesting window into the use and object of policy in commerce. Public policy relevantly provides that an interest is illegitimate if it breaches the following rules:

1. An individual cannot bind themselves such that their labour is a securitised property right;²² and
2. An individual cannot bind themselves such that they cannot “reasonably” earn a living;²³ together: Freedom of Trade.
However:
3. individuals can freely enter any legal contract, unless subject to an incapacity;
4. individuals must honour their binding obligations;²⁴ together: Freedom of Contract. Further,
5. the common law disapproves of monopolies and arrangements that reduce competition.²⁵

Freedom of Trade

The restraint of trade cases look at parties dealing in commercial settings in which terms of a contract (or other legally binding arrangement) are being used to protect an interest, at the cost of a vulnerable party. The rule was once very simple: covenants in restraint of trade were void and unenforceable.²⁶ Later it was recognised that such covenants are commercially and socially valuable. No tradesperson²⁷ would train an apprentice if they had no protection from the

20 [1934] AC 181.

21 *Vancouver Malt and Sake Brewing Co Ltd v Vancouver Breweries Ltd* [1934] AC 181, 189 (Lord Macmillan for the Board).

22 *Horwood v Millar’s Timber and Trading Co Ltd* [1917] 1 KB 305, 311 (Lord Cozens-Hardy MR).

23 *Herbert Morris v Saxelby* [1916] AC 688; *Perls v Saalfeld* [1892] 2 Ch 149 and many others.

24 *Esso Petroleum Co Ltd v Harper’s Garage (Stourport) Ltd* [1968] AC 269, 304 (Lord Morris Both-y-Gest).

25 *Attorney General (Cth) v Adelaide Steamship Co* (1913) 18 CLR 30.

26 Harlan M Blake, Employee Agreements not to Compete (1960) 73 *Harvard Law Review* 625, 631.

27 It should be noted that the cases in this area assume that apprentices and employees will be male and refer to them relevantly as “tradesmen”. However the better view of the judgements is that they are not concerned with gender, or even with the specific employee in them selves, but with the employee as the source of income for a family, see *Mitchell v Reynolds* (1711) 1 P Wms 181 or *Herbert Morris v Saxelby* [1916] AC 688 as examples.

competition that the newly created tradesperson would present.²⁸ No business person at the end of their career (or the end of their tether) would be able to sell the goodwill of a business if the buyer could not obtain and enforce some protection against competition from the Vendor.²⁹ In other businesses support and assistance has been provided from one part of the industry to another in exchange for restraints of trade that secure the parties in a stable relationship for the benefit of both.³⁰ Therefore, an absolute rule against a restraint of trade is no more beneficial to the community than absolute freedom to trade.³¹ These cases therefore canvas both the practical requirements of commerce in a changing world, but also the basic values that underpin contract law. While the cases do not engage with fairness directly, they do deal with power imbalance, detriment and the practical needs of business; therefore they relate to the issues raised by the UFT.

There are many cases on the contractual restraint of employees in their career. There are two things that we can observe from these cases:

1. The implications, economic, domestic and social for the employee, are often very serious³²; and that
2. the employer has an interest in the future and concurrent employment of its employees that can be protected.

While the broad outline of the relationship of employer to employee has similarities to the Vendor to Consumer relationship the seriousness of the relationships and closeness of connection are generally on very different scales. Though employers and Vendors make the rules and exercise discretion, the impact of those choices on employees will often be much greater than on a similarly placed Consumer. Further, while the actions of the employee can have as strong an impact on the employer, i.e. giving a competitor access to technical information, business practices or key relationships in important commercial partners, Consumers individually cannot have such a strong impact on the business of the Vendor. In the employment cases that impact provides a very clear interest that courts have found legitimate, even if the attempted protection was too broad to be reasonable. That said, the employees in these cases are generally high level employees, who could act at a lower level while at least subsisting. However, that option is not even canvassed.³³ It is clear from these cases that protection can be granted despite

28 *Mitchell v Reynolds* (1711) 1 P Wms 181, 191 (Lord Parker CJ).

29 *Mitchell v Reynolds* (1711) 1 P Wms 181, 191 (Lord Parker CJ).

30 Examples include: *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] AC 269; *Petrofina (GB) Ltd v Martin* [1966] 1 Ch 146; *McEllistrim v Ballymacelligott Cooperative Agricultural and Dairy Society Ltd* [1919] AC 548.

31 *Mitchell v Reynolds* (1711) 1 P Wms 181, 190-192 (Lord Parker CJ).

32 *Herbert Morris v Saxelby* [1916] AC 688: moving to another country or leaving the industry; *Mitchell v Reynolds* (1711) 1 P Wms 181 and *Perls v Saalfeld* [1892] 2 Ch 149: moving to another town.

33 *Herbert Morris v Saxelby* [1916] AC 688; *Nordenfelt v Maxim Nordenfelt Co Ltd* [1894] AC 535; *Perls v Saalfeld* [1892] 2 Ch 149; *Curro v Beyond Productions Pty Ltd* (1993) 30 NSWLR 337; *Emeco International Pty Ltd v O'Shea (No2)* [2012] WASC 348.

the gravity of the harm to the employee though it is constrained by the extent of the interest of the employer that is at risk.

Applying that test to Consumer transactions would provide a broad scope for protection of business interests. Despite the serious implications for the employee and their future employment, in the restraint of trade cases courts have found that the interest to be protected is broad. Virtually any interest that the business deems worthy of having protected³⁴ can be legitimate. The relatively modest harm of a Consumer transaction suggests that it is more likely that the protection would be found reasonable. If this is the way that courts see the cases, then the legitimacy of the protected interest becomes a more important test and the breadth of established legitimate interests suggests that Vendors have little to fear from the UFT.

Freedom of Contract

The personal autonomy of the individual is one of the common law's most important values.³⁵ Though freedom is never absolute, it must be balanced with other factors.³⁶ In contract law that value is expressed in the freedom of the capable individual to bind themselves to any legal contract.³⁷ The primacy of freedom of contract has come to the fore in the restraint of trade cases, as the rule has developed. When the rule was first applied it was used to strictly void all restraints of trade unless they fell within one of the exceptions.³⁸ As the commercial world has evolved more complex relationships the exceptions have been broadened to accommodate businesses on a scale that would be been unimaginable in late Tudor England when the rule was settled.³⁹ The rule continues to balance the freedom of the parties with the practical needs of the parties and the benefit of the community more broadly.⁴⁰

The Productivity Commission in its Review of Australia's Consumer Policy Framework, while not addressing the policy value of freedom of contract, notes that one-sided contracts can be necessary for the effective operation of some industries, or to deal with unexpected conduct.⁴¹ Therefore, unless Consumers

34 *Kores Manufacturing Co Ltd v Kolok Manufacturing Co Ltd* [1959] 1 Ch 108.

35 *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] AC 269, 323 (Lord Pearce).

36 *Petrofina (GB) Ltd v Martin* [1966] 1 Ch 146, 181 (Lord Diplock).

37 *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] AC 269, 304 (Lord Morris Both-y-Gest).

38 *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] AC 269, 295 (Lord Reid).

39 *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] AC 269, 324 (Lord Pearce).

40 *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] AC 269, 306 (Lord Morris Both-y-Gest) referring to *Herbert Morris v Saxelby* [1916] AC 688, 716 (Lord Shaw); *Vancouver Malt and Sake Brewing Co Ltd v Vancouver Breweries Ltd* [1934] AC 181, 189 (Lord Macmillian for the Board).

41 Productivity Commission, *Review of Australia's Consumer Policy Framework* (Productivity Commission Inquiry Report, 2008), 151 and 155.

were able and prepared to accept “one-sided”⁴² contracts, some industries would not be workable, at least not in their present form. In this way Consumers and employees, such as apprentices, are in a similar position.

Monopolies and Competition

Trade is the “lifeblood” of a community.⁴³ The public has a direct interest in the promotion of trade both socially as expressions of personal autonomy, and economically in the spread of prosperity in the community generally by means of the market. While theories on how trade should be managed vary over time, the broad direction is consistent: trade should be free but balanced with measures that limit or diminish the associated harm.⁴⁴

Part of the policy behind the development of the rule against restraint of trade, was the common law’s disapproval of monopolies.⁴⁵ While a monopoly can be used as a device to effectively open new markets, which can be good for the community, they generally do so by raising prices or by the imposition of unfavourable terms at the cost of the community. Therefore competition should always be preferred as a matter of public policy.⁴⁶ However, this argument itself shows that the reduction of competition is a valuable interest, that a commercial party would wish to attain.⁴⁷ Beyond this, monopolies or cartels on a more modest scale can be used to manage risk and make a business or an industry workable for the benefit of the community. In the *English Hop Growers Ltd v Dering*⁴⁸ Dering signed and later tried to escape a contract to sell his hops to English Hop Growers Ltd on several grounds including that the clause was void as a restraint of trade. It was noted that growing hops, or any crop, is subject to a fluctuating market price and in that case marketing arrangements that might under other circumstances be a monopoly or cartel may have to be accepted in order to spread the risk and stabilise the market so that the industry can continue.⁴⁹ The court held that while generally, courts should always be wary of monopolies, where there was no evidence of harm to the public, and the parties to the arrangement benefited, freedom of contract should prevail.⁵⁰ This interest, though seemingly a simple agreement to reduce

42 Productivity Commission, *Review of Australia’s Consumer Policy Framework* (Productivity Commission Inquiry Report, 2008), 151.

43 *Petrofina (GB) Ltd v Martin* [1966] 1 Ch 146, 175 (Lord Harmon).

44 *Petrofina (GB) Ltd v Martin* [1966] 1 Ch 146, 181 (Lord Diplock).

45 *Attorney General (Cth) v Adelaide Steamship Co* (1913) 18 CLR 30, 34 (Lord Parker of Waddington for the Board).

46 *Attorney General (Cth) v Adelaide Steamship Co* (1913) 18 CLR 30, 32 (Lord Parker of Waddington for the Board).

47 *McEllistrim v Ballymacelligott Cooperative Agricultural and Dairy Society Ltd* [1919] AC 548, 563-564 (Lord Birkenhead LC) and, 579 (Lord Atkinson).

48 [1928] 2 KB 174.

49 *English Hop Growers Ltd v Dering* [1928] 2 KB 174 181 (Scutton LJ). In a different setting the same idea was applied in *Buckley v Tutty* (1971) 125 CLR 353, 377 the High Court considered the need for the New South Wales Football League to stabilise the rules for the transfer of players to facilitate the operation of a reasonably competitive competition.

50 *English Hop Growers Ltd v Dering* [1928] 2 KB 174, 187 (Sankey LJ).

competition was a legitimate interest. The Productivity Commission took a similar view of “one-sided” Consumer contracts.⁵¹

Reduction of competition among Vendors is therefore a valuable and real interest, though generally not a legitimate one without some further benefit or interest.⁵² Whereas the policy debate around restraint of trade tends to centre on the “freedoms” of contract and trade, there is a further interest, a community interest in the free operation of the market, red in tooth and claw, regardless of the harsh effects of competition on otherwise socially beneficial enterprises.⁵³

Shifting focus to Consumer transactions, Vendor-to-Vendor competition is generally not going to be a relevant issue. A person who is a Consumer in one part of their life, clearly leaves that behind before they can compete as a Vendor.⁵⁴ However, competition has another role in the assessment of the legitimacy of protected interests. The competition that the Vendor faces against other members of its industry for connection with Consumers, is a factor that has to be accepted in determining the legitimacy of an interest.⁵⁵ As the size and structure of the Vendor’s business will often be dependant on the population who consumes the Vendor’s products, the competition for the connection to those Consumers may be a legitimate interest, grounding a term that limits the Consumer’s ability to leave the Vendor’s business.⁵⁶

“To be determined” with reference to the circumstances and evidence

If an interest is not illegitimate, it may be legitimate. The cases show that courts

51 Productivity Commission, *Review of Australia’s Consumer Policy Framework* (Productivity Commission Inquiry Report, 2008), 151.

52 *McEllistrim v Ballymacelligott Cooperative Agricultural and Dairy Society Ltd* [1919] AC 548, 579 (Lord Atkinson) and *English Hop Growers Ltd v Dering* [1928] 2 KB 174, 187 (Sankey LJ) and *Buckley v Tutty* (1971) 125 CLR 353 in this case the High Court recognised that reducing competition as a means of allowing the development of a stable competition could be legitimate, though they noted that the players, whose freedom was directly effected, were also the beneficiaries of the operation of stable clubs whose existence was dependant of the prosperity of the league as a whole.

53 *McEllistrim v Ballymacelligott Cooperative Agricultural and Dairy Society Ltd* [1919] AC 548, 562 (Lord Birkenhead LC) and 579 (Lord Atkinson).

54 The ACL defines a consumer in s3, though Part 2-3 is not limited to the protection of consumer as defined in s3. The UFT addresses “parties” and “consumer contracts”. Therefore, the protection of Part 2-3 is not limited to consumers, though by implication the UFT only applies to a contract that includes a consumer. This would seem to be similar to the position under the Trade Practices Act 1974 (Cth) where the protection would run in both directions but the conduct had to engage a corporation on at least one side of the conduct, for example s51AC.

55 *Esso Petroleum Co Ltd v Harper’s Garage (Stourport) Ltd* [1968] AC 269, 312 (Lord Morris Both-y-Gest).

56 *Esso Petroleum Co Ltd v Harper’s Garage (Stourport) Ltd* [1968] AC 269, 312 (Lord Morris Both-y-Gest); *Petrofina (GB) Ltd v Martin* [1966] 1 Ch 146, 173-174 (Lord Denning MR).

take a permissive view. If the interest is one that is recognised by law or equity or by either party as being worth protection, that seems to be enough. The cases are largely centred on restraint of employees (current and former) and the sale of businesses, particularly the sale of goodwill. The interests to be protected are generally so unlike the interests of Vendors and Consumers that they are unlikely to assist in determining the legitimate interests of Vendors under the UFT. There is a fundamental difference to the intimacy of employment and consumer relationships. However, the cases do address interests that are likely or at least possible, in a Consumer contract.

Collateral arrangements

In small business franchise systems it is common for the franchisor to provide collateral, or additional benefits to franchisees for either the advancement of the business and/or to cement the franchisee into the franchise system.⁵⁷ The benefit may take the form of a better than usual wholesale price,⁵⁸ or a loan on either better than market terms or just a loan where no other lender would provide it.⁵⁹ In such cases the franchisor's object is in part to increase sales by improving the franchisee's facilities, but it is also significantly to hold the franchisee, or at least their business in the franchise system. The drafting of the contracts both the general franchise agreement and the instant loan and security documentation will be designed to protect this interest, and so can be a restraint of trade. The cases show that such interests are legitimate interests, in that they can be reasonably protected. The protection can be as much as is required to secure the full value of the collateral interest, for example the amount of the loan, though not to protect the restraint in itself.⁶⁰ Such collateral benefits are common in at least some Consumer transactions, i.e. the lease of a phone that goes with a fixed term contract.

The needs of the Business

The cases show that the practical needs of running the business structure are legitimate interests that can be reasonably protected. Such needs include:

1. Limiting the right to end the relationship to provide the Vendor with a stable demand for its products: the Stable Relationship interest;
2. Limiting competition between parties within the Vendor's business structure, the Business Structure interest;
3. Providing support for:

57 for example: *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] AC 269; *Petrofina (GB) Ltd v Martin* [1966] 1 Ch 146, *Alec Lobb (Garages) Ltd v Total Oil Great Britain Ltd* [1983] 1 WLR 87.

58 *Petrofina (GB) Ltd v Martin* [1966] 1 Ch 146.

59 *Alec Lobb (Garages) Ltd v Total Oil Great Britain Ltd* [1983] 1 WLR 87; *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] AC 269.

60 *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] AC 269; *Petrofina (GB) Ltd v Martin* [1966] 1 Ch 146.

- a. new investments, products; or
- b. new entrants into a market, the New Entrant interest;

Stable Relationship Interest

Most, if not all businesses, have a supply chain. They commit to the purchase, production or resourcing of a system that produces one or more products at a certain rate. The volume of production being dictated by the demand for the product in the market. That demand is supported by the connection that the Vendor has to its Consumers. A clause that protects the supply chain by limiting a person's right to depart from the system, has been considered and found enforceable, and therefore the protection of the supply chain at least can be a legitimate interest.

In *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd*⁶¹ ("Esso v Harper") the House of Lords had to consider an agreement that tied Harper's Garage (Stourport) Ltd ("Harpers") to Esso Petroleum Co Ltd ("Esso") for an extended period. The case considered two factual applications of a restraint of trade including the Kidderminster Site. The court considered the nature of the interest that Esso was trying to protect:

1. Esso was a foreign company investing in petrochemical infrastructure in the UK.
2. The nature of the industrial processes required:
 - a. very large investments in plant;
 - b. forward purchases on various precursors for the refining processes.
2. The business required a stable volume of production.
3. The scale of the business required a large distribution system.⁶²

This interest, though not referred to expressly as a legitimate interest was certainly considered one that Esso could properly act to protect. At the Kidderminster site, the dealer agreement provided a five year term.⁶³ The House of Lords noted that, without making any general rule about duration, five year terms meant that only 20% of the dealer group was able to turnover each year. That gave Esso a manageable level of change in its distribution system, and that was an interest that Esso could protect.⁶⁴ While the departure of any one site from the distribution system would not have a great impact on Esso's business, the imposition on each

⁶¹ [1968] AC 269.

⁶² *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] AC 269, 302 (Lord Reid).

⁶³ *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] AC 269 303 (Lord Reid). His honour noted that the other site at Stourport-on-Severn which had a 21 year restraint was too long though it failed on the basis that it was unreasonably long, not that the interest was not one that could be protected.

⁶⁴ for a similar argument, on the other side of the supply chain see: *McEllistrim v Ballymacelligott Cooperative Agricultural and Dairy Society Ltd* [1919] AC 548, 567 and 572 (Lord Finlay).

member was part of the protection of the legitimate interest of the Vendor in the stability of the whole system.

In *Esso v Harper, Petrofina (GB) Ltd v Martin*⁶⁵ (“Petrofina”) and *McEllistim v Ballymacelligott Cooperative Agricultural and Dairy Society Ltd*⁶⁶ (“McEllistim”) the courts expressly considered the significance of stability of business relationships to the Vendor. In each case the business had a supply chain that required a supply of inputs that must be secured some time ahead of production placing the Vendor’s business at risk if the supply chain was subjected to an irregular or unpredictable supply of inputs or an inability to sell its products in a timely manner relative to production.⁶⁷

It was noted in *Petrofina* that each site in the relevant systems was both important to the operation of the business in that it supported the creation of the franchisor’s production business, but also it was valuable in that there was a limited supply of suitable sites.⁶⁸ Each business site that was presently in existence could only be created with a considerable investment in money (to secure the use of the site) and time (to obtain the necessary local government approvals).⁶⁹ Given the nature of the business, with noise, large vehicles and dangerous chemicals, the approvals would not be granted on many sites that also have the requisite proximity to the consumers that the site depends upon.⁷⁰

While the cost and delay associated with the commissioning of a service station may not seem to be very directly referable to a Consumer entering a contract for a loan, lease, phone or other service contract, in basic ways there is a considerable similarity if we accept that the margin for the Vendor will be similarly limited in comparison to the cost of finding a replacement Consumer.

65 [1966] 1 Ch 146.

66 [1919] AC 548.

67 Though *McEllistim v Ballymacelligott Cooperative Agricultural and Dairy Society Ltd* [1919] AC 548 considered this problem from the supply side: the issue arose between the providers of the input (the dairy farmers) and the manufacturer, in *Esso Petroleum Co Ltd v Harper’s Garage (Stourport) Ltd* [1968] AC 269 and *Petrofina (GB) Ltd v Martin* [1966] 1 Ch 146 the same problem, supply chain stability, was considered in relation to the output side of the process, specifically members of the distribution system. The management of supply chains and product distribution is now a great interest of industrial producers, see for example Toyota Motor Company’s “Kanban” philosophy.

68 *McEllistim v Ballymacelligott Cooperative Agricultural and Dairy Society Ltd* [1919] AC 548; *Esso Petroleum Co Ltd v Harper’s Garage (Stourport) Ltd* [1968] AC 269 Lord Reid, 302, 312 (Lord Morris Both-y-Gest).

69 *Esso Petroleum Co Ltd v Harper’s Garage (Stourport) Ltd* [1968] AC 269, 302 (Lord Reid).

70 This argument applies to *Esso Petroleum Co Ltd v Harper’s Garage (Stourport) Ltd* [1968] AC 269 and *Petrofina (GB) Ltd v Martin* [1966] 1 Ch 146, as both turned on the relative scarcity of petrol station sites in the UK. *McEllistim v Ballymacelligott Cooperative Agricultural and Dairy Society Ltd* [1919] AC 548 addressed a similar problem, the limited supply of dairy farms in the region of the Coop, though the other industrial problems were different, turning on the quality of the milk.

Business Structure Interest

The commercial world is increasingly complex. Supply chains that stretch around the world, and distribution systems that seem to be unified but are actually franchise systems with many more or less separate members are more the norm than the exception. Even shopping centres where individual retailers are presented as separate businesses are subject to terms that require the tenant to provide information and cooperation to the landlord that far exceed traditional leases. Any or all of these ties can be the source of a legitimate interest that can be protected. Though their legitimacy is no more than that an obligation exists, created by a contract agreed by parties, one member of which then enters the consumer contract, where the Consumer will rarely have notice of the term, or even the contract creating the obligation.

In *Curro v Beyond Productions Pty Ltd*⁷¹, Tracy Curro (“Curro”) a journalist wanted to leave an existing employer (Beyond Productions Pty Ltd, a sub-contracted supplier to the Seven Network: “Beyond”) to take up a more desirable position with a competing employer: the Nine Network. Curro claimed that the contract under which she was tied to Beyond was void as a restraint of trade, preventing her from appearing for the Nine Network. Beyond had an obligation in its contract with the Seven Network that required Beyond to prevent its on-air employees, including Curro from appearing on a competitor without Seven’s consent.⁷² The court reviewed the terms of Beyond’s obligations with respect to its on-air employees. The court accepted that the obligation was a legitimate interest.⁷³

In *Buckley v Tutty*⁷⁴ a player in the NSW rugby league (the “League”) was bound by a contractual term that provided that he could not play for another club within the league, or any club in certain other significant leagues without the consent of the League.⁷⁵ It was argued that this restraint of trade was necessary to protect the League from internal competition among its clubs for the most able players. The restraint, it was argued, though clearly unfair to the best players, who were deprived of the chance to access the market and obtain the best reward for their skills, was necessary for the League to operate. The League argued that their business was the promotion and operation of a competition between local clubs and that a reasonable equality between the clubs was essential for this business to exist. Otherwise the richer clubs would buy the services of the better players and the competition would become unbalanced, the results of the games too predictable and the public would lose interest in the League. The court accepted

71 (1993) 30 NSWLR 337.

72 *Curro v Beyond Productions Pty Ltd* (1993) 30 NSWLR 337, 345 (Meagher JA, Handley JA and Cripps JA).

73 *Curro v Beyond Productions Pty Ltd* (1993) 30 NSWLR 337, 345-6 (Meagher JA, Handley JA and Cripps JA).

74 (1971) 125 CLR 353.

75 *Buckley v Tutty* (1971) 125 CLR 353, 357.

that this interest could be protected.⁷⁶

A similar issue arose in *Kores Manufacturing Co Ltd v Kolok Manufacturing Co Ltd*⁷⁷ (“Kores”). In this case two companies whose businesses employed similar industrial processes meant that their employees were largely interchangeable. When for a period they operated from neighbouring premises putting the two companies in at least potential competition for the same employees, they formed a binding agreement not to employ any person who had recently been an employee of the other firm.⁷⁸ The court considered the interests that this agreement was to protect:

1. The adequate supply of employees;
2. The stability of each company’s workforce, here meaning that the employees had been in place long enough to perform their role without ongoing training;
3. Confidential commercial information. While the industrial processes were similar the businesses were not identical and so taking over an employee could mean taking on commercially valuable information; and
4. Stable employment conditions. The court noticed that if the two companies competed for the employees of the neighbouring firm then wages and other working conditions could become the basis of competition.⁷⁹

Though the restraint would fail in *Kores*, it was not because these are interests that cannot be protected, it was because the protection provided was not reasonable: the protection continued even after the geographic proximity that gave rise the covenant ended.⁸⁰ While in *Buckley v Tutty* and *Kores* the relationship in question was an employment relationship, it was not the intimacy of the relationship that was protected, but the stability of the business. That stability is directly referable to the interests of Vendors in Consumer transactions. Therefore, a term that limits the movement of a Consumer from the business of the Vendor, if the goods or services relevant to the contract can be related to the needs of the business structure can be a legitimate interest.

76 *Buckley v Tutty* (1971) 125 CLR 353, 377-8 (Barwick CJ, McTiernan, Windeyer, Owen and Dixon JJ), though the court found that the actual protections were not reasonable.

77 [1959] 1 Ch 108.

78 *Kores Manufacturing Co Ltd v Kolok Manufacturing Co Ltd* [1959] 1 Ch 108, 121 (Jenkins LJ).

79 *Kores Manufacturing Co Ltd v Kolok Manufacturing Co Ltd* [1959] 1 Ch 108, 122 (Jenkins LJ).

80 *Kores Manufacturing Co Ltd v Kolok Manufacturing Co Ltd* [1959] 1 Ch 108, 124-5 (Jenkins LJ).

New Entrant Interest

Stability of business relationships or of the business structure are relevant where an existing business simply wishes to continue. However, where a business is trying to enter a market, or to grow in a market they are already part of, different interests have been found legitimate.

In *Petrofina* the Court of Appeal considered agreement very like the one in *Esso v Harper*. In this case the agreement was entered originally by a prior owner, but continued by Ronald Martin when he took over the business that was subject to the restraint. The clause bound Martin until the site delivered 600,000 gallons of fuel. This was estimated to take 12 years if the site delivered fuel at its break even point: 50,000 gallons per year.⁸¹ The site failed to meet the expectations of Martin or Petrofina in first 8 weeks that Martin operated the site. The business ran at the same rate it had run for the prior two owners, at approximately 30,000 gallons per year, and therefore at a loss. After the first 8 weeks Martin contacted a competing supplier (Esso) and obtained a new agreement, with a better discount and a 2 year term. Petrofina objected, and the matter came before the courts.

Petrofina claimed that the clause represented their legitimate interest in that, like Esso, they needed a stable dealer group to facilitate their business. There were few existing free dealers remaining in the market, and the delay and cost associated with the establishment of new sites would prevent Petrofina, a new and small player in the motor fuel business, from establishing itself in competition with existing businesses such as Esso's.⁸² Lord Denning MR was prepared to accept that, while a clause with the object of avoiding, or removing competition was not enforceable, a clause that was for the promotion of competition prima facie would be enforceable.⁸³

In this case Petrofina's claim failed, but not because they lacked a legitimate interest.⁸⁴ From this case we can assume that where a new entrant to a market imposes stricter terms than more established Vendors, that interest can be protected if it represents the more vulnerable interests of a new entrant to a market.

In *McEllistrim* we can see a similar problem: developing an existing business with a new project. In this case the Ballymacelligott Cooperative Agricultural and Dairy Society Ltd (the "Coop") had an existing relationship with the dairy farmers of its region in Ireland. Its rules provided that it would buy the milk of its members and from that milk it would produce and sell butter and cheese. The Coop resolved to build an additional creamery to increase production. To secure

81 *Petrofina (GB) Ltd v Martin* [1966] 1 Ch 146, 167 (Lord Denning MR).

82 *Petrofina (GB) Ltd v Martin* [1966] 1 Ch 146, 174 (Lord Denning MR).

83 *Petrofina (GB) Ltd v Martin* [1966] 1 Ch 146, 174 (Lord Denning MR).

84 *Petrofina (GB) Ltd v Martin* [1966] 1 Ch 146, 174 (Lord Denning MR): While Martin was required to bear the burden of any negative change, Petrofina was not. Petrofina could draw the relationship to a close if it chose while Martin could not.

the increased supply of milk necessary for this development it resolved to change its rules (under a power provided by the existing rules) to prevent its members from diverting their production to other creameries who might offer better terms. Prior to the change the Coop could enforce against a breaching member by forfeiture of their membership (their interest in the Coop), subsequently the penalties could be much more onerous. This led to a discussion of the validity of the two sets of penalties, before and after the change. While most of the court found that the prior punishment (forfeiture of membership) was at least potentially acceptable⁸⁵, the latter more onerous system was not in the view of the majority.⁸⁶

The court considered the legitimacy of the interest was the first issue to be determined.⁸⁷ That the stable supply of milk was an interest could be protected was accepted. Further, that the Coop, managed by a committee of members, could plan for expansion and introduce rules to facilitate the expansion was accepted. The new formula of protection failed in the view of the majority, not because the interest it protected was not legitimate, but because the extent and nature of the protection was not reasonable.⁸⁸ Therefore, the Vendor can include the needs of expansion in their account of the legitimate interests of the business, not just the preservation of the existing business.

Reasonableness and legitimacy

While the reasonableness of the restraint overshadows the legitimacy of the interest protected in the cases, the two ideas are connected.⁸⁹ A promise not to compete may be a valuable interest. The wider the promise the more valuable the interest.⁹⁰ A promise not to compete in a region may be accepted as an effective restraint of trade, and therefore be a legitimate interest, where a restraint over a much broader area would not be accepted.⁹¹ While the language of the cases tends to characterise the failure of the covenant as turning on the reasonableness of the restraint, that quality, the “reasonableness” is itself constrained by the extent or the legitimacy of the interest that it protects. Therefore a discussion that is overtly

85 *McEllistrim v Ballymacelligott Cooperative Agricultural and Dairy Society Ltd* [1919] AC 548, 568 (Lord Finlay), though Lord Atkinson found even that protection unreasonable, 582.

86 *McEllistrim v Ballymacelligott Cooperative Agricultural and Dairy Society Ltd* [1919] AC 548, 560 (Lord Birkenhead LC), 568 (Lord Finlay), Lord Parmoor was in dissent.

87 *McEllistrim v Ballymacelligott Cooperative Agricultural and Dairy Society Ltd* [1919] AC 548, 563 (Lord Birkenhead LC), impliedly see 567-8 (Lord Finlay).

88 *McEllistrim v Ballymacelligott Cooperative Agricultural and Dairy Society Ltd* [1919] AC 548, 565 (Lord Birkenhead LC).

89 *Vancouver Malt and Sake Brewing Co Ltd v Vancouver Breweries Ltd* [1934] AC 181, 191 (Lord Macmillian for the Board).

90 *Nordenfelt v Maxim Nordenfelt Co Ltd* [1894] AC 535; *Vancouver Malt and Sake Brewing Co Ltd v Vancouver Breweries Ltd* [1934] AC 181, 191 (Lord Macmillian for the Board).

91 *Nordenfelt v Maxim Nordenfelt Co Ltd* [1894] AC 535, 550 (Lord Herschell LC), though in this case a global restraint was allowed given the nature of the contract and the interests involved; *Vancouver Malt and Sake Brewing Co Ltd v Vancouver Breweries Ltd* [1934] AC 181, 191 (Lord Macmillian for the Board).

a review of reasonableness can provide some insight into the extent of legitimacy.

In the *Vancouver Brewing Case*, the Privy Council as prepared to accept the possibility of an effective 15 year restraint that covered the city of Vancouver, or possibly the province of British Columbia, however in this case the restraint covered the whole world, and that was too broad. While the court used the language of reasonableness, it might as easily have said that such a broad interest, under the circumstances, was simply too broad to be legitimate. Vancouver Malt and Sake Brewing Co Ltd had a right to brew beer (and related products), however had never done so. It had a great need of funding, so it agreed to “sell” its beer brewing business (more accurately its legal right to brew beer) to Vancouver Breweries Ltd.⁹² The transaction, while apparently the sale of the business, was actually an agreement not to compete given by a party who had a legal right to compete but nothing more. In the earlier case of *Nordenfelt*, the House of Lords considered another world wide restraint and given the circumstances found it legitimate. In *Nordenfelt*, Thorsten Nordenfelt had agreed to a restraint for the world, as Vancouver Malt and Sake Brewing Co Ltd had; however, in *Nordenfelt* the business was actual rather than potential and the interest was therefore legitimate.

Conclusion

One of the difficulties in trying to draw a unifying principle from the restraint of trade cases is that they span a wide range of circumstances.⁹³ Despite being primarily commercial, and largely centred on contracts, they deal with many relationships that are very different to the consumer contracts that the UFT addresses.⁹⁴ However, there is enough overlap that we can take some useful guidance from them.

In the restraint of trade cases, the economic implications for the affected party can be grave. Yet, despite the very serious effect of the restraint, the courts have been very permissive in finding interests that can be protected. By comparison, while Consumer transactions can have serious implications they are unlikely to have negative effects on the scale of depriving a person/family of their income in a period with no general government unemployment benefit system, or effectively forcing the employee and their dependant family to leave their home and wider family to try to establish themselves in a new community. If the gravity of the harm caused by the clause is any guide then courts should be more permissive in finding contractual protection of interests reasonable in UFT cases than in the restraint of trade cases. If that is the case, then the question of the legitimacy of

92 *Vancouver Malt and Sake Brewing Co Ltd v Vancouver Breweries Ltd* [1934] AC 181, 190 (Lord Macmillian for the Board).

93 Harlan M Blake, Employee Agreements not to Compete (1960) 73 *Harvard Law Review* 625.

94 John Dyson Heydon, *The Restraint of Trade Doctrine* (Butterworths, 3rd Ed, 2008), 269.

the interest becomes more important.

If courts accept this view, that a key part of the test for access to the UFT should be modelled on the restraint of trade cases, that puts the test on a well understood and accepted footing in our legal tradition. It allows a novel protection for Consumers, while allowing businesses a reasonable protection of their interests. It is on this view a very practical and commercially appropriate test, and one that could safely have been applied more broadly, as the rule against restraint of trade already does.