Submission No 16

INQUIRY INTO UNFAIR TERMS IN CONSUMER CONTRACTS

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Dear Sir or Madam

I refer to the Inquiry into Unfair Terms in Consumer Contracts.

Please find enclosed the submission to the Inquiry by the NSW Office of Fair Trading.

Yours sincerely

Baker.

Lyn Baker
Commissioner for Fair Trading
12 October 2006

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NSW Office of Fair Trading

Submission to Standing Committee on Law and Justice

Inquiry into Unfair Terms in Consumer Contracts

October 2006

Introduction

Prior to the March 2003 election the New South Wales Government made two commitments in relation to unfair contracts in its policy document *A Fair Go For All: Labor's plan for fairer trading*. These were to:

- review the existing legislation governing contracts to enable fairer access by consumers to the court system in relation to unjust contracts; and
- legislate to make contracts involving the provision of goods and services fairer and more transparent ('plain English'). This will especially benefit consumers using mobile phones, funeral services, car hire and introduction agencies.

The Office of Fair Trading commenced a review of the *Contracts Review Act 1980*, which allows a consumer to apply to certain courts or a tribunal for relief in relation to an unjust consumer contract. The review was later deferred because of the work of the Ministerial Council on Consumer Affairs (outlined below). Action on 'plain English' contracts was deferred for the same reason.

At its meeting in August 2002, the Ministerial Council on Consumer Affairs had directed the Standing Committee of Officials of Consumer Affairs to establish a national working party to investigate policy options to address unfair terms in consumer contracts and the merits of adopting a more nationally consistent and effective regulatory regime. The working party comprised representatives of each State and Territory fair trading agency and was jointly chaired by Queensland and Victoria. Representatives of the Commonwealth Treasury, the Australian Competition and Consumer Commission and the Australian Securities and Investments Commission were observers.

In August 2003 the Ministerial Council agreed to the development of consistent State and Territory legislation to address unfair terms in consumer contracts subject to the completion of a regulatory impact statement confirming the need for such regulation. Under the Council of Australian Governments' *Principles and Guidelines on National Standard Setting by Ministerial Councils and National Regulatory Bodies*, a regulatory impact statement must be prepared for all regulatory proposals which would affect business or impact on competition. Draft regulatory impact statements must be referred to the Commonwealth Office of Regulation Review for assessment and advice as to whether the draft meets the requirements set out in the COAG Principles and Guidelines.

In January 2004, a discussion paper that sought views from members of the public on the need for unfair contract terms regulation and the most appropriate model to deal with unfair contract terms was released by the working party. 74 submissions were received in response to the discussion paper. Those views were taken into account in drafting the regulatory impact statement. Despite extensive consultation with the Office of Regulation Review during 2005 and 2006, the draft regulatory impact statement has not yet been assessed as meeting the COAG requirements.

In May 2003, Victoria amended its *Fair Trading Act 1999* to include provisions to address unfair contract terms. The provisions draw heavily on the United Kingdom's *Unfair Terms in Consumer Contracts Regulations 1999*, which give effect to the European Union Directive on Unfair Contract Terms in Consumer Contracts.

When examining unfair contract terms, a distinction needs to be made between *substantive unfairness*, in which unfairness results from the actual wording of contract terms which unduly favour the supplier or unduly disadvantage the consumer, and *procedural unfairness*, in which the circumstances surrounding the formation of a contract involve unfairness. Substantive unfairness focuses on the question of whether the supplier has included terms in a consumer contract that go beyond what is reasonably necessary to protect the legitimate interests of the supplier.

Terms of Reference

The Standing Committee on Law and Justice is to inquire into and report on the incidence and impact of unfair contract terms in consumer contracts for the supply of goods and services of a kind ordinarily acquired for personal, domestic or household use or consumption. This submission addresses the specific terms of reference.

> ***(a) whether consumer contracts contain terms which cause a significant imbalance in the rights and obligations arising under a contract, to the detriment of the consumer, including the incidence of:***
> ***(i) terms which allow the supplier to unilaterally vary the price or characteristics of the goods or services without notice to the consumer;***
> ***(ii) terms which penalise the consumer but not the supplier when there is a breach of the agreement;***
> ***(iii) terms which allow a supplier to suspend services supplied under the contract while continuing to charge the consumer; or***
> ***(iv) terms which permit the supplier but not the consumer to terminate the contract.***

It has been the experience of the regulatory authorities responsible for the administration of the United Kingdom and Victorian legislation, the Ministerial Council on Consumer Affairs Working Party on Unfair Contract Terms, and organisations such as the Australian Consumers' Association and the Communications Law Centre that consumer contracts do contain terms which cause a significant imbalance in the rights and obligations arising under a contract, to the detriment of the consumer. Such terms are identified in contracts used by a wide range of consumer product and service industries, including:

- car rental;
- telecommunications;
- financial services ;
- consumer credit;
- health and fitness centres;
- utilities;
- online services/products;
- retirement homes;
- building and home improvement;
- home removalists;
- package travel; and
- entertainment contracts/ticket conditions.

The NSW Office of Fair Trading does not capture data relating to the number of consumer complaints received about unfair contract terms as there are no specific

provisions in fair trading legislation dealing with that issue. Contracts containing potentially unfair terms do come to attention in the course of dealing with complaints whose immediate cause may be misleading or high pressure sales tactics, poor quality goods or services, delivery delays, lack of after sales service etc. When Fair Trading intervenes in a complaint, the objective is to inform parties of their rights and responsibilities and to assist them in resolving disputes. Where intervention does not achieve a satisfactory resolution, complainants are advised of other options such as making a claim to the Consumer, Trader and Tenancy Tribunal or seeking independent legal advice. In the absence of specific legislation on unfair contract terms like that in place in the United Kingdom and Victoria, Fair Trading has no authority to take action seeking the removal of unfair contract terms.

Significant imbalance

The concept of 'significant imbalance' is present in both the Victorian Fair Trading Act and the UK Unfair Terms in Consumer Contracts Regulations. Section 32W of the Fair Trading Act defines a term in a consumer contract as unfair if, 'contrary to the requirements of good faith and in all the circumstances, it causes a significant imbalance in the parties' rights and obligations arising under the contract to the detriment of the consumer'. The UK definition is similar: a term is regarded as unfair if 'contrary to the requirements of good faith, it causes a significant imbalance in the parties' rights and obligations, to the detriment of the consumer'.

In *Director General of Fair Trading v First National Bank plc* [2001] UKHL 52, Lord Bingham stated:

> 'The requirement of significant imbalance is met if a term is so weighted in favour of the supplier as to tilt the parties' rights and obligations under the contract significantly in his favour. This may be by the granting to the supplier of a beneficial option or discretion or power, or by the imposing on the consumer of a disadvantageous burden or risk or duty.'

The UK Office of Fair Trading publication Unfair Standard Terms describes unfair terms as those which 'have the aim or effect of reducing the consumer's rights under the ordinary rules of contract or the general law. They either stop consumers from making certain sorts of legal claim against the business which they could otherwise have made, or give the business rights against the consumer that it would not otherwise have had. This is how a term is most likely to cause an imbalance – by altering the balance in rights and obligations that the law would have struck if left to itself'.

The types of unfair terms listed in terms of reference (a) are a limited example of the range of possible terms. Annexe B to *Unfair Standard Terms* contains a list of unfair terms under the following categories:

- Terms excluding or limiting liability
- Non-returnable consumer prepayments
- Unfair cancellation terms
- Binding the consumer to hidden terms
- Variation clauses
- Denying liability for statements made by agents
- Denying liability for statements made by agents and employees
- Unbalanced assignment clauses
- Hindering or preventing the consumer going to court
- Allowing excessive burdens or requirements to be imposed on the consumer
- Requiring the consumer to bear inappropriate risks

- Requiring the consumer to make disadvantageous declarations.

Both section 32X of the Victorian Fair Trading Act and Schedule 2 to the UK Regulations contain similar lists of potentially unfair terms.

The test case, *Director of Consumer Affairs Victoria v AAPT Ltd [2006] VCAT 1493*, is the first to consider the unfair terms provisions in the Victorian Fair Trading Act. In his recent judgement, the President of the Victorian Civil and Administrative Tribunal noted that unfairness has both procedural and substantive elements, in that while some terms in contracts are substantively unfair, others may not be unfair in effect if appropriate procedural safeguards are in place. Furthermore, even if an analysis of the terms of the contract does not reveal a significant imbalance in the parties' rights, there may be an 'information imbalance' because important terms are not clearly drafted or are hidden in fine print.

Although AAPT adopted new terms and conditions for its contracts in May 2005, the judgement confirmed the unfairness of terms previously used in contracts for a mobile phone service and pre-paid mobile phone service. For example:

> *'We reserve the right to suspend the provision of Services to you, where charges owing to us or any amount owing under this clause remain outstanding after 60 days, unless we have received written notice from you disputing those charges in good faith. If we suspend or terminate the Services for unpaid charges or any other reason, subsequent reconnection may incur a reconnection fee'.*

The first sentence of the term was not found to be unfair, but the second sentence was unfair because the words 'any other reason' could 'embrace a reason which does not involve any breach by the customer of its obligations under the contract'.

Another example concerned a termination clause:

> '***Immediate termination****: We may terminate this Agreement immediately by notice to you if:*
> *(a) you have breached this Agreement'*

The judgement noted that a customer may breach the agreement in a manner which is inconsequential, yet faces having the service terminated. The term was found to be so broadly drawn and one-sided in operation that it was unfair.

(b) whether the use of standard form contracts has increased the prevalence of the above terms in consumer contracts;

The Victorian Fair Trading Act defines a 'standard form contract' as 'a consumer contract that has been drawn up for general use in a particular industry, whether or not the contract differs from other contracts used in that industry' (section 32U).

Although not defined in the UK Unfair Terms in Consumer Contracts Regulations, a standard form contract has the following features:

- contractual terms have not been individually negotiated;
- contractual terms have been drafted in advance;
- the consumer has not been able to influence the substance of the terms; or
- an overall assessment of it indicates that it is a pre-formulated standard contract.

The use of standard form contracts in transactions between businesses and consumers is largely a consequence of the mass production and provision of goods and services, the deregulation of certain markets (eg telecommunications, financial services, retail supply of electricity and gas) and technical innovation. In some industries a single standard form contract, often developed by an industry or professional association, is used by most or all service providers. Standard form contracts are used in various types of transactions, including transactions that occur on-line.

Standard form contracts have distinct advantages, namely convenience, certainty, time saving and reduced transaction costs. Use of a standard form allows the parties to more easily concentrate on comparatively important terms such as product or service attributes, price, delivery date, interest rate and so on. Where standard terms are used by competitors this may assist consumers in comparative shopping, while lower transactions costs for suppliers can, in turn, benefit consumers where they are reflected in price reductions. Furthermore, the use of standard form contracts can allow for suppliers and purchasers to, over time, become more familiar with common trading practices.

However, the way in which standard form contracts are used and entered into can be problematic. Typically, consumers do not bargain or shop around in the area of contractual terms and traders do not compete. In some transactions, consumers have little opportunity to fully understand the contract terms or obtain independent advice before making a decision to purchase. Even where consumers are aware of the contract terms, this may not necessarily be of much assistance to them. Standard form agreements are generally offered on a non-negotiable, 'take it or leave it' basis only.

The mere existence of standard form contracts does not necessarily mean that such contracts contain unjust terms, but the increasing complexity of the consumer marketplace and the use of standard form contracts create a climate in which unjust terms can, and do, exist.

(c) the remedies available under common law and statute with respect to the above terms in consumer contracts;

In the 19th century, contract law, reflective of the liberalism of the time, was free of State intervention or imposition. It was thought that individuals should be free to contract however and with whomever they pleased: the court's role was merely to give force to the parties' intentions, as disclosed by the agreement. By limiting State intervention, certainty and surety in contracting was to be promoted, and competition increased due to each individual possessing equal influence and power over the market.

However, in practice, the theory of 'freedom to contract'1 was undermined, as the theory was predicated on equality of bargaining power between contracting parties that, in reality, did not exist. In fact, the lack of regulation led to an imbalance of power, where large corporations and traders used their bargaining power to extract or impose conditions which were harsh or unfair on consumers, such as broad exclusion clauses and high penalty rates. In effect, freedom to contract came to mean freedom to exploit.

[1] See for example Sir George Jessel's classic statement in *Printing and Numerical Registering Co v Sampson* (1875) LR 19 Ex. 462 at 465

In the 20th century, Government, recognising the imbalance of bargaining power between contracting parties, began to intervene in the contract relationship in certain areas. For example, landlords could no longer impose any terms they liked upon their tenants, the lending practices of finance companies were controlled, and sellers of goods had to guarantee certain minimum standards of quality.

The increased use of standard form contracts and online contracting has lead to a decrease in the extent to which weaker parties, particularly consumers, can actually negotiate and formulate the terms under which they are asked to contract. The common law and existing statute go some way towards protecting the interests of consumers, as outlined below.

Common law

Under the common law there is currently no remedy for unfair contract terms per se. Yet in equity, Australian law has always recognised that not all contracts are the result of a process of true negotiation. Australian courts have traditionally focused on remedying procedural rather than substantive instances of unfairness,2 preferring to grant relief where the contracting process was unfair, rather than unfairness in the agreed terms themselves.

The courts have developed the law in a piecemeal way, with judges applying narrow and discretionary relief only in the most serious cases.[3] Although equitable relief is available, it can be difficult to obtain as equity must acknowledge the common law's support for free contracting: applicants for relief must rebut the presumption of law that all contracts are made freely between autonomous and equal parties. Yet equitable relief does not undermine freedom of contact, nor limit the terms which negotiating parties can agree to. As Deane J stated in *Louth v Diprose, ``the intervention of equity is not merely to relieve the plaintiff from the consequences of his own foolishness. It is to prevent his victimisation*".[4]

There are a number of factors that can vitiate (that is, make legally defective or invalid) a contract due to presumed or actual unfairness in order to prevent 'victimisation', including duress, undue influence, mistake, misrepresentation and unconscionable conduct. These factors operate consistently with the consensual theory of freedom of contract, because each factor evidences a lack of true consent on behalf of at least one party.[5]

Equitable relief is discretionary in nature. Once the existence of a vitiating factor affecting the formation of the contract has been proven, the court can then decide if equitable relief is appropriate.

Relief is restitutionary in nature – that is, the remedy aims to return the parties to their pre-contractual positions, rather than fulfil the expectancy of the contract. The court may order that the contract be voidable at the election of the weaker party, and if the

[2] Peden JR, (1982) *The Law of Unjust Contracts* Butterworths: Sydney p 25

[3] Peden JR, (1982) *The Law of Unjust Contracts* Butterworths: Sydney p 9

[4] (1992) 175 CLR 621 at 638

[5] Peden JR, (1982) *The Law of Unjust Contracts* Butterworths: Sydney p 9

contract becomes void, the court will direct that any consideration paid under the contract be returned in full.

Evidence of a vitiating factor affecting the formation of the contract can be used as a defence to a claim for specific performance. Thus where the stronger party is trying to enforce the contract and compel the weaker party to carry out their obligations under the contract, the weaker party can resist by arguing unfairness in the contracting process.

The remedy of rectification is limited to cases of mutual mistake, as it is not the role of the court to draft fair terms for the parties to agree to. Rectification refers to the court ordering that a part of the contract be rewritten to accurately reflect the common intention/understanding of the parties.

Although equity is able to grant relief, where appropriate, to a party who has suffered procedural unfairness in the contracting process, the common law is underutilised by consumers. The common law limits equitable relief to a narrow set of circumstances, and the discretionary nature of the court deters, rather than encourages aggrieved consumers to seek redress through the common law. In view of the high cost and uncertainty of litigation, consumers are understandably unwilling to risk an unfavourable determination from the court unless the contract involves large consideration.

The common law alone is therefore an inadequate vehicle through which consumers can be protected from unfair contract terms. As Goldring, Pratt and Ryan commented, it is clear "*that the Courts, working on a case by case approach, …[can] never achieve by judicial technique rules of law that could be considered economically, socially or politically attuned to modern conditions*"[6].

Statutory protection offered by the *Contracts Review Act* 1980 (NSW)

When the Contracts Review Act (CRA) became law in New South Wales on 15 April 1980, it was "*intended to confer on the courts a new and wide discretion to determine the existence and extent of harshness in a contract, and thereby develop a doctrine of unconscionability suitable to present and future business and community needs and standards*"[7]. The CRA represented a "*radical disturbance of time honoured concepts governing contractual relations*"[8], as it empowered the judiciary to intervene into 'unjust' contracts more readily, unhindered by the common law constraint of freedom of contract, and associated public policy.[9] In this way, the legislature was being responsive to the changing needs of consumers as it acknowledged the disparity between the common law's conception of the contracting process, and the modern reality.

The original purpose was to expand and modify the general law relating to unjust contracts by providing a framework for setting aside unjust contracts that was less

[6] Goldring J, Pratt JL, & Ryan DEJ, "The Contracts Review Act (NSW)" (1981) 4(2) *University of New South Wales Law Journal* 1 at 4

[7] Minister for Consumer Affairs, Second Reading Debate , Parliamentary Debates 1980, p 5858

[8] *West v AGC (Advances) Ltd* (1986) 5 NSWLR 610 at 612 per Kirby J

[9] Terry AL, "Unconscionable contracts in New South Wales: the Contracts Review Act 1980" (1982) 10 *Australian Business Law Review* 311 at 313

onerous on the applicant than the common law,[10] and by ensuring that an adequate range of remedies would be available to obviate the existence of any injustice a party to a contract may suffer. The notion of `*unjustness in all the circumstances*', which underlies the CRA, is therefore wider than equity's notion of an `unconscionable dealing'. The CRA does not, however, apply "*so far as the contract was entered into in the course of or for the purpose of a trade, business or profession*"[11], and cannot be used by a public or local authority, corporation or the Crown as a ground for relief.[12]

A contract or contractual provision which is unjust at the time it is entered into may be the subject of a grant of relief where the court considers this just for the purpose of avoiding an unjust consequence: section 7(1). It is the contract or its provisions, not the transaction generally, which must be unjust for relief to be available under the CRA.[13] However, the contract may be unjust as a result of procedural injustice in the negotiations preceding its formation. The CRA is not limited to "standard" terms although whether a term was negotiated or not is a consideration for the court.

Before a court may grant relief from a contract it must be satisfied that the contract is unjust. An `unjust' contract is defined as including an ``unconscionable, harsh or oppressive" contract: section 4(1), yet in line with an expansive interpretative approach to the CRA, what is unjust is not restricted by these terms,[14] is less onerous than the general law[15] and is ultimately a question of fact to be determined on a case-by-case basis.[16] `Unjust' is also defined as requiring an evaluation "*in the circumstances relating to the contract at the time it was made*": section 9(1).
When deciding if a term is unjust, the court will take a liberal approach[17] and consider the terms and effect of terms of the actual contract in question and the way in which the contract was made. That is, what is unjust will include procedural and substantive injustice.[18] Public policy will also be a relevant consideration.[19] This is a reference to the rationale of the CRA in striving to uphold accepted community standards of fair dealing. But the public interest in holding parties to their contract is also relevant.[20]

Specific mandatory guidance as to what is unjust is given by section 9. The majority of circumstances deal with instances of procedural injustice and whether the party seeking relief freely entered the contract. Whilst only guidelines, these requirements, when considered together, provide some matrix for considering what may be unjust. In

[10] Burns FR, "Statutory "Unconscionability": The Application of the Contracts Review Act 1980 (NSW) to the Elderly" (2005) 21 *Journal of Contract Law* 51 at 68

[11] s6 *Contracts Review Act* 1980 (NSW)

[12] Ibid.

[13] *West v AGC (Advances) Ltd* (1986) 5 NSWLR 610 at 621 per McHugh JA

[14] *West v AGC (Advances) Ltd* (1986) 5 NSWLR 610 at 620-621 per McHugh JA.

[15] *Elders Rural Finance Ltd v Smith* (1996) 41 NSWLR 296 at 302 per Mahoney P.

[16] *Gough v Commonwealth Bank of Australia* [1994] ASC 56-270.

[17] See for example *West v AGC (Advances) Ltd* (1986) 5 NSWLR 610 at 631 per McHugh JA and at 611 per Kirby P.

[18] *West v AGC (Advances) Ltd* (1986) 5 NSWLR 610 at 620 per McHugh JA. Note also s 4 (1): what is unjust creates injustice

[19] s9(1) *Contracts Review Act* 1980 (NSW)

[20] *Baltic Shipping Company v Dillon (Mikhail Lermontov)* (1991) 22 NSWLR 1 at 9 per Gleeson CJ & at 20 per Kirby P.

summary, they include:

- the existence of any material inequality of bargaining power;
- whether there were negotiations;
- whether the terms and conditions were reasonably necessary for the protection of parties to the contract;
- the age or physical capacity of a party to the contract or their representative;
- the relative economic circumstances, educational background and literacy of the parties or their representatives;
- the physical form of the contract and the intelligibility of the language used;
- the existence of independent advice;
- whether the terms of the contract were understood by the party seeking relief under the CRA;
- whether there was any undue influence, unfair pressure or unfair tactics exerted; and
- the commercial setting of the contract and its purpose and effect.

The CRA provides the Supreme Court and the District Court with jurisdiction to consider contracts under the CRA (and the Local Court and the Consumer, Trader and Tenancy Tribunal in more limited circumstances). The District Court's jurisdiction depends on its monetary jurisdictional limit. In general, the provisions of the CRA may be used either in actions commenced specifically or by way of defence in other proceedings arising out of, or in relation to, the contract. A person's rights under the Act cannot be excluded or restricted in any way.

Significantly, section 10 of the CRA empowers the Minister or the Attorney General (or both) to address systemic cases of unjust contracts by making an application to the Supreme Court where a person has embarked, or is likely to embark, on a course of conduct leading to the formation of unjust contracts. In such cases the Court may "*prescribe or otherwise restrict, the terms upon which that person may enter into contracts of a specified class*".[21] This section represents a dramatic departure by the legislature from traditional notions of freedom and sanctity of contract, as the court is able to make judgments on the 'justness' of terms without the party's instigation or consent. However, to date very few applications under this section have been made, evidencing the reluctance of the administrative arm to interfere with freedom, independence and surety in contract.

The manner in which a court may intervene into private contracts is far broader under the CRA than under the common law, allowing judicial discretion to select the most appropriate relief for the specific case at hand.

Two forms of relief may be granted under the CRA. Principal relief may be granted under section 7. A court may order one or more of the following:

- to refuse to enforce the entire contract or some part thereof;
- to declare the entire contract or some part thereof void from the time it was made or some subsequent date;
- to vary the entire contract or some part thereof from the time it was made or some subsequent date; and
- the execution of an instrument varying or terminating the operation of a land instrument.

[21] s10 *Contracts Review Act* 1980 (NSW)

The ability of the court to make orders relating to a part (even a single term) of the contract is significant, as it reflects the ability of the Act to address the substantive unfairness imposed by specific terms, rather than merely redress issues of unfairness in the contracting process. In this way, unfair terms may be dealt with and modified/removed if the contract as a whole can continue to operate without the offending term.

Ancillary relief is provided in section 8. Schedule 1 to the Act sets out the various orders the court may make, including any other 'such orders in connection with the proceedings as may be just in the circumstances'. The breadth of relief that may be granted under the Act is therefore in stark contrast with the narrow remedies available under common law.

Over the last quarter of a century, the CRA has been applied to a wide range of contracts. These include but are not limited to:

- contracts of guarantee to secure a loan (including third parties);[22]
- a mortgage to secure a loan by the individual[23] or a third party;[24]
- contracts for the sale of (residential) land;[25] and contracts granting rights over land;[26]
- contracts for the sale of business;[27]
- contracts between family members regarding loans and property;[28]
- lease agreements;[29]
- employment contracts; and[30]
- contracts to settle litigation.[31]

In 2001 Carlin reviewed a sample of 160 cases and found that the majority of applicants (over 85%) utilising the CRA did so in matters concerning mortgage contracts, lending guarantees, contracts for sale of land and options contracts.[32] A review of cases decided between 2001 and 2005 confirms that that is still the case. Therefore, whilst the CRA has provided a more flexible and discretionary avenue of relief for parties contracting over large amounts of money or highly valuable assets, *"there is an apparent lack of impact on the terms of standard form contracts used by companies in consumer transactions … despite the strong expectation on the part of the architects of the Act that this would be an area where the legislation would make a strong impression".*[33]

The litigious basis of the CRA may therefore prevent consumers from utilising the Act in cases that do not involve a large sum of money or valuable asset (such as a mortgage

[22] *S H Lock (Australia) Ltd v Kennedy* (1988) 12 NSWLR 482.
[23] *Elders Rural Finance Ltd v Smith* (1996) 41 NSWLR 296.

[24] *Esanda Finance Corporation Ltd v Tong* (1997) 41 NSWLR 482.
[25] *Antonovic v Volker* (1986) 7 NSWLR 151.

[26] *Ellison v Vukicevic* (1986) 7 NSWLR 104.

[27] *Coombs v Bahama Palm Trading Pty Ltd* (1991) ASC 56-097.

[28] *Gordon v Carr* (unreported, SC of NSW, McLelland CJ 8 Dec 1995).

[29] *Murphy v Overton investments Pty Ltd* (2001) ATPR 41-819.
[30] *Bolton Gems Pty Ltd v Gregory* (unreported, Supreme Court of NSW, 10 November 1995).

[31] *Baltic Shipping Company v Dillon (Mikhail Lermontov)* (1991) 22 NSWLR 1.

[32] Carlin TM, "The Contracts Review Act 1980 (NSW) – 20 years on" (2001) 23 *Sydney Law Review* 125 at 131

[33] Carlin TM, "The Contracts Review Act 1980 (NSW) – 20 years on" (2001) 23 *Sydney Law Review* 125 at 144

or land), as the financial and temporal resources that litigation requires are too high for small claimants.

Another reason why consumers are not using the protection offered by the CRA more may be the lack of a consistent approach in the application of the CRA. The case-by-case approach of the judiciary has lead to a disparate body of case law, which lacks precedential value to potential litigants.

Such uncertainty makes litigation an unattractive option to aggrieved consumers, as they are unable to reliably assess the strength of their case prior to commencing proceedings, thus making the perceived risk of litigation far greater.

Therefore, whilst the expansive approach of the CRA to 'unjustness' in contracts, and the broad discretionary relief provided for in the Act may attract aggrieved consumers who are parties to highly valuable contracts such as mortgages or contracts for the sale of land, the litigious basis of the Act, and the lack of instructive precedent may deter smaller claimants from utilising the statutory protection and relief available to them.

Other statutory protection

The equitable doctrine of unconscionable conduct is given statutory recognition by section 51AA of the Commonwealth *Trade Practices Act 1974* (TPA) and section 12CA of the Commonwealth *Australian Securities and Investments Commission Act 2001* (ASIC Act) (which applies to financial services). Equity may grant relief for unconscionable conduct where:

- one party is in a position of special disadvantage; and
- the other party knows or ought to know of that special disadvantage and takes unfair advantage of his or her position.[34]

Circumstances that indicate a special disadvantage include drunkenness, age, infirmity, lack of education, illiteracy or poor English, an intellectual disability, low income, emotional vulnerability and psychological problems. However, mere inequality of bargaining power does not of itself constitute special disadvantage.

Relief against unconscionable conduct is designed to prevent the stronger party from acting against equity and good conscience by attempting to enforce, or retain the benefit of, a contract induced by that conduct.35 The main remedy for unconscionable conduct is rescission of the contract.

Both Commonwealth and State laws include provisions that regulate unconscionable conduct. Section 51AB of the TPA, section 12CB of the ASIC Act and section 43 of the New South Wales *Fair Trading Act 1987* prohibit unconscionable conduct in trade or commerce in connection with the supply of goods or services to consumers. In order for section 51AB to apply, the goods or services supplied must be of a kind ordinarily acquired for personal, domestic or household use or consumption.

In determining whether section 51AB of the TPA, section 12CB of the ASIC Act or section 43 of the FTA have been contravened, the Court may have regard to the following factors as guidelines:

[34] *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447 at 462 and 474

[35] Ibid at 480

- the relative bargaining strengths of the parties;
- whether the consumer was required to comply with conditions that were not reasonably necessary for the protection of legitimate interests of the supplier;
- whether the consumer was able to understand the documentation;
- whether undue influence or pressure was exerted or unfair tactics used; and
- the amount for which, and the circumstances under which, the consumer could have acquired equivalent goods or services from another party.

Although these factors include considerations involving both substantive unfairness and procedural unfairness, the statutory prohibitions against unconscionable conduct, like the equitable doctrine of unconscionable conduct, are concerned primarily with procedural unfairness - that is, unfairness in the circumstances surrounding the formation (or enforcement) of a contract.

In *Hurley v McDonald's Australia*[36], the Full Court of the Federal Court held that:

'Before sections 51AA, 51AB or 51AC will be applicable, there must be some circumstance ***other than the mere terms of the contract itself*** [emphasis added] that would render reliance on the terms of the contract 'unfair' or 'unreasonable' or 'immoral' or 'wrong'.

Breaches of the unconscionable conduct provision do not attract criminal sanctions. Under the Fair Trading Act, application may be made to the Supreme Court for civil remedies, including injunctions to stop the illegal conduct, monetary compensation, rescission or variation of a contract, refund or specific performance of a contract.

Section 70 of the Uniform Consumer Credit Code provides a court or tribunal with the power to re-open a transaction where the credit contract, mortgage or guarantee is considered unjust in the circumstances relating to it at the time it was entered into or amended.

Section 70(2) of the UCCC provides a list of factors that the court may take into account in determining whether a term of a credit contract, mortgage or guarantee is unjust. The list includes procedural and substantive considerations and is similar to the list in section 9 of the Contracts Review Act.

If the court considers that a credit contract, mortgage or guarantee is unjust, it may re-open the transaction that gave rise to the contract and set aside the agreement, revise the agreement or adjust the debtor's or guarantor's payment obligations.

(d) the effectiveness of specific purpose legislation such as the UK Unfair Terms in Consumer Contracts Regulations 1999 and the Victorian Fair Trading Act 1999 (Part 2B – Unfair Terms in Consumer Contracts);

Victoria

The 2003 amendment which introduced Part 2B, Unfair Terms in Consumer Contracts, into the Victorian *Fair Trading Act 1999* was designed to address the substantive

[36] [1999] FCA 1728 at [31]

unfairness of terms in consumer contracts. A reference panel of consumer, industry, academic and legal representatives, established by the Victorian Minister for Consumer Affairs in 2001, recommended strengthening the existing law, noting that it 'was limited to the conduct of the supplier when forming the contract. Generally, it did not look at the fairness of the contract, nor did it ask the supplier to take any positive steps to resolve any imbalance in the bargaining power between the supplier and the consumer'.

The second reading speech of the Fair Trading (Amendment) Bill 2003 stated that the provisions of the Bill would 'enable the government to step in where consumers sign take it or leave it contracts, not necessarily because of misleading, deceptive or unconscionable conduct by the trader, but which nevertheless contain terms that tip the balance unfairly and disproportionately in favour of the trader'.

Part 2B empowers individual consumers, the regulatory authority (in this case, the Director of Consumer Affairs) and the government to take action against unfair contract terms. According to the 2005/06 Annual Report of Consumer Affairs Victoria (CAV), the provisions seek to ensure that contractual rights and obligations are fairly distributed between parties to a contract.

Individual consumers who believe they have entered into a contract containing unfair terms can take civil action in a court or tribunal to void the unfair terms; the regulatory authority can apply to the Victorian Civil and Administrative Tribunal for an injunction or declaration in respect of the use of unfair terms and the government, by regulation, can prescribe certain terms as unfair for the purposes of standard form contracts.

The 2005/06 Annual Report outlines the compliance strategy followed by CAV and the results achieved to date. The strategy initially involves industry education and consultation. Individual companies' consumer contracts are reviewed and potentially unfair contract terms identified. CAV seeks the companies' cooperation in modifying or removing these terms and in most cases these negotiations result in companies amending the contracts. The Annual Report notes such action with respect to mobile phone, vehicle hire and health and fitness centre contracts. The Report also notes action in progress in relation to domestic building, accommodation, travel, pay television, car sales, internet service providers, online auctions, curtain and carpet supplies, and major events (the Grand Prix and Commonwealth Games) contracts.

CAV also develops guidelines on the application of the unfair contract terms legislation to particular industries, and uses the legislation to assist in dispute resolution where consumer complaints indicate that particular traders are attempting to enforce potentially unfair contract terms.

Consumer Affairs Victoria has made it clear that its enforcement and compliance strategy would begin with education and negotiation ahead of litigation. In the one case that has been decided by the Victorian Civil and Administrative Tribunal (Director of Consumer Affairs Victoria 2006 v AAPT Limited (Civil Claims) [2006] VCAT 1493), the tribunal declined to make the declarations sought or to grant injunctions, essentially because AAPT Limited had already adopted new terms and conditions in its contracts for mobile phone services following industry-wide negotiations by CAV after the commencement of the unfair contract terms amendments to the Fair Trading Act.

The regulation-making power to prescribe unfair terms (colloquially referred to as a 'black list') has not yet been exercised.

United Kingdom

The Victorian provisions are based on the UK Unfair Terms in Consumer Contracts Regulations 1999, with variations.

Under the UK Regulations, if a contract term is unfair, it is not legally binding on a consumer. If a trader refuses to accept that a term is unfair, an individual consumer can take court proceedings.

The regulatory authority (in this case, the UK Office of Fair Trading) must consider complaints made in relation to unfair contract terms and can either accept undertakings in regard to their continued use or seek injunctions from the court preventing their use. However, unlike in Victoria, other government and non-government agencies also have a role in enforcement following the enactment of the *Enterprise Act 2002*. The Enterprise Act enables action to be taken against contraventions of a range of legal requirements that protect consumers, including the Unfair Terms in Consumer Contracts Regulations. Bodies such as local Trading Standards authorities, the Financial Services Authority, the Office of Gas and Electricity Markets and the Consumers' Association are specified as 'qualifying bodies' for the purposes of the Regulations. Qualifying bodies that are government agencies may handle complaints, seek undertakings or apply for injunctions; those that are non-government agencies (the Consumers' Association) may apply for injunctions.

The UK law also differs from Victoria in that there is no regulation-making power to prohibit the use of prescribed unfair terms and therefore no 'black list'. However, Schedule 2 to the UK Regulations contains a so-called 'grey list' – an indicative and non-exhaustive list of terms which may be regarded as unfair (Item 1 of Schedule 2) supplemented by clarification as to when particular terms may, in the right circumstances, be legitimately used in consumer contracts (Item 2 of Schedule 2). According to one commentator, 'the UK model strikes a balance between seeking to disallow particular terms in circumstances where they operate unfairly, while allowing their use in appropriate circumstances and with suitable safeguards'.[37]

Regardless of variations in legislation, both jurisdictions rely heavily on first, working with industry to find mutually satisfactory solutions and alternatives to the use of potentially unfair terms in consumer contracts and secondly, publicising the results of this work, through guidelines, bulletins, seminars etc.

[37] Frank Zumbo, *Dealing with Unfair Terms in Consumer Contracts: The Search for a New Regulatory Model* (2005) 13 TPLJ 197.