Submission No 24

INQUIRY INTO UNFAIR TERMS IN CONSUMER CONTRACTS

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Hon Christine Robertson
Standing Committee on Law and Justice
Parliament of NSW
Macquarie St
Sydney NSW 2000

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Submission to the Inquiry into Unfair Terms in Consumer Contracts[1]

Dear Ms Robertson

I congratulate you and our Parliament in joining Victoria and many other jurisdictions world-wide in considering legislation to address unfair terms in consumer contracts. As a teacher, researcher and practitioner in comparative contract law for over a decade, based at USydney since 2001, I consider that **new legislation is clearly and urgently needed**:

(a)-(b) Prevalence of unfair terms and standard-form contracts: pervasive and growing

Economic liberalisation and increased concentration of economic power, despite certain rearguard actions by some competition law regulators, has combined with globalisation and the Information Technology revolution to generate growing volumes of standard-form contracts containing a myriad of unfair contract terms. Virtually anyone can set up shop online and copy over one-sided standard form contracts found online in jurisdictions with little tradition of consumer protection law, built up painstakingly in countries like Australia since the 1970s. Consumers hardly ever read them before "clicking" their "consent", and can't negotiate the terms anyway even if they do read and understand them. Enforcement agencies increasingly lack resources, as well as jurisdiction, to patrol even the worst excesses under current law. Such problems are not new, but they are spreading again, undermining hard-won improvements in firms' dealings with consumers. Many Submissions so far to this Inquiry (eg No 19 from the Australian Consumers Association or "ACA", No 21 from the Consumer Credit Legal Centre (NSW) / Redfern Legal Centre) detail the many types of unfair terms found across many sectors – not just in predominantly online trading environments, including precisely:

[1] Addressing the numbered Terms of Reference available via http://www.parliament.nsw.gov.au/prod/PARLMENT/Committee.nsf/0/99D3B2CE26A40F9CCA2571D90018D245.

(i) unilateral variation clauses – often found in credit contracts, and mobile phone contracts;
(ii) penalty clauses – often found in credit contracts, and eg in one rental car agreement I became aware of which insisted that "the customer is bound to pay $200 if the car is damaged, irrespective of fault" (held in one CTTT proceeding to be valid under current law, even if the customer can prove that the party who damaged the car completely admits fault and will pay all damages);
(iii) terms allowing suppliers to suspend service while continuing to charge consumers – found eg in Internet Service Provider contracts;
(iv) terms permitting only suppliers to terminate the contract – in other long-term contracts for services.

Something must be done to prevent such unfair terms further eroding norms of fair dealing, painstakingly promoted over the last three decades by legislators, regulators, courts, educators and civil society groups. "Self-regulation" and other "soft law" has reached its limits in this area, for the general reasons outlined in many of the Submissions and a wealth of other literature,[2] and because the existing law casts an increasingly pale light over business behaviour.

(c) Relief under existing law: limited

The **judge-made law** of contracts has long struggled to deal with such contractual unfairness. Courts in the common law tradition applied strict rules based on the (increasing fictional) notion of "party agreement" or "voluntary assumption of contractual liability". Australian judges are struggling even to develop narrower concepts of a general duty of "good faith" in contract law, long known and applied in the United States and the civil law tradition world-wide. In the Anglo-Commonwealth tradition, to be sure, the Courts of Equity provided a safety valve, primarily through the doctrine of unconscionable bargains (revived in Australia in *CBA v Amadio* [1983] 151 CLR). Yet Equity always operated on the periphery. Further, Australia has never had a judge as influential as Lord Denning in England over the mid- to late 20th-century, who tried to develop more sweeping doctrines to regulate contractual unfairness – and even his innovations inevitably ended up being knocked back by England's Law Lords. The closest we have in Australia is Justice Kirby, who is almost always now in dissent on the High Court.

Indeed, as then President of the NSW Court of Appeal, his Honour was the dissenter in *AGC v West* (1986) 5 NSWLR 610, a leading judgment refusing relief under the **Contracts Review Act 1980 (NSW, "CRA")**. That case helps explain the limited impact of this legislation aimed at striking down "unjust" contracts, derived from a report dating back to 1976 by the late USydney Professor John Peden.

An empirical study by Tyrone Carlin found only 160 judgments in which any form of reference was made to the CRA between 1982-2000.[3] His sample of 60 from these established that most involved mortgage contacts and loan guarantees. One feature Carlin noted was that out of the 18 cases in which relief was granted

[2] Eg Howells and Weatherill, *Consumer Protection Law*, 2nd ed 2005, Ashgate.
[3] 23 Syd L Rev 125-44 (2001).

and to which a financial institution was a party, only one was held unjust due solely to the oppressiveness of the terms themselves. He speculates that this is because they may have put systems in place to ensure that such terms are not inserted. There is a more likely explanation in light of the evidence presented by recent Submissions to this Inquiry, and everyday experience nowadays. The courts (and therefore lawyers) have reverted to interpreting the Act in light of the background judge-made law, which focuses on "procedural injustice" (in the negotiation phase) rather than "substantive injustice" (of the resultant terms).

A second feature noted by Carlin is that more recent cases tend to grant only partial relief, rather than complete relief, from those contracts nonetheless found to be unjust. In my view, this is consistent with greater conservatism among the Australian judiciary more generally, notably in the High Court. For example, in *ACCC v Berbatis* (2003) 197 ALR 153, the Court (Kirby J dissenting) refused to find that a shopping mall operator had forced an unconscionable bargain on a fish and chip owner. The Court set a high standard for establishing the "special disability" in the negotiation process, which is needed to obtain relief under the *Amadio* doctrine (and therefore s51AA of the **Trade Practices Act** or TPA, added in 1992 and which any individual or firm can invoke against corporations).

In addition, judgments from around 2003 under s51AA of the TPA have gone almost completely in favour of financial institutions.[4] This case law trajectory, in turn, makes it increasingly hard for consumers to obtain relief from corporations for **unconscionable conduct** prohibited in TPA s51AB (originally s52A when added in 1986, and with a counterpart in NSW's Fair Trading Act 1987 s43). Indeed, the list of factors that courts may have regard to in assessing statutory unconscionability under that section is much more limited (and therefore inviting to judges) than under the CRA.

Finally, minimum **statutory implied warranties** under the TPA (Part V Div 2) are inadequate as well. They should ensure minimum quality standards in goods and services, but they do not extend to the sorts of unfair terms identified above as the subject for this Inquiry. Anyway, you can go into even major retail chains and be told by some staff that they owe no obligations beyond say their own "one-year" express warranty or – even worse – none at all, telling you that the only recourse is against the manufacturers of the goods they sell. Regrettably, fair trading authorities no longer have the resources to enforce the existing law, and are faced with a growing nonchalance of even larger firms that carries over into other forms of unfair contracting with consumers.

Further, as many of the Submissions point out, a major problem with both the current judge-made law and legislation is that this still relies primarily on individual consumers being able to bring formal proceedings against suppliers. Even the ACCC lacks resources to intervene in proceedings except in the most egregious and widespread problem areas. Private litigants' access to the courts is also starting to be closed off in Australia, as evidenced by the federal and state "tort reforms" since 2002. We are also losing momentum in developing effective Alternative Dispute Resolution procedures, as my Report for Australia shows in a European Commission ("EC") comparative study coordinated by Leuven University and due out end-November.

[4] Eg Abigail McGregor, Legalwise Seminar (2004).

(d) Specific-purpose legislation (eg UK, Victoria): Simple and effective

Fortunately, the solution is simple. NSW should enact new legislation following the well-established 1993 EC Directive on Unfair Terms in Consumer Contracts. In (soon 27) European member states, this applies new **substantive rules** directly regulating the sorts of unfair terms that will otherwise no doubt continue to proliferate in NSW. The regime also requires mechanisms for effective enforcement. In the UK, that comes primarily through the Office of Fair Trading. Their helpful Submission to this Inquiry (No 5) shows how the regime has had enormous impact in reducing unfair terms in standard form contracts. The rules are so straightforward that hardly any cases have had to be taken to formal (and expensive) adjudication. Likewise, Victoria's amendments to their Fair Trading Act in 2003, modelled on the Directive, are helping consumers there without the skies falling in on businesses. The same is true in Japan, under its Consumer Contracts Act of 2000. In light of such experiences, in May 2006 New Zealand's Ministry of Consumer Affairs published a "Review of the Redress and Enforcement Provisions of Consumer Protection Law: International Comparison Discussion Paper", concluding there was merit in adding an EC-like regime in that country as well.[5]

Indeed, Japan's Act was recently amended to allow accredited organisations to bring **representative actions** for court injunctions to rectify unfair terms in standard form contracts. In enacting legislation with substantive rules based on the EC's emerging global standard, Australia similarly should provide avenues of redress and enforcement for respected associations like the ACA, as well as adequate resources and training for regulators. In fact, s10 of the CRA already allows the NSW Minister to seek a court order prescribing terms on which a person may enter into contracts of a specific class. However, there seems to be only one reported case in which such an order was obtained ([1986] ASC 55-478).

For many years, including in Australia's leading contract law textbook,[6] the late USydney Professor David Harland urged reform of the law on unfair contract terms to incorporate such mechanisms of "abstract control", as well as the substantive approach of the EC Directive. The **time has now come** to fill this growing gap in our legal system. Please let me know if I can be of any further assistance in this important project.

Dr Luke Nottage

[5] http://www.consumeraffairs.govt.nz/policylawresearch/enforcement-review/paper-two/paper-two-06.html#P318_46426.
[6] Carter & Harland, *Contact Law in Australia*, 4th ed 2002, para [1530].