

# UNFAIR CONTRACTS AND THE CONSUMER LAW BILL

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*The federal government has recently introduced the Trade Practices Amendment (Australian Consumer Law) Bill 2009 (Cth) (the Bill) into Parliament. It proposes major consumer law reforms, including the introduction of a general regime relating to unfair contracts. The incidence of unfair terms in contracts is seen to be high.<sup>1</sup> In this paper, the reforms relating to unfair contracts are critically considered, as well as the background to the introduction of such provisions and their rationale. The importance of the proposed changes in light of existing principles in this area will also be noted. The paper will note, but not discuss in detail, the changes made to remedies in the context of breach of consumer protection laws that the amending Bill proposes.*

## I OUTLINE OF PROPOSED LEGISLATION

Schedule 1 of the Bill contains the proposed new *Australian Consumer Law*, which will be included as a schedule in the *Trade Practices Act 1974* (Cth). It deals with unfair and prohibited contract terms. Clause 2 sets out the key provision – that a term of a consumer contract is void if:

- (a) the term is unfair; and
- (b) the contract is a standard form contract.<sup>2</sup>

There is provision for severance of the void term.<sup>3</sup> Clause 2 relies on definitions of three key concepts: (i) a consumer contract; (ii) an unfair term; and (iii) a standard form contract. It is necessary to explain each of these in more depth.

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<sup>1</sup> The Productivity Commission estimated that there might be 30 000 cases each year in Australia involving perceived detriment associated with unfair contracts. United Kingdom evidence is that 4% of annual cases of consumer detriment were caused by unfair terms: *Review of Australia's Consumer Policy Framework* (2008) 428 ('Productivity Commission Report'). Consumer Affairs Victoria estimated that 17% of consumers had experienced unfair contract terms: *Unfair Contract Terms in Victoria: Research into Their Extent, Nature, Cost and Implications* Research Paper No 12 (2007).

<sup>2</sup> The clause does not apply to a term of the consumer contract if it merely defines the main subject matter of the contract, sets the upfront price, or is a mandatory term required by Commonwealth or State law (cl 5). However, the new regime also applies to financial services and financial products (sch 3). The definitions of consumer contract, unfairness and standard form contracts in this context are the same as in the context of goods and other services so it is not proposed to discuss these separately. However, these provisions amend the *Australian Securities and Investments Commission Act 2001* (Cth).

The definition of *consumer contract* is found in cl 2(3) of the schedule to mean a contract for the supply of goods or services, or 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.<sup>4</sup>

A term of a consumer contract is *unfair* if (a) it would cause a significant imbalance in the parties' rights and obligations arising under the contract; and (b) it is not reasonably necessary<sup>5</sup> to protect the legitimate interests of the party that would be advantaged by the term. The court can take account of all matters, but is required by the Bill to take into account the extent to which the term would cause, or there is a substantial likelihood it would cause, detriment to a party if it were relied on, the extent to which the term is transparent,<sup>6</sup> and the contract as a whole.<sup>7</sup>

The Bill gives some non-exhaustive examples of the kinds of terms of a consumer contract that may be unfair:<sup>8</sup>

- (a) a term that permits one party (but not another) to avoid or limit performance of the contract;
- (b) a term that permits one party (but not another) to terminate the contract;
- (c) a term that penalises one party (but not another) for a breach or termination of the contract;
- (d) a term that permits one party (but not another) to vary the terms of the contract;
- (e) a term that permits one party (but not another) to renew or not renew the contract;
- (f) a term that permits one party to vary the upfront price payable under the contract without the right of another party to terminate the contract;
- (g) a term that permits one party unilaterally to vary the characteristics of the goods or services to be supplied, or the interest in land to be sold or granted, under the contract;
- (h) a term that permits one party unilaterally to determine whether the contract has been breached or to interpret its meaning;
- (i) a term that limits one party's vicarious liability to its agents;

<sup>3</sup> The remaining contents of the contract will continue to apply provided they are operational without the severed term: Trade Practices Amendment (Australian Consumer Law) Bill 2009 (Cth) cl 2(2).

<sup>4</sup> This definition is somewhat similar to the existing definition of 'consumer' in s 4B of the *Trade Practices Act 1974* (Cth), but differs in that s 4B applies where either the transaction is below a certain dollar amount (no equivalent in the proposed new provision), or where the goods were of a kind ordinarily acquired for personal, domestic or household use or consumption, or consisted of a commercial road vehicle. The proposed new Australian Consumer Law Bill definition refers to the purpose of the actual purpose of this acquisition, not whether such acquisitions are usually for a private purpose, and no reference is made to commercial road vehicles. However, the Bill does not apply to contracts of marine salvage or towage, chartering of a ship, or a contract for the carriage of goods by ship (see cl 8). In respect of the definition of 'consumer' in the legislation of various states, there is a divergence of approaches: S Corones and S Christensen, *Comparison of Generic Consumer Protection Legislation* (2007) 40-6. Corones and Christensen also observe that, in varying degrees, provisions of State fair trading legislation can apply to contracts where a corporation is the purchaser, including occasions where the acquisition is for business purposes (54-5), and to cases where individuals acquire services for business purposes (58-9).

<sup>5</sup> The onus is on the party who would benefit from the clause to prove the term if reasonably necessary in this context.

<sup>6</sup> A term is transparent if it is (a) expressed in reasonably plain language; (b) is legible; (c) is presented clearly; and (d) is readily available to any party affected by the term.

<sup>7</sup> Trade Practices Amendment (Australian Consumer Law) Bill 2009 (Cth) cl 3(1), (2).

<sup>8</sup> In the list, references to 'permits' include references to 'has the effect of permitting', 'punish' includes 'has the effect of punishing', and the same for the use of the words 'limits' and 'imposes'.

- (j) a term that permits one party to assign the contract to the detriment of another party without their consent;
- (k) a term that limits one party's right to sue another;
- (l) a term that permits the evidence one party can adduce in proceedings relating to the contract;
- (m) a term that imposes the evidential burden on one party in proceedings relating to the contract;
- (n) a term of a kind prescribed by regulations.<sup>9</sup>

It is presumed that a contract is a standard form contract. Relevant factors are for the court to determine, but must include:

- (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 a discussion relating to the transaction occurred between parties;
- (c) whether another party was, in effect, required either to accept or reject the terms of the contract as presented by the other;
- (d) whether another party was given an effective opportunity to negotiate the terms of the contract;
- (e) whether the contract terms take into account the specific characteristics of another party to the transaction;
- (f) any other matter prescribed by regulation.

If a court finds according to the rules above that a clause is an unfair one, it will be struck out of the contract. This does not mean the party who would have obtained the benefit of such a clause has breached the Act.<sup>10</sup> However, if after the court ruling, that party seeks to rely on such a clause, they would then be in breach of the Act. Further, a party that would derive the benefit of a 'prohibited term' under the regulations (once made) would also breach the Act. The ACCC can seek an injunction in respect of the use of unfair terms, and compensation can be ordered to a person who suffers loss or damage as a result of that conduct.<sup>11</sup> The Bill also proposes the introduction of civil pecuniary penalties both for breaches of the Australian Consumer Law and other consumer protection provisions of the *Trade Practices Act 1974* (Cth).<sup>12</sup>

## II RATIONALE FOR NATIONAL CONSUMER LAW APPROACH

### A *Duplication, Lack of Consistency*

The draft legislation is based on recommendations contained in the 2008 Productivity Commission Report.<sup>13</sup> The Commission recommended that Australia introduce a

<sup>9</sup> The regulations can also provide for 'prohibited terms' (cl 6). No draft regulations are currently available.

<sup>10</sup> Trade Practices Amendment (Australian Consumer Law) Bill 2009 (Cth) cl 4KC.

<sup>11</sup> Trade Practices Amendment (Australian Consumer Law) Bill 2009 (Cth) sch 2, pt 7 cl 40, 44 respectively.

<sup>12</sup> This is the proposed new s 76E of the *Trade Practices Act 1974* (Cth). Disqualification orders will also be available against individuals in relation to activities of companies (new s 86E(1B)). Infringement notices will also be available in relation to breaches of the consumer protection provisions (pt 5) as well as public warning notices (pt 6). It is not proposed to discuss the question of remedies for breach of consumer protection laws in detail in this paper.

<sup>13</sup> Productivity Commission Report, above n 1.

national consumer law model jointly enforced by the Australian government and States and Territories, to replace the existing model of federal and state legislation. The Commission had noted the costs of compliance with a patchwork of different laws. Corones and Christensen, in a commissioned research report, had noted the significant differences in consumer protection legislation among states, and between the Commonwealth legislation and state regimes.<sup>14</sup> Harmonisation of these laws was estimated to save between A\$1.5 and A\$4.5 billion per year.<sup>15</sup> By adopting a national regulatory approach, the law would be adapting to changes in business models. The Productivity Commission noted that in 2007, almost 50 per cent of goods and services measured by turnover were supplied by firms operating nationally.<sup>16</sup> Since 2003, there had been a 70 per cent increase in firms operating nationally, and exponential growth in e-business. These realities made State-based approaches to consumer regulation increasingly incongruous.

## B *Sufficiency of Current Non-Statutory and Statutory Approaches to Unfairness in Contracts*

In assessing the need for, and merits of, the proposed unfair contracts regime, one should consider the mooted reforms in light of the current law in this area, governed by both non-statutory law<sup>17</sup> and statute.

### 1 *Non-Statutory Law*

It is trite to observe that traditional principles of contract law did not deal comprehensively with allegations of ‘unfairness’ in relation to contracts,<sup>18</sup> and not surprisingly there have been many calls for statutory intervention in this area due to this perceived inadequacy.<sup>19</sup> Contracts were assumed to have been made by well-informed, educated and experienced people who had been appropriately advised. They were thoroughly aware of the nature and contents of the contractual bargain and had made a conscious decision to contract to trade something worth less for something worth more. They were rational, utility maximisers, in the words of economists. The law’s responsibility was to uphold and enforce such bargains, not to interfere with them.<sup>20</sup> The

<sup>14</sup> Corones and Christensen, above n 4.

<sup>15</sup> Ibid 3.

<sup>16</sup> Productivity Commission Report, above n 1, 15, 51-2.

<sup>17</sup> This term, rather than ‘common law’ is used to avoid confusion, as the doctrine of unconscionability is typically recognised to be an equitable doctrine.

<sup>18</sup> P Atiyah, ‘Contract and Fair Exchange’ (1985) 35 *University of Toronto Law Journal* 1, 2.

<sup>19</sup> Some of the recent literature includes N Howell, ‘Catching Up with Consumer Realities: The Need for Legislation Prohibiting Unfair Terms in Consumer Contracts’ (2006) 34 *Australian Business Law Review* 447; F Zumbo, ‘Dealing with Unfair Terms in Consumer Contracts: Is Australia Falling Behind?’ (2005) 13 *Trade Practices Law Journal* 70; B Horrigan, ‘The Expansion of Fairness-Based Business Regulation – Unconscionability, Good Faith and the Law’s Informed Conscience’ (2004) 32 *Australian Business Law Review* 159; L Griggs, ‘The ‘(Ir)rational Consumer and Why We Need National Legislation Governing Unfair Contract Terms’ (2005) 13 *Competition and Consumer Law Journal* 51; J Davidson, ‘Unfair Contract Terms and the Consumer: A Case for Proactive Regulation?’ (2007) 15 *Competition and Consumer Law Journal* 74; P O’Shea, ‘All’s Fair in Love and War – But Not Contract’ (2004) 23 *University of Queensland Law Journal* 227. The Productivity Commission Report justifies government regulation of private contracts where there is ‘market failure’, including gaps in information provision, cognitive limitations or in order to achieve social justice goals. Refer, Productivity Commission Report, above n 1, 30.

<sup>20</sup> An alternative view is presented by Stephen Smith, who argues the law should not enforce contracts where the price differs significantly from the ‘normal’ price, where the worse off party cared about

adequacy of contractual consideration was not relevant to the validity of the bargain. Very much exceptionally, a party might be able to rely on non est factum, undue influence, or mistake to avoid a transaction apparently voluntarily entered into. In more recent times, principles of estoppel or restitution might be of assistance in some cases coming with the broad umbrella of ‘unfair contracts’, but perhaps the doctrine of unconscionability has come to be regarded as the primary doctrine by which contracts alleged to be tainted by some kind of ‘unfairness’ might be challengeable legally.<sup>21</sup>

Typically, the doctrine of unconscionable conduct, at least in Australia, requires:

- (1) proof that one party to a contract suffers some kind of ‘special disadvantage’;<sup>22</sup>
- (2) knowledge of that special disadvantage by the stronger party; and
- (3) exploitation of that advantage by the stronger party.<sup>23</sup>

Different views are evident on the precise nature of the ‘special disadvantage’ required by the common law. For example, in *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd*,<sup>24</sup> Gleeson CJ stated that ‘unconscientious exploitation of another’s ability, or diminished ability, to conserve his or her own interests is not to be confused with taking advantage of a superior bargaining position’.<sup>25</sup> Gummow and Hayne JJ,<sup>26</sup> and Callinan J,<sup>27</sup> agreed that the applicants’ difficult bargaining position did not amount to a special disadvantage.

Further, the courts have distinguished between what some call procedural fairness, and substantive fairness. The occasions where a court has been prepared to intervene on the basis of unconscionable conduct have tended to be where there has been a lack of procedural fairness, in other words factors that mean one of the parties is not giving informed consent to the transaction, pressure was placed on a party to sign the contract etc. The courts in applying the non-statutory doctrine of unconscionable conduct have not been as willing to consider substantive fairness, in other words the actual content of the clauses of the contract, perhaps on the assumption that these were freely negotiated and entered into by informed and knowledgeable parties, so as long as there was no procedural unfairness, substantial unfairness in particular clauses are not grounds for the

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price, was not making a gift, was not mistaken about the value of the good and was not in a better position than the gaining party to obtain the normal price: ‘In Defence of Substantive Fairness’ (1996) 112 *Law Quarterly Review* 138, 154. See also Howell, above n 19, 447, 463: ‘a substantively unfair consumer contract is not one that the law should support’, and the Productivity Commission Report, above n 1, 414: ‘contesting the ethical rationale for laws against unfair contracts would represent an unravelling of legal principles formed over centuries’.

<sup>21</sup> There is no consensus that unconscionability means unfairness. For example, see G Dal Pont, ‘The Varying Shades of Unconscionable Conduct – Same Term, Different Meaning’ (2000) 19 *Australian Bar Review* 135, 138: ‘the purpose and role of the doctrine of unconscionability is not to arm the courts with a general power to set aside bargains simply because, in the eyes of the judges, those bargains appear to be unfair, unjust, onerous, harsh or unconscionable’.

<sup>22</sup> Special disadvantage has been defined to include illness, ignorance, inexperience, impaired facilities, financial need or other circumstances that affect a person’s ability to conserve their own interests: *Blomley v Ryan* (1956) 99 CLR 362, 415 (Kitto J), Fullagar J in the same case noted poverty or need of any kind, sickness, age, sex, infirmity of body or mind, drunkenness, illiteracy, lack of education, lack of assistance or explanation where assistance or explanation may be necessary.

<sup>23</sup> *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447.

<sup>24</sup> (2003) 214 CLR 51.

<sup>25</sup> *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd* 214 CLR 51, 64.

<sup>26</sup> *Ibid* 77-9.

<sup>27</sup> *Ibid* 115-16.

courts' intervention.<sup>28</sup> This distinction has served to further limit the ability of the doctrine of unconscionable conduct to deal with 'unfairness' in contracts.

The courts have been wary of extending the doctrine of unconscionable conduct 'too far' to disturb parties' bargains. They are aware of the danger that the concept of fairness is inherently a subjective assessment, and have been concerned that the law in this area becomes idiosyncratic and lacking in principle.<sup>29</sup> While this concern is understandable, the fact that the Commonwealth government now sees fit to introduce a national consumer law dealing with unfair contracts might reflect its assessment that the non-statutory doctrine of unconscionability, as interpreted and together with other non-statutory doctrines dealing with contractual aspects under the broad umbrella of 'unfairness', has not sufficiently protected consumers from take it or leave it standard contracts written by powerful businesses. The very purpose of the reforms is to remedy a perceived problem caused by contracts between parties of unequal bargaining power, in contrast to non-statutory law which refuses to intervene for this reason alone.

The other problem with relying on the doctrine of unconscionability to deal with unfairness in contracts is that, as noted by Zumbo and Howell, these rules rely on an individual being willing and able to challenge the provisions in court.<sup>30</sup> The Productivity Commission found existing processes to be 'very costly, slow and uncertain in their application'.<sup>31</sup> Even if the challenge is successful, the remedy applies only to that individual, given the focus of the doctrine is largely on procedural aspects leading up to negotiation of that individual contract, rather than being applicable to a broad number of consumers.<sup>32</sup> Howell concludes:

A regime that focuses on procedural unfairness normally requires separate litigation for each affected consumer, as the procedural irregularities may differ from one consumer to the next. The costs and hurdles for consumers taking individual legal actions can be very

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<sup>28</sup> P O'Shea, 'All's Fair in Love and War – But Not Contract' (2004) 23(1) *University of Queensland Law Journal* 226, 231; J Davidson, 'Unfair Contract Terms and the Consumer: A Case for Proactive Regulation?' (2007) 15 *Competition and Consumer Law Journal* 74; S Smith, 'In Defence of Substantive Fairness' (1996) 112 *Law Quarterly Review* 138.

<sup>29</sup> Brennan J in *Stern v McArthur* (1988) 165 CLR 489, 514; and in *Louth v Diprose* (1992) 175 CLR 621, 654: 'if unconscionability were regarded as synonymous with the judge's sense of what is fair between the parties, the beneficial administrations of the broad principles of equity would degenerate into an idiosyncratic intervention'; another example appears in the judgment of Kirby P (as he then was) in *Austotel Pty Ltd v Franklins SelfServe Pty Ltd* (1989) 16 NSWLR 582, 586 where he noted 'the wellsprings of the conduct of commercial people are self-evidently important for the efficient operation of the economy. Their actions typically depend on self-interest and profit-making not conscience or fairness. In particular circumstances protection from unconscionable conduct will be entirely appropriate. But courts should, in my view, be wary lest they distort the relationships of substantial, well-advised corporations in commercial transactions by subjecting them to the overly tender consciences of judges'. K Mason, 'Restitution in Australian Law' in P Finn (ed), *Essays on Restitution* (1990) 1, 41 called on judges to 'rein in unconscionability lest it become an entirely unruly horse'.

<sup>30</sup> F Zumbo, 'Dealing With Unfair Terms in Consumer Contracts: Is Australia Falling Behind?' (2005) 13 *Trade Practices Law Journal* 70; Howell, above n 19, 447.

<sup>31</sup> 'Actions often take years to progress and cost hundreds of thousands of dollars and sometimes millions for single cases. They set a hurdle for unconscionability that is high and their application to the use of unfair terms, while evolving, is still not clear': Productivity Commission Report, above n 1, 154.

<sup>32</sup> Zumbo, above n 30; Howell, above n 19, 447.

high, with the result that, in some cases, legal rights will not be pursued and unfair practices may continue unchecked.<sup>33</sup>

Pragmatically, this might lead businesses to ‘roll the dice’ in terms of their business practices in relation to contracts, willing to risk that few or any consumers affected by unfair provisions will be willing and able to enforce, and cognisant enough of, their rights in this area.

## 2 Statute

Existing provisions of the *Trade Practices Act 1974* (Cth) and other legislation<sup>34</sup> deal with conduct that is considered ‘unconscionable’. These include s 51AA, which prohibit a corporation in trade or commerce<sup>35</sup> from engaging in unconscionable conduct within the meaning of the common law, and s 51AB which prohibits unconscionable conduct in relation to the supply or possible supply of goods or services to a person. Relevant factors are stated to include (a) the relative strengths of the bargaining positions of the corporation and the consumer; (b) whether, as a result of conduct engaged in by the corporation, the consumer was required to comply with conditions not reasonably necessary for the protection of the corporation’s legitimate interests; (c) whether the consumer was able to understand any documents relating to the supply; and (d) whether any undue influence or pressure was exerted on, or unfair tactics used against, the consumer. Section 51AC applies a similar regime to business to business transactions, with the above factors and other listed factors relevant in assessing whether conduct was unconscionable or not.

There remains different views as to the extent to which the unconscionability provisions in the *Trade Practices Act 1974* (Cth) improve on some of the perceived limitations of the common law doctrine. In part, this reflects different views as to whether the statutory protection is of wider ambit than the common law. The full federal Court was cautious about this; in discussing the *Trade Practices Act 1974* (Cth) provisions, it noted that they:

May arguably take the concept of unconscionability beyond that developed by the courts of equity ... and may comprehend a degree of disadvantage which may not amount to the special disability spoken of in the High Court authorities.<sup>36</sup>

There remains doubt as to the extent to which the *Trade Practices Act 1974* (Cth) provisions allow focus to be on substantive unfairness as well as procedural fairness, a perceived deficiency in the common law approach.<sup>37</sup> While some of the provisions do

<sup>33</sup> Howell, above n 19, 461 (speaking here of the doctrine of unconscionability both in the non-statutory sense and under the existing statutory regimes).

<sup>34</sup> For example, fair trading legislation in each State, as well as industry-specific provisions. The differences in application of unconscionability provisions federally and at state level are summarised in Corones and Christensen, above n 4, 66-8.

<sup>35</sup> Subject to the s 6(2) and s 6(3) extensions of the *Trade Practices Act 1974* (Cth).

<sup>36</sup> *Dai v Telstra Corporation Ltd* (2000) 171 ALR 348, [29]. Corones and Christensen conclude there is some evidence that judges are willing to extend the concept of unconscionability in s 51AC beyond the common law understanding. Refer Corones and Christensen, above n 4, 65.

<sup>37</sup> The Productivity Commission concluded that ‘while the unconscionability provisions in the generic consumer law can theoretically be used to address abuse of unfair terms, that route is very costly and slow, and there is a lack of clarity about its precise applicability in this area’. Productivity Commission Report, above n 1, 34, 412. It notes one case involving costs of A\$70 000 to have

arguably consider the specific terms of the contract in assessing whether conduct was unconscionable,<sup>38</sup> others doubt the extent to which the *Trade Practices Act 1974* (Cth) provisions as interpreted have in fact dealt with substantive unfairness.<sup>39</sup> In two federal Court decisions, this attitude is apparent. Firstly, in *Hurley v McDonald's Australia Ltd*, the Full Court concluded that:

Before ss 51AA, 51AB or 51AC will be applicable, there must be some circumstance other than the *mere* terms of the contract itself that would render reliance on the terms of the contract 'unfair' or 'unreasonable' or 'immoral' or 'wrong' (emphasis added).<sup>40</sup>

These comments were mirrored by Nicholson J in *Australian Competition and Consumer Commission v Lux Pty Ltd*:

To ground a finding of contravention of s 51AB, there must be some circumstance other than the mere terms of the contract itself which renders reliance on the terms of the contract unconscionable.<sup>41</sup>

Further, some of the reluctance to expand the doctrine at common law, to avoid subjectivity and uncertainty in contract enforceability, has appeared in the context of interpretation of the statutory provisions. For example, Spigelman CJ in the context of considering 'unconscionability' in leasing legislation stated that:

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allegations of unfair treatment heard. The Explanatory Memorandum to the Trade Practices Amendment (Fair Trading) Bill 1997 (Cth) stated that the intention of the amendments was to broaden the meaning of unconscionable conduct from mere procedural fairness to substantive fairness, but arguably the cases don't demonstrate that this has, in fact, occurred. Nicole Dean argued that s 51AC should lead to different results in some cases than those that would be obtained by use of s 51AA (the non-statutory law of unconscionability): 'Cases and Comments: *ACCC v Berbatis Holdings*' (2004) 26 *Sydney Law Review* 255; as does E Webb, 'Fayre Play for Commercial Landlords and Tenants – Lessons for Lawyers' (2001) 9 *Australian Property Law Journal* 99; and B Horrigan, 'Unconscionability Breaks New Ground – Avoiding and Litigating Unfair Client Conduct After the ACCC Test Cases and Financial Services Reforms' (2002) 7 *Deakin Law Review* 73. In the context of commercial leasing arrangements, see S Christensen and B Duncan, 'Unconscionability in Commercial Leasing – Distinguishing a Hard Bargain from Unfair Tactics?' (2005) 13 *Competition and Consumer Law Journal* 158.

<sup>38</sup> For example, s 51AB(2)(b) (and s 51AC(3)(b)) in the business-to-business context considering whether as a result of the conduct of the corporation, the consumer was required to comply with conditions not reasonably necessary for the protection of the corporation's legitimate interests; and s 51AC(3)(e) (business-to-business) the amount for which, and the circumstances under which, the business consumer could have acquired identical or equivalent goods or services from another provider.

<sup>39</sup> For example, James Davidson claims that the 'arguably enlarged doctrine may still not provide relief in pure cases of substantive unfairness': 'Unfair Contract Terms and the Consumer: A Case for Proactive Regulation?' (2007) 15 *Competition and Consumer Law Journal* 74; see also P Strickland, 'Rethinking Unconscionable Conduct under the Trade Practices Act' (2009) 37 *Australian Business Law Review* 19, 29 'unconscionability under s 51AC has the potential to cover substantive unfairness, rather than merely procedural unfairness, which is what equity addresses'. Lynden Griggs concludes that 'at the present time, the courts appear reluctant to extend the sphere of operation of (the unconscionability provisions of the TPA) to include purely substantive grounds': 'The (Ir)rational Consumer and Why We Need National Legislation Governing Unfair Contract Terms' (2005) 13 *Competition and Consumer Law Journal* 51. Griggs cites *Hurley v McDonald's Australia Ltd*, (2000) ATPR 41-741, 40, 585 where the court found that 'before s 51AA, AB or AC will be applicable, there must be some circumstance other than the mere terms of the contract itself that would render reliance on the terms of the contract 'unfair' or 'unreasonable' or 'immoral' or 'wrong'; Coronos and Christensen, above n 4, 65.

<sup>40</sup> *Hurley v McDonald's Australia Ltd* (2000) ATPR 41-741, 29-31.

<sup>41</sup> *Australian Competition and Consumer Commission v Lux Pty Ltd* [2004] FCA 926, [94].



Unconscionability is a well-established but narrow principle in equitable doctrine. It has been applied over the centuries with considerable restraint and in a manner which is consistent with the maintenance of the basic principles of freedom of contract. It is not a principle of what ‘fairness’ or ‘justice’ or ‘good conscience’ requires in the particular circumstances of the case ... Unconscionability is a concept which requires a high level of moral obloquy. If it were to be applied as if it were equivalent to what was ‘fair’ or ‘just’, it could transform commercial relationships in a manner which (was not intended).<sup>42</sup>

Statutes dealing with unfairness in contracts at the state level include the *Contracts Review Act 1980* (NSW), provisions in industry specific legislation, and fair trading legislation in each State. The Victorian fair trading legislation, which the federal government specifically alludes to in its Explanatory Memorandum to this Bill, must be considered in some detail.

The *Contracts Review Act 1980* (NSW) confers broad power on a court to make orders in the event that a contract is found to be ‘unjust’. The focus is mainly on consumer type contracts.<sup>43</sup> Various factors are relevant to the question of unjustness, including the public interest, whether or not there was any material inequality of bargaining power between the parties to the contract, whether or not the terms were the subject of negotiation, whether any provisions of the contract impose conditions which are unreasonably difficult to comply with or not reasonably necessary for the protection of the legitimate interests of a party to the contract, whether or not the non-business party was reasonably able to protect their interests due to their age or physical or mental capacity, the relative economic circumstances, educational background and literacy of the non-business party to the contract, whether or not and when independent legal or other advice was obtained by the party seeking relief, whether any undue influence, undue pressure or unfair tactics were exerted on or used against the applicant, and the commercial or other setting, purpose and effect of the contract.<sup>44</sup>

It has again been noted of this legislation that the reality has been that the courts have focused mainly on procedural fairness, rather than substantive fairness. Carlin for example found that in only one of 18 cases studied in which equitable relief was granted was it based on the unfairness of a specific clause, rather than aspects of procedural unfairness.<sup>45</sup> Corones and Christensen conclude that:

While courts are able to consider substantive unconscionability under the Act, they rarely do so without also considering the impact of procedural unconscionability. The reliance

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<sup>42</sup> *Attorney-General (NSW) v World Best Holdings Ltd* (2005) 63 NSWLR 557, [120-1].

<sup>43</sup> Section 6(2) provides for a ‘business contracts’ exception to the Act, defined as a contract entered into in the course of or for the purpose of a trade, business or profession carried on by the person or proposed to be carried on by the person, other than a farming undertaking.

<sup>44</sup> *Contracts Review Act 1980* (NSW) s 9(2).

<sup>45</sup> T Carlin, ‘The *Contracts Review Act 1980* (NSW) – 20 Years On’ (2001) 23 *Sydney Law Review* 125, 129; B Zipser, ‘Unjust Contracts and the *Contracts Review Act 1980* (NSW)’ (2001) 17 *Journal of Contract Law* 76. For example, in refusing to grant relief under the Act where the price was substantially less than market value (at least 15%), the court noted that the main focus of the Act was on procedural aspects of fairness rather than substantive aspects: *Vakele Pty Ltd v Assender* [1989] NSW Conv R 55-467. McHugh JA claimed that most cases involved both procedural and substantive unfairness: *West v AGC (Advances) Ltd* (1986) 5 NSWLR 610, 621.

upon procedural unconscionability severely limits the ability of the Act to deal directly with unfair terms in consumer contracts.<sup>46</sup>

Part 2B of the *Fair Trading Act 1999* (Vic) includes an unfair contract regime in relation to consumer contracts.<sup>47</sup> Section 32W defines such a contract<sup>48</sup> as one which causes a significant imbalance in the parties' rights and obligations arising under the contract to the detriment of the consumer.<sup>49</sup> In assessing whether a contract is unfair, relevant factors include whether the term was individually negotiated, and whether the term has been prescribed by regulation as unfair. Some specific examples are given of unfair clauses:

- (a) those which permit the supplier but not the consumer to avoid or limit performance of the contract;
- (b) those which permit the supplier but not the consumer to terminate the contract;
- (c) those which penalise the supplier but not the consumer for a breach or termination of the contract;
- (d) those which permit the supplier but not the consumer to vary the terms of the contract;
- (e) those which permit the supplier but not the consumer to renew or not renew the contract;
- (f) those which permit the supplier to determine the price without the right of the consumer to terminate the contract;
- (g) those which permit the supplier unilaterally to vary the characteristics of the goods or services to be supplied under the contract;
- (h) those which permit the supplier unilaterally to determine whether the contract had been breached or to interpret its meaning;
- (i) those limiting the supplier's vicarious liability for its agents;
- (j) those permitting the supplier to assign the contract to the consumer's detriment without the consumer's consent;
- (k) those limiting the consumer's right to sue the supplier;
- (l) those limiting the evidence the consumer can lead in proceedings on the contract; and
- (m) those imposing the evidentiary burden on the consumer in proceedings on the contract.<sup>50</sup>

<sup>46</sup> Corones and Christensen, above n 4, 128.

<sup>47</sup> These are defined as contracts involving the supply of goods and services of a kind ordinarily acquired for persona, domestic or household use or consumption (*Fair Trading Act 1999* (Vic) s 32U).

<sup>48</sup> A past reference to the concept of 'good faith' was deleted. For interpretation see *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234; *Hughes Aircraft Systems International v Airservices Australia* (1997) 146 ALR 1; s 1-203 United States *Uniform Commercial Code*; Lord J Steyn, 'The Role of Good Faith and Fair Dealing in Contract Law: a Hair-Shirt Philosophy?' (1991) *Denning Law Journal* 131; P Girard, 'Good Faith in Contract Performance: Principle or Placebo?' (1983) 5 *Supreme Court Law Review* 309; Sir A Mason, 'Contract, Good Faith and Equitable Standards in Fair Dealing' (2000) 116 *Law Quarterly Review* 66.

<sup>49</sup> The wording here is similar to the definition of an unfair contract in the *Unfair Terms in Consumer Contracts Regulations 1999* (UK). The Regulations are based on the European Union *Directive on Unfair Terms in Consumer Contracts*. The House of Lords has found the good faith requirement was one of fair and open dealing. Terms were to be expressed fully, clearly and legibly. Terms that might impact adversely on consumers should be brought to the customer's attention: *Director-General of Fair Trading v First National Bank Plc* [2002] 1 AC 481. See also P Nebbia, 'Reforming the UK Law on Unfair Terms: The Draft Unfair Contract Terms Bill' (2007) 23 *Journal of Contract Law* 228.

<sup>50</sup> *Fair Trading Act 1999* (Vic) s 32X; for interpretation, see *Director of Consumer Affairs Victoria v AAPT Ltd* [2006] VCAT 1493.

Clauses deemed to be unfair will be struck out, and the remaining contents enforced provided the contract is capable of existing without the unfair term/s.<sup>51</sup> The Victorian provisions are similar to the United Kingdom provisions contained in the *Unfair Terms in Consumer Contracts Regulations 1999* (UK). Schedule 2 of the regulations contains a non-exhaustive list of terms which may be regarded as unfair.<sup>52</sup> Both the Victorian and United Kingdom models, but not the proposed new Australian consumer law, have an ex ante aspect, allowing the regulator to pre-emptively rule out unfair terms that could potentially cause harm. In contrast, the new Australian consumer law operates an ex post model, where action is possible only after a consumer suffers detriment.<sup>53</sup>

### III EVALUATION OF SOME ASPECTS OF THE PROPOSED LAW

Some aspects of the proposed law will now be critically considered.

<sup>51</sup> *Fair Trading Act 1999* (Vic) s 32Y(2).

<sup>52</sup> These include terms with the object or effect of: (a) excluding or limiting the legal liability of a seller or supplier in the event of death of a consumer or personal injury to the latter resulting from an act or omission of the seller; (b) inappropriately excluding or limiting the legal rights of the consumer vis-à-vis the seller or supplier or another party in the event of total or partial non-performance or inadequate performance by the seller or supplier of any of the contractual obligations, including the option of offsetting a debt owed to the seller or supplier against any claim the consumer may have against them; (c) making an agreement binding on the consumer whereas provision of services by the seller or supplier is subject to a condition whose realisation depends on their own will alone; (d) permitting the seller or supplier to retain sums paid by the consumer where the latter decides not to conclude or perform the contract, without providing for the consumer to receive compensation of an equivalent amount from the seller or supplier where the latter is a party cancelling the contract; (e) requiring any consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation; (f) authorising the seller or supplier to dissolve the contract on a discretionary basis where the same facility is not granted to the consumer, or permitting the seller or supplier to retain the sums paid for services not yet supplied by him where it is the seller or supplier who dissolves the contract; (g) enabling the seller or supplier to terminate a contract of indeterminate duration without reasonable notice except where there are serious grounds for doing so; (h) automatically extending a contract of fixed duration where the consumer does not indicate otherwise, when the deadline fixed for the consumer to express their desire not to extend the contract is unreasonably early; (i) irrevocably binding the consumer to terms with which they had no real opportunity to become acquainted before the contract concluded; (j) enabling the seller or supplier to alter the terms of the contract unilaterally without valid reason specified in the contract; (k) enabling the seller or supplier to alter unilaterally without valid reason any characteristics of the product or service to be provided; (l) providing for the price of goods to be determined at the time of delivery or allowing a seller of goods or supplier of services to increase their price without in both cases giving the consumer the corresponding right to cancel the contract if the final price is too high in relation to the price agreed when the contract was concluded; (m) giving the seller or supplier the right to determine whether the goods or services supplied are in conformity with the contract, or giving them the exclusive right to interpret any term of the contract; (n) limiting the seller's or supplier's obligation to respect commitments undertaken by their agents or making commitments subject to compliance with a particular formality; (o) obliging the consumer to fulfil all obligations where the seller or supplier does not perform theirs; (p) giving the seller or supplier the possibility of transferring their rights and obligations under the contract, where this may serve to reduce the consumer's guarantees, without the latter's agreement; and (q) excluding or hindering the consumer's right to take legal action to exercise any other legal remedy, particularly requiring the consumer to take matters to arbitration not covered by legal provisions, unduly restricting the evidence available to them, or imposing a burden of proof which, according to the applicable law, should lie with the other party to the contract.

<sup>53</sup> The rationale for this appears in the Productivity Commission Report, above n 1, 165-6.

### A *Filling the Substantive Fairness Gap Created by the Pre-Existing Law*

The provisions in the Bill clearly permit the court to consider whether terms of a contract are substantively fair. This is a major departure from the pre-existing law in relation to the non-statutory doctrine of unconscionability, as well as the statutory provisions regarding unconscionability, and provisions of the *Contracts Review Act 1980* (NSW). Whatever the intent behind these statutory provisions, at least as interpreted they have had little application in cases of substantive, as opposed to procedural, unfairness.

It is submitted that this is a major weakness of the existing law. Firstly, it may be argued to represent a triumph of form over substance. This is seen in comments where courts have claimed that in assessing whether a contract is unfair, something other than the 'mere' terms of the contract must fit the category. One might have thought that in the context of considering whether reliance on a contract as written would in the circumstances be unfair, the actual terms of the contract itself would be fundamental to the question, rather than of secondary or peripheral importance, as seems to be implied by the use of the word 'mere' by more than one court in this context.

Second, it is not as if consideration of the fairness of individual terms is anathema to the law. Several examples may be given. For example:

- (a) the 'unlimited and unfettered jurisdiction' to provide relief against clauses in contracts providing for forfeitures and penalties has been noted;<sup>54</sup>
- (b) courts will provide relief where a contract clause provides for acceleration of payments in the event of default;<sup>55</sup>
- (c) provisions amounting to a 'clog' on the equity of redemption in the context of a mortgage will be struck out.<sup>56</sup>

Further, the suggestion that a clear line can or should be drawn between what is substantively unfair and what is procedurally unfair is questionable. Clearly, the fact that particular clauses are in substance unfair may call into question the circumstances in which the contract was executed in the first place. In other words, substantive unfairness may be evidence of procedural unfairness. In this light, it seems to the author to be somewhat artificial that existing doctrines largely consider only procedural unfairness.

### B *Limits to the Application of the Provisions*

As has been noted, the legislation applies only to unfair contracts that are standard form contracts.<sup>57</sup> Contracts are presumed to be standard form in nature, and various factors

<sup>54</sup> *Shiloh Spinners Ltd v Harding* [1973] AC 691; *O'Dea v Allstates Leasing System (WA) Pty Ltd* (1983) 152 CLR 359. Some suggest this is on the basis of restitution: *Lexane Pty Ltd v Highfern Pty Ltd* [1985] 1 Qd R 446, 455. This is despite claims by one court that the power to strike down a penalty clause was a 'blatant interference with freedom of contract': *Elsley v J G Collins Insurance Agencies Ltd* [1978] 2 SCR 916, 937.

<sup>55</sup> *Richard Clarke and Co Ltd v Widnall* [1976] 3 All ER 301; *Wanner v Caruana* [1974] 2 NSWLR 301.

<sup>56</sup> *Kreglinger v New Patagonia Meat and Cold Store Pty Ltd* [1914] AC 25; *Samuel v Jarrah Timber and Wood Paving Corp Ltd* [1904] AC 323; L Willmott and B Duncan, 'Clogs on the Equity of Redemption: An Outmoded Concept?' (2002) 2(1) *QUT Law and Justice Journal* 35.

are provided to determine whether or not a contract is standard form in nature, including the bargaining power of the parties, whether the contract was prepared prior to discussion between the parties, whether a party was in effect required to accept or reject the terms, and whether a party had an effective opportunity to negotiate the terms. It is appreciated that in so providing, the legislature is embarking on a delicate balancing act between, on the one hand, allowing parties to negotiate and make contractual decisions that are in their best interests, given some presumption that the parties are best able to decide what is best for them, while on the other hand, recognising the reality that in many cases contracts have not been the subject of any real negotiation, and that power imbalances do exist and affect the terms on which the parties engage.

Firstly, this limit is difficult to understand at a conceptual level. These new laws are necessary partly because of the perceived failure of the classical rules of contract to deliver appropriate relief when there is broad unfairness in a contract. At the time these classical rules of contract were created in the mid 19<sup>th</sup> century, a typical contract really was an individual agreement between two parties, with little or no evidence of the use of standard form contracts.<sup>58</sup> Thus when bringing in laws to remedy perceived problems with the classical rules, it might have made most sense to have those laws apply to the range of contracts contemplated by those classical rules, rather than one category of contracts (standard form) that did not actually exist at the time the classical rules were created.

There is also a question as to why the kinds of provisions that are referred to as examples of unfair terms, which might be loosely described as one-sided clauses, giving specified rights to one party to the contract but not the other, should ever be acceptable. One might wonder whether, in respect of such clauses, they are not simply examples of unfair clauses, liable to be struck out, without the need to go on and show further that they appear in a standard form contract. The difficulty with this requirement is that there is then a need to consider this definition, which alludes to various factors, including whether there was a right to negotiate, whether there was flexibility in relation to contractual terms. Of course, much will depend on how these provisions are interpreted by the courts over time. It is hoped that, given these sections are designed to be remedial in nature, they are construed generously to the consumer and not in an overly pedantic fashion. One risk, however, is that a court might find there has been some negotiation or discussion between the parties about contractual terms, yet clauses of the kind the Bill identifies as examples of unfair clauses might still appear in the contract. Given this

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<sup>57</sup> There is no real discussion in the Productivity Commission Report as to the reasons for legislating only in respect of unfair terms in standard form contracts, other than all contracts. The only reference is a statement that ‘the regulatory risks entailed by such a new law (consumer law regarding unfair contracts) could be reduced by ... excluding ... negotiated contracts from its scope’. There is no detailed explanation in the Explanatory Memorandum as to the rationale for this limitation, other than a statement that ‘unfair terms are more likely to be found in standard form contracts’ and a comment about the Victorian legislation, which doesn’t exclude negotiated contracts from its ambit, that such an approach ‘limits the capacity of businesses and consumers to negotiate good outcomes’. Refer, Productivity Commission Report, above n 1, 139, 462, 479. Some authors defend standard form contracting: see for example J S Johnston, ‘The Return of Bargain: An Economic Theory of How Standard-Form Contracts Enable Cooperative Negotiations Between Businesses and Consumers’ (2006) 104 *Michigan Law Review* 857; L Bechuk and R Posner, ‘One-Sided Contracts in Competitive Consumer Markets’ (2006) 104 *Michigan Law Review* 827.

<sup>58</sup> Priest records an early use of a standard clause warranty in the late 19<sup>th</sup> century, well after classical rules of contract had been created: G Priest, ‘A Theory of the Consumer Product Warranty’ (1981) 90 *Yale Law Journal* 1297.

kind of situation, will a court find that it is not a standard form contract, so the contract stands, despite the inclusion of clauses that the Bill recognises to be generally unfair. One would hope not, but the possibility exists.

Given this risk, the author queries whether it should also be necessary that the unfair clause exists in a contract described as a 'standard form contract'. Arguably, there is nothing redeeming about a clause that provides important contractual rights to one of the contracting parties but not the other, and such clauses should be unfair and unacceptable. It is true that the presumption is that a contract is a standard form contract, and the business relying on the contract must show otherwise. The risk is that some businesses might be able to avoid a finding that a contract is standard form by including some negotiation of terms in its practices, however piecemeal.

A counter argument to this might be that contracts include many trade-offs, and one party might agree to a term that, in isolation, might seem unfair, because they have the benefit of other clauses in the contract very favourable to them. This is perhaps why the ability of the weaker party to negotiate terms in a particular contractual setting is considered important.<sup>59</sup> However, in assessing whether a term is fair or not, the proposed new law requires the court to consider the contract as a whole, rather than consider terms in isolation. Further, as Howell observes, given that these contracts are usually written by or on behalf of business, it is presumably rare that individual terms will be particularly favourable to consumers, unless they are mandated in some way.<sup>60</sup>

Another way of questioning the need to show that the clause said to be unfair must appear in a standard form contract is to argue that sometimes there are sound reasons for the use of standard form contracts,<sup>61</sup> and their use may not be exploitative. One example considered by the United States Supreme Court was a clause on a consumer cruise-line ticket that provided for the forum in which any disputes between the parties would be heard. The Supreme Court was satisfied that:

It would be entirely unreasonable for us to assume that respondents – or any other cruise passenger – would negotiate with petitioner the terms of a forum-selection clause in an ordinary commercial cruise ticket. Common sense dictates that a ticket of this kind will be a form contract, the terms of which are not subject to negotiation, and that an individual purchasing the ticket will not have bargaining parity with the cruise line ... a clause establishing ex ante the forum for dispute resolution has the salutary effect of dispelling any confusion about where suits arising from the contract must be brought and defended, sparing litigants the time and expense of pre-trial motions to determine the correct forum and conserving judicial resources that otherwise would be devoted to deciding those motions ... passengers who purchase tickets containing a forum clause

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<sup>59</sup> One of the submissions to the Productivity Commission made this point: 'Unfair contract terms laws have the potential to interfere with the complex balance of the contractual bargain – the deletion of one term as unfair may see another term, which the consumer values, affected adversely. What may seem on its face attractive – the protection of powerless consumers from the excessive power of business – may in fact upset the complex balance of the contractual bargain in ways that are harmful to consumers (submission 102, 5 (Professor Chris Field)).

<sup>60</sup> Howell, above n 19, 447, 462.

<sup>61</sup> For example, to minimise transaction costs. As the Productivity Commission noted, their use may reflect the existence of competition in a market, rather than be an attempt to inhibit competition: Productivity Commission Report, above n 1, 415.

like that at issue ... benefit in the form of reduced fares reflecting the savings that the cruise line enjoys by limiting the fora in which it may be sued.<sup>62</sup>

In relation to the definition of ‘standard form contract’ in the proposed Australian consumer law, it is submitted that the term discussed above would meet the definition given the lack of negotiation, the fact it was pre-determined, and the fact that one party to the contract is in a superior bargaining position. While it is acknowledged that the term would likely not meet the definition of ‘unfair’ in the proposed new law, the point made here is that the fact that a clause appears in a standard form contract or does not should not be a relevant factor in assessing whether it is proscribed under the Australian consumer law, since evidently there are examples of clauses in standard form contracts that are eminently fair.

The converse principle also holds - the mere fact that clauses appear in ‘negotiated’ contracts does not necessarily mean that, objectively, they are fair. This occurs partly because there is significant evidence that consumers do not read contracts, whether these are standard form in nature or ‘negotiable’.<sup>63</sup> The assumption that consumers who ‘negotiate’ contract terms do so in their own best interests is open to serious question. It will be difficult for a consumer to negotiate terms to their best advantage if they haven’t read the contents of a draft or understand it. Nor has any evidence that terms in a standard form contract are more likely to be unfair than terms in a ‘negotiated’ contract been presented in the Productivity Commission report.

### C *Comparison between Proposed Australian Consumer Law Description of an Unfair Contract with Victorian and United Kingdom Models*

Some key differences exist between the definition of an unfair contract (or an unfair clause in a contract) in the proposed Australian consumer law, and existing definitions in the Victorian and United Kingdom legislation.

Each of three models refers to contracts reflecting an imbalance in the parties’ rights and obligations as an indicator that a contract is unfair. Each of the three models refer to the detriment that a consumer would suffer if bound to the challenged clause/s. However, the United Kingdom models, but not the Australian or Victorian, specifically refer to the idea that the contract was concluded contrary to good faith. While the doctrine of good faith is accepted in the United States<sup>64</sup> and in the UNIDROIT *Principles of International Commercial Contracts*,<sup>65</sup> the Australian High Court has to date been reluctant to decide whether the doctrine is part of Australian law.<sup>66</sup> The

<sup>62</sup> *Carnival Cruise Lines Inc v Shute* 499 US 585, 593-4 (1991).

<sup>63</sup> The Office of Fair Trading (Qld) found in a survey that at least half of those signing contracts failed to read or understand them, according to their media release ‘Don’t Be Afraid To Ask Contract Questions’ (6 September 2002), while Consumer Affairs Victoria found a quarter of consumers did not read contracts at all: *Unfair Contract Terms in Victoria: Research Into Their Extent, Nature, Cost and Implications*, Research Paper No 12 (2007).

<sup>64</sup> Section 1-203 of the United States *United Commercial Code* provides that contracts within the Act are governed by good faith in performance or enforcement; see also the *Restatement (Second) of Contracts* (1981) s 205.

<sup>65</sup> Article 1.7(1) mandates that parties ‘must act in accordance with good faith and fair dealing in international trade’.

<sup>66</sup> *Royal Botanic Gardens and Domain Trust v South Sydney City Council* (2002) 186 ALR 289; compare with *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR

doctrine remains controversial, with its advocates<sup>67</sup> and its critics on the basis it creates uncertainty.<sup>68</sup> It is beyond the scope of this article to decide whether Australia should embrace the doctrine of good faith in contract law generally, but in the specific context of consumer law considered here, its specific inclusion may not be necessary given the broad scope the proposed new law gives for courts to review contract provisions on the basis of unfairness.

As indicated, the Australian model applies only to standard form contracts. The United Kingdom model applies to contracts that were ‘not individually negotiated’, which might mean something very similar to the Australian approach, but then allows that even if the contract was individually negotiated, an overall assessment might indicate that a pre-formulated standard contract was used, in which case the regulations apply. The Victorian legislation does not contain such a requirement, merely providing that the question whether a term was individually negotiated or not is a relevant factor in assessing fairness.<sup>69</sup> In contrast to the other two, the Victorian model also allows upfront prices to be deemed unfair.

Many of the examples given in the new Australian consumer law of clauses that might be considered to be unfair are virtually identical to the provisions in the Victorian legislation. A common theme is a concern that one party is given rights in a contract that the other is not given.<sup>70</sup> Limitations of liability in relation to agents are frowned upon. One difference in wording is that the Australian consumer law considers the extent to which a clause permits a party to vary the ‘upfront price’ payable under the contract, while the Victorian legislation talks more generally about a clause permitting a supplier to ‘determine the price’. The Victorian legislation is of broader ambit in this regard and is preferred.

There are some real differences in wording, however, between examples of unfair terms in the Australian and Victorian legislation on the one hand, and the United Kingdom regulations on the other. In the table below, I consider the extent to which the examples of unfair contracts given in the United Kingdom regulations are dealt with in the Australian and Victorian legislation, or whether there are gaps, or good explanations for the difference in treatment.

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234; *Hughes Aircraft Systems International v Airservices Australia* (1997) 146 ALR 1; and *Spira and 5 v Commonwealth Bank of Australia* [2003] NSWCA 180.

<sup>67</sup> See cases *ibid*, and E Peden, *Good Faith in the Performance of Contracts* (2003); P Finn, ‘Commerce, the Common Law and Morality’ (1989) 17 *Melbourne University Law Review* 87; Sir A Mason, ‘Contract, Good Faith and Equitable Standards in Fair Dealing’ (2000) 116 *Law Quarterly Review* 66; S Burton, ‘Breach of Contract and the Common Law Duty to Perform in Good Faith’ (1980) 94 *Harvard Law Review* 369.

<sup>68</sup> For example P Girard, ‘Good Faith’ in *Contract Performance: Principle or Placebo?* (1983) 5 *Supreme Court Law Review* 309.

<sup>69</sup> For the reasons given in the previous part, the Victorian model on this aspect is preferred. The better view is that the fact a clause was, or was not in, a standard form contract should not be relevant to the question whether it is challengeable on fairness grounds.

<sup>70</sup> For example, in relation to limiting or avoiding performance, termination, amendments to the terms, penalty for breach of contract, decisions to renew or not renew the contract, amendment of the characteristics of what is supplied, to determine whether the contract has been breached or to interpret the contract, to assign responsibilities and rights under the contract without consent, and in relation to evidence.



<i>United Kingdom Provision</i> Terms with the object or effect of	<i>Australian/Victorian equivalent (if any)</i> NB reference to the words permit, penalise, limit and impose below include reference to clauses that have the effect of permitting, penalising, limiting and imposing respectively
1. Excluding or limiting legal liability of a seller or supplier in the event of death or personal injury to the consumer	Term that limit one party's right to sue the other
2. Inappropriately excluding or limiting the legal rights of the consumer vis a vis the seller or supplier or another in the effect of total or partial non-performance or inadequate performance by the seller of any contractual obligations	Term that limit one party's right to sue the other Term that permit one party but not the other to avoid or limit performance of the contract
3. Making an agreement binding on the consumer while provision of services by the seller or supplier is subject to a condition whose realisation depends on their will alone	Term that permit one party but not the other to avoid or limit performance of the contract
4. Permitting the seller or supplier to retain sums paid by the consumer where the latter decides not to conclude or perform the contract, without providing compensation to the consumer where the seller or supplier is the party cancelling the contract	A term that penalises one party but not the other for a breach or termination of the contract
5. Requiring any consumer who fails to fulfil their obligations to pay a disproportionately high sum in compensation	A term that penalises one party but not the other for a breach or termination of the contract
6. Authorising the seller or supplier to dissolve the contract where the same facility is not granted to the consumer, or permitting the seller to retain the sums paid for services not yet supplied by them where it is the seller or supplier who dissolves the contract	A term that permits one party but not the other to terminate the contract A term that permits one party but not the other to vary the terms (or to avoid or limit performance) of the contract
7. Enabling the seller or supplier to terminate a contract of indeterminate duration without reasonable notice unless serious grounds exist	A term that permits one party but not the other to terminate the contract – not specifically about contracts of indeterminate duration, no reference to whether serious grounds exist to justify
8. Automatically extending a contract of fixed duration where the consumer does not indicate otherwise, when the deadline for the consumer to express their desire not to extend is	No direct equivalent Arguably – a term that permits one party to vary the terms of the contract – if it can be said that the extension is a variation of the existing terms of the contract in terms

unreasonably early	of its length; however, the new arrangements may be seen as a new contract albeit on the same terms as the old one
9. Irrevocably binding the consumer to terms with which they had no real opportunity to become acquainted before the contract was made	No direct equivalent in the examples of unfair clauses, but the definition of unfairness refers to the issue of transparency <sup>71</sup>
10. Enabling the seller or supplier to alter the terms of the contract unilaterally without valid reason specified in the contract	A term that permits one party but not the other to vary the terms of the contract – no reference to whether there is a valid reason specified in the contract or not
11. Enabling the seller or supplier to alter unilaterally without valid reason any characteristics of the product or service to be provided – no specific reference to land or interests in land	A term that permits one party unilaterally to vary the characteristics of the goods or services to be supplied, or interest in land to be sold or granted, under the contract
12. Providing for the price of goods to be determined at the time of delivery or allowing a seller to increase their price without in both cases giving the consumer the corresponding right to cancel the contract if the final price is too high in relation to the original price	A term that permits one party to vary the upfront price without the right of the other to terminate the contract
13. Giving the seller or supplier the right to determine whether goods or services supplied are in conformity with the contract, or the exclusive right to interpret any term of the contract	A term that permits one party unilaterally to determine whether the contract has been breached or to interpret its meaning
14. Limiting the seller or supplier's obligation to respect commitments undertaken by their agents or making commitments subject to compliance with a particular formality	A term that limits one party's vicarious liability for its agents
15. Obliging the consumer to fulfil all obligations where the seller or supplier does not perform theirs	A term that permits one party but not the other to avoid or limit performance of the contract
16. Giving the seller or supplier the possibility of transferring their rights and obligations under the contract (where this may serve to reduce the guarantees for the consumer) without the consumer's agreement	A term that permits one party to assign the contract to the detriment of another party without the other's agreement – proof of detriment required here, not under the UK provision
17. Excluding or hindering the consumer's right to take legal action or exercise any legal remedy eg compulsory arbitration not covered by	A term that limits one party's right to sue another party A term that limits the evidence one party can adduce in proceedings relating to the

<sup>71</sup> Para 63 of the Explanatory Memorandum, in discussing the meaning of transparency here, refers to the fact that the term is 'readily available to any party affected by the term'.

legal provisions, unduly restricting evidence available to the consumer or imposing on the consumer a burden of proof which according to the relevant law should lie with another party to the contract	contract A term that imposes the evidential burden on one party in proceedings relating to the contract
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Some of the key differences, with author views on the preferred option, can thus be summarised as follows:

(a) The United Kingdom provisions (example clause five above) suggest a clause requiring a consumer to pay a disproportionately high sum in compensation for breach of contract might be unfair – at common law in Australia and the United Kingdom such a clause might be struck down as a ‘penalty’,<sup>72</sup> while the Australian law does not focus on penalties per se, but on differential treatment of non-performance between the parties – the United Kingdom clause is preferred here; while penalties in contracts for non-performance are not acceptable in either jurisdiction, again this requires action by the consumer, and these enforcement difficulties have been alluded to above in the broader context of unfairness; perhaps the Australian provisions should have included a specific provision dealing with ‘penalties’ for non-performance;

(b) The United Kingdom provisions (example clause seven above) suggest a clause giving a seller or supplier the right to terminate a contract of indeterminate duration without reasonable notice or serious grounds might be unfair – while the Australian provisions are again more concerned with differential rights of termination between the parties; the Australian provisions are preferred here; it is not clear why it is only a clause providing for termination without notice or grounds in a contract of indeterminate duration is unfair, yet apparently one in a limited duration contract is okay; nor is it clear what ‘reasonable notice’ is or why that should make what otherwise may be a breach of contract not unfair according to the regime;

(c) The United Kingdom provisions (example clause eight above) suggest that provision for automatic renewal of a contract may be unfair where the consumer must express their wish not to continue at an unreasonably early time; the Australian provisions don’t directly deal with such clauses, though arguably they may come within the provision dealing with one party ‘varying’ the terms of the contract; it is better to specifically provide for this automatic rollover clause and prima facie it is agreed that such clauses are unfair – perhaps the law should go even further here than the United Kingdom model and not only suggest they are unfair where the consumer’s notice to withdraw must be given at an unreasonably early time, but generally unfair;

(d) The United Kingdom provisions (example clause 12 above) suggest that a clause allowing the seller to determine the price at the time of delivery, or to increase the price, without in either case giving the consumer the right to cancel the contract if the final price is ‘too high’ compared with the original price; the Australian provisions suggest that a clause allowing either party to vary the upfront price payable under the contract

<sup>72</sup> *O’Dea v Allstates Leasing System (WA) Pty Ltd* (1983) 152 CLR 359; *Clydebank Engineering and Shipbuilding Co Ltd v Don Jose Ramous Yzquierdo y Castaneda* [1905] AC 6. The Explanatory Memorandum to the Trade Practices Amendment (Australian Consumer Law) Bill 2009 (Cth) states that the clause ‘reflects the common law concept of penalties’ (cl 80).

might be unfair; the United Kingdom provision may be criticised on the basis of a lack of certainty – what level of departure will be necessary before the new price is considered ‘too high’ and why is the seller given any opportunity to vary the originally agreed price? The Australian provision is explicable in that the intention was not to allow a party to challenge the upfront price itself as being unfair;<sup>73</sup>

(e) The provisions regarding the assignment of the supplier’s obligations under the contract differ (example clause 16 above), with the Australian model preferred, suggesting unfairness where the consumer can show they will suffer detriment as a result, rather than a theoretical possibility in relation to reduction of guarantees to the consumer in the United Kingdom model.

### C *The Specific and the General*

As with any legislative framework, there will inevitably be debate as to the ‘right’ balance between specifying provisions in great detail, and providing general principles to be refined on an individual case by case basis. Of course, the benefit of precise prescription is the certainty said to be provided,<sup>74</sup> making it easier to advise as to the legal requirements, and making resolution of disputes easier by increasing predictability; the downside is the possible lack of flexibility and the tendency to become very technical about the meaning of the precise words used, sometimes at the expense of the spirit of the provisions, the context in which they are included, or the rationale for the regime. This is not a new debate and there is no magic wand solution to this dilemma.

What might be suggested is that these provisions achieve a workable balance between the two – sellers and suppliers have been given a list of the types of clauses that the regulator suggests might be unfair. They (or their advisers) are in a position to thoroughly review contracts to which they are a party (and to which the new law might apply) to make sure that such contracts do not contain these types of clauses. At the same time, the list of examples of unfair terms is not exhaustive, and over time clauses not included in the list may come to be seen as unfair in particular cases.

## IV CONCLUSION

The proposed new laws will fill a gap in the current legal contractual framework. Existing non-statutory and statutory provisions dealing broadly with aspects of fairness in contracts have not been judged to adequately address the issue. Some of the existing regulation is based on classical notions of contract that no longer match the reality of contracting, and enforcement of rights can in practice be difficult and expensive. Specifically, the new law’s willingness to consider substantive fairness is to be

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<sup>73</sup> See the Explanatory Memorandum to the Trade Practices Amendment (Australian Consumer Law) Bill 2009 (Cth) paras 87-96. It seems that the definition of upfront price includes a future payment or series of future payments (para 91).

<sup>74</sup> The lack of certainty was given as a reason why the proposed new law does not include a reference to good faith, as appears in the United Kingdom and Victorian models. The view was that given the uncertain meaning or application of such a concept in Australian law, its inclusion here could potentially create uncertainty in the application of the new law (para 482 of the Explanatory Memorandum). On the other hand, Bryan Horrigan notes that references to ‘good faith’ already appear in more than 150 federal Acts: ‘The Expansion of Fairness-Based Business Regulation – Unconscionability, Good Faith and the Law’s Informed Conscience’ (2004) 32 *Australian Business Law Review* 159, 187.

welcomed, and is a major improvement over the existing situation. While the author has questioned the rationale for limiting the ambit of the new law to standard form contracts, the author commends the specific guidance the new laws provide as to the kinds of clauses that may be regarded as unfair, and the opportunities they provide for those using contracts to review the contracts currently in use to ensure compliance with the new regime. The new laws potentially significantly improve the protection to consumers from unfairness in contracting.