UNFAIR CONTRACT TERMS: A NEW DAWN IN AUSTRALIA AND NEW ZEALAND?

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Australia finally regulated unfair contract terms under its Australian Consumer Law and New Zealand has included unfair contract terms in its Fair Trading Amendment Act 2013 *(NZ), which will come into force on 18 March 2015. Traders will in effect bear the burden of proving that terms are fair by showing that they are reasonably necessary to protect the trader's legitimate interests. While the regulation of unfair contract terms is welcome, there is concern that the Australian and New Zealand courts may not give proper effect to the provisions and so would allow unfair contract terms to continue to be used. The courts must accept that the classical theory of contract law, in relation to consumers, is dead, and so too is the rational consumer. This paper argues that for the unfair contract term law to achieve the legislatures' desired outcome of eliminating unfair contract terms in standard form consumer contracts, the courts in both New Zealand and Australia must move from their traditional focus on procedural fairness to addressing substantive fairness and give effect to both the wording and purpose of the provisions. Moreover, there are legislative lapses in both Australia and New Zealand that require urgent attention.*

I INTRODUCTION

Unfair contract terms abound in New Zealand and Australia.[1] An unfair contract term can be defined as 'a term that causes a party to a contract (usually a consumer) to be at a disadvantage while the term is not reasonably necessary for the protection of the interests of the other party (usually a business). The Ministry of Consumer Affairs (NZ) states: 'Typically, an unfair term is a pre-written term in a standard form contract'.[2] Common terms that are thought to be unfair include ones that penalise a consumer if the consumer breaches the contract in any way, but there is no corresponding penalty if the trader breaches the contract, and those that allow traders to unilaterally alter the terms and conditions at any time.[3]

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1 See, eg, Australian Competition and Consumer Commission, 'Unfair Contract Terms: Industry Review Outcomes' (Report, March 2013) <http://www.accc.gov.au/system/files/Unfair%20Contract%20Terms%20-%20Industry%20Report.pdf>, where the ACCC looked into selected industries (airline, telecommunications, fitness and vehicle rental industries, as well as some contracts commonly used by online traders) and found a large number of unfair terms. See below n 12.

2 Ministry of Consumer Affairs (NZ), 'Consumer Law Reform Additional Paper — Unfair Contract Terms' (September 2010) 1 <http://www.consumeraffairs.govt.nz/pdf-library/legislation-policy-pdfs/CLR-Additional-paper---Unfair-contract-terms.pdf>.

3 See also the list of 'grey terms' below nn 30–41 and accompanying text.

In one example, a New Zealand telecommunications company used a term in the standard form contract allowing it to unilaterally increase its prices. The company increased a customer's monthly plan price for its broadband service from $35 to $40 six months into a two year contract. The company's justification was that the third party who supplied the service had increased its prices. It insisted the customer pay a large termination fee if the customer cancelled the contract because of the price increase.[4] In another example, a consumer had had her alarm monitored by a security company for 10 years. When she notified the company that she no longer required their services, she was told that she had to pay the remaining time in her two year contract. A term of the contract provided that it was rolled over every two years.[5] The effect of the use of unfair contract terms in many standard form contracts has been, on the one hand, to grant the trader as much freedom as possible and exclude its liability to the consumer and other parties as far as possible,[6] while, on the other hand, to ensure that the consumer rigidly adhered to the contract.

Regulation of unfair contract terms is not a new or radical concept. Unfair contract terms have been regulated in Victoria[7] and legislation has been in place for many years in other jurisdictions such as the United Kingdom.[8] With the Australian and New Zealand legislatures' stance of increasing consumer protection and the international moves to regulate unfair contract terms, regulation of unfair contract terms in Australia and New Zealand became inevitable. Unfair contract terms, however, proved difficult to regulate. Although there was no doubt of their prevalence in standard form contracts in Australia,[9] there was relatively limited evidence of their harm.[10] In New Zealand the Ministry of Consumer Affairs was unable to determine the prevalence of unfair contract terms and the detriment —

4 Ministry of Consumer Affairs (NZ), 'Briefing for Commerce Committee on Consumer Law Reform Bill: Including Unfair Contract Term Provisions in the *Fair Trading Act*' (26 June 2012) 5 [24] <http://www.parliament.nz/resource/0000216543>.

5 Consumer NZ, Submission to Ministry of Consumer Affairs (NZ), *Consumer Law Reform Additional Paper: Unfair Contract Terms*, 15 October 2010, 6 <http://www.consumeraffairs.govt.nz/pdf-library/consumer-law-reform-submissions-pdfs/Unfair-Contract-Terms-Additional-Paper-Submission-Consumer-NZ.pdf>.

6 For example, in New Zealand, the *Consumer Guarantees Act 1993* (NZ) s 43 ('*CGA*') prevents contracting out of the *CGA* for consumer transactions in respect of the guarantees under the *CGA* when the goods or services are not being acquired for business purposes.

7 *Fair Trading Act 1999* (Vic) pt 2B, as repealed by *Fair Trading Amendment (Australian Consumer Law) Act 2010* (Vic) s 17.

8 *Unfair Contract Terms Act 1977* (UK) c 50; *Unfair Terms in Consumer Contracts Regulations 1999* (UK) SI 1999/2083. See also *Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts* [1993] OJ L 95/29; *Consumer Contract Act 2000* (Japan); *Consumer Protection Act 2008* (South Africa).

9 See Treasury, Australian Government, *The Australian Consumer Law: Consultation on Draft Provisions on Unfair Contract Terms* (11 May 2009) 2 <http://archive.treasury.gov.au/documents/1537/PDF/The_Australian_Consumer_Law_Consultation_Paper.pdf>.

10 See Productivity Commission, Australian Government, 'Review of Australia's Consumer Policy Framework' (Productivity Commission Inquiry Report No 45, 30 April 2008) vol 2, 149 <http://www.pc.gov.au/__data/assets/pdf_file/0008/79172/consumer2.pdf>, where the Productivity Commission observed that the Ministerial Council on Consumer Affairs (MCCA) had failed to devise national uniform legislation on unfair contract terms as the regulatory impact statement (RIS) had not met the required standard. The RIS provided only 'anecdotal evidence of detriment from the use of unfair terms'.

if any — that consumers were suffering.[11] The Ministry of Consumer Affairs, however, accepted that unfair contract terms were being used in New Zealand.[12]

In 2010, Australia, through the introduction of its *Australian Consumer Law* ('*ACL*'),[13] finally took the step of regulating unfair contract terms.[14] New Zealand is poised to follow Australia when its unfair contract terms law comes into force on 18 March 2015.[15] While the intent of New Zealand's unfair contract term provisions is to 'reflect the essential features of the Australian Consumer Law provisions relating to unfair contract terms',[16] New Zealand's provisions are not identical. In practice some differences are semantic only, yet others are significantly different. For example, only the Commerce Commission can take an action under New Zealand's unfair contract terms law,[17] whereas regulators and consumers are able to bring actions in Australia.[18] This article explores those differences.

Although the regulation of unfair contract terms is long overdue, there remains a danger that the courts will apply the unfair contract term provisions in favour of traders and will thereby continue to allow unfair contract terms to proliferate in

11 Ministry of Consumer Affairs (NZ), 'Consumer Law Reform' (Discussion Paper, June 2010) 30–4 [6.2.1] <http://www.consumeraffairs.govt.nz/pdf-library/legislation-policy-pdfs/consumer-law-review-a-discussion-paper.pdf>.

12 See, eg, Ministry of Consumer Affairs (NZ), 'Including Unfair Contract Term Provisions in the *Fair Trading Act*', above n 4, 3–4. In Australia, see ACCC, above n 1, 6, where the ACCC found the following types of terms the most problematic in the industries it surveyed:

1. Contract terms that allow the business to change the contract without consent from the consumer.
2. Terms that cause confusion about the agency arrangement that apply [sic] and seek to unfairly absolve the agent from any liability.
3. Terms that unfairly restrict the consumer's right to terminate the contract.
4. Terms that suspend or terminate the services being provided to the consumer under the contract.
5. Terms that make the consumer liable for things that would ordinarily be outside of their control.
6. Terms that prevent the consumer from relying on representations made by the business or its agents.
7. Terms seeking to limit consumer guarantee rights.
8. Terms that seek to remove the consumer's right to a credit card chargeback facility when buying the service through an agent.

13 The *ACL* is set out in *Competition and Consumer Act 2010* (Cth) sch 2.

14 Commentators have been critical of the slowness of Australia to regulate unfair contract terms: see, eg, Lynden Griggs, 'The [Ir]rational Consumer and Why We Need National Legislation Governing Unfair Contract Terms' (2005) 13 *Competition and Consumer Law Journal* 51; Frank Zumbo, 'Dealing with Unfair Terms in Consumer Contracts: Is Australia Falling Behind?' (2005) 13 *Trade Practices Law Journal* 70; Nicola Howell, 'Catching Up with Consumer Realities: The Need for Legislation Prohibiting Unfair Terms in Consumer Contracts' (2006) 34 *Australian Business Law Review* 447; Luke Nottage, 'Consumer Law Reform in Australia: Contemporary and Comparative Constructive Criticism' (2009) 9 *Queensland University of Technology Law and Justice Journal* 111, 121–6.

15 *Fair Trading Amendment Act 2013* (NZ) ss 2, 14, 36, inserting *Fair Trading Act 1986* (NZ) ss 26A, 46H–46M. The section numbers used in this article refer to the amended *Fair Trading Act 1986* (NZ) ('*FTA*'), rather than to sections of the amending Act or clauses of the Consumer Law Reform Bill 2011 (287–2) (NZ) as reported from the Commerce Committee <http://www.parliament.nz/resource/0001676127> ('*Consumer Law Reform Bill*').

16 *Consumer Law Reform Bill*, Commentary, 4–5.

17 *FTA* s 46H(1).

18 *ACL* s 250.

standard form contracts. That is, the courts may be reluctant to break free of the final vestiges of the shackles of classical contract theory by continuing to operate under the misguided notion that consumers act rationally. Such fear is real. The Australian courts have, for example, demonstrated a clear reluctance to break with tradition with respect to unconscionable conduct. The Australian legislature has been required to intervene repeatedly to spell out that unconscionable conduct is not acceptable.[19]

The ability of traders to structure their contracts in a one-sided fashion is due to traders' taking advantage of the classical theory of contract law. The classical theory is based on the premise that people have the freedom to contract with whom they like and on the terms that they like. The theory works on the assumption that the parties to the contract negotiate equally to agree to terms that accord with their interests. So long as the proper procedural steps are taken, people are 'free' to 'agree' to the most draconian and unfair terms imaginable (even if in reality one party was unable to negotiate). Quite simply, if a person is foolish enough to agree to unfair terms, then it is her fault and the courts will not come to her rescue to remove her from her bad bargain (albeit that equity has intervened to protect vulnerable people, for example, through the doctrine of unconscionable bargain[20] and the common law was also used to 'mitigate [its] harshness').[21] Classical contract theory with respect to consumer contracts has been considerably weakened in the last decades of the 20th century as the law in Australia and New Zealand, through consumer protection statutes such as the *Trade Practices Act 1974* (Cth), the *Fair Trading Act 1986* (NZ) ('*FTA*') and the *Consumer Guarantees Act 1993* (NZ) ('*CGA*'), has increasingly regulated consumer contracts.

This article argues that for unfair contract term regulation to achieve the respective legislatures' desired outcome of eliminating unfair contract terms in consumer standard form contracts, the courts must move from their traditional

19 Despite the former *Trade Practices Act 1974* (Cth) prohibiting unconscionable conduct under ss 51AA, 51AB and 51AC, the Australian courts gave little effect to it, preferring to stick to the narrow equitable doctrine: see Philip Tucker, 'Unconscionability: The Hegemony of the Narrow Doctrine under the *Trade Practices Act*' (2003) 11 *Trade Practices Law Journal* 78. A series of official reports have looked into unconscionability: Senate Standing Committee on Economics, Parliament of Australia, *The Need, Scope and Content of a Definition of Unconscionable Conduct for the Purposes of Part IVA of the Trade Practices Act 1974* (December 2008); Treasury, Australian Government, 'The Nature and Application of Unconscionable Conduct Regulation: Can Statutory Unconscionable Conduct be Further Clarified in Practice?' (Issues Paper, November 2009) <http://archive.treasury.gov.au/documents/1676/PDF/Unconscionable_Conduct_Issues_Paper.pdf>; Department of Innovation, Industry, Science and Research, Australian Government, 'Strengthening Statutory Unconscionable Conduct and the Franchising Code of Conduct' (Report, February 2010) <http://www.innovation.gov.au/SmallBusiness/CodesOfConduct/Documents/ExpertPanelReportUCCFCC.pdf>. The disquiet over the courts' narrow interpretation led to Parliament clarifying unconscionable conduct in the *ACL* ss 20–2 — whether the changes have the desired effect remains to be seen.

20 See, eg, 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, 421–2; New Zealand Law Commission, '"Unfair" Contracts: A Discussion Paper' (Preliminary Paper No 11, 1990) 7 <http://www.nzlii.org/nz/other/lawreform/NZLCPP/1989/11.html>: 'The principle of [equity] setting aside unfair transactions (using unfair in its active sense) was thus clearly established 100 years ago'.

21 See, eg, Nyuk Yin Nahan and Eileen Webb, 'Unfair Contract Terms in Consumer Contracts' in Justin Malbon and Luke Nottage (eds), *Consumer Law & Policy in Australia & New Zealand* (Federation Press, 2013) 129, 131.

focus on procedural fairness to addressing substantive fairness and give effect to both the wording and purpose of the provisions.

What then is the purpose of the provisions?[22] The Australian Explanatory Memorandum[23] does not specifically state the purpose of the unfair contract terms law under the *ACL*. Instead, in discussing the '[c]ontext of amendments', the Explanatory Memorandum refers to the Council of Australian Governments (COAG) which 'agreed to establish a national law addressing unfair contract terms, as proposed by the Ministerial Council on Consumer Affairs (MCCA)'.[24] The Australian Explanatory Memorandum also states that '[t]he national unfair contracts law is based on the recommendations made by the Productivity Commission'.[25] The Australian Productivity Commission in turn observed '[t]he strongest argument for [regulation] is ethically based — and is merely the extension of existing ethical principles about fairness in contracts, to cover substantive terms that appear to be manifestly unfair in most circumstances'.[26] The Productivity Commission identified an economic rationale as well — that 'good' firms face relative difficulties in signalling that they will act in good faith with their customers, in contrast to 'bad' firms.[27] New Zealand's Commerce Committee was clear that the intent of the provisions was to prohibit the use of unfair contract terms in standard form contracts.[28] To that end, the new purpose section of New Zealand's *FTA* 'prohibits certain unfair conduct and practices in relation to trade'.[29]

The purpose of the unfair contracts term law in Australia and New Zealand is evident from the face of the provisions. Both legislatures have given a clear steer to the courts on the type of terms that are likely to be unfair by setting down a list of 'grey terms' that are examples of the kinds of terms that may be unfair. They are terms that permit, or have the effect of permitting, one party (but not the other party) to: avoid or limit performance of the contract;[30] terminate the contract;[31] vary the terms of the contract;[32] renew or not renew the contract;[33] unilaterally determine whether the contract has been breached or interpret its meaning;[34] assign the contract to the detriment of another party without that other

22 *Acts Interpretation Act 1901* (Cth) s 15AA: 'In interpreting a provision of an Act, the interpretation that would best achieve the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act) is to be preferred to each other interpretation'. In New Zealand, see *Interpretation Act 1999* (NZ) s 5(1): 'The meaning of an enactment must be ascertained from its text and in the light of its purpose'.

23 Explanatory Memorandum, Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010 (Cth).

24 Ibid 57 [5.2].

25 Ibid 57 [5.3].

26 Productivity Commission, above n 10, 151.

27 Ibid.

28 *Consumer Law Reform Bill*, Commentary, 4: 'New section 26A would prohibit the use of unfair contract terms in standard form contracts'.

29 *FTA* s 1A(2)(a).

30 *ACL* s 25(1)(a); *FTA* s 46M(a).

31 *ACL* s 25(1)(b); *FTA* s 46M(b).

32 *ACL* s 25(1)(d); *FTA* s 46M(d).

33 *ACL* s 25(1)(e); *FTA* s 46M(e).

34 *ACL* s 25(1)(h); *FTA* s 46M(h).

party's consent;[35] or unilaterally vary the characteristics of the goods or services to be supplied, or the interest in land to be sold or granted under the contract.[36] In addition, other grey terms are ones that limit or have the effect of limiting: one party's vicarious liability for its agents;[37] one party's right to sue another party;[38] or the evidence one party can adduce in proceedings relating to the contract.[39] Also included are those terms that either impose or have the effect of imposing the evidential burden on one party in proceedings relating to the contract.[40] Finally, Australia, but not New Zealand, allows for additional grey terms to be added by way of regulation.[41]

Crucially, the consumer or regulator (in Australia) or the regulator (in New Zealand) does not have to establish that a term is unfair. Instead, as soon as there is a significant imbalance between the parties' rights and obligations arising under the contract, and if that clause would cause detriment to the consumer were the trader to apply or rely upon it, the term is presumed to be unfair.[42] It is then up to the trader to prove the term is fair.[43] The purpose of regulating unfair contract terms is clear: it is to stop traders from using and enforcing unfair terms in their contracts.

This article, addressing as it does both the Australian and New Zealand provisions, is ambitious. It is also apposite because New Zealand courts will be influenced strongly by the decisions of the Australian courts. By way of example, the New Zealand courts when interpreting s 9 of the *FTA*,[44] which was taken from s 52 of the *Trade Practices Act 1974* (Cth),[45] followed the Australian jurisprudence on misleading or deceptive conduct.[46]

35 *ACL* s 25(1)(j); *FTA* s 46M(j).

36 *ACL* s 25(1)(g); *FTA* s 46M(g).

37 *ACL* s 25(1)(i); *FTA* s 46M(i).

38 *ACL* s 25(1)(k); *FTA* s 46M(k).

39 *ACL* s 25(1)(l); *FTA* s 46M(l).

40 *ACL* s 25(1)(m); *FTA* s 46M(m).

41 *ACL* ss 25(1)(n), 25(2). There would appear to be a drafting mistake in the *ACL*. The *ACL*, covering as it does not only federal but also state law, covers a number of different Ministers. Section 2 provides definitions for the 'Commonwealth Minister' and the 'responsible Minister'. In the rest of the *ACL* the Minister is always referred to as either the Commonwealth Minister or the responsible Minister. However, simply 'Minister' is used in relation to unfair contract terms law.

42 *ACL* s 24; *FTA* s 46L. See especially *ACL* s 24(4): 'For 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'. New Zealand's equivalent provision is worded almost identically: *FTA* s 46L(3).

43 *ACL* s 24(4); *FTA* s 46L(3).

44 *FTA* s 9 states: 'No person shall, in trade, engage in conduct that is misleading or deceptive or is likely to mislead or deceive'.

45 *Trade Practices Act 1974* (Cth) s 52: 'A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive'. Section 52 has since been replaced by *ACL* s 18.

46 See, eg, the New Zealand High Court case *Taylor Bros Ltd v Taylors Group Ltd* [1988] 2 NZLR 1, 26–30, where Australian jurisprudence was relied upon and the Australian approach of allowing traders to bring actions under the *FTA* was adopted: at 26–7. On appeal in *Taylor Bros Ltd v Taylors Group Ltd* [1988] 2 NZLR 1, 33–41, the Court of Appeal took no issue with the High Court's importation of the Australian jurisprudence where the statutory wording was the same: at 39. See generally W Pengilley, 'The New Zealand Fair Trading Act: The Likely Impact of the Law and Commercial Conduct in Light of Australian Experience' (1987) *New Zealand Law Journal* 59.

The article first outlines the somewhat tortured process of the (belated) inclusion of unfair contract terms in New Zealand's *Consumer Law Reform Bill*, which was subsequently divided and the unfair contract terms law was included in the *Fair Trading Amendment Act 2013* (NZ). Second, it argues that for the regulation of unfair contract terms to be effective and reduce and even eliminate the use of unfair contract terms by traders in Australia and New Zealand, the courts must ensure that they move from their traditional focus on procedural fairness to look at substantive fairness and the courts must take into account behavioural economics. That is, consumers do not act in ways that neo-classicist economists have traditionally argued that they do. The courts must accept that the classical theory of contract law, in relation to consumers, is dead, and so too is the rational consumer. Third, the article will cover in detail the unfair contract terms law in both Australia and New Zealand. Not all contracts are covered by the provisions, nor, at least, in New Zealand, will all standard form contracts concluded by consumers be covered. Furthermore, even if a contract comes within the ambit of the provisions, not all of its terms can be challenged, for example, upfront costs are excluded. Because the trader must establish that the term it is seeking to enforce is reasonably necessary to protect its legitimate interests, the definitions of those and other terms are vital. Finally, the actual effect of the finding that a term is unfair is explored. While an unfair term is void in Australia,[47] in New Zealand such a term must not be used in a standard form consumer contract.[48]

II THE WINDING PATH TO REGULATING UNFAIR CONTRACT TERMS IN NEW ZEALAND

In June 2010 the New Zealand Ministry of Consumer Affairs released a Discussion Paper, *Consumer Law Reform*, which, inter alia, recommended the regulation of unfair contract terms.[49] This was not the Ministry's first foray into unfair contract terms: it had recommended the regulation of unfair contract terms in 2006.[50] New Zealand's non-regulation of unfair contract terms was in stark contrast to the United Kingdom where such terms have been regulated for many years.[51] The Discussion Paper noted that the extent of concerns in New Zealand was not known, albeit that community agencies had advised the Ministry of Consumer Affairs of contracts that potentially contained unfair terms and a review of the operation of the *Credit Contracts and Consumer Finance Act 2003* (NZ) noted

47 *ACL* s 23.

48 *FTA* s 26A.

49 Ministry of Consumer Affairs (NZ), 'Consumer Law Reform', above n 11.

50 Ministry of Consumer Affairs (NZ), 'Review of the Redress and Enforcement Provisions of Consumer Protection Law' (International Comparison Discussion Paper, May 2006) 28 <http://www.consumeraffairs.govt.nz/pdf-library/publications/Review-of-the-Redress-and-Enforcement-Provisions-of-Consumer-Protection-Law-International-Comparison-Discussion-Paper.pdf>. In addition, the New Zealand Law Commission had released a Discussion Paper in 1990 on Unfair Contracts: New Zealand Law Commission, above n 20, 40–2. Despite its name, unfair contract terms were looked at only briefly.

51 See *Unfair Contract Terms Act 1977* (UK) c 50; *Unfair Terms in Consumer Contracts Regulations 1999* (UK) SI 1999/2083.

that some credit contracts also may include unfair contract terms.[52] Given the UK experience, the close attention paid to unfair contract terms in Australia over a number of years[53] and the impending coming into force of the *ACL* with its regulation of unfair contract terms, it was not surprising that the Discussion Paper supported including unfair contract term provisions in the *FTA* along the lines of the *ACL*.[54]

Submissions on the proposal to amend the *FTA* to prohibit unfair contract terms were mixed. Consumer-orientated groups and some business groups supported regulating unfair contract terms.[55] In contrast, businesses and business groups argued that the Discussion Paper had not demonstrated there was a problem,[56] or that the *FTA* contained effective provisions such as providing remedies for misleading or deceptive conduct. [57]

In response to the stinging and, sadly, entirely predictable response of business, the Ministry of Consumer Affairs released an additional paper on unfair contract

52 Ministry of Consumer Affairs (NZ), 'Consumer Law Reform', above n 11, 30–4 [6.2.1]; Ministry of Consumer Affairs (NZ), 'Review of the Operation of the *Credit Contracts and Consumer Finance Act 2003*' (Discussion Paper, September 2009) <http://www.consumeraffairs.govt.nz/pdf-library/Credit-Contracts-and-Consumer-Finance-Act-Discussion-Paper.pdf>.

53 Ministry of Consumer Affairs (NZ), 'Consumer Law Reform', above n 11, 30–4 [6.2.1]. See generally Unfair Contract Terms Working Party, 'Unfair Contract Terms' (Discussion Paper, Standing Committee of Officials of Consumer Affairs, January 2004) <http://www.consumer.vic.gov.au/library/publications/resources-and-education/research/unfair-contract-terms-a-discussion-paper-2004.pdf>; Standing Committee on Law and Justice, Parliament of NSW, *Unfair Terms in Consumer Contracts* (November 2006) <http://www.parliament.nsw.gov.au/prod/parlment/committee.nsf/0/3ecd89db93b4314eca25722f000b8bc9/$FILE/Unfair%20terms%20in%20consumer%20contracts%20Report%2032.pdf>; Consumer Affairs Victoria, 'Unfair Contract Terms in Victoria: Research into Their Extent, Nature, Cost and Implications' (Research Paper No 12, October 2007) <http://www.consumer.vic.gov.au/library/publications/resources-and-education/research/unfair-contract-terms-in-victoria-research-into-their-extent-nature-cost-and-implications-2007.pdf>; Productivity Commission, above n 10; Standing Committee of Officials of Consumer Affairs, 'An Australian Consumer Law: Fair Markets — Confident Consumers' (Consultation Paper, 17 February 2009) <http://www.commerce.wa.gov.au/consumerprotection/PDF/Reports/An_Australian_Consumer_Law.pdf>, cited in Ministry of Consumer Affairs (NZ), 'Unfair Contract Terms', above n 2, 3.

54 Ministry of Consumer Affairs (NZ), 'Consumer Law Reform', above n 11, 30–4 [6.2.1].

55 See, eg, Consumer NZ, Submission to Ministry of Consumer Affairs (NZ), *Consumer Law Reform: A Discussion Paper*, 30 July 2010; Whitireia Community Law Centre, Submission to Ministry of Consumer Affairs (NZ), *Consumer Law Reform: A Discussion Paper*, 23 November 2010; Citizens Advice Bureaux Inc, Submission to Ministry of Consumer Affairs (NZ), *Consumer Law Reform: A Discussion Paper*, 2 August 2010; New Zealand Federation of Family Budgeting Services, Submission to Ministry of Consumer Affairs (NZ), *Consumer Law Reform: A Discussion Paper*, 3 August 2010; National Council of Women of New Zealand, Submission to Ministry of Consumer Affairs (NZ), *Consumer Law Reform: A Discussion Paper*, 2 August 2010; Motor Trade Association, Submission to Ministry of Consumer Affairs (NZ), *Consumer Law Reform: A Discussion Paper*, 30 July 2010. See the complete list of submissions at: Ministry of Consumer Affairs (NZ), *Consumer Law Reform Submissions PDFs* <http://www.consumeraffairs.govt.nz/pdf-library/consumer-law-reform-submissions-pdfs>.

56 See, eg, New Zealand Post, Submission to Ministry of Consumer Affairs (NZ), *Consumer Law Reform: A Discussion Paper*, 4 August 2010; New Zealand Retailers Association, Submission to Ministry of Consumer Affairs (NZ), *Consumer Law Reform: A Discussion Paper*, July 2010; Rae Nield, Les Mills New Zealand Ltd, Submission to Ministry of Consumer Affairs (NZ), *Consumer Law Reform: A Discussion Paper*, 3 August 2010.

57 See, eg, New Zealand Food & Grocery Council, Submission to Ministry of Consumer Affairs (NZ), *Consumer Law Reform: A Discussion Paper*, 30 July 2010; New Zealand Bankers' Association, Submission to Ministry of Consumer Affairs (NZ), *Consumer Law Reform: A Discussion Paper*, 3 August 2010.

terms.[58] Despite that paper's robust justification of why regulatory intervention was required, the resulting *Consumer Law Reform Bill* was silent on unfair contract terms. The Hon John Boscawen, then Minister of Consumer Affairs, gave the following reasons for the deafening silence on unfair contract terms in the *Consumer Law Reform Bill*:

> New Zealand has few recorded examples of unfair contract terms, and introducing a prohibition would lead to increased uncertainty around whether contracts were valid, particularly amongst businesses which rely heavily on standard form contracts. There is mixed evidence on whether a prohibition on specific terms considered 'unfair' would have any real effect, or would just encourage contracts to be worded differently, but with equal effect. The incentive to amend contracts in an attempt to reduce the potential for unfairness imposes a compliance cost on businesses and consumers for little or no benefit. Similar provisions have recently been introduced into Australian law, and the Ministry of Consumer Affairs will monitor the impact of these, reporting back on the Australian experience.[59]

The Minister therefore dismissed any concern for the plight of consumers, preferring instead not to scare business with even a whiff of increased compliance costs. The comments were curious given that many companies operate in both Australia and New Zealand. If unfair contract terms were identified as an issue in Australia (and elsewhere around the world) it is strange to think there was no problem in New Zealand.

A new Minister of Consumer Affairs, however, requested that the Ministry of Consumer Affairs provide a briefing paper to the Commerce Committee (the Select Committee which dealt with the Bill). That paper once again made the case for regulating unfair contract terms.[60] When the Commerce Committee reported back on the *Consumer Law Reform Bill*, it recommended regulation:

> We recommend the addition of new clause 11A, which would insert a new section 26A in Part 1 of the *Fair Trading Act*. New section 26A would prohibit the use of unfair contract terms in standard form contracts. Contravention of this prohibition would give rise to the remedies described in Part 5 of the *Fair Trading Act*. A term is an unfair contract term only if it is declared to be such by the High Court or a District Court, on the application of the Commerce Commission. This process would ensure

58 Ministry of Consumer Affairs (NZ), 'Unfair Contract Terms', above n 2. The additional paper was prepared following consideration of the submissions received on the Consumer Law Reform Discussion Paper. In particular, it addresses the criticism that the Discussion Paper did not make a strong case for regulating unfair contract terms, and that the Discussion Paper placed too much emphasis on the alignment of consumer and business law with Australia without sufficient justification.

Ibid 16–17.

59 Ministry of Consumer Affairs (NZ), *Q & A for Consumer Law Reform Decision Announcement* (May 2011) [24] <http://www.consumeraffairs.govt.nz/pdf-library/legislation-policy-pdfs/Consumer-Law-Reform-Questions-and-Answers.pdf>.

60 Ministry of Consumer Affairs (NZ), 'Including Unfair Contract Term Provisions in the *Fair Trading Act*', above n 4.

> that the Commerce Commission was given control of the enforcement of unfair contract terms. To provide for this process, we recommend inserting new clause 26A, which would insert new sections 46H to 46M. These provisions set out the power of a court to declare a term in a standard form consumer contract to be unfair, and the basis for such a declaration. These provisions reflect the essential features of the Australian Consumer Law provisions relating to unfair contract terms. A 'grey list' of examples of unfair contract terms is included in new section 46M, replicating the list in the Australian Consumer Law.[61]

On 11 December 2012 the *Consumer Law Reform Bill* passed its second reading: the Commerce Committee's proposed additions were accepted in their entirety.[62] The Consumer Law Reform Bill was subsequently divided and the unfair contract terms law was included in the Fair Trading Amendment Act 2013.

III THE DEATH OF CLASSICAL CONTRACT THEORY AND THE RATIONAL CONSUMER THEORY

The Australian and New Zealand provisions will be of limited success and thus their purpose frustrated if the courts continue to apply classical contract theory in their analysis and operate on the false assumption that consumers are rational actors. The twin theories of classical contract theory and rational consumer theory are inextricably bound: if consumers are shown not to act rationally, classical contract theory breaks down. This part explains why both theories are no longer valid.

A *Classical Contract Theory*

Classical contract theory is premised on the assumption that people have complete freedom of contract. People are free to structure their affairs how they choose. If a person choses poorly, that was her choice and she must live with the consequences: the courts will not ride to her rescue and relieve her of her poor choice.[63] As Jessel MR in *Printing and Numerical Registering Co v Sampson* stated:

> if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely

61 *Consumer Law Reform Bill*, Commentary, 4–5.

62 New Zealand, *Parliamentary Debates*, House of Representatives, 11 December 2012, vol 686, 7410. The Supplementary Order Paper (218) divided the *Consumer Law Reform Bill* into 6 Bills, thus the part relating to unfair contract terms became the *Fair Trading Amendment Act 2013* (NZ). Supplementary Order Paper (273) provided that the unfair contract term provisions would come into effect 15 months after the Bill receives Royal Assent.

63 See, eg, Melvin Aron Eisenberg, 'The Limits of Cognition and the Limits of Contract' (1995) 47 *Stanford Law Review* 211, 211–12, albeit that Eisenberg describes it as the 'bargain principle'.

> and voluntarily shall be held sacred and shall be enforced by Courts of justice.[64]

There are numerous problems with the classical contract theory. First, the mythical 'freedom of contract' is a fiction. No court would uphold a contract in which a child was purported to be sold.[65]

Second, as the New Zealand Law Commission has observed, the very nature of the terms drawn up beforehand by a strong party, are 'a long way from the assumptions that seem to underlie freedom of contract. They are more akin to private legislation than to the traditional contract'.[66] Third, the courts, while seemingly kneeling down and worshipping before the altar of freedom of contract,[67] were extraordinarily creative. The courts:

> concealed under their cloaks a secret weapon. They used it to stab the idol [freedom of contract] in the back. This weapon was called 'the true construction of the contract' … They used it so as to depart from the natural meaning of the words of the exemption clause and to put upon them a strained and unnatural construction. In case after case, they said that the words were not strong enough to give the big concern exemption from liability; or that in the circumstances the big concern was not entitled to rely on the exemption clause.[68]

Other artifices used by the courts included the creation of the doctrine of reasonable notice[69] and duress.[70]

Fourth, the theory also breaks down when it meets the real world. There is, of course, the argument that the consumer did not have to accept that particular contract; the consumer ought to have found another trader whose terms were more agreeable to the consumer. Such an argument is problematic. The lost opportunity costs for consumers of such actions aside;[71] there is often, however, no true alternative as other businesses' standard form contracts will have similar, if not the same, terms.[72] Typically, consumers purchasing from companies barely pay attention to the pages of small print; they assume that a standard contract is the one and only route to the item that they want to purchase. And if terms and conditions should differ between the 'same' goods and services, while economists,

64 (1875) LR 19 Eq 462, 465.

65 For the policy and economic reasons behind this, see Margaret Jane Radin, *Contested Commodities* (Harvard University Press, 1996); Alexandra Sims, 'Reforming the *Consumer Guarantees Act 1993* and Its Enforcement: Time for Action' (2010) 16 *New Zealand Business Law Quarterly* 145, 148.

66 New Zealand Law Commission, above n 20, 6. See also W David Slawson, 'Standard Form Contracts and Democratic Control of Lawmaking Power' (1971) 84 *Harvard Law Review* 529.

67 *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] QB 284, 297 (Lord Denning MR).

68 Ibid.

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

70 *Maskell v Horner* [1915] 3 KB 106; *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd; The Atlantic Baron* [1979] QB 705.

71 Zumbo, above n 14, 71.

72 Ibid.

competition lawyers and the courts may say that certain goods and services are substitutable,[73] sometimes in practice they are not an equitable substitution: a marathon runner will tell you there is a world of difference between a marathon run in Rotorua in early May and one run in November in Auckland. Moreover, there may be no practical alternative. For example, in New Zealand there are many places where only one of the dominant telecommunication companies' mobile services works. If you live or work in that particular place, you have no actual choice of providers.

Fifth, it is often difficult, if not impossible, for people to work out the differences between traders' offerings. In a recent New Zealand example, one bank in relation to its basic saving products alone had more than 50 different fee and penalty combinations.[74] Consumers would find it 'virtually impossible to compare the products within [the bank's] range let alone make a competitive comparison'.[75] Indeed, in the telecommunication industry, confusion has traditionally been the industry's chief marketing tool.[76]

Sixth, to the argument that the consumer should and could have negotiated with the trader to alter particularly egregious terms of the trader's standard form contract, the response is that the consumer would normally need legal advice to understand the true nature and effect of some of the terms of the standard form contract.[77] It goes without saying that the cost of the legal advice would be prohibitive for most consumer transactions and added to this are the increased costs to the trader as a result of the negotiation.[78] The point of standard form contracts is to reduce costs, not increase them. Moreover, the theory of negotiation again breaks when subjected to the sunlight of the real word.[79] If a consumer enters a bricks and mortar shop, more often than not, the trader's employees or other agents do not have the authority to make changes to the standard form contract.[80] (The exception occasionally being the price.) In addition, there is the practical issue that increasing numbers of consumers are transacting online where there is no

73 See, eg, *Tru Tone Ltd v Festival Records Retail Marketing Ltd* [1988] 2 NZLR 352, 360, where 'top 50' albums were found to be substitutable under the *Commerce Act 1986* (NZ).

74 Rob Stock, 'Banks May Be Playing on Customer Ignorance', *The Press* (online), 28 April 2013 <http://www.stuff.co.nz/the-press/business/8605804/Banks-may-be-playing-on-customer-ignorance>.

75 Ibid.

76 Peter Nowak, 'Gattung Admits Telcos Not Being Straight', *The New Zealand Herald* (online), 9 May 2006 <http://www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=10380894>.

77 Zumbo, above n 14, 75.

78 Ibid.

79 *Contra* Jason Scott Johnston, '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.

80 Zumbo, above n 14, 71.

ability to talk to a living person.[81] As Lord Denning MR observed in *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd*:

> the freedom was all on the side of the big concern which had the use of the printing press. No freedom for the little man who took the ticket or order form or invoice. The big concern said, 'Take it or leave it'. The little man had no option but to take it.[82]

Finally, the strongest argument against the classical contract theory is that times change. The days of caveat emptor and laissez-faire are long gone in respect to contracts involving consumers.[83] In Australia, the *Trade Practices Act 1974* (Cth) (replaced by the *Competition and Consumer Act 2010* (Cth)) and in New Zealand the *FTA* prevented traders from effectively lying about their products' attributes to consumers (and others).[84] More recently, the *CGA* set out a number of guarantees that goods and services must meet in New Zealand when they are acquired by consumers.[85] It is not possible to exclude the minimum guarantees under the *CGA* for consumers via contractual terms,[86] indeed it is an offence to purport to contract out of the *CGA*.[87] Australia has followed New Zealand's lead and the *ACL* has incorporated minimum guarantees modelled on New Zealand's *CGA*.[88]

The regulation of unfair contract terms can be seen, therefore, as a further and natural step along the path of the protection of consumers against traders' avarice, a path that was laid down clearly some 40 years ago. As the Minister for Customs and Excise when introducing the second reading of the Trade Practices Bill 1973 (No 2) (Cth) stated:

> In consumer transactions unfair practices are widespread. The existing law is still founded on the principle known as caveat emptor — meaning 'let the buyer beware' … The untrained consumer is no match for the businessman who attempts to persuade the consumer to buy goods or

81 See generally PwC and Frost & Sullivan, *Australian Online Shopping Market and Digital Insights: An Executive Overview* (July 2012) <http://www.pwc.com.au/industry/retail-consumer/assets/Digital-Media-Research-Jul12.pdf>; Australian Communications and Media Authority, *Report 1 — E-Commerce Marketplace in Australia: Online Shopping* (2011) 4 <http://www.acma.gov.au/webwr/_assets/main/lib410148/CR_comp_report1-E-commerce_Marketplace_in_Australia.pdf>, where it was estimated that 59 per cent of SMEs in Australia were taking orders online.

82 [1983] QB 284, 297.

83 Indeed, regulations first started to be put in place surrounding the sale of goods around 100 years ago, albeit that level was set very low, and could be contracted out of by judicious drafting. See generally *Sale of Goods Act 1923* (NSW); *Sale of Goods Act 1908* (NZ); *Sale of Goods Act 1896* (Qld); *Sale of Goods Act 1895* (SA); *Goods Act 1958* (Vic); *Sale of Goods Act 1895* (WA); Sims, above n 65, 148–50.

84 Despite the long passage of years since the passing of the *FTA*, this has not prevented, in New Zealand at least, constant complaints from business that the simple and easily understood ban on misleading and deceptive conduct was much too wide and uncertain — and essentially not fair to traders. Their calls have been partially answered with the *Consumer Law Reform Bill* containing a provision that would allow for limited contracting out for business when dealing with others in trade: see *FTA* s 5D.

85 *CGA* ss 5–13, 28–31.

86 Ibid s 43.

87 Ibid s 43(4).

88 *ACL* ss 51–62. Section 64 prevents the guarantees from being excluded by contract.

> services on terms and conditions suitable to the vendor. The consumer needs protection by the law and this Bill will provide such protection.[89]

While the *Trade Practices Act 1974* (Cth) and the *FTA* created consumer law in Australia and New Zealand, the Acts as originally drafted went only some of the way to protecting the consumer from buying 'goods or services on terms and conditions suitable to the vendor'. The latest iteration of those Acts will — if properly applied by the courts — finally protect consumers, provided the courts throw off the shackles of freedom of contract in relation to consumer contracts. As the UK Office of Fair Trading observed, the UK unfair contract terms law and the *European Council Directive on Unfair Terms in Consumer Contracts*[90] represent 'a fundamental challenge to a … buyer beware approach to drafting. [They] … represent the death of freedom of contract'.[91]

B *The (ir)Rational Consumer*

In the neo-classical economists' world, people are rational. People, such as consumers, will seek out information and carefully weigh up the advantages and disadvantages and make a decision that maximises their individual self-interest. Such carefully balanced decision-making justifies the classical contract theory as it 'rest[s] on the empirical premise that in making a bargain a contracting party will act with full cognition to rationally maximize his subjective expected utility'.[92]

Even if it were true that people did carefully seek out and weigh all the advantages and disadvantages in making decisions to maximise their individual self-interest, they may find that the cost of doing so outweighs the benefit. There is the issue that in real life, searching out and understanding all the information relevant to making that decision is normally not economically rational as it involves search costs, such as time, effort and sometimes money.[93] Thus consumers act within a 'bounded rationality'.[94]

The next hurdle with the rational consumer theory is that even if people do carefully weigh the advantages and disadvantages, because of their limited knowledge set, people often make mistakes or demonstrate poor judgment. For example, in a study consumers were faced with credit cards with low introductory

89 Commonwealth, *Parliamentary Debates*, Senate, 15 November 1973, 1 (Lionel Murphy).

90 *Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts* [1993] OJ L 95/29.

91 Office of Fair Trading (UK), *Unfair Contract Terms Bulletin No 4* (1997) 6, quoted in Iain Ramsay, *Consumer Law and Policy: Text and Materials on Regulating Consumer Markets* (Hart Publishing, 3rd ed, 2012) 320.

92 Eisenberg, above n 63, 212.

93 Ibid 214–16.

94 Ibid.

rates.[95] One was for 4.9 per cent for a six-month period; another was for 7.9 per cent for 12 months. After six months the 4.9 per cent rate shot up to 16 per cent. Significantly more consumers chose the 4.9 per cent rate even though it resulted in them spending more in interest. Banks are fully aware of consumers' faulty understanding and that is why they engage in marketing activities.[96]

Under neo-classical theory, consumers who benefited from a low introductory credit card rate would switch immediately to another low credit card rate once the introductory period was over. However, the credit card study showed that the majority of consumers (60 per cent) who took up the cards with low introductory rates continued with those cards after the expiry of the initial low rate.[97] This known behavioural quirk is precisely why credit card companies offer enticingly low offers — well below the going interest rate — to new consumers to transfer to their cards.[98] Another compounding factor that distorts the decision-making process is that people underestimate the chances of risk and over-estimate their own ability.[99] For example, most people irrationally believe they are above average drivers.[100]

Faced with compelling evidence that people are not rational, Richard A Epstein, a neo-classicalist economist, has conceded that people do often make mistakes and exercise poor judgment:

> it seems impossible to deny two facts about human nature. First, people often make serious mistakes in deciding important matters. Second, people often find it hardest to keep their emotions in check when it matters the most.[101]

If Epstein — the high priest of neo-classical economics — concedes that people are not rational actors, there is no need to go further; the myth of the rational

95 See Haiyan Shui and Lawrence M Ausubel, 'Time Inconsistency in the Credit Card Market' (Paper presented at the 14th Annual Utah Winter Finance Conference, Cliff Lodge, Utah, 3 May 2004) 2–3 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=586622>, cited in Oren Bar-Gill, 'The Behavioral Economics of Consumer Contracts' (2008) 92 *Minnesota Law Review* 749, 763.

96 The study on credit card tests was taken from data arising from a market experiment of 600 000 credit card offers carried out by a major United States issuer of bank credit cards: see Shui and Ausubel, above n 95, 7, cited in Bar-Gill, above n 95, 764.

97 Shui and Ausubel, above n 95, 3, cited in Bar-Gill, above n 95, 762.

98 In February 2013, ANZ bank were offering 2.99 per cent for 12 months on balances transferred from another banks' credit card. The lowest mortgage rate offered by ANZ at that time was 5.25 per cent for six months and one year.

99 See generally Eisenberg, above n 63, 216–18.

100 Ola Svenson, 'Are We All Less Risky and More Skillful Than Our Fellow Drivers?' (1981) 47 *Acta Psychologica* 143, cited in Eisenberg, above n 63, 216.

101 Richard A Epstein, 'Behavioral Economics: Human Errors and Market Corrections' (2006) 73 *University of Chicago Law Review* 111, 111.

consumer has been debunked.[102] And to return to Lord Denning MR in *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd*:

> None of you nowadays will remember the trouble we had — when I was called to the Bar — with exemption clauses. They were printed in small print on the back of tickets and order forms and invoices. They were contained in catalogues or timetables. They were held to be binding on any person who took them without objection. No one ever did object. He never read them or knew what was in them. No matter how unreasonable they were, he was bound … *When the courts said to the big concern, 'You must put it in clear words,' the big concern had no hesitation in doing so. It knew well that the little man would never read the exemption clauses or understand them.*[103]

IV THE PROVISIONS

The New Zealand provisions in the *Fair Trading Amendment Act 2013* (NZ) were taken almost in their entirety from the *ACL*. The Australian provisions were modelled on the Victorian unfair contract term provisions,[104] which in turn were modelled on the United Kingdom unfair term provisions.[105] Some of the terminology from the United Kingdom provisions can be seen clearly in the New Zealand and Australian provisions, for example, 'significant imbalance' and 'detriment'.[106] While it is arguable that the United Kingdom and Victorian cases can offer some guidance, a key difference is the deliberate omission of a good faith requirement in Australia and New Zealand. The omission was because the term 'good faith' had caused problems in the interpretation of unfair contract term regulation in the UK and formerly in Victoria.[107]

102 Ibid 111–132. Epstein's central argument in the article is that the known frailties of people do not mean that the law ought to intervene to protect consumers. For example, he argues that consumers learn over time, thus their mistakes lessen. Granted, people learn. However, this is not an interesting experiment played out with lab rats. Real people are involved and one poor decision by a person could have serious consequences not just for them, but also for their dependants. For an examination of these adverse consequences, see Bar-Gill, above n 95, 786–8.

103 [1983] QB 284, 296–7 (emphasis added).

104 *Fair Trading Act 1999* (Vic) pt 2B, as repealed by *Fair Trading Amendment (Australian Consumer Law) Act 2010* (Vic) s 17.

105 *Unfair Terms in Consumer Contracts Regulations 1999* (UK) SI 1999/2083.

106 *Fair Trading Act 1999* (Vic) s 32W: 'a term … is to be regarded as unfair if, contrary to the requirements of good faith and in all the circumstances, it causes a significant imbalance in the parties' rights and obligations arising under the contract to the detriment to the consumer', later amended by *Fair Trading and Other Acts Amendment Act 2009* (Vic) s 5 to remove the good faith requirement by omitting the words 'contrary to the requirements of good faith and'. *Unfair Terms in Consumer Contracts Regulations 1999* (UK) SI 1999/2083 reg 5(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'.

107 See, eg, the UK Law Commissions' recommendation to remove the concept of 'good faith' in the UK: The Law Commission and the Scottish Law Commission, *Unfair Terms in Contracts: Report on a Reference under Section 3(1)(e) of the Law Commissions Act 1965* (LAW COM No 292 and SCOT LAW COM No 199, 2005) 39–40 <http://lawcommission.justice.gov.uk/docs/lc292_Unfair_Terms_In_Contracts.pdf>.

In terms of guidance to the Australian and New Zealand courts, the Victorian cases[108] are preferable over the UK cases, as the UK House of Lords has taken a restrictive view of unfair contract terms.[109] For example, despite Lord Bingham acknowledging in *Director General of Fair Trading v First National Bank plc* that it was 'readily understandable that a borrower may be disagreeably surprised'[110] at the existence of a clause that meant if the debtor defaulted the interest was set at the contractual rate instead of the (normally lower) rate of judgment debts,[111] the clause was found to be fair.

This Part first looks at the contracts and terms that are excluded from the ambit of the provisions.[112] As will be demonstrated, not all contracts and terms can be challenged on the basis that they are unfair. Second, the test for determining whether a term is unfair is explored. Third, the effects of a finding or declaration that a term is unfair will be explained. Finally, the differences between the Australian and New Zealand provisions will be explored.

Two striking differences between Australia and New Zealand that need to be addressed here are that in New Zealand only the District Court and High Court has jurisdiction to hear unfair contract term disputes and only the regulator — the Commerce Commission — can challenge an unfair contract term.[113] This is in sharp contrast to Australia where some tribunals can hear such disputes and consumers and regulators are entitled to challenge unfair contract terms. For example, in Victoria the Victorian Civil and Administrative Tribunal heard

108 See, eg, *Director of Consumer Affairs Victoria v Craig Langley Pty Ltd* [2008] VCAT 482 (17 March 2008) (Harbison J) (unfair terms found in gym contract); *Director of Consumer Affairs v AAPT Ltd* [2006] VCAT 1493 (2 August 2006) (Morris P) (mobile phone contract terms found to be unfair — albeit only in obiter as defendant had changed its terms and was no longer using the disputed ones); *Jetstar Airways Pty Ltd v Free* [2008] VSC 539 (3 December 2008) (Cavanough J) (terms found not to be unfair due to the very low price the flights were purchased for and the desire not to allow others to effectively scalp the tickets); *Director of Consumer Affairs Victoria v Trainstation Health Clubs Pty Ltd* [2008] VCAT 2092 (24 October 2008) [175] (unfair terms in a gym contract) (Harbison V-P); *Director of Consumer Affairs Victoria v Backloads.com Pty Ltd* [2009] VCAT 754 (11 May 2009) [305], [324], [329], [338] (Harbison V-P) (terms in removal contract found to be unfair).

109 See, eg, *Office of Fair Trading v Abbey National plc* [2010] 1 AC 696. See also The Law Commission and the Scottish Law Commission, 'Unfair Terms in Consumer Contracts: A New Approach?' (Joint Issues Paper, 25 July 2012) 4 <http://lawcommission.justice.gov.uk/docs/unfair_terms_in_consumer_contracts_issues.pdf>, where it was observed that this case had created considerable uncertainty and concern.

110 [2002] 1 AC 481, 497.

111 See Meryll Dean, 'Defining Unfair Terms in Consumer Contracts — Crystal Ball Gazing? *Director General of Fair Trading v First National Bank plc*' (2002) 65 *Modern Law Review* 773, 780.

112 In addition, *ACL* s 28 provides that the *ACL* Pt 2-3 does not affect a contract for marine salvage or towage, a charterparty of a ship or a contract for the carriage of goods by ship. Unfair contract terms provisions also do not apply to terms regulated by the *Insurance Contracts Act 1984* (Cth) s 15. (The Insurance Contracts Amendment (Unfair Terms) Bill 2013 (Cth) would amend the *Insurance Contracts Act 1984* (Cth) to cover unfair contract terms in insurance contracts.) However, private health insurance contracts, state and Commonwealth government insurance contracts and re-insurance contracts (among others) are not regulated by the *Insurance Contracts Act 1984* (Cth) and are subject to the unfair contract terms law under the *ACL*.

113 *FTA* s 46H(1). Under s 46H(2) any person may ask the Commerce Commission to apply to the court for a declaration that a contract term is unfair, however, the Commerce Commission does not have to act on that request.

the bulk of the disputes.[114] The Disputes Tribunal plays a vital part in access to justice for consumers and it is inexplicable that the Disputes Tribunal will have its jurisdiction excluded in this area.[115] The Ministry of Consumer Affairs recommended in 2006 that both consumers and the regulator have access to the unfair contracts law and that the Disputes Tribunal was to hear disputes in addition to the courts.[116] New Zealand's provisions should be changed to follow the *ACL* on these two points.

A *Contracts and Terms Excluded from the Provisions*

Before delving into the contracts and terms that are excluded from the clutches of the unfair contract terms law, it is important to note that the terms in standard form contracts that have been placed beyond the reach of the unfair contract terms law are defined narrowly. As Lord Bingham in *Director General of Fair Trading v First National Bank plc* observed:

> The object of the … [UK unfair contract term law] is to protect consumers against the inclusion of unfair and prejudicial terms in standard-form contracts into which they enter, and that object would plainly be frustrated if … [the exemption provision was] so broadly interpreted as to cover any terms other than those falling squarely within it.[117]

1 *Non-Consumers*

The provisions cover only 'consumer contracts'. In Australia 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.[118]

Thus in Australia, consumers are natural people who are acquiring goods, services or interests in land wholly or predominately for personal, domestic household use or consumption. In contrast, in New Zealand, fewer natural people will be protected because a consumer is defined as meaning a person who:

114 See above n 108.

115 Although the Disputes Tribunal does not work perfectly and improvements could be made to its operation (see Sims, above n 65, 145), nonetheless the Disputes Tribunal is a low cost and valuable tribunal which facilitates consumers' access to justice.

116 Ministry of Consumer Affairs (NZ), 'Review of the Redress and Enforcement Provisions', above n 50, 27.

117 [2002] 1 AC 481, 491, quoted in Jeannie Paterson, 'The Australian Unfair Contract Terms Law: The Rise of Substantive Unfairness as a Ground for Review of Standard Form Consumer Contracts' (2009) 33 *Melbourne University Law Review* 934, 942.

118 *ACL* s 23(3).

(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.[119]

The focus in New Zealand, therefore, is on the nature of actual goods or services, not who is purchasing them. A person buying an ex-army tank for her personal use would not be protected as a consumer in New Zealand, whereas she would be in Australia (provided the contract was a standard form contract).[120] In addition, another curious quirk in New Zealand law would be that businesses that are acquiring goods or services will be protected under the unfair contract terms law in some circumstances. For example, both consumers and businesses purchase mobile phones. If company X purchases mobile phones for its employees, X will be treated as a consumer. Whereas if company Y purchases mobile phones to on sell those phones, Y will be deemed not to be a consumer.[121]

New Zealand's seemingly strange definition of consumer is a result of using the same definition of consumer as in the *CGA*.[122] While one can see the rationale for common definitions in New Zealand's two key consumer protection statutes, there is a difference between the two. Under the *CGA* a supplier (the business providing the goods or service) can exclude its liability to companies and other businesses by contracting out of the *CGA*.[123] With the proposed unfair contract terms law in New Zealand there is no ability to contract out. However, there will be no flood of well-resourced plaintiffs in the form of large corporates going before the courts arguing that terms in contracts be set aside as only the Commerce Commission can challenge a term on the basis that it is unfair.[124]

Because there will be instances of consumers left without protection when they acquire goods or services that are not ordinarily acquired for personal and domestic use, New Zealand's Bill should be amended to follow the *ACL* on this point.

119 *FTA* s 2(1) (definition of 'consumer').

120 See below nn 126–35.

121 *FTA* s 2(1) (definition of 'consumer' para (b)(i)) (resupply in trade).

122 See *CGA* s 2(1) (definition of 'consumer').

123 Ibid s 43(2).

124 *FTA* s 46H(1).

2 *Standard Form Contracts Only Are Caught*

In both Australia and New Zealand only standard form contracts are caught. Section 27(1) of the *ACL* provides in relation to standard form contracts that: 'If a party to a proceeding alleges that a contract is a standard form contract, it is presumed to be a standard form contract unless another party to the proceeding proves otherwise'. Thus, if the consumer alleges that the contract is a standard form contract, the onus falls on the trader to show that it is not a standard form contract.[125] In contrast, in New Zealand drafters have not slavishly followed the Australian wording. Instead New Zealand's equivalent provides that: 'A court may determine that any contract in which the terms … have not been subject to effective negotiation between the parties is a standard form contract'.[126] While the New Zealand provision talks about 'effective negotiation', the consumer would appear to be better off in Australia as once the consumer or regulator alleges the contract is a standard form contract the onus is on the trader to prove that it was not a standard form contract.

What, then, is a standard form contract? As with much of the provisions there is no set definition of a standard form contract. Instead the provisions provide some guidance to the courts. Section 27(2) of the *ACL* allows the court to take any matters into account when determining if a contract is a standard form contract, however, the court must take the following factors into account:

> (a) whether one of the parties has all or most of the bargaining power relating to the transaction;
>
> (b) whether the contract was prepared by one party before any discussion relating to the transaction occurred between the parties;
>
> (c) whether another party was, in effect, required either to accept or reject the terms of the contract (other than the terms referred to in section 26(1)) in the form in which they were presented;
>
> (d) whether another party was given an effective opportunity to negotiate the terms of the contract that were not the terms referred to in section 26(1);
>
> (e) whether the terms of the contract (other than the terms referred to in section 26(1)) take into account the specific characteristics of another party or the particular transaction;
>
> (f) any other matter prescribed by the regulations.[127]

A key aspect of the provisions is that they are meant to only catch standard form contracts. In relation to the Victorian provisions it was observed that

125 Treasury, above n 9, 4.

126 *FTA* s 46J(1).

127 *ACL* s 27(2). The New Zealand factors are substantively the same: *FTA* s 46J(2) with the exception that there is no power in *FTA* s 46J(2) to add more terms by way of regulation.

> terms of a consumer contract which have been the subject of genuine negotiation should not be lightly declared unfair. This legislation is designed to protect consumers from unfair contracts, not to allow a party to a contract who has genuinely reflected on its terms and negotiated them, to be released from a contract term from which he or she later wishes to resile.[128]

It has been argued the courts might find that because there has been some negotiation or discussion — no matter how slight — the contract is no longer a standard form contract.[129] Thus otherwise unfair terms would be enforceable.[130] For example, what would happen if a consumer changed one obviously egregious term in a contract, such as the requirement to give a security alarm company 36 months' notice of cancelling the contract for a home alarm, but left the rest unchanged?[131] Would the consumer still be able to challenge another term as being unfair? For all intents and purposes the contract is still a standard form contract — the consumer has simply changed one term. Moreover, the purpose of the unfair contract terms law is not just to provide relief to the particular consumer before the courts, but to protect all of the trader's clients who are subject to that clause. Finding that the changing of a term or two of the contract meant that the contract was no longer a standard form contract and thus outside the scope of the provisions would be nonsense. Thus the factors contained in ss 27(2)(a) and (b) should be given the most weight. Indeed, the United Kingdom's *Unfair Terms in Consumer Contracts Regulations 1999* (UK), provides that it is not whether negotiation of the contract has occurred, but rather whether the term that is being complained about has been individually negotiated.[132] The Tribunal in *Director of Consumer Affairs Victoria v Craig Langley Pty Ltd* also made it clear that the focus should be on the whether the term complained about has been individually negotiated.[133]

In regards to standard form contracts where the consumer has attempted unsuccessfully to alter the terms, it is inconceivable that the discussions could render that contract into a non-standard form contract. In such a situation s 27(2)(c) would come into play, the consumer was in effect required to accept or reject the terms of the contract. The courts must also be aware of potentially

128 *Director of Consumer Affairs Victoria v Craig Langley Pty Ltd* [2008] VCAT 482 (17 March 2008) [66] (Harbison J). Her Honour went on to state: 'The legislation is not designed to allow a consumer to drive a hard bargain, entering into a contract with his or her eyes wide open, and then to use this legislation to keep the benefits, but set aside the disadvantages': at [69].

129 See Anthony Gray, 'Unfair Contracts and the Consumer Law Bill' (2009) 9 *Queensland University of Technology Law and Justice Journal* 155, 167–8.

130 Ibid.

131 This situation occurred a few years ago to the author. The term of the contract was for 36 months. One clause stated: 'This agreement shall be for the term specified herein and shall thereafter continue for further term(s) unless otherwise advised by either party giving one terms [sic] prior written notice to the other or such variation and/or termination'.

132 *Unfair Terms in Consumer Contracts Regulations 1999* (UK) SI 1999/2083 reg 5(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' (emphasis added).

133 [2008] VCAT 482 (17 March 2008) (Harbison J) [67].

insidious practises by traders. It has been argued that some traders might in practice adopt some form of sham negotiation in relation to their contracts so as to bring them out of the clutches of the provisions.[134] For example, a contract could have a blank space for the notice period that the trader is required to give the consumer for making changes to its terms and conditions and the trader and the customer would 'agree' what a suitable period would be and record that in the contract. Such artifices must be seen for what they are.

For the courts to take a narrow view of what constitutes a standard form contract would result in a perverse situation. To find that some negotiation, no matter how slight, brought the contract outside of the ambit of the provisions would mean that consumers would be in a better position legally if they accepted the terms as they were. If consumers spot a particularly bad contract term they should not be penalised for attempting to change it.

In summary, it would be rare, therefore, for a contract prepared by a trader and used by that trader for all its consumers acquiring the same goods and services not to be found to be a standard form contract, even if one or two of the terms were altered at the consumer's insistence.

3 *Terms that Set the Upfront Price Payable under the Contract*

Not all of the terms of a standard form consumer contract can be challenged. Terms that set out the 'upfront price payable' under the contract are excluded from the operation of the provisions.[135] There is, however, a significant difference in the definition of terms that set the upfront price payable in relation to fees and other changes in Australia and New Zealand as will be seen below.

(a) Basic Price Paid or Agreed to Be Paid for the Goods and Services

The basic price paid (or agreed to be paid) for the goods and services has been omitted deliberately in both Australia and New Zealand.[136] The exclusion is justified on the basis that consumers should not be permitted to challenge the basic price of the goods, services or land that they agreed to at a later date.[137] Such an exclusion can be justified on the basis that the price of goods or services is the one term that consumers do take notice of and will often choose to purchase from that trader based on that single term.

There is an obvious deficiency in the Australian definition of upfront price, however. There is no requirement that the term be expressed in reasonably plain language, be legible and be presented clearly, that is, that it be transparent.[138] This is because under the *ACL* once something is caught as an upfront price, s 23

134 Gray, above n 129, 168.

135 *ACL* s 26(1)(b); *FTA* s 46K(1)(b).

136 *ACL* s 26; *FTA* s 46K.

137 Treasury, above n 9, 15.

138 The additional requirement of 'readily available to any party affected by the term' is not relevant here as *ACL* s 26(2)(b) requires that the term be disclosed at or before the time the contract is entered into.

does not apply to that term, thus that term is not within the scope of a 'consumer contract', thus the transparency of the term cannot be taken into consideration. Notwithstanding the legislative wording, the Treasury in addressing the question: 'Is interest or a future payment determined according to a formula an "upfront price"?' responded:

> The price may vary over time (in the case of interest payable for credit) or be calculated according to a formula after a specified amount of time has passed or specified conditions have been met. The intention of the provisions is that these would be included in the upfront price, if it is disclosed at or before the time that the contract is made. Having regard to the matters set out in … [s 24(2)] a key consideration of a court in considering this issue would be the transparency of such disclosure.[139]

While the Treasury's response accords with common sense and the purpose of the unfair contract terms law, the statutory language does not support its argument. Indeed, the omission in Australia of a transparency requirement in relation to the upfront price may well have been a drafting error. Under the UK unfair contract term law, transparency is a requirement of the price paid or payable for the goods.[140] In contrast, in New Zealand, terms setting the basic price paid or agreed to be paid for the goods and services are required to be transparent.[141] An amendment is required to the Australian provisions. As it stands currently a contract that obscured the upfront price through legalese or other drafting devices would be permitted in Australia, but not in New Zealand.

(b) Fees and Additional Charges

Excessive early termination fees are a common consumer complaint.[142] In the consumers' favour in Australia, fees and additional charges do not come under the upfront price exclusion.[143] Early termination fees would therefore be caught.[144] In contrast, New Zealand's definition of 'upfront price' has been defined differently. 'Upfront price' means 'the 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'.[145]

139 Treasury, above n 9, 16.

140 *Unfair Terms in Consumer Contracts Regulations 1999* (UK) SI 1999/2083 reg 6(2):

> In 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.

141 *FTA* s 46K(2): 'upfront price means the consideration … only to the extent that the consideration is set out in a term that is transparent'.

142 See, eg, Consumer NZ, '*Consumer Law Reform Additional Paper*', above n 5, 2.

143 *ACL* s 26(2); Treasury, above n 9, 17.

144 Paterson, above n 117, 947.

145 *FTA* s 46K(2).

In New Zealand, additional fees and charges, including early termination fees, are likely to be part of the upfront price because they are contingent on a certain event. For example, the payment of a fee if a consumer wants to terminate a contract early. Therefore additional fees and charges may well be exempted, no matter how extortionate they are, albeit that the additional fees and charges must be transparent. This exemption was a deliberate choice by the Bill's drafters.

In Australia, it will not necessarily be so simple as saying that there will always be a dividing line between the basic price and fees and additional charges. As Gross J in *Bairstow Eves London Central Ltd v Smith* observed, the equivalent UK provision to the Australian provision 'must be given a restrictive interpretation; otherwise a coach and horses could be driven through the [unfair contract terms law]'.[146] The warning was given because if a fee or charge can be made to appear as if it was part of the basic price paid, it would escape scrutiny under the unfair contract terms law. *Bairstow Eves London Central Ltd v Smith* concerned a real estate agents' agreement which set out the standard commission fee of three per cent and an early payment discounted commission rate of 1.5 per cent if the fee was paid within 10 working days of the completion date. The discussion between the real estate agency and the vendor was in relation solely to the 1.5 per cent rate. For Gross J two options were possible. First, was the agreement for a three per cent commission rate (or price) with the vendors having an option (but no obligation) to pay 1.5 per cent, in which case the term could not be challenged as it was part of the upfront price. Second, did the agreement place an obligation on the vendors to pay 1.5 per cent with a 'default' position exercisable at the real estate's option to insist on three per cent, in which case it was not part of the upfront price. Gross J found that it came within the second option and was thus subject to examination under the UK's unfair contract terms law.[147]

Lord Walker in *Office of Fair Trading v Abbey National plc* approved Gross J's reasoning and decision.[148] Lord Walker warned that '[t]raders ought not to be able to outflank consumers by "drafting themselves" into a position where they can take advantage of a default provision'.[149] Thus Australian traders must be mindful that terms containing what purport to be upfront prices are not automatically immune from the courts' jurisdiction.

There is virtue in certainty for New Zealand businesses knowing that their fees — such as early termination fees — cannot be challenged, provided that they are transparent,[150] thus the problems that have been caused in the UK in the aftermath of *Abbey National* will not occur in New Zealand. However, given how many businesses trade in both New Zealand and Australia, particularly banks,[151] it would appear strange to permit banks to treat their customers differently

146 [2004] EWHC 263 (QB) (20 February 2004) [25].

147 Ibid [29].

148 [2010] 1 AC 696, 790 [43].

149 Ibid.

150 *FTA* s 46K(2).

151 Four of New Zealand's major banks are Australian owned: ANZ National, BNZ, Westpac and ASB. The fifth major bank is KiwiBank.

depending on where those customers are located. Much then will depend in New Zealand on how the courts apply the transparency requirement.[152]

Notwithstanding the carve out of fees and additional charges in New Zealand, the New Zealand courts must be alert to a possible practice of some traders in New Zealand. As will be seen below, a term that states that the consumer must give a lengthy notice period before cancelling a contract would likely be an unfair contract as it would create a substantial imbalance between the trader and the consumer. However, if the term was rephrased so that if the consumer cancelled the contract before the expiration of the contract term a fee was payable, which just so happened to equate either exactly or roughly with the amount owing under the contract, a strict interpretation of 'upfront price' would mean that in effect the notice period term would be enforced. One way the courts could interpret 'upfront price' to avoid traders gaming the unfair contract terms law by clever drafting, would be to require the traders to set as the 'consideration' a fixed sum which was not proportionate to the amount of time left on the contract. In this way it would be crystal clear to the consumer at the outset exactly how much the consumer would have to pay for early termination. While this approach would bring clarity on the part of the trader and consumers (who read and understood the contract), it has disadvantages. On the one hand, the trader would not want to set its fee too high and scare off potential customers, thus in some cases it could be out of pocket as the fee would not be sufficient to cover its legitimate costs. On the other hand, it may well collect fees from some customers which are greatly in excess of the loss that it has suffered, which would harm customers.[153]

Moreover, there is an added internal complication with New Zealand's unfair contract terms law. One of the grey list of terms is 'a term that penalises, or has the effect of penalising, one party (but not another party) for a breach or termination of the contract'.[154] New Zealand courts could potentially use this grey term to protect consumers where the trader is attempting to charge an early termination fee. The question is whether the New Zealand courts will use s 46M(c) to trump the exclusion of fees and charges thus forcing the trader to justify that the fees and charges the trader is attempting to impose are fair.

(c) Variations in Interest Rates

Another intriguing possible exclusion concerns variations in interest rates.[155] The Treasury has explained that the intention is to prevent consumers from challenging variations in interest rates.[156] The Treasury's view is curious: a number of arguments can be made against its view. First, while it is sensible that consumers should not be permitted to challenge the interest rate they agreed to,

152 See below nn 198–203 and accompanying text.

153 The trader would, however, be likely to fall foul of the penalty doctrine, see, eg, *Andrews v Australia and New Zealand Banking Group Ltd* (2012) 247 CLR 205.

154 *FTA* s 46M(c). The inconsistency between ss 46M(c) and 46K(2) highlights the problems of copying law from another jurisdiction and making changes to it.

155 Treasury, above n 9, 16.

156 Ibid 14.

it is not the same as the trader being able to change that interest rate at a later date. Traders could lure consumers into entering into credit arrangements at one price, then unilaterally increase that price substantially above market rates. To be sure, there will be occasions when traders need to vary interest rates; however, in such situations consumers should be given the opportunity to terminate the contract. Second, if the Treasury's logic was applied to instalments payable under the contract, the consumer would not be permitted to challenge a variation clause if the trader was attempting to raise the amount payable per instalment. What could be more 'unfair' than a contract where the payments for goods were set, only to have the trader unilaterally raise those payments? Finally, there is an inconsistency with s 25(1)(d) of the *ACL* that provides that one of the terms on the grey list is a 'term that permits, or has the effect of permitting, one party (but not the another party) to vary the terms of the contract'. In short, there is nothing in the legislative wording to exclude a term that allowed a trader to vary the interest rate with impunity. The courts must reject Treasury's view on this point.

(d) Main Subject Matter

The main subject matter is the decision to enter into the contract as well as the actual goods, services or land itself.[157] The rationale is that the consumer decided to enter into the contract.[158] For example, if a consumer agreed to purchase a small car with two doors, a consumer who had changed her mind when she realised she needed a car with four doors cannot turn around later and claim the term specifying the nature of the car was unfair if the trader refused to supply her with a car with four doors.[159] The courts, of course, must take care to thwart attempts by those drafting standard form contracts to tie what would otherwise be challengeable terms to the main subject matter of the contract.[160]

B *What Is an Unfair Contract Term?*

Section 24 of the *ACL* sets out the test to determine whether a term is unfair (the equivalent New Zealand provision is s 46L of the *FTA*):

> (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

157 Ibid 15.

158 Ibid.

159 Ibid.

160 Graeme McEwen, 'Challenging Standard Form Contracts under the Unfair Contract Terms Law' (Paper presented at the Victorian Property Law Conference, Melbourne, 17 February 2011) 13 <http://www.vicbar.com.au/GetFile.ashx?file=pdf/Graeme%20McEwen%20Challenging%20standard%20form%20contracts%20under%20the%20unfair%20contracts%20law%20(17%202%2011).pdf>: 'The artful draftsperson will strive to draw challengeable terms in a manner which, where possible, ties them to defining the main subject matter of the contract'.

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

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

(2) In determining whether a term of a consumer contract is unfair under subsection (1), a court may take into account such matters as it thinks relevant, but must take into account the following:

(a) the extent to which the term is transparent;

(b) the contract as a whole.

(3) A term is transparent if the term is:

(a) expressed in reasonably plain language; and

(b) legible; and

(c) presented clearly; and

(d) readily available to any party affected by the term.

(4) For 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.

Section 24 needs to be read in conjunction with s 25(1) which sets out the 'grey list'. The grey list are examples of the kinds of terms that may be unfair:

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

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

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

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

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

(l) 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;

(m) 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;

(n) 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;

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

(p) 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;

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

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

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

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

For all intents and purposes, New Zealand's grey list in s 46M of the *FTA* is identical, with the exception of the last term as there is no power provided in New Zealand for terms to be added by way of regulation. The grey terms are crucial. Such terms can be used in the contract only if the trader can show that the term (or terms) are reasonably necessary to protect its legitimate interests.[161]

1 *Significant Imbalance*

The phrase 'significant imbalance' is not defined. 'Significant imbalance' is used in the United Kingdom unfair contract term provisions,[162] and it was used in the Victorian provisions.[163] Thus the cases decided in the United Kingdom and Victoria can be looked at on this point. Unfortunately the previous cases are not enlightening. As Morris P in *Director of Consumer Affairs v AAPT Ltd* observed in relation to the Victorian provisions:

> The word 'significant' simply means 'important' or 'of consequence'. It does not mean 'substantial'. It is not a word of fixed connotation and besides being elastic is somewhat indefinite. However, in its context, it is designed to identify an imbalance, to the detriment of the consumer, which should be regarded as unfair. In this sense the definition is circular. But it is impossible to avoid the notion of fairness in determining whether a term

161 *ACL* s 24(4): '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'. New Zealand's equivalent provision under *FTA* s 46L(3) is substantively the same.

162 *Unfair Terms in Consumer Contracts Regulations 1999* (UK) SI 1999/2083 reg 5(1).

163 *Fair Trading Act 1999* (Vic) s 32W, as repealed by *Fair Trading Amendment (Australian Consumer Law) Act 2010* (Vic) s 17.

> causes a significant imbalance, even though this exercise is designed to ascertain *whether* a term is unfair.[164]

It has been suggested that the test to determine whether a clause creates a significant imbalance 'should be whether there are burdens placed on the consumer that are not balanced by concessions elsewhere in the transaction'.[165] Indeed, part of the test in determining whether a term is unfair is that the court must look at the contract as a whole.[166] And in respect to the Victorian provisions it was observed that the unfairness can be 'cancelled out or ameliorated by the terms of the contract as a whole'.[167] If a balancing test is adopted, the balancing must be done properly, and not simply on the basis that one term in favour of the trader will automatically be balanced by one term in favour of the consumer. The benefit of a term in favour of the consumer must be reasonably proportionate to the disadvantage to the consumer of another term.[168] For example, a term that excluded the trader from all liability for defective products[169] would not be counterbalanced by the ability of a consumer to return goods for a full refund if the consumer was not pleased about the performance of the goods. If the trader is able to show that the term does not create significant imbalance in its favour, then that is the end of the investigation as the term will be fair.

It is difficult to see, however, how a term that allows a trader to terminate a contract if the consumer breaches any of its terms but does not allow a consumer to terminate for a breach by the trader, could be balanced by other terms in the contract.

Many standard form contracts will contain terms that cause a significant imbalance in the parties' rights and obligations arising under the contract. Indeed, the main purpose of a standard form contract from the trader's view is to limit its liability as much as is possible. However, the fact that the term causes significant imbalance is not sufficient in itself. The trader can still use that term if it is able to show that the term is 'reasonably necessary' to protect its 'legitimate interests'.

2 *Not Reasonably Necessary and Legitimate Interests*

The terms 'not reasonably necessary' and 'legitimate interests' are not defined. What then is 'reasonably necessary', and what are 'legitimate interests'? Before

164 [2006] VCAT 1493 (2 August 2006) [33] (emphasis in original) (citations omitted).

165 Paterson, above n 117, 944.

166 *ACL* s 24(2)(b); *FTA* s 46L(2)(b).

167 *Director of Consumer Affairs Victoria v Craig Langley Pty Ltd* [2008] VCAT 482 (17 March 2008) [69] (Harbison J).

168 Zumbo, above n 14, 73.

169 The ability of traders to limit liability for defective products is limited. In New Zealand, consumers are entitled to damages from the suppliers of services and suppliers and manufacturers of goods for any loss or damage to the consumer resulting from the failure which was reasonably foreseeable as liable to result from the failure: *CGA* ss 18(4), 27(1)(b), 32(c). See also *ACL* ss 259(4), 267(4), 272(1)(b). For example, in *A & W Holdings (New Zealand) v Hosking* (Unreported, Auckland High Court, Cartwright J, 14 April 1999) a faulty electric blanket caused a house fire. The consumer was awarded damages of $50 000 for damage to their house and $7 500 for inconvenience and stress caused by the fire.

looking at these the grey list becomes relevant. While it is not a black list,[170] if the term complained about is of a type that appears in the grey list the burden falls upon the trader to justify the term.

Paterson argues that a two-step test is suggested here: first, does the trader (as it is difficult to see a term that advantages a consumer) have a 'legitimate interest' that needs protection? Second, is the term 'reasonably necessary' to protect that trader's legitimate interests?[171]

(a) Legitimate Interest

One of the grey listed terms under the *ACL* is 'a term that limits, or has the effect of limiting, one party's right to sue another party',[172] thus exemption clauses are clauses that will be challenged. It has been argued that limiting the trader's vicarious liability for its agents is a legitimate interest,[173] and presumably the same argument would be made for a trader's employees. However, it is questionable whether denying liability for the acts of others is a legitimate interest. The difficulty with the argument that traders should be able to limit or exclude liability for the acts of others is that it is the trader who selects (and often supervises) its employees and agents. The common law is clear that the principal is liable for the negligent actions of its employees and agents through the doctrine of vicarious liability.[174] Insurance is the most efficient and fair way for a trader to protect itself and the trader should not be able to pass the risk of loss onto the consumer.

(b) Not Reasonably Necessary

What is not reasonably necessary will, of course, depend on the facts in each case. And it goes without saying that the test for reasonably necessary is an objective one.[175] Reasonably necessary connotes that the term must be proportionate to the interest being protected.[176] One clear example of a term that is not reasonably

170 A black list means terms that are not permitted at all in contracts. The *Unfair Contract Terms Act 1977* (UK) c 50 has a black list and a grey list of terms; the black list includes terms such as excluding or restricting a person's liability in negligence for death or personal injury resulting from negligence: at s 2(1). On the grey list were terms that excluded or restricted other forms of loss or damage resulting from negligence, provided the term satisfied the requirement of reasonableness under the Act: at s 2(2).

171 Paterson, above n 117, 944–5.

172 *ACL* s 25(1)(k). See also *FTA* s 46M(k).

173 McEwen, above n 160, 24.

174 See, eg, John Hughes, 'Vicarious Liability' in Stephen Todd (ed), *The Law of Torts in New Zealand* (Brookers, 5th ed, 2009) 1027, 1030–53 (employees), 1061–6 (agents). To be sure, the trader is not necessarily liable for all of an employee's or agent's wrongful acts, as the New Zealand Supreme Court observed in *Nathan v Dollars & Sense Ltd* [2008] 2 NZLR 557, 573 [40]:

> the Court must concentrate on the nature of the tasks to be performed on behalf of the principal and on how the use of the agent for that purpose has created risk for the third party. Without a sufficiently close connection between the task for which an agent was engaged and the unlawful action of that agent, so that the wrong can be seen as a materialisation of the risk inherent in the task, it will be neither fair nor proper to impose vicarious (strict) liability on a principal who has not necessarily been guilty of any personal negligence and so would not be directly liable to the claimant.

175 Zumbo, above n 14, 73.

176 Paterson, above n 117, 945.

necessary would be the example of a security company insisting on a 36 month notice period for a consumer to cancel a security alarm contract.[177] Gym contracts, which often require a minimum 12 month contract term, would appear to be prime examples of terms which are not reasonably necessary. The argument in defence of gyms using minimum terms of 12 months in their contracts is that such terms are necessary because the gym has invested in its equipment on the basis of the contracts it has entered into with its customers.[178] The problem with this argument is that gyms are financed, built, equipped and staffed before they enter into contracts with their customers. Moreover, these gyms tend to require a joining fee, thus consumers are covering the gyms' costs of signing them up.[179] What is the difference between a gym and the hundreds of other types of businesses? A restaurant, for example, that attempted to force consumers into entering into long term contracts if they wanted a meal in that restaurant would not be in business for long. That 12 month contracts are not required by gyms to operate is evidenced by a number of gyms that operate on a 'no contract' basis.

Traders will argue that a clause is reasonably necessary to protect their legitimate interests where, without it, they will be required to 'bear a disproportionate higher level of contractual risk or obligation than the consumer'.[180] If this argument is accepted, which on its face it must be, the converse is that equally the contractual terms cannot impose upon the consumer a higher level of contractual risk than the trader.[181] Thus, if the effect of the clause in question makes the risk fall more heavily upon the consumer, by definition it cannot be reasonably necessary.

3 *Detriment*

For a clause to be unfair it must also cause detriment (whether financial or otherwise) to a party if it were to be applied or relied upon.[182] Detriment is a minor requirement and 'may not add much'[183] to the question of whether a term is unfair. One obiter example of a term that would cause detriment to the consumer would be a term that allowed a service provider such as a telecommunication company to alter its products, with or without giving the consumer notice of those

177 See above n 131 and accompanying text.

178 Ibid. The person who defended the gyms' use of minimum terms also attempted to justify the existence of a 36 month notice period for an alarm company by saying that the latter probably did not realise such a term existed in its contract. The alarm company has since changed its standard form contract; the notice period has been cut to 12 months. A period of 12 months is still excessive for people who, for example, want to cancel the contract as they have sold their house.

179 Of course, some gyms have special offers where the joining fee is waived or lowered, or other gyms have no joining fee at all. However, in both these cases, the lack of a joining fee or a reduced joining fee is a device to lure customers into that gym.

180 Zumbo, above n 14, 73.

181 Ibid.

182 *ACL* s 24(1)(c); *FTA* s 46L(1)(c).

183 *Director General of Fair Trading v First National Bank plc* [2002] 1 AC 481, 499 [36] (Lord Steyn).

changes.[184] For example, a telecommunications company that reduced the number of calls that a person could make under a prepaid mobile phone service.[185]

4 *Transparency and the Contract as a Whole*

Before looking at the statutory test for transparency, it must be noted that transparency is not the determining factor as to whether a term is unfair. The legislative provisions are clear that transparency is only one factor in the balancing exercise, albeit the extent to which a term is transparent is a factor that the courts must take into account in assessing whether a term is unfair.[186] As the Australian Explanatory Memorandum was careful to say: '[t]ransparency, on its own account, cannot overcome underlying unfairness in a contract term'.[187] Such a construction accords with common sense. The mere fact that something is transparent does not mean that it is not unfair.[188] Take for example, the following term, '[w]hilst every effort is made to ensure that your carpet is in perfect condition, no complaints can be accepted after the carpet has been cut into … you cut it, you own it'.[189] The term is in plain language — crystal clear language — but it is nonetheless unfair, not to mention, in New Zealand and Australia, misleading of a consumers' rights.[190] Therefore, the fact that a term is clear and legible does not make it any less unfair. The inability for a transparent clause to trump unfairness is justified. First, most people do not read contracts.[191] Second, it is simply not rational behaviour for people to read contracts due to the time it would take consumers to read each contract carefully. Third, traders that use standard form contracts operate on a take it or leave it basis.[192] There is no ability for consumers to negotiate to change the contract,[193] and often all the traders in that area have similarly bad terms. Finally, disclosure of the term does not transform an otherwise unfair term into a fair one. Disclosure simply does not work, as the Productivity Commission explained, disclosing terms rarely makes a difference as 'consumers trust suppliers and do not expect to face problems'.[194]

184 *Director of Consumer Affairs v AAPT Ltd* [2006] VCAT 1493 (2 August 2006) [54] (Morris P).

185 Ibid.

186 *ACL* s 24(2)(a); *FTA* s 46L(2)(a).

187 Explanatory Memorandum, Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010 (Cth) 65 [5.39]. See also Treasury, above n 9, 12.

188 Chris Willett, *Fairness in Consumer Contracts: The Case of Unfair Terms* (Ashgate, 2007) 18: 'if we simply insist upon transparency and enforce terms as long as they are transparent, we retain the freedom of the parties to choose (based on a decent level of transparency) to agree to terms that are unfair in substance'.

189 Office of Fair Trading (UK), *Unfair Contract Terms Guidance: Consultation on Revised Guidance for the Unfair Terms in Consumer Contracts Regulations 1999* (April 2007) 87 <http://www.oft.gov.uk/shared_oft/reports/unfair_contract_terms/oft311cons-annexes.pdf>. Indeed, as a result of intervention by the Office of Fair Trading, this term was deleted from the trader's contracts.

190 This term would also be a breach of the *FTA* s 13(i) as it purports to contract out of the *CGA* which is not permitted.

191 See, eg, Lee Goldman, 'My Way and the Highway: The Law and Economics of Choice of Forum Clauses in Consumer Form Contracts' (1992) 86 *Northwestern University Law Review* 700, 716–17.

192 See, eg, Productivity Commission, above n 10, 406.

193 Ibid.

194 Ibid 157.

The courts must be extremely careful, therefore, not to fall into the trap of holding that a term which is clear and disclosed to consumers is fair.

In Australia a term is transparent if the term is expressed in reasonably plain language, legible, presented clearly and readily available to any party affected by the term.[195] The equivalent provision in New Zealand is expressed in largely the same terms.[196]

Although the UK statutory language is different, the UK unfair contract terms law refers to 'plain intelligible language'[197] — Smith J in *Office of Fair Trading v Abbey National plc* stated that the unfair contract term law:

> requires not only that the actual wording of individual clauses or conditions be comprehensible to consumers, but that the typical consumer can understand how the term affects the rights and obligations that he and the seller or supplier have under the contract … the [unfair contract terms law] does not exclude an assessment of fairness unless not only can the typical consumer understand the actual wording used in the contractual documentation but also its effect.[198]

It is not a stretch of the legislative wording to ensure that transparency in Australia and New Zealand means that consumers understand the term and its consequences. It is arguable that long contracts with important terms buried in them are arguably not transparent and should be found to be unfair. This is because of the requirement in the test for transparency that the term be 'presented clearly'[199] and the court in assessing whether a term is unfair must take into account 'the contract as a whole'.[200] Thus it would be difficult for an important term buried in a lengthy contract to be found to be transparent.[201] This is especially important in New Zealand in relation to fees and other charges.

Finally, the Explanatory Memorandum to the *ACL* states that 'the extent to which a term is not transparent is not, of itself, determinative of the unfairness of a term in a consumer contract and the nature and effect of the term will continue to be relevant'.[202] This cryptic comment could be read in more than one way. The best interpretation is that: if the term itself does not create a substantial imbalance in favour of the trader, or it does create such an imbalance, but it is reasonably necessary to protect the legitimate interests of the trader, then the term will not be found to be unfair simply because it is not transparent.

195 *ACL* s 24(3).

196 *FTA* s 2(1).

197 *Unfair Terms in Consumer Contracts Regulations 1999* (UK) SI 1999/2083 reg 6(2).

198 [2008] EWHC 875 (Comm) (24 April 2008) [103].

199 *FTA* s 2(1) (definition of 'transparent').

200 Ibid s 46L(2)(b).

201 See generally Jeffrey Davis, 'Protecting Consumers from Overdisclosure and Gobbledygook: An Empirical Look at the Simplification of Consumer-Credit Contracts' (1977) 63 *Virginia Law Review* 841, a study showing that the understanding of terms in contracts can significantly increase with simplified language and fewer words.

202 Explanatory Memorandum, Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010 (Cth) 65 [5.39].

C *The Effect of a Term Found to be Unfair*

Once a term is found to be unfair, the final question is what is the effect of such a finding? Certainly the affected consumer benefits as the term cannot be enforced against that consumer. The larger question, once a term has been found to be unfair, is what are the broader effects of this finding? Australia and New Zealand differ on this point.

In Australia a contract term which is found to be unfair is void,[203] thus the trader is unable to enforce it against that particular consumer, although the remainder of the contract is still valid. If the consumer or regulator wishes for non-parties to that contract — other consumers of the trader who have the same clause in their standard form contracts — to also benefit by having the clause in their contract found to be void, the consumer or regulator must apply for a declaration that the term of the contract is an unfair term.[204] The requirement to seek a declaration for non-parties means the effect of the Australian unfair contract terms law is limited: if a consumer is taking the action it is unlikely that she will be public minded enough to bear the time and expense of applying for a declaration. On the other hand, the regulator who will naturally seek a declaration has to satisfy the court that such a declaration should be made. While declarations have been made under the Victorian provisions,[205] it does not mean that declarations will be granted automatically.[206]

In contrast, in New Zealand s 26A(1) of the *FTA* provides that:

> If a court has declared, under section 46I, that a term in a standard form consumer contract is an unfair contract term, a person must not—
>
> (a) include the unfair contract term in a standard form contract (unless the term is included in a way that complies with the terms (if any) of the decision of the court); or
>
> (b) apply, enforce, or rely on the unfair contract term in a standard form contract.

203 *ACL* s 23(1).

204 Ibid s 250.

205 See, eg, *Director of Consumer Affairs Victoria v Craig Langley Pty Ltd* [2008] VCAT 482 (17 March 2008) (Harbison J). For details of the letter sent to the trader's customers whose contracts contained the same unfair contract terms, see *Director of Consumer Affairs Victoria v Craig Langley Pty Ltd* [2008] VCAT 1332 (14 July 2008) (Harbison J).

206 See, in a different context, *ACCC v Danoz Direct Pty Ltd* [2003] FCA 881 (22 August 2003) where approximately 100 000 AbTronic Fitness Systems were sold at $165 each. The AbTronic failed to do that which it promised, such as being able to 'flatten your stomach once and for all'. The Court held that there had been numerous breaches of s 52 of the *Trade Practices Act 1974* (Cth) (equivalent to *FTA* s 9). The Court, however, was extremely reluctant to order that the first respondent refund other customers who had purchased the AbTronic because the first respondent would not be able to cross examine those customers to see if they had relied upon the misleading claims: *ACCC v Danoz Direct Pty Ltd* [2003] FCA 881 (22 August 2003) [270]. The Court held it had no power to award a refund to non-parties: at [275]. The case demonstrates a reluctance of some courts to protect non-parties.

Thus in New Zealand a term will only be found to be unfair by the court if the court has declared that it is unfair.[207] The practical effect is that in New Zealand a finding that a term is unfair will mean that it extends automatically to the businesses' contracts with other consumers, thus the trader would be unable to enforce that term against its other customers who had the same standard form contract. There is no need for the Commerce Commission to take further steps to protect the trader's other consumers who have the same standard form contract. In addition, the trader who used the unfair contract term would have committed an offence.[208] In contrast, in Australia there is no obvious criminal sanction that can be taken against a company that used the unfair contract term.

The final question is how far do the consequences of finding a term to be an unfair contract term extend? Do they extend to different standard form contracts used by that trader that includes an identical term, or another trader who uses an identical term in its standard form contract? In Australia, the answer would be that unless the regulator can show the trader the error of its ways and convince it to change the term voluntarily; the regulator (or consumer) must begin proceedings in the courts.

In New Zealand there are two possible approaches the courts can take. First the courts could decide that once a court declares a term to be an unfair contract term, that unfair contract term cannot be used in another standard form contract by that trader, or any other trader. In effect a black list has been created: the use of an identical term will automatically be an offence. Thus if a case was taken to court concerning the same term there would be no need for the Commerce Commission to demonstrate that it was an unfair contract term. The only question for the court would be the level of the fine. The second approach would be to accept that each contract will be different and thus each contract must be looked at on its merits, thus the trader may well be able to show that the term was not unfair as the presence of other terms in favour of the consumer meant there was no significant imbalance. The use of the term in a different standard form contract may be found to be justified as it was reasonably necessary to protect the trader's legitimate interests. Both options have their strengths. For example, the first approach provides certainty; however, on balance it is likely for the courts to take the second path. While the second approach is understandable, if a term has previously been declared unfair, if the same term comes before a court and is also found to be unfair, the second court must impose the fullest fines possible under the *FTA*. The trader after all would have known that attempting to rely on a clause that had previously been found to be unfair was playing with fire.

207 See *Consumer Law Reform Bill*, Commentary, 4: 'A term is an unfair contract term only if it is declared to be such by the High Court or a District Court, on the application of the Commerce Commission'.

208 *FTA* s 40(1): '(a) in the case of a person other than a body corporate, to a fine not exceeding $60,000; and (b) in the case of a body corporate, to a fine not exceeding $200,000'. The Commerce Committee was clear of its intent to criminalise the use of unfair contract terms: the '[n]ew section 26A would prohibit the use of unfair contract terms in standard form contracts. Contravention of this prohibition would give rise to the remedies described in Part 5 of the *Fair Trading Act*': *Consumer Law Reform Bill*, Commentary, 4. See also Meryll Dean, 'Unfair Contract Terms: The European Approach' (1993) 56 *Modern Law Review* 581, 588, who recommended criminal sanctions for unfair contract terms as '[a] "mere" declaration of invalidity may not be "adequate and effective" as a means of control'.

V CONCLUSION

The regulation of unfair contract terms in Australia and New Zealand is welcome. The deliberate omission of a good faith requirement is sensible as it has caused more problems than it has solved in the United Kingdom and Victoria. This article has suggested numerous places where amendments could and should be made: for example, some to fix drafting errors — currently under the *ACL* there is no requirement for the upfront price to be transparent; while others are more contentious, that New Zealand follow Australia and exclude fees and other charges from the upfront price, allow consumers in New Zealand to challenge unfair contract terms and allow the Disputes Tribunal to hear unfair terms cases.

Notwithstanding the existence of laws preventing the use of unfair contract terms, will the law be effective in the sense of removing unfair contract terms from standard form consumer contracts, or failing that, at least preventing the egregious use of unfair contract terms? Sadly, even if the courts do throw off the shackles of freedom of contract and the rational consumer, and approach the interpretation of the legislation with the same spirit as the Victorian Civil and Administrative Tribunal, such judicial action will not in itself be sufficient. For example, when the Commission of the European Communities reported back on the implementation of the *European Council Directive on Unfair Terms in Consumer Contracts*,[209] it lamented that:

> the civil penalties provided for by the Member States do not seem sufficient to protect consumers and to effectively oblige professionals to refrain from using unfair terms.
>
> Indeed the only risk (and it is a minor one) run by the [trader] when a consumer challenges a term before the courts is that this term may be declared invalid. Besides, when an action for an injunction is brought against a [trader] the only risk [it] runs is that [it] may have to replace the offending term by another one. In both cases the [trader] is ultimately in a situation pretty similar to the one which would have existed if [it] had never used the unfair term. However, [it] can make the most of the term in respect of all consumers who do not have the information or wherewithal to react. In the case of injunctions the penalty is not dissuasive enough to the extent that it does not penalise the prior use of the unfair term, but simply means that the [trader] may not use it in future.[210]

Granted, in New Zealand there are criminal penalties for the use of unfair contract terms. However, the presence of criminal penalties in other areas of New Zealand's consumer law has not seen traders cease their illegal activity. For example, the *CGA* in New Zealand is clear that where suppliers supply services to a consumer

209 *Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts* [1993] OJ L 95/29.

210 Commission of the European Communities, *Report from the Commission on the Implementation of Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts* (April 2000) 20 <http://ec.europa.eu/consumers/cons_int/safe_shop/unf_cont_terms/uct03_en.pdf>.

there is a guarantee that the service will be carried out with reasonable care and skill,[211] and while an appropriately phrased exclusion clause can deny liability for both breach of contract and negligence, such clauses cannot operate to defeat the operation of the *CGA*.[212] Indeed, it is an offence to attempt to attempt to contract out of the *CGA*.[213] Despite this, many New Zealand businesses routinely flout the law.[214]

Therefore, the key aspect of the success of the unfair contract terms law in both Australia and New Zealand lies as much with events outside of the courtroom than within it. The clearest law is of little effect if it is not enforced. The regulators in both Australia and New Zealand must work intensively with traders to ensure that terms which are unfair are removed and substituted with fair ones.[215]

211 *CGA* s 28.

212 See *Jetz International Ltd v Orams Marine Ltd* [1999] DCR 831.

213 *CGA* s 43(4).

214 See, eg, Wilson Parking, one of New Zealand's largest parking firms, has a clause that purports to deny all liability for any loss or damage done to its customers' cars however caused, and is thus a clear breach of *CGA* s 43(4). The clause states:

> While we shall take all reasonable care, we cannot guarantee the security of your vehicle. We accept no liability for any claim by you or any other person, whether for loss or damage to you or any other person or to your vehicle or any other vehicle, whether resulting from using the car park or being unable to use the car park or from our negligence or otherwise.

Wilson Parking, *Terms and Conditions*, cl 8 <http://www.wilsonparking.co.nz/go/footer/terms-and-conditions>.

215 For example, after the *ACL* came into force the ACCC reviewed standard form consumer contracts in the airline, telecommunications, fitness and vehicle rental industries, some contracts commonly used by online traders and some contracts used by prominent travel agents. The ACCC then worked with traders to amend potentially unfair contract terms. The ACCC reported that most businesses worked with the ACCC to align their terms with the *ACL* and in relation to airline contracts '79% of problematic terms identified by the ACCC [were] amended or deleted as a result of the review': ACCC, above n 1, 1.