# Small Business – Forgotten and in need of protection from unfairness?

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*In light of the statutory protections that have been introduced and developed for the benefit of consumers in their contracts with commercial entities, the vulnerable position of small business in their contracts with bigger business has become even more apparent. Given the diverse nature of small businesses and the fact that small businesspeople share many characteristics with consumers, it is artificial for two individuals to suffer the same wrong but that only one is entitled to recourse. Such denial disregards the inequity of the conduct and focuses instead on a rather perfunctory classification. This article considers why the UCT provisions in the ACL should be extended to small businesses. In the likelihood that such amendments will not be forthcoming, the article considers common law and statutory alternatives for small businesses faced with unfair contract terms. First, it is suggested that common law doctrines and rules may need to be revisited and rethought so they can provide some assistance to small business, so that in their contracts they are not left entirely to the mercy of larger players. Second, the article considers whether the unconscionability provisions in the ACL may be used to provide some relief for small businesses impacted upon by unfair contract terms.*

## INTRODUCTION

> *To uphold the sanctity of contracts is doubtless a prime business of government, but it is no less its business to provide against contracts being made, which from the helplessness of one of the parties to them, instead of being a security for freedom becomes an instrument of disguised oppression.*[3]

Conventionally, consumers and businesses tend to be regarded as mutually exclusive. Consumers are perceived to be vulnerable *vis*-à-*vis* business and thus require protection from the excesses of commercial exchange. Consumers benefit from special protections whatever their knowledge and experience; even experienced, 'savvy' consumers can take advantage of common law and statutory safeguards. In comparison, businesses tend to be perceived as well-resourced and advised commercial entities. Their common commercial character binds them, regardless of the business's size or the education and experience of

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3 TH Green, 'Liberal Legislation and Freedom of Contract' (1881) in *Lectures on the Principles of Political Obligation and Other Writings* ed Harris and Morrow (1986) Cambridge University Press, Cambridge, 199.

the proprietors. Being regarded as commercial 'players', it is assumed that the protections available to consumers are unnecessary.

More recently, the legislature has been cognizant that some small businesses, including retail shop lessees and franchisees, can be disadvantaged in their dealings with other, larger businesses.[4] The scope of some consumer protection legislation is applicable to, or has been extended to apply, to dealings between small businesses and their larger counterparts.[5] This is particularly so in the *Australian Consumer Law*[6] where many pivotal sections are equally applicable to consumer or business plaintiffs[7]. Indeed, the ACL, through its earlier incarnation in the former *Trade Practices Act* – somewhat controversially – introduced a prohibition of unconscionable conduct in small business transactions that has subsequently been extended to all transactions involving the supply or acquisition of goods or services.[8]

It is perplexing, therefore, that Part 2-3 ACL, the prohibition of unfair contract terms (UCT), does not extend to contracts between businesses, even small businesses. While the rationale for this decision will be discussed later, at this stage it is important to note that although small businesses can seek relief under the ACL through provisions prohibiting misleading or deceptive conduct, specific false or misleading representations or conduct and unconscionable conduct, small businesses are denied relief when affected by UCTs.

Part 1 of this article outlines the statutory protections available for consumers and argues that small businesses should have comparable protection. Part 2 considers what measures could be taken to assist small businesses affected by unfair contract terms. First, it is suggested that common law doctrines and rules may need to be revisited and rethought so they can provide some assistance to small business, so that in their contracts they are not left entirely to the mercy of larger players. Second, we examine s21 ACL and consider whether that section's recent extension to the substantive performance of a contract could assist a small business affected by a UCT. The article concludes that although the common law and s21 ACL could be utilised – to an extent – to compensate for the UCT provisions inapplicability to B2B contracts, the better approach would be to extend the scope of the UCT provisions to small business contracts.

4 The House of Representatives Standing Committee on Industry, Science and Technology *Finding a Balance –Towards Fair Trading In Australia,* Canberra May 1997 (The Reid Report).

5 For example, s51AC *Trade Practices Act 1974 (Cth)* prohibited unconscionable conduct in certain B2B transactions.

6 Hereafter referred to as 'ACL'.

7 See for example s18 (misleading or deceptive conduct) and s21 (unconscionable conduct).

8 Section 51 AC TPA.

## *Part 1: Protections that law provides for consumers in their contracts with business*

### *Consumer protection*

Consumers in their contracts with commercial entities have a number of statutory protections which ensure a certain standard of performance in the parties with whom they contract.

- Section 18 ACL prohibits a person in trade or commerce from engaging in conduct that is misleading or deceptive or likely to mislead or deceive. Part 3 ACL also contains a number of specific prohibitions targeting various forms of false or misleading statements;

- Part 2-2 *inter alia* prohibits unconscionable conduct in relation to the supply or acquisition of goods or services;[9]

- Part 2-3 ACL introduces provisions addressing unfair contract terms in standard form consumer contracts. The effect of s23 is that an unfair contract term will be rendered void. Pursuant to s24(1), a term of a consumer contract is unfair if:

    (a) it would cause a significant imbalance in the parties› rights and obligations arising under the contract; and
    (b) it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and
    (c) it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.[10]

- The consumer guarantee provisions in Part 3-2 Div 1 imply certain guarantees into contracts for the supply of goods and services to consumers. These include guarantees of quality, fitness for purpose and correspondence with description. As the guarantees are non excludable, this has meant the virtual disappearance of exclusion clauses in consumer contracts.

### *Contrasting consumer and small business protection*

The cosseted position of consumers, protected by an armoury of legislative provisions, is to be contrasted with the plight of small business in their contracts with other commercial entities. At common law, contracting parties may rely on vitiating factors such as misrepresentation or mistake to avoid a contract. But in

9 Part 2-2 will be discussed in some detail in this article.

10 See generally Nyuk Nahan, Eileen Webb 'Unfair Contract terms in Consumer Contracts' in *Consumer Law & Policy in Australia & New Zealand* (The Federation Press, 2013).

the absence of conduct establishing the elements of these actions, the party is without recourse. The remedies available are also very limited. Parties may also seek the assistance of the equitable doctrine of unconscionable dealing but this provides only limited protection and is largely confined to procedural matters. It is also notoriously difficult to establish unconscionable conduct in a commercial transaction.

So far as statute is concerned, a small business person may seek relief through s18 ACL (misleading or deceptive conduct), the specific prohibitions targeting false and misleading representations and conduct in Part 3-1 Division 1 and the statutory unconscionability provisions in Part 2-2.[11] The utility of these provisions, however, in a matter involving an unfair contract term is likely to be constrained. As will be discussed, the scope of s21, the prohibition of unconscionable conduct may provide some relief for small businesses impacted upon by unfair contract terms although this will depend on the view taken by a court of unconscionable behaviour in relation to contractual terms and their manner of enforcement. The news does not get better for small businesses. The UCT legislation specifically has no application to contracts where both parties are in business[12]. The consumer guarantees do not apply and the implied terms in the sale of goods legislation, which may apply, can be excluded[13].. Thus B2B contracts are fair game for exclusion clauses In relation to small business lending the responsible lending provisions are inapplicable to non-consumer borrowers. Although the ASIC legislation mirrors the consumer protection provisions of the ACL, again unfair contract terms in business lending agreements are not addressed.[14]

## *Does small business warrant consumer-directed protection?*

Ordinarily, contract law deems large and small businesses as one and the same thus relegating the smallest of businesses to the 'arms-length' category of commercial transactions. Such a distinction disregards the business's size or the education and experience of the proprietors[15] and assumes that all businesses are

11 SS 20, 21 ACL.

12 Section 23 ACL states that (1) A term of a consumer contract is void if: (a) the term is unfair; and (b) the contract is a standard form contract. Section 23(3) defines a consumer contract as a contract for: (a) a supply of goods or services; or (b) a sale or grant of an interest in land to an individual whose acquisition of the goods, services or interest is wholly or predominantly for personal, domestic or household use or consumption.

13 B2B contracts for sale of goods are governed by sale of goods legislation which will imply terms, similar to the consumer guarantees, into the contract but only if they have not been excluded by the parties; in B2B contracts for the supply of services terms implied at law can be excluded in the same way See s54 *Sale of Goods Act* (WA) There are equivalent provisions in sale of goods legislation in all Australian states and territories

14 *Australian Securities and Investments Commission Aci 2001 (Cth)* Division 2, Subdivision BA (s12BF – 12BM). On this topic see generally: Eileen Webb 'Extending Responsible Lending to Small Business: A 'Consumer' Categorization?' in *International Responses to Issues of Credit and Over-indebtedness in the Wake of Crisis* (Ashgate Publishing Limited, 2013).

15 Miller notes that: '… in the absence of a meaningful definition of sophistication, courts are not actually addressing the context of the deal. Rather, they are simply reciting well-worn

better resourced and informed than consumers. Thus, businesses are presumed to bargain on an equal footing with each other; businesses do not need the protection of consumer-style laws because businesspeople can protect their own interests.

Such presumptions do not sit comfortably with research undertaken on the economic, societal and practical reality of many small businesses.[16] For example, Professor Abril[17] has explored the inequity in treating all businesses alike under the Uniform Commercial Code (UCC)[18] while Jane P Mallor notes that the rate at which small businesses fail rebuts the presumption that all business people are knowledgeable, competent and experienced.[19] Small-businesspersons come from a variety of backgrounds, levels of business and personal experience, financial liquidity, education and literacy. Moreover, small businesses feature a significant proportion of persons who are, in many circumstances, marginalized from the wider workforce, such as women[20] and migrants.[21] Also, being a good businessperson with regard to one's own trade or profession does not automatically mean that a person is well versed in business and the law. In most cases, the future of a small business rests on the managerial expertise of an individual or small group of owners. Despite contentions from large business, many small businesses simply

clichés about "sophisticated parties dealing at arms' length": Meredith Miller, 'Contract Law, Party Sophistication and the New Formalism' (2010) 75 Missouri Law Review 1 available at SSRN < http://ssrn.com/abstract=1468647>; Blake Morant, 'The Quest for Bargains in an Age of Contractual Formalism: Strategic Initiatives for Small Businesses' (2003) 7 Journal of Small & Emerging Business Law 233.

16 For example, Jane Mallor, 'Unconscionability in Contracts Between Merchants' (1986) 40 SW LJ 1065, 1066; Tansel Yilmazer and Holly Schrank, 'Financial Intermingling in Small Family Business' (2006) 21 Journal of Business Venturing 726; George Haynes and R J Avery 'Family Businesses: Can the Family and the Business Finances be Separated?' (1997) 5 Journal of Entrepreneurial and Small Business Finance 61.

17 Patricia Abril, '"Acoustic Segregation" and the Hispanic Small Business Owner' (2007) 10 Harvard Latino Law Review 1, 3–4; Miller, 'Contract Law, Party Sophistication and the New Formalism' (n 19); see also Meredith Miller 'Party Sophistication and Value Pluralism in Contract' <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2103351> accessed 6 October 2013.

18 Ibid, Abril notes that the law is said to contribute to this inequity because it does not 'explicitly recognize the existence of, particularly, the disadvantages of Chamber 3 merchants'. Identifying business people as Chamber 2 merchants ('experienced business owners, educated Anglophones with Internet access, and those with the financial wherewithal to obtain legal counsel') and Chamber 3 merchants (people with 'limited access to education, business and contract-related information'). Abril notes at 3-4 that these may include 'non-English speakers, recent immigrants, the unschooled, the illiterate, and those that cannot pay for legal or business services'. Members of Chamber 3 receive little information about normative information and conduct rules. For a discussion of Abril's thesis in an Australian context see Eileen Webb, 'Unconscionable Conduct in *Australian Competition and Consumer Commission v Dukemaster Pty Ltd*' (2010) 18 Australian Property Law Journal 48.

19 Mallor, above n 14, 1085-6.

20 In June 2006, 68 per cent of Australian small-business operators were male and 32 per cent were female: Australian Bureau of Statistics, *Characteristics of Australian Business 2006* <http://www.abs.gov.au/AUSSTATS/abs@.nsf/0/E49E3B4DC3595C92CA2568A900139377?Open Document#SELECTED> at 13 October 2012.

21 In June 2006, 71 per cent of all Australian small-business operators were born in Australia, with the remaining 29 per cent born overseas. Ibid.

cannot afford the accounting, financial and legal advice which larger concerns take for granted.[22]

In Australia, the vulnerability of small businesspersons, at least in the context of retail leases, franchises and small business lending was highlighted in the Reid Report and subsequent state and Commonwealth inquiries.[23] The TPA[24] was amended in seeming acknowledgement that small businesses may require protection from the unconscionable conduct of, in particular, larger landlords and franchisors.[25] *Australian Competition and Consumer Commission v Dukemaster Pty Ltd*[26] highlights the disadvantages some small businesspeople have in relation

22 This issue has been the subject of considerable research in studies of small business failure in the United States. The findings are summarised by Blum, who states:

> 'The picture painted by these studies portrays the prototypical small business failure as an owner-managed enterprise, operating on a small scale, living from hand-to-mouth and struggling to make a profit from a position of disadvantage in the market. There is some indication that an appreciable percentage of small business failures involve start-up enterprises, but one must be cautious not to exaggerate the role played by the immaturity of the business. It seems reasonable to assume that a new business, struggling to enter the market under the control of management that may lack experience, and is undercapitalised, would be most vulnerable to failure.'

B A Blum, 'Goals and Process of Reorganizing Small Business in Bankruptcy' (2000) 4 *Journal of Small and Emerging Business Law* 181, 188; B D Morant, 'Quest for Bargains in an Age of Contractual Formalism: Strategic Initiatives for Small Businesses' (2003) 7 *Journal of Small and Emerging Business Law* 233, 234 J Watson and J E Everett, 'Do Small Businesses Have High Failure Rates?' (1996) 34 *Journal of Small Business Management* (1996); D R Korobkin, 'Vulnerability, Survival and the Problem of Small Business Bankruptcy' (1994) 23 *Capital University Law Review* 413.

23 For example see The House of Representatives Standing Committee on Industry, Science and Technology *Finding a Balance –Towards Fair Trading In Australia,* Canberra May 1997;' Senate Economic References Committee, *The Effectiveness of the Trade Practices Act 1974 in Protecting Small Business,* Commonwealth of Australia, March 2004 <http://www.aph.gov.au /senate/committee/economics_ctte/completed_inquiries/2002/04/trade_practices_1974/report/report.pdf> at 6 December 2009; Commonwealth Government *Response to the Senate Standing Committee on Economics, Report on the Need, Scope and Content of a Definition of Unconscionable Conduct for the Purposes of Part IVA of the* Trade Practices Act 1974 *(Cth)* <http://www.aph.gov.au/SENATE/committee/ economics_ctte/tpa_unconscionable_08/gov_response.pdf> at 6 October 2013; Report of the Senate Economics Committee, *The Need, Scope and Content of a Definition of Unconscionable Conduct for the Purposes of Part IVA of the* Trade Practices Act 1974 (3 December 2008) <http://www.aph.gov.au/Senate/committee/economics_ctte/tpa_unconscionable_08/report/report.pdf> at 6 October 2013.

24 Now the Australian Consumer Law, Schedule 2 *Competition and Consumer Act* 2010 (Cth).

25 Eileen Webb, 'The Productivity Commission Inquiry Report: The Market for Retail Tenancy Leases in Australia' (2009) 16 *Australian Property Law Journal* 219; Neil Crosby, Sandi Murdoch and Eileen Webb, 'Landlords and Tenants Behaving Badly? The Application of Unconscionable and Unfair Conduct to Commercial Leases in Australia and the United Kingdom' (2007) 33 *University of Western Australia Law Review* 207; Eileen Webb, 'Almost a Decade On – A (Reid) Report Card on Retail Leasing' (2006) 13 *Australian Property Law Journal* 240.

26 (2009) FCA 682. See generally Eileen Webb, '*ACCC v Dukemaster*: A Recognition of Acoustic Segregation in Australian Retail Leasing?' (2010) 18 *Australian Property Law Journal* 48.

to other better-resourced and informed entities particularly in relation to language, information and/or financial acumen.[27]

## The era of standard form contracts

It is unnecessary to review the shortcomings of classical contract law in an era of standard form contracts; this has been done on many occasions by others.[28] Suffice to say, the 'meeting of the minds' required in the classical model is artificial where standard form contracts are the norm and there is little to no opportunity to negotiate terms. Furthermore, the traditional focus has been on the procedural stage of the contract and in the absence of vitiating factors, there was little recourse available in the event of unfairness in the terms of the contract itself. Today, contract scholars recognise that examining the transaction rather than simply its formation is appropriate. [29] Also, statute has intervened to rebalance the emphasis on procedural issues and addressed instances of substantive unfairness. This is emphasised in the interpretive principles to s21 ACL[30] that stipulate that the provision is not limited to equitable notions of unconscionability and is applicable to both the procedural and substantive stages of a contract. [31]

A market analysis also underscores the shortcomings of classical thinking in 2013. Although there is confidence that a competitive market will address inequities within markets, this is not the case with unfair contract terms.[32] Put simply, the players within the market focus on persuading consumers to purchase their products; this is almost invariably achieved on the basis of price. Those terms in the 'fine print' dealing with unsavoury matters such as termination and penalties are not pivotal considerations. Indeed, even if a consumer was to compare these terms in addition to matters such as the product and the price, he or she would probably find that the terms were almost identical between dealers. Despite the many benefits of a competitive market, there is little incentive for businesses to compete on the basis of fair terms.[33]

Another reason to provide small business with equivalent protection to consumers is to ensure consistency in the application of the law, particularly within the same legislation. Many provisions of the ACL are applicable to both businesses (even large businesses) and to consumers.[34] It is strange, therefore, that the UCT

27 Ibid 48-55

28 Howell N, (2006) 'Catching up with consumer realities: The need for legislation prohibiting unfair terms in consumer contracts' Australian Business Law Review, p 447, 449.

29 Recently, Roger Brownsword has been taking a similar 'transactional' view in relation to his discussions of good faith: 'Regulating Transactions' (2009) Paper delivered to the Consumer Law Conference, University of Manchester.

30 Section 21(4) ACL.

31 See generally Nyuk Nahan, Eileen Webb 'Unfair Contract terms in Consumer Contracts' in Consumer Law & Policy in Australia & New Zealand (The Federation Press, 2013).

32 C Field, Current Issues in Consumer Law and Policy (Pearson Press, 2006) 67.

33 Nicola Howell.

34 Although there must be compliance with the technical definition of consumer before the

provisions only provide protection for consumers when it has been recognised, in the form of inter alia s18 and Part 2-2, that there is a need for small business protection from unfair business conduct. As one of the authors has noted previously:

> Many contracts are used by both business and by consumers: for example mobile telephones. It defies common sense for a statute which promotes, inter alia, fair trading, to have the same contract subject to unfair contract terms provisions when a well-educated, experienced consumer purchases the telephone, but not when a less experienced, small businessperson does.[35]

## *Part 2: Potential protections at common law and in statute for small businesses affected by unfair contract terms*

Our suggestion is that since small business is left largely unprotected by the law in relation to substantive unconscionability and is subject to the impact of unfair contractual terms, other existing legal mechanisms need to be brought into play to ensure the fairness of B2B transactions. As far as the common law is concerned, these should largely centre around the construction of any exclusion clauses that may form part of these contracts as well as the interpretation, with the help of certain implied terms, of any other express terms that appear on their face to be unfair. Also, recent High Court authority may assist small businesses that are subject to onerous penalties for non-performance.[36] We will also discuss the possible application of the statutory unconscionability provisions in the ACL to unfair contract terms and the possible extension of the UCT provisions to small businesses.

### *The Common Law Revisited*

### Exclusion Clauses

The legal position is that for these clauses to apply the clauses must first be incorporated into the contract. Generally if they are included in a document which is signed by the small business person they will generally be incorporated. If they are in another document that is referred to in the signed document, there may be issues of notice, and the more onerous the exclusion clause, the more notice that is required.[37] Some protection is thus provided where an exclusion clause is

consumer guarantees in Part 3-2 will apply, in fact both large and small businesses can enjoy their protection in a variety of contexts: eg the purchase of several floors of office furniture by a large company would be a transaction covered by the consumer guarantees

35 Eileen Webb 'Considering unfairness in retail leases - A bridge too far or justifiable extension?' (2010) 19 *Australian Property Law Journal*, 58-102.

36 *Andrews v Australia and New Zealand Banking Corporation* [2012] HCA 30.

37 It should be noted that in *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004 ) 219 CLR 165 the High Court referred to a person signing '…a document which is known by that person to contain contractual terms…[being] bound by those terms…' If the document refers to

sought to be included in a contract by stealth. If they are incorporated into the contract, the exclusion clauses then need to be construed. The rule currently is, as approved by the High Court, that they are to be interpreted according to the ordinary rules of construction and only if there is any ambiguity are they to be read down, according to the *contra proferentum* rule.[38]

In a contract involving unequal business contractors, there is a strong case for the *contra proferentum* rule to be applied *ab initio* rather than as a second resort when the meaning of the exclusion clause is ambiguous. Historically, before the enactment of the consumer legislation we have today, particularly the non excludable consumer guarantees of acceptable quality, fitness for purpose etc exclusion clauses were always construed strictly against the party relying on them – see *Wallis, Son & Wells v Pratt & Haynes*[39] which reflects a clear judicial attempt to protect the weaker of the parties to the transaction. It would seem that this approach would be entirely appropriate in contracts between small business and 'large business'.

In the case of *Photo Productions v Securicor*, Lord Wilberforce stated, after taking the circumstances of the contract into consideration, '*In these circumstances, nobody would consider it unreasonable that as between* ***these two equal parties***[40]*, the risk assumed by Securicor should be a modest one and that Photo Productions should carry the substantial risk of damage or destruction.'*[41] In this case, the exclusion clause was given its ordinary meaning and this was largely based on the equality of the parties. The application of this approach to contracts involving unequal commercial parties would require a different method of interpreting exclusion clauses. This would seem to follow logically from the *Photo Productions* rationale.

Our suggestion is that since small business is left largely unprotected by the law in relation to substantive unconscionability and cannot make use of the legislative regime of unfair contractual terms, other legal mechanisms need to be brought into play to ensure the fairness of B2B transactions. This should include a particular approach to the construction of any exclusion clauses that may form part of these contracts Tthe exclusion clause must be strictly and narrowly construed so as not to unreasonably detract from the rights of the small business.[42]

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terms elsewhere there will be an issue as to whether sufficient notice has been provided of them and the fact of the signature per se will not satisfy this.

38 In *Darlington Futures Ltd v Delco Aust Pty Ltd* (1986) 16 CLR 500 the *contra proferentum* rule requires that where, according to the ordinary rules of construction, the words of the exclusion clause are capable of having more than one meaning, they are to be strictly construed against the interests of the party relying on the clause.

39 [1911] AC 394.

40 Authors' emphasis.

41 *Photo Productions Ltd v Securicor Transport Ltd* [1980] 2 WLR 283.

42 The four corners rule which confines the operation of exclusion clauses to events which are in the contemplation of the parties could be of use to SB. See eg *Council of City of Sydney v West*(1965)114CLR481

## *Implication of Terms*

In relation to the construction of other terms that detract from the rights of small business, eg unilateral termination clauses or variation clauses, one approach may be to require the implication of terms in fact in order to give effect to the (presumed) intentions of the parties. The Privy Council case of *BP Refinery (Westernport) Pty Ltd v Hastings Shire Council*[43] laid down the following conditions that must be satisfied: (1) it must be reasonable and equitable, (2) it must be necessary to give business efficacy to the contract, (3) it must be so obvious 'it goes without saying', (4) it must be capable of clear expression and (5) it must not contradict any express term of the contract. These tests were approved by the High Court.[44] It is arguable that where there is an unqualified termination or variation clause it would be necessary to imply a term that would require a reasonable notice period for activation of these clauses. It is arguable that these five conditions would be satisfied including the more difficult (2) necessity for business efficacy[451] and (3) 'so obvious it goes without saying'. The rationale for the implication of a term of this nature is that the small businessperson would only have entered into the contract if the term in question were to be activated in this way.

(Apart from not reflecting the intentions of the parties, a contract containing a clause which allows a contracting party to terminate the contract at any time, for no reason is arguably unsupported by consideration – the consideration is illusory because the promisor's obligation to perform is in effect purely discretionary[46]). The difficulties of implying a term in fact may be overcome by the implication of the duty of good faith as an implied term in law.[47] Good faith has been implied into specific classes of commercial contracts rather than having a more general application. These have included building contracts[48], commercial leases[49], franchise contracts[50] and loan contracts[51] What does good faith require and how can it be measured? In Australian contract law there is precedent that good faith can be equated with reasonableness and that this includes some level of consideration for the interests of the other contracting party. Although the decision of the case turned on its own facts, in *Garry Rogers Motors (Aust) Pty Ltd v Subaru (Aust)*

Where the parties are unequal, there is some potency in the argument that even if the exclusion clause is clearly worded it cannot defeat the main object of the contract. In *Photo Productions*, arguable the main purpose was defeated, but the parties were of equal bargaining strength.

43 (1977) 180 CLR 266.

44 See eg *Codelfa Construction Pty Ltd v State Rail Authority of NSW*(1982)149CLR337

45 In *Attorney General of Belize v Belize Telecom* [2009]1WLR1988[23]-[27], as Lord Hoffman stated '…a contract may work perfectly well in the sense that both parties can perform their express obligations, but the consequences would contradict what a reasonable person would understand the contract to mean…'

46 See *Placer Development Ltd v Commonwealth* (1969) 121 CLR 353.

47 See *Burger King Corporation v Hungry Jack's Pty Ltd* [2001] 69 NSWLR 558.

48 *Renard Constructions(ME) v Minister for Public Works* (1992 )NSWLR 234.

49 *Alcatel Australia v Scarcella* (1998) 44 NSWLR 349.

50 *Far Horizons Pty Ltd v McDonalds Australia Ltd*{2000}VSC310.

51 *Commonwealth Bank of Australia v Renstel Nominees Pty Ltd*[2001]VSC167.

*Pty Ltd*[52] Finkelstein J accepted that a duty of good faith might be implied to restrict the exercise of a right to terminate. In this way, the implication of a term of good faith could afford some protection to small business from unfairness.

## *Penalties*

The recent decision in *Andrews v Australia and New Zealand Banking Corporation*[53] saw the High Court consider the scope of the courts' jurisdiction to relieve against penalties. In summary, the court rejected recent authorities that stated such relief was only available where fees were payable upon a breach of contract and concluded that a fee payable under a contract is a penalty where the purpose of the fee is to secure performance of a primary obligation. This widens the scope of the doctrine in that fees payable under a contract may be regarded as penalties even if they are not generated by a breach. In such cases the fee must represent a genuine pre-estimate of loss or the fee will be struck down as a penalty. On the other hand, if the fee is, in fact, a charge for further services or accommodation such fee will not be regarded as a penalty.[54]

Therefore, a term of a contract that compels payment of a fee, even if not triggered by a breach of contract, may be scrutinised to determine whether the fee is a penalty. The only defence to a person imposing the fee is that it was either a genuine pre-estimate of loss or it was a legitimate fee for additional services. Prior to *Andrews,* skilful drafting meant that if such terms were drafted not on the basis of fees being payable on a breach of contract but in permissive terms such fees would avoid scrutiny as a potential penalty. The situation post-*Andrews* is, with respect, a more realistic approach where the substance of the fee is examined rather than the form in which the relevant term is drafted.

The decision may provide some relief for small business persons who are subject to (arguably) unfair terms requiring the payment of considerable fees for relatively minor breaches or even in circumstances not involving breach. If a term requires payment of a fee, as long as the fee is not for additional services, it will be scrutinised to ascertain whether such fee amounts to a penalty. If the UCT provisions were available in a business context, arguably a fee imposing a considerable penalty would be an unfair contract term – it would cause a significant imbalance between the party imposing the fee and the party the fee is being imposed upon. It is also arguable that an excessive fee would not be in the legitimate interests of the party imposing the fee and would be likely to cause considerable detriment. The decision in *Andrews* would seem, however, to address this situation by another route and one that would be available to small business. Any term imposing a fee to secure a primary obligation will necessitate an examination as to whether such term is a penalty. If the fee exceeds a genuine

52 [1999] FCA 903.
53 [2012] HCA 30.
54 *Metro-Goldwyn Mayer Ltd v Greenham* [1966] 2 NSWLR 717.

pre-estimate of loss (in other words is, arguably, unfair) it will not be payable.

## *Using the ACL - can section 21 ACL be used as a de facto method of addressing UCT in small business contracts?*

This section of our article examines whether despite the exclusion of small business from the ambit of the UCT provisions, s21 ACL can 'fill the void' left by the unavailability of Part 2-3. This will be addressed by considering the various interpretations of 'unfair' and 'unconscionable', the background to the introduction of the unconscionable conduct and UCT provisions and comparing the respective scope of s21 ACL and s23 ACL.

## *Interpretation of unfair and unconscionable*

First, the various meanings of 'unconscionable' and 'unfair 'must be considered. Clearly, the terms 'unconscionable' and 'unfair' involve differing standards; the former being a more onerous standard than the latter. Indeed, because the definition of unconscionable has a higher threshold than the definition of unfair it will be harder to satisfy. This creates an obvious difficulty in trying to use unconscionability to address B2B matters involving unfair terms.

'Fairness' can attract a variety of meanings, including just, equal, good, ethical or moral. 'Unfairness' attracts similarly diverse interpretations. It must be said that the interpretation of unfair under the UCT provisions is narrower than in common parlance. The elements in s24 must be established and the requirement regarding detriment has been perceived as problematic.[55]
On the other hand, as Strickland notes:

> 'Unconscionable' is a strong word. It is stronger than 'wrong' and stronger than 'unfair'. It connotes conduct of a kind that attracts moral obloquy or an adverse moral judgment.[56]

The interpretation of section 21 and that of its predecessor has been cautious. Although the consensus seems to be that a dictionary interpretation of 'unconscionable' is appropriate,[57] a high standard for the wrongdoing is required to evince unconscionable conduct in a commercial transaction.[58] Recently, some courts and tribunals have embraced the 'gloss' of moral obloquy to prevent the interpretation of 'unconscionable' becoming too unwieldy and more akin to a fairness standard.[59]

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55 Frank Zumbo, Promoting Fairer consumer conduct: Lessons from the United Kingdom and Victoria 2006 15 TPLJ 84

56 *Hall v Kennards Storage Management Pty Ltd* [2009] VCAT 153.

57 As discussed in Chapter 2.

58 *Hall v Kennards Storage Management Pty Ltd* [2009] VCAT 153; *Transaero Pty Ltd v Goulthorpe* [2009] VCAT 2146, [92].

59 *Attorney General of New South Wales v World Best Holdings Ltd* (2005) 63 NSWLR

Establishing unconscionable conduct, especially in a business context is a hard task. The dearth of cases exhibiting a successful plaintiff in commercial matters involving s51AC and now s21 is testament to the difficulty. The interpretive principles may provide additional flexibility and scope for the unconscionability provisions but, in our view, the existing standard will not be diluted. Would extension of the UCT provisions to small business make for an easier standard to meet? Although the necessity to establish the elements in s 23 complicates the process and is likely to make unfairness under the UCT provisions a more onerous standard than a dictionary definition, it would still seem less difficult to establish than unconscionable conduct. Having said this, the narrow scope of the UCT provisions and the likely exclusion of considerations of object and effect considerably reduce the provision's potential. On the other hand, despite the more onerous standard, the wider scope of s21 would appear to provide potentially more possibilities/relief for a small business person experiencing the ramifications of onerous contract terms.

## *Unconscionability in small business transactions*

Although the possibility of a prohibition of unconscionable conduct could have been included in the TPA as early as 1976, a provision prohibiting unconscionable conduct in consumer transactions was not introduced until 1986 and s51AA, a prohibition impacting on commercial transactions, in 1992. The latter provision had practically no success as small businesses were treated in the same way as commercial parties of far greater size, resources and, often, business acumen.[60] For example, in *Australian Competition and Consumer Commission v C G Berbatis (Holdings) Pty Ltd*[61] *(Berbatis)* the majority of the High Court approached the relationship between the landlord and the tenants as being on an equal legal footing, as both were commercial parties. Gleeson CJ concluded that the tenants had no legal entitlement to a new lease, and as such a disability routinely affects tenants at the end of a lease term, it could not be said to be a 'special' disadvantage[62] in

557, 583 per Spigelman J, applied in, inter alia, *Canon Australia Pty Ltd v Patton* (2007) 244 ALR 759, 768. Such an approach has recently been the subject of criticism. In *Canon Australia Pty Ltd v Patton* (2007) 244 ALR 759 [4], Basten JA agreed that it was inappropriate to dilute the unconscionability standard but was concerned that the use of terms such as 'high moral obloquy' simply substituted one uncertain standard for another:

> [T]o treat the word 'unconscionable' as having some larger meaning, derived from ordinary language, and then to seek to confine it by such concepts as high moral obloquy is to risk substituting for the statutory term language of no greater precision in an attempt to impose limits without which the Court may wander from well-trodden paths without clear criteria or guidance.

60 For example, this comment from the Shopping Centre Council of Australia is typical: 'businesses, unlike consumers, have sufficient knowledge of the contracting subject matter, have access to legal and other specialist advice and have sufficient bargaining power to resolve these matters without intervention by government.' Ibid 5.10.

61 (2003) 214 CLR 51.

62 (2003) 214 CLR 51, [15]: 'They were at a distinct disadvantage, but there was nothing "special" about it. They had two forms of financial interest at stake: their claims, and the

the sense known to equity. Gummow and Hayne JJ acknowledged that the tenants were in a vastly inferior bargaining position when compared with the landlord, but considered they were not under a disabling condition which affected their ability to make a judgment as to their own best interests. Callinan J responded in terms of commercial choice:[63] the tenants had a choice, to accept the unpalatable terms but secure the lease renewal, or to not accept and be unable to sell the business. The landlord was, in Callinan J's view, merely insisting on its legal rights and could not be considered unreasonable or unconscionable.[64]In 1998, in the wake of the Reid Committee's report that identified questionable business practices impacting upon small business lessees and franchisees, s51AC was introduced to prohibit unconscionable conduct in small business transactions. Section 51AC was one of the few provisions that distinguished between business sizes and, to an extent, power. Although the monetary threshold was unwieldy, it did highlight the fact that small businesses require protections when dealing with larger counterparts
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The ACL addresses unconscionable conduct in ss 20-22. Section 20 is the equivalent of s51AA TPA and, it seems, will continue to have limited utility. Of more relevance to a small business person are ss21 and 22. Section 21 states:

(1) A person must not, in trade or commerce, in connection with:

(a) the supply or possible supply of goods or services to a person (other than a listed public company); or

(b) the acquisition or possible acquisition of goods or services from a person (other than a listed public company);

engage in conduct that is, in all the circumstances, unconscionable. [65]

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sale of their business. The second was large; as things turned out, the first was shown to be relatively small. They had the benefit of legal advice. They made a rational decision, and took the course of preferring the second interest. They suffered from no lack of ability to judge or protect their financial interests. What they lacked was the commercial ability to pursue them both at the same time.'

63 'Whenever parties are in a business relationship with each other and they fall out over an aspect of that relationship, it will generally not be unreasonable or indeed unconscionable for them to seek to insist upon their legal rights, or to require that one party give up some right in exchange for the conferral of a new right upon that party...there is nothing special about a situation in which a tenant without an option is anxious to obtain a fresh lease, and the landlord, conscious of that anxiety, utilizes it to obtain a business advantage, whether by way of a higher rent or otherwise.' (2003) 214 CLR 51 [38].

64 Ibid.

65 Merely instituting legal proceedings or referring a matter to arbitration in relation to the supply or possible supply, or in relation to the acquisition or possible acquisition of goods or services will not, of itself, amount to unconscionable conduct. In determining whether a person has contravened s21(1)(b) the court may have regard to conduct engaged in, or circumstances existing, before the commencement of this section but (a) the court must not have regard to any circumstances that were not reasonably foreseeable at the time of the alleged contravention.

Section 22 contains a non-exhaustive list of factors to which the court can refer when determining whether conduct is unconscionable.

Section 21 (4) is relevant to our discussion of UCT. Section 51AC TPA was plagued for many years by uncertainties regarding the scope of unconscionable conduct: was it limited to the equitable doctrine or was it a wider concept? Was the section applicable to the substantive operation of a contract or did it apply only to the procedural stage of the contract? These questions were addressed in November 2009 with the release of '*The Nature and Application of Unconscionable Conduct Regulation: Can Statutory Unconscionable Conduct be Further Clarified in Practice?*' and the appointment of an expert panel by the Commonwealth government to consider options for clarifying the scope of the unconscionable conduct provisions of the TPA.[66] The Expert Panel suggested a set of interpretive principles intended to provide general guidance. These interpretive principles are found in s21(4) ACL.[67]

The Expert Panel noted that the purpose of the interpretive principles is to recognise that s 51AC (now s21 ACL) was intended to go beyond the scope of the equitable doctrine of unconscionability and that certain principles could be distilled from the case law; the intention of Parliament was that the court could consider the terms and progress of a contract- the provisions may apply to systems of conduct or patterns of behaviour; and the identification of a special disadvantage is not necessary to attract the application of the provisions.[68] Of particular relevance to this article is s21(4)(c):

(4) It is the intention of the Parliament that:

(c) in considering whether conduct to which a contract relates is unconscionable, a court›s consideration of the contract may include consideration of:

i) the terms of the contract; and

66 The Issues Paper and appointment of the expert panel arose out of the Commonwealth Government *Response to the Senate Standing Committee on Economics, Report on the Need, Scope and Content of a Definition of Unconscionable Conduct for the Purposes of Part IVA of the* Trade Practices Act 1974 *(Cth)* <http://www.aph.gov.au/SENATE/committee/ economics_ctte/tpa_unconscionable_08/gov_response.pdf> at 6 October 2013; report of the Senate Economics Committee, *The Need, Scope and Content of a Definition of Unconscionable Conduct for the Purposes of Part IVA of the* Trade Practices Act 1974 (3 December 2008) <http://www.aph.gov.au/Senate/committee/economics_ctte/tpa_unconscionable_08/report/report.pdf> at 6 October 2013.

67 The Expert Panel concluded that a list of examples would not improve the understanding or implementation of the unconscionable conduct provisions. For the same reason, a set of principles which would operate as rebuttable presumptions of unconscionable conduct was also rejected.

68 The Expert Panel also recommended that further test cases be pursued to draw on conduct in diverse industries and assist in the understanding of the interpretative principles recommended by the panel.

(ii) the manner in which and the extent to which the contract is carried out;

and is not limited to consideration of the circumstances relating to formation of the contract.

Section 21(4) makes it clear that s21 is concerned with both procedural and substantive unconscionability. This is significant because, as well as a consideration of the conduct of the supplier/acquirer as to the manner and extent the contract is carried out, a consideration of the terms of the contract is emphasised.

Section 22 includes several factors relevant to an assessment of *inter alia* the terms of a contract. Section 22(1)(j)[69] and (k) are of particular interest stating:

(j) if there is a contract between the supplier and the customer for the supply of the goods or services:

(i) the extent to which the supplier was willing to negotiate the terms and conditions of the contract with the customer; and

(ii) the terms and conditions of the contract; and

(iii) the conduct of the supplier and the customer in complying with the terms and conditions of the contract; and

(iv) any conduct that the supplier or the customer engaged in, in connection with their commercial relationship, after they entered into the contract; and

(k) without limiting paragraph (j), whether the supplier has a contractual right to vary unilaterally a term or condition of a contract between the supplier and the customer for the supply of the goods or services…

Several other factors in s22 are also relevant to terms in B2B contracts, for example ss22 (e),(f),(g),(h) and (l).

This raises the obvious question - in the absence of UCT provisions applying to small business transactions, could s21 be used by a small business person to challenge an unfair contract term? In other words, in what circumstances can the inclusion of and/or the enforcement of an unfair contract term amount to unconscionable conduct under s21 ACL?

69 And s22(2)(j) (ii).

## *Unfair contract terms*

Much of the background to the introduction of the UCT provisions has been canvassed elsewhere in this volume. For the purpose of this article it is instructive to note that legislation addressing UCT was regarded as necessary because, *inter alia* in many cases, unfair contract terms 'fell through the cracks' because the conduct did not come within the elements of other provisions in the TPA and due to doubts as to the applicability of the unconscionability provisions, especially in relation to the substantive stage of a contract. Initially, it was contemplated that the ACL would include provisions that would extend the UCT provisions to business-to-business transactions[70] because

> [s]tandard-form contracts are used by parties irrespective of the legal status or nature of the party to whom the contract is presented, and without any effective opportunity for that party to negotiate the term. In such cases, it would be invidious to suggest that the same term, which may be considered unfair in relation to a contract entered into by a natural person, would not be similarly unfair in relation to a business, where neither of them is in a position to negotiate the term.[71]

Perhaps not surprisingly, there was a torrent of criticism from large business interests, in particular the Shopping Centre Council of Australia and some members of the legal profession[72] and academia.[73] A proposal to limit the extension to small businesses[74] did not quell concerns, and the provisions were removed from the proposed legislation.[75] Therefore the UCT provisions are confined to standard form consumer contracts.[76]

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70 The Treasury, 'Consultation on Draft Unfair Contract Terms Provisions' (11 May 2009) Commonwealth of Australia, Canberra. <http://www.treasury.gov.au/documents/1537/PDF/ The_Australian_Consumer_Law_Consultation _Paper.pdf> at 6 October 2013.

71 Ibid 8.

72 In particular the Trade Practices Committee of the Law Council of Australia.

73 Professor John Carter, Freehills Submission in response to 'Consultation on Draft Unfair Contract Terms Provisions', ibid.

74 In June 2009, the then Minister for Competition Policy, the Hon. Chris Bowen, announced that there would be a upfront price cap of $2 million on the size of transactions that would be subject to the unfair contract terms ban. Later that month, however, the new Minister narrowed the provisions to business-to-consumer contracts.

75 Note comments too of Senate Economics Committee Trade Practices Amendment (Australian Consumer Law) Bill 2009 (7 September 2009) [5.18] <http://www.aph.gov.au/Senate/committee/ economics_ctte/tpa_consumer_law_09/report/ report.pdf> at 6 October 2013..

76 Definition of consumer contract Section 2(3): 'A ***consumer contract*** is a contract for: (a) a supply of goods or services; or (b) a sale or grant of an interest in land; to an individual whose acquisition of the goods, services or interest is wholly or predominantly for personal, domestic or household use or consumption.'

## *The respective scope of the unconscionability and the UCT provisions*

The UCT provisions have a relatively narrow focus on the unfairness of a particular *term* whereas s21 permits a broader assessment of *conduct*. The scope of s21 extends to consideration of the terms of a contract and the manner and extent to which the contract is carried out. Moreover, it is now clear that the court may consider both the procedural and substantive stages of the contract when assessing whether conduct is unconscionable.[77]

Like consumer contracts, some B2B terms are objectionable on their face and the UCT provisions, if extended to B2B contracts, would be applicable. As an exemplar, we can again use, as we did above[78] a rather extreme (but existent) clause that permits a supplier to terminate a supply agreement without notice. It seems likely that such a term would offend s23: it causes a significant imbalance in the parties' positions; it would seem to be unreasonable in terms of a business's legitimate dealings[79] and would almost invariably cause detriment. The term would seem to fit within the factors in s25(1) (a) and (b) and , in appropriate circumstances, possibly (e) and (h). In such a case, the UCT would be useful to the businessperson.

However, there also seems no reason why reliance on such a term could not equally be unconscionable. Although earlier decisions doubted that merely exercising the terms of a contract agreed between two commercial parties can be regarded as unconscionable,[80] more recent authorities recognise that in the right circumstances, enforcement of strict contractual rights by one party can evince unconscionable conduct.[81]

Section 21 extends to the terms of the contract *and the way the terms are carried out*.[82] Several factors in s22 support a contention that seeking to enforce an unfair term could, in the appropriate circumstances, amount to unconscionable conduct. Section 22(1)(a) permits an examination of the relative strengths of the parties' bargaining positions. 'Bargaining position' is broad and could refer to the weaker party's position vis-à-vis the other party to the contract. In comparison s24(1)(a) ACL necessitates a consideration of whether the potentially unfair term causes significant imbalance. These provisions appear to overlap as, in a consideration

77 Section 21(4).

78 Page ?

79 This is presumed to be the case so the supplier would have to rebut.

80 In *Hurley v McDonald's Australia* (2000) ATPR 41-741,[22]it was noted that:

> before sections 51AA, 51AB, or 51AC will be applicable, there must be some circumstance other than the mere terms of the contract itself that would render reliance on the terms of the contract `unfair' or `unreasonable' or `immoral' or `wrong'.

81 Corones [5.65] and reference therein.

82 *Competition and Consumer Legislation Amendment Bill 2010, Explanatory Memorandum* at [2.25].

of unconscionable conduct, the more significant the difference (imbalance) in the parties' bargaining positions, the more likely it seems unconscionable conduct could have occurred. Section 22(1)(b) is very similar to section 24(1)(b), the crux of establishing an unfair contract under the ACL. Under the UCT provisions, there is a presumption that the term is not in the stronger party's legitimate interests.[83] This is not the case with s22 so the plaintiff must discharge the burden of proof. It has been suggested that principles of good faith and reasonableness will be relevant to an interpretation of s22(1)(b). It is uncertain if this will be the case with the UCT provisions. Indeed, if a restrained interpretation of the UCT provisions is adopted s22(1)(b) would seem to have a wider operation.

Pursuant to s22(1)(d) an improper use of a contractual term could indicate the use of unfair tactics. Unless a wider interpretation of the UCT provisions is embraced, this use would be irrelevant unless there is unfairness on the face of the term. Again, if the focus of the ACL is on the terms themselves, s21 and 22 seem to provide the opportunity for a more expansive consideration, as does s22(1)(f), which permits a consideration of the extent to which the supplier's conduct towards the business consumer is consistent with the supplier's conduct in similar transactions. A term exercised in respect of one business and not another could suggest discrimination between businesses, and after a consideration of all the circumstances there could be a finding of unconscionable conduct. Similar considerations could apply in relation to willingness to negotiate. An obvious point of comparison is section 22(1)(j) which will involve a consideration of the procedural issue of whether there was negotiation involving the clause to the term itself and the conduct engaged in by the other party. Section 22(1)(k), permits a consideration of whether the supplier has a contractual right to vary unilaterally a term or condition of a contract between the supplier and the business consumer for the supply of goods or services.[84] This would permit a wider examination of context. Finally, good faith is noted as a consideration in an assessment of unconscionable conduct.

The considerations in s22 have considerable importance as, in practice contractual terms may appear benign on the surface but the *effect* of their exercise or the *object*

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83 Above n 8 [4.8]: 'It would be a huge impediment for an individual claimant to prove either of these matters, as they are unlikely to be able to bring evidence before a court without disproportionate effort and expense. A regulator would need to use intrusive and expensive coercive information-gathering powers to obtain the required information to bring a case.'

84 ***Terms permitting unilateral changes by one party to the contract***
Paragraphs (a), (b), (d), (e), (f), (g) and (h) are examples of types of terms that allow a party to make changes to key elements of a contract, including terminating it, on a unilateral basis.
[2.55] The inclusion of these examples does not prohibit unilateral variation terms, nor does it create a presumption that such terms are unfair. Indeed, the need for the unilateral variation of contract terms is expressly contemplated by legislation in specific contexts, including for example Parts 4 and 5 of the *Uniform Consumer Credit Code* (see also Parts 4 and 5, Schedule 1 of the National Consumer Credit Protection Bill 2009).

behind their exercise may be harsh.[85] For example, complaints from retail tenants are almost invariably in the context of a landlord's *conduct,* not the terms of the lease;[86] it is the manner in which the landlord exercises a clause or the motive behind the exercise that causes most consternation.[87] On the present drafting of the UCT provisions, it seems such factors are unlikely to be considered by a court when assessing unfairness. The Commonwealth legislature narrowed the scope of the ACL UCT provisions in comparison to that of Victorian and UK equivalents. The latter provisions provided for consideration of the object and effect of a term, a consideration of 'all the circumstances' and good faith. The absence of these factors suggests that s23 will have a narrower scope – more focussed on the term itself – rather than the potentially wider view taken elsewhere. Although the court must examine the contract as a whole, its transparency and is not limited by the factors listed in s25, the ACL is silent on how far the court can go beyond the term itself to the *effect* of the clause and certainly the *motive* behind its exercise. If this is the case, the scope of s23 may be limited only to terms that are brazenly unfair on the surface. The incidence of this will inevitably decline with a rise in awareness of the ACL and contractors will find other ways to achieve their ends. In our view, such an interpretation will artificially limit the UCT provisions preventing a court from looking beyond the term's form and considering its mode of application or the reason for its exercise. If this is the case, however, even if s23 was extended to cover small business, it would often be of limited use.

## *Remedies*

As discussed, depending on how the courts regard cases of alleged unconscionable conduct involving the terms of a contract, s21 may provide small businesspersons some relief from the existence and effect of unfair contract terms, despite the unavailability of the UCT provisions. Interestingly, the remedies available under s21 may be of more use to a small business person than those under the UCT provisions. If a contract term is unfair it will be void. If the contract can continue without the term it will do so. If the contract cannot continue without the relevant term, the contract will be set aside. Compensation can be awarded for any loss occasioned by the operation of the term.[88] On the other hand, a contravention of the unconscionability provisions can result in a civil pecuniary penalty in addition to a variety of enforcement powers and remedies including compensatory orders under s237.

85 Eileen Webb 'Considering unfairness in retail leases - A bridge too far or justifiable extension?' (2010) 19 *Australian Property Law Journal* 58, 62.

86 Ibid.

87 Indeed, retail leases are highly regulated pursuant to the various state and territory retail leasing legislation so it is unlikely that a term drafted to comply with the relevant legislation would be held to be unfair.

88 Section 236

## *Conclusions*

This article has argued that the many protections available to consumers in their contracts with commercial entities highlights the dearth of protection available to small business in B2B contracts with larger players. In our view, the diversity of size, composition and experience of small-businesses and, in many cases, the similar vulnerabilities shared with consumers renders it inequitable for only some members of what is in fact a class of 'consumers' to receive statutory protection. The adoption of a status driven dichotomy[89] that cuts an arbitrary legal line between consumers and business[90] distorts the perspective from which the legislature and the courts proceed.[91]

However, when we examine the common law and statutory provisions available to small business, this perceived lack of legal protection for small business may be more apparent than real? Indeed, under the common law there is clearly scope for established doctrines to be utilised to provide small business with some protection when they contract with their larger counterparts. In this same context, there may need to be a return to the underlying rationale of some principles of interpretation so they are true to their purpose.

Similarly, s21 ACL is likely to provide some assistance to a small businessperson in some such circumstances. Section 21(4) clarifies the scope of the statutory unconscionability provisions and it is clear that the provisions apply to terms in a contract and to the substantive performance of a contract. While this is a promising development, the lofty standard required to establish unconscionable conduct may tell against the success of a small businessperson except in the light of the operation of the most arduous term. On a positive note, the factors in s22

89 Larry Garvin, 'Small Business and the False Dichotomies of Contract Law' (2005) 40 *Wake Forest Law Review* 295.

90 Ibid, 296. See too Rick Bigwood An example of this approach can be seen in the Australian decision, *Australian Competition and Consumer Commission v C G Berbatis (Holdings) Pty Ltd* (2003) 214 CLR 51 (*Berbatis*) where the majority of the High Court approached the relationship between the landlord and the tenants as being on an equal legal footing, as both were commercial parties. Gleeson CJ concluded that that the tenants had no legal entitlement to a new lease, and as such a disability routinely affects tenants at the end of a lease term; it could not be said to be a 'special' disadvantage in the sense known to equity. Gummow and Hayne JJ acknowledged that the tenants were in a vastly inferior bargaining position when compared with the landlord, but considered they were not under a disabling condition which affected their ability to make a judgment as to their own best interests. Callinan J responded in terms of commercial choice. In this respect the High Court's approach can be likened to Garvin's discussion of the 'rational actor' model. Professor Bigwood is critical of the High Court's approach: "I criticise the majority judges' rather perfunctory handling of the facts of the case, which was made worse by their failure to link the elements of unconscionable dealing to a sophisticated conceptual account of interpersonal exploitation in market exchange contexts': Bigwood, 'Curbing Unconscionability'

91 Indeed, Bigwood notes that: 'Taken too far, those classifications can become akin to caricatures.'

provide licence to take a wider, contextual view of the contractual term. The UCT provisions seem focused on 'discrete' rather than relational transactions[92] whereas the factors in s22 permit a consideration of the wider relationship of the parties and the circumstances of the term's operation.

Also, even if the UCT provisions of the ACL were extended to small business there may be considerable limitations on their efficacy for small business. 'Unconscionable' is a more arduous legal standard than 'unfair' and the definition of UCT in the ACL has little resemblance to a dictionary definition of 'unfair'. Also, if the interpretation of the UCT provisions is limited to an assessment of unfairness on the term's face, many contract terms are unlikely to be sanctioned. For example, terms in a B2B contract may be justified as legitimate in a commercial environment but not in a consumer scenario. Also, if contractual terms must comply with prescribed legislation or codes of conduct, for example retail leases and franchise contracts such terms will, presumably, be regarded as fair.

With this in mind, we conclude it is logical to deal with all UCT – consumer and B2B – in one provision. In some cases, the conduct may arguably be unconscionable too and the terms or its use can be considered in that context. But, it seems unnecessary to manipulate the common law, albeit logically, and/or s21 to 'fit' a set of circumstances because a provision that is already in existence is inadequate. Commentators have encapsulated the numerous valid economic and moral reasons for regulating unfair contract terms.[93] If conduct is inappropriate – and a term of a contract is unfair – it should not matter to whom it is directed.

92 Luke Villiers, Eileen Webb 'Using relational contract principles to construe the landlord-tenant relationship: Some preliminary observations' (2011) 1 *Property Law Review* 1.

93 See F Zumbo, 'Dealing with Unfair Terms in Consumer Contracts: Is Australia Falling Behind?' (2005) 13 *Trade Practices Law Journal* 70; N Howell, 'Catching up with Consumer Realities: The Need for Legislation Prohibiting Unfair Terms in Consumer Contracts' (2006) 34 *Australian Business Law Review* 447.