Dealing with unfair terms in consumer contracts: Is Australia falling behind?

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As the modern corporation has grown in size and power so has its use of standard form contracts in consumer transactions. While defended by the modern corporation on economic efficiency grounds such as reducing transaction costs, these standard form contracts are not drafted for the ultimate benefit of the consumer. While standard form contracts may spare the parties the cost and time of drafting contracts for each and every consumer purchase or borrowing, that saving comes at a price. For the consumer it means a loss of control over the contents of the contract. Given that a standard form contract is drafted on the corporation's behalf, there can be little doubt that its contents will always tend to favour the corporation. Equally certain is that in the absence of any check on the corporation there is nothing stopping it from having the contract drafted in a way that goes beyond what is reasonably necessary to protect its legitimate commercial interests. Indeed, without an effective mechanism for dealing with unfair terms, consumers have no choice but to sign standard form contracts no matter how one-sided or unfair they may be in their operation. Statutory prohibitions against unconscionable conduct are of little use, as they are difficult to enforce and deal only with individual examples of offending conduct. Significantly, a finding of unconscionable conduct in one relationship may not necessarily promote better conduct in another relationship. What is needed is a new statutory framework giving the relevant government consumer protection agency broader powers to proactively deal with unfair terms in consumer contracts. With such a statutory framework having been implemented in the United Kingdom several years ago, and more recently adopted in Victoria, the article addresses both the operation of the relevant legislation and the clear benefits to consumers from having such new legislation. In doing so, the article argues that by refraining from enacting such new legislation other Australian jurisdictions are falling behind in this increasingly important area of consumer protection.

While Australia has had a relatively longstanding commitment to the prohibition of unconscionable conduct in consumer transactions,[1] serious questions have arisen in recent years as to whether Australia is keeping pace with international developments aimed at more effectively dealing with unfair terms in consumer contracts. Indeed, while the United Kingdom has enacted legislation to give its consumer protection agency the power to proactively identify and deal with inherently unfair terms in industry-wide as well as in individual consumer contracts, Australian jurisdictions, with the exception of Victoria, have been content to rely solely on their longstanding statutory prohibitions against unconscionable conduct as the way to deal with "unfairness" in consumer contracts. Such prohibitions,[2] it was thought, would not only give the aggrieved consumer access to a remedy through the relevant court or tribunal, but would also, following judicial consideration of such prohibitions, bring about fairer consumer contracts, as those contracts would subsequently be redrafted to reflect

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[1] See, for example, the *Contracts Review Act 1980* (NSW).

[2] See, for example, s 51AB of the *Trade Practices Act 1974* (Cth) and s 43 of the *Fair Trading Act 1987* (NSW).

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any judicial pronouncements. Such an approach was intuitively appealing for governments concerned to minimise the regulatory burden on business, while seeking to strike what was considered at the time an appropriate balance between freedom of contract and protecting consumers from abuses of contractual power by modern corporations.

In reality, however, reliance on statutory prohibitions against unconscionable conduct to deal with unfair terms in consumer contracts suffers from a number of limitations. First, it relies on a concept of "unconscionable" that, in judicial minds, has a preconceived meaning typically equated with the equitable doctrine of unconscionability as set out in cases like *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447; 46 ALR 402. Such a preconceived notion of unconscionable conduct has been largely, if not totally, focused on what is described as procedural unconscionability. This is clearly evident from the emphasis the courts place on the concept of "special disadvantage" when dealing with equitable doctrine of unconscionability. With the concept of special disadvantage focusing on the position of the weaker party in the lead-up to the contract, it is clear that, in the absence of such things as poverty, sickness, infirmity of body or mind, drunkenness, illiteracy, lack of education, or lack of assistance where assistance is necessary, the weaker party has hitherto been unable to rely on the equitable doctrine of unconscionability to have the contract set aside. Irrespective of how one-sided, harsh or oppressive the contract itself may be, the courts have, when dealing with the equitable doctrine of unconscionability, confined themselves strictly to whether or not the weaker party entered the contract freely and not while under a relevant special disadvantage. The courts have steadfastly stood by a notion of freedom of contract that assumes that contracts are the result of genuine negotiations between parties who are capable of determining what is in their best interests and who are free to walk away from the proposed contract if it does not serve those interests or disadvantages one of them in a manner that is not reasonably necessary for the protection of the legitimate interests of the other party. Such a notion, however, is quite simplistic in its outlook, and fails to reflect the growing and often substantial disparity of bargaining power between the modern corporation and the ordinary consumer.

While, of course, the long cherished judicial notion of freedom of contract remains relevant where the terms of a contract are individually or genuinely negotiated between the parties, the notion is becoming increasingly divorced from reality in consumer transactions where the consumer is often faced with little choice but to agree to an industry-wide standard form contract. Any suggestion that such standard form contracts are the result of genuine negotiation between the corporation and the ordinary consumer can often easily be dismissed, as should any pretence that a consumer can walk away from the standard form contract where the terms of the contract are not acceptable to the consumer. The reality is quite different, as the corporation's representative dealing with consumers is generally denied authority to alter any of the terms of a standard form contract, and, where consumers do walk away from one standard form contract, they would again be confronted with a similar, if not the same, standard form contract when seeking the goods or services from another corporation.

Within a consumer context, the emphasis on procedural unconscionability and simplistic notions of freedom of contract, has meant that the equitable doctrine of unconscionability and existing statutory provisions have been of little, if any, benefit in getting relief against consumer contracts that a consumer may have signed, but because those contracts were standard form contracts the consumer has had little, if any, ability to genuinely negotiate individual terms of those contracts, or to fully understand their nature and scope. Thus, while statutory provisions such as s 51AB of the *Trade Practices Act 1974* (Cth) refer to conduct that is, in all the circumstances, unconscionable, the court's general adherence to a narrow notion of unconscionability has meant that consumers and government enforcement agencies have been confronted with the challenge of seeking a wider judicial interpretation of the concept of "unconscionable". Clearly, this would require consumers and government agencies taking a wide selection of cases to court under such statutory provisions. From a consumer perspective, the cost of bringing such cases is usually prohibitive, especially when the cost of enforcing such a statutory prohibition could greatly surpass the cost of the perceived unfair contract. From a government consumer protection agency point of view, taking action seeking redress under the statutory prohibitions for individual instances of unconscionable conduct was often not seen to be an efficient use of resources, as the impact of any judicial pronouncement was likely to be localised to the particular contract in question rather than have a broader impact on, for example, standard form contracts used by the corporation or relied upon across the particular industry.

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Importantly, in any event, the court's ability to deal with unconscionable conduct under the statutory prohibitions was limited to the particular contract or conduct before the court and to the parties to the contract or contracts being considered by the court. Typically, the court has not had the power to extend any redress to other similar contracts entered into by the corporation or others in the relevant industry. Such a limitation, when coupled with the onerous standard required, in general, to prove a case of statutory unconscionability arising from the preconceived judicial notions associated with the equitable doctrine of unconscionability, has conspired against the running of so-called test cases by government consumer protection agencies.

Not surprisingly, the statutory prohibitions against unconscionable conduct have increasingly been seen as ineffective in dealing with unfair contractual terms beyond the individual contract being questioned under those prohibitions by an aggrieved consumer or consumer protection agency. Even then, successful reliance on statutory prohibitions against unconscionable conduct has been hampered by the infiltration of equitable notions of unconscionability which at times have been used to justify a narrow interpretation being given to such prohibitions. In view of the challenges facing an applicant seeking to rely on the statutory prohibitions against unconscionable conduct, those prohibitions have been little used by consumers and consumer protection agencies alike. In turn, the limited success of such prohibitions against perceived unfair terms in consumer contracts has meant that the broader impact of such statutory prohibitions as a method of dealing with industry wide contractual terms perceived to be unfair is, at best, questionable and, at worst, negligible.

In short, while corporations dealing with consumers may have been, and continue to be, well aware of the existence of the statutory prohibitions against unconscionable conduct in consumer transactions, those prohibitions are unlikely to prevent corporations from seeking to rely on contractual terms that are perceived to be unfair by consumers because of their obviously one-sided nature in favour of the corporation. After all, where the corporation is large and powerful and the one-sided term is found in industry-wide standard form consumer contracts, consumers realistically have little, if any, choice but to enter the contract despite the inclusion of the perceived unfair term. More importantly, the corporation relying on such one-sided contractual terms has little to fear from the existing statutory prohibitions against unconscionable conduct. Indeed, the difficulty an applicant has in seeking to rely on such prohibitions means that there is a very high probability that the corporation will rarely, if ever, need to defend actions under such prohibitions. Where the consumer or relevant enforcement agency does challenge the perceived unfair term in a particular contract, it may succeed only in having the term in that particular contract altered or removed. Of course, other contracts entered into by the corporation with the perceived unfair term remain effective until such time as they are also challenged before a court or tribunal, or the enforcement agency secures an undertaking from the corporation not to rely on the particular term. Similarly, industry-wide contracts also having the perceived unfair term will remain effective until such time as they are also challenged before a court or tribunal, or the enforcement agency secures an undertaking from those other corporations not to rely on the particular term.

DEALING WITH UNFAIR TERMS IN CONSUMER CONTRACTS: THE CASE FOR REFORM

Fundamentally, the debate about whether or not to deal with unfair terms in consumer contracts centres around the issue of whether or not contractual terms should be allowed to disadvantage a consumer in circumstances where placing a consumer at that disadvantage is not reasonably necessary for the protection of the legitimate interests of the corporation. In considering this issue, two matters immediately arise. First, the debate concerns the fairness or otherwise of the terms of the contracts. Within this context, the focus is on the substance of the contract and not on the procedural aspects leading up to the making of the contract. In short, dealing with unfair terms in consumer contracts is about dealing solely with what is described as substantive unconscionability.

With allegations of procedural unconscionability already able to be considered under the equitable doctrine of unconscionability or the existing statutory prohibitions against unconscionable conduct, any attempts to deal with unfair terms in consumer contracts are therefore concerned with allowing allegations based solely on substantive unconscionability to come before the courts. In doing so, allegations of substantive unfairness of consumer contracts should be allowed to be considered on

their merits rather than merely dismissed in view of prevailing judicial assumptions that consumers freely agree with the terms of a standard form contract and understand fully the nature and scope of those terms. Indeed, efforts to deal with unfair terms in consumer contracts reflect growing scepticism because of judicial assumptions that consumers genuinely negotiate contracts with the modern corporation and that when consumers sign contracts they do so fully understanding, and willingly accepting, all the terms of the contracts.

Second, in addressing the issue of fairness when dealing with unfair terms in consumer contracts, an objective assessment of the contractual terms is involved. Fairness within this context is to be tested by an objective standard of whether or not a contractual term that places a consumer at a disadvantage is reasonably necessary for the protection of the legitimate interests of the corporation. Implicit in such a standard is the recognition that consumer contracts involve trade-offs whereby a consumer may be disadvantaged in one way, but is rewarded in another way so as to offset the disadvantage. Where the offsetting reward is reasonably proportionate to the disadvantage, the corporation would be entitled to contractually protect the trade-off. As the reward is reasonably proportionate to the disadvantage, and the corporation may itself be at a financial disadvantage if the trade-off is not contractually protected, the corporation would be entitled to claim the relevant contractual terms protecting the trade-off are reasonably necessary for the protection of the legitimate interests of the corporation. In this way dealing with unfair terms in consumer contracts would in no way detract from, or undermine, the corporation's ability to include contractual terms that are reasonably necessary to protect its legitimate interests.

Clearly, a corporation is perfectly entitled to rely on contractual terms that are reasonably necessary to protect its legitimate interests. Indeed, both contracting parties should be entitled to include contractual terms that are reasonably necessary to protect their respective legitimate interests. In this sense, freely negotiated contracts may be seen as involving a sharing or an apportioning of the contractual risks and rewards between the parties. In particular, in any genuine negotiation process the parties will seek to strike a balance in their respective rights and obligations arising from the contract. Where, however, the contract is not freely negotiated between the parties, but rather is a standard form contract imposed on a take it or leave it basis by the corporation, there is a real danger that the contract has been drafted in a way that seeks to shift those contractual risks disproportionately onto the consumer and creates an significant imbalance in the respective rights and obligations of the parties in favour of the corporation, or simply seeks to impose an additional detriment on the consumer or minimises the potential benefit to the consumer under the contract without any offsetting reward. Should a corporation be allowed to use contracts in this manner? Of course, assuredly a corporation would strenuously (and rightly) object if, as a result of being prevented from including contractual terms that were reasonably necessary to protect its legitimate interests, the corporation was required to suffer a unilateral financial detriment; be unreasonably denied a potential benefit of the contract; or bear a disproportionate higher level of contractual risk or obligation than the consumer. So why allow consumers to be on the receiving end of contractual terms that would not be acceptable to the corporation if their positions were reversed?

In short, if traditional contracts can be viewed as legal relationships in which the parties have freely agreed to deal with one another in a manner to further their individual economic interests, then to have a one-sided contractual term in these circumstances must mean that the disadvantaged party is being required to potentially bear a disproportionately higher level of risk or obligation under the contract, or is being potentially exposed to additional detriment or denied a contractual benefit without an offsetting reward. Where that occurs during a process of genuine negotiation between parties equally matched in terms of bargaining power and ability to fully understand the nature and scope of contractual terms, then the potentially disadvantaged party would be able to renegotiate or even remove a one-sided term that detracts from or undermines that party's legitimate interests. Alternatively, the disadvantaged party may simply be the victim of a better negotiator or may just decide to knowingly forego the potential benefit or accept a higher level of risk or obligation as a trade-off for other benefits that may have been negotiated under the contract. While in each of these instances the parties are capable of acting in their best interests, or at least having the opportunity or resources to do so, in reality standard form contracts often take the place of genuinely negotiated contracts, and corporations and consumers may not be so equally matched in terms of bargaining power and ability to fully understand the nature and scope of contractual terms. It is in these latter

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instances that consumers on the receiving end of a one-sided contractual term not reasonably necessary for the protection of the corporation may, through no fault of their own, be denied a potential benefit of the contract or be disadvantaged in some other way without some offsetting reward from the contract. Clearly, consumers in such instances are being disadvantaged, not as a result of a genuine choice, or ability to negotiate or renegotiate particular terms, but simply because of a lack of bargaining power and/or ability to fully understand the nature and scope of contractual terms. Where the consumer is being disadvantaged in a manner that is not reasonably necessary to protect the legitimate interests of the corporation, then the corporation is using its superior position to not only secure for itself an advantage that it may not have otherwise been able to secure if faced with an equally matched consumer, but to do so to the obvious detriment of a consumer who has no choice but to acquiesce.

At it simplest, therefore, unfair terms in consumer contracts are of concern where they are imposed by a corporation in an attempt to significantly alter in its favour the relative balance of rights and obligations under the contract in circumstances where that is not reasonably necessary for the protection of the corporation's legitimate interests. It is the combination of denying the consumer the ability to genuinely negotiate the contract, and then seeking to shift significantly in its favour the relative balance of rights and obligations under the contract in a way that goes beyond what is reasonably necessary to protect the corporation's legitimate interests that place the conduct of the corporation under the spotlight. Clearly, then, it is this combination that not only holds the key to, but also reveals the challenges of, dealing with unfair terms in consumer contracts.

Indeed, while it may be easy to suggest that consumers should be given the ability to genuinely negotiate with a corporation, in reality consumers and corporations are not, as a general statement, equally matched in terms of bargaining power and ability to fully understand the nature and scope of contractual terms. Of course, where consumer contracts are genuinely negotiated between equally matched and resourced parties, such contracts should, in the absence of some other vitiating factor, ordinarily escape scrutiny from an unfair consumer contract point of view. In practice though, it would not be surprising to find that consumer contracts are often standard form contracts presented on a take it or leave it basis. In such circumstances, the contract is not the result of genuine negotiations and, more importantly, even if the consumer did have the opportunity to read and fully understand the terms of the standard form contract, there is typically no opportunity to renegotiate individual terms of the contract.

Faced with a standard form contract presented on a take it or leave it basis, the consumer has little real choice but to acquiesce. To walk away is often a futile gesture as the consumer, on seeking to deal with another corporation, is in all likelihood going to be faced with a similarly drafted standard form contract again presented on a take it or leave it basis. Clearly, any suggestion that consumers ordinarily have the ability to walk away or seek to renegotiate the standard form contract is a fanciful one. Not only does the industry-wide imposition of basically similar standard form contracts operate to effectively deny the consumer the ability to walk away from such contracts, but once the consumer is locked into a contract, the consumer has little, if any, real ability to walk if the corporation chooses to utilise an unfair contractual term. In short, there is little, if any, practical value in the consumer walking away from a standard form contract presented by one corporation only to find another corporation seeking to rely on a similarly drafted standard form contract. While, of course, some may suggest that the consumer could decline to enter into any standard form contract found to be objectionable or simply seek to renegotiate its terms, such a suggestion is equally fanciful as not only would the cost to the consumer of seeking legal advice on the contents of the standard form contract typically far outweigh the value of the goods or services, but with standard form contracts within a particular industry often drafted in the same manner, any consumer walking away from such contracts would simply be denied access to those goods or services.

Once it is accepted that consumers have little, if any, ability to walk away or seek to renegotiate standard form contracts, it is rather pointless to suggest that changes in the drafting of standard form contracts can be promoted through consumer initiatives. Given the very limited bargaining power of individual consumers, the general inability to renegotiate terms of a standard form contract, and the importance to consumers of having reasonable access to the goods or services, little, if anything, would be gained from any suggestion that consumers should be better educated about, or more willing to challenge the use of, standard form contracts. Little is gained from such suggestions for the

simple reason that corporations presently have no real incentive to redraft standard form contracts. More importantly, no amount of pressure from individual consumers is going to create such an incentive. In short, consumers threatening to walk away or seeking to challenge the corporation's use of standard form contracts will have very little, if any, impact where standard form contracts are the industry norm. From the corporation's point of view, either the consumer accepts the standard form contract in its entirety, or the corporation refuses to supply the consumer.

Clearly, educating consumers about standard form contracts or assisting them to better understand key terms of such contracts is of little practical benefit unless consumers are given sufficient time to read such contracts *and* the opportunity to renegotiate terms they consider are unfair. In practice, however, consumers are generally given neither the time to read the standard form contract nor the opportunity to renegotiate it. In fact, the standard form contract inevitably contains terms to the effect that the written contract represents the whole of the contract or "entire agreement" between the parties and that the corporation's representative has no authority whatsoever to make changes to the contract. While, of course, consumers may, in relation to more expensive goods or services, have some ability to insist on reading the contract in full and renegotiating unfair terms of the contract, in reality such opportunities are non-existent in relation to lower priced consumer goods or services.

In particular, where low-priced consumer goods or services are involved, the potential cost of seeking to renegotiate the terms of a standard form contract may outweigh the potential benefits of doing so from both the consumer's and the corporation's point of view. Not only would the consumer typically need legal advice as to the nature and scope of some of the more complex terms of the standard form contract, but the consumer would need to spend time and effort with a corporation's representative that was properly authorised to renegotiate the terms of the contract. Would a consumer spend such time and money where the cost of doing so was greater than the value of the goods or services? Similarly, would the corporation spend time and money on allowing consumers to renegotiate standard form contracts where the corporation was trading on thin profit margins in relation to the goods or services? Clearly, in both cases it would not serve the interests of either the consumer or corporation to pursue a strategy where the potential cost outweighs the potential benefit. This is particularly so if consumers were to be denied reasonable access to low-priced goods or services as result of a corporation having to withdraw supply or raise prices to cover increased transactions costs flowing from consumers seeking to renegotiate standard form contracts. After all, corporations would argue that the lower transaction costs associated with using standard form contracts enables them to offer more competitive pricing on their goods or services than they could otherwise offer if they individually negotiated the terms of a contract with each and every consumer.

In response, consumers would no doubt accept there are benefits associated with the use of standard form contracts. In particular, consumers would recognise that transactions can be completed in a more timely and efficient manner where standard form contracts are used. Given such advantages, consumers would not generally be opposed to standard forms contracts as such, but rather are growing increasingly concerned that the advantages are being outweighed by the disadvantages they may face as a result of unfair terms in such contracts. In other words, if consumer concerns regarding the imposition of unfair terms through standard form contracts could be addressed, then consumers would be much more comfortable with the use of such contracts. In short, most, if not all, consumers would not have a problem with standard form contracts provided that their contents sought to strike a reasonable balance between the respective rights and obligations of the consumer and the corporation.

Once the potential advantages of standard form contracts to both the consumer and the corporation are recognised, then progress can be made towards seeking to address the potential disadvantages to consumers arising from such contracts without in the process disadvantaging the corporation. In this regard, the key issue appears to be how best to deal with the issue of unfair terms within standard form contracts. While consumers may seek to renegotiate such terms, it is readily apparent that consumers are ordinarily ill-equipped to do so and/or the value of doing so outweighs the potential benefits to the consumer. This, of course, assumes that the corporation would allow such individual renegotiation, something that would detract from the benefits to the corporation from using standard form contracts. Besides, it could be argued that, even if they could, consumers would not generally want to individually renegotiate the terms of a standard form contract provided they

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believed that the standard form contract was reasonably balanced in that the corporation did not go beyond what was reasonably necessary to protect the corporation's legitimate interests.

Given that allowing the consumer the ability to genuinely renegotiate terms of a standard form contract is arguably not the best response to dealing with unfair terms in such contracts, then clearly the alternative to dealing with unfair terms is to deal in some manner with the corporation's attempt to impose such terms in the first place. Since the essence of an unfair term is the attempt by the corporation to significantly alter, in its favour, the relative balance of rights and obligations under the contract in circumstances where that is not reasonably necessary for the protection of the corporation's legitimate interests, then providing a mechanism for dealing with such attempts by the corporation is arguably the key to dealing with unfair terms in consumer contracts. After all, the immediate question that arises is why must the corporation go beyond what is reasonably necessary to protect its legitimate interests. Surely it is appropriate for a corporation to limit itself to doing what is reasonably necessary to protect its legitimate interests in circumstances where to show such restraint not only minimises or possibly even removes consumer concerns with standard form contracts, but does so in a manner that would not disadvantage the corporation. Indeed, self-regulation has always been, and will continue to be, an available option for corporations wishing to show self-restraint by choosing not to use unfair terms. It is only where a corporation refuses to show such self-restraint that self-regulation fails and there arises a need to explore alternatives to self-regulation.

In summary, with consumers having a limited ability to renegotiate standard form contracts and given the inefficiencies or additional costs associated with renegotiating such contracts were consumers generally allowed to do so, the debate regarding how best to deal with unfair terms in consumer contracts shifts quickly to considering ways that corporations may, when drafting standard form contracts, be encouraged not to go beyond what is reasonably necessary to protect the corporation's legitimate interests. Needless to say, there will be standard form contracts in which there are no unfair terms. In these contracts, the corporation has willingly chosen not to go beyond what is reasonably necessary to protect the corporation's legitimate interests. In such instances, self-regulation has clearly worked well. Unfortunately, there will be those corporations that will continue to include unfair terms in standard form contracts despite growing consumer concern with such terms. It is the continued use of unfair terms by such corporations that prompts debate regarding the effectiveness of present laws dealing with unconscionable conduct.

A PROCEDURAL UNCONSCIONABILITY BIAS: A CRITICAL LIMITATION ON USING THE EQUITABLE DOCTRINE OR THE EXISTING STATUTORY PROHIBITIONS AGAINST UNCONSCIONABLE CONDUCT TO DEAL WITH UNFAIR TERMS IN CONSUMER CONTRACTS

With over 20 years now having gone by since the flurry of activity in the early 1980s regarding the equitable doctrine of unconscionability and the enactment of the two key statutory initiatives aimed at giving the courts a broader mandate in the unconscionability area, lawyers are now well placed to reflect on whether the interpretation of either that doctrine or the statutory provisions has, if at all, evolved to deal with the contemporary challenges faced by consumers with the growing use and abuse of standard form contracts. In doing so, it must from the outset be noted that this flurry of activity did create a level of excitement that the legislature and even the courts were moving towards a notion of unconscionbility better able to deal with, or at least be more responsive to, the contemporary challenges arising from consumer contracts.

Indeed, the following comments by Mason J in the landmark High Court decision in *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447 at 461-463; 46 ALR 402 at 412-413 appeared to suggest that in relation to the equitable doctrine of unconscionability the courts would be moving with the times. Not only do the comments state that the categories of special disadvantage were not closed, but they even offered hope that the time had come when the use and abuse of standard form contracts would be considered by the courts:

> It goes almost without saying that it is impossible to describe definitively all the situations in which relief will be granted on the ground of unconscionable conduct. As Fullagar J said in *Blomley v Ryan* (1956) 99 CLR 362 at 405:

> The circumstances adversely affecting a party, which may induce a court of equity either to refuse its aid or to set a transaction aside, are of great variety and can hardly be satisfactorily classified. Among them are poverty or need of any kind, sickness, age, sex, infirmity of body or mind, drunkenness, illiteracy or lack of education, lack of assistance or explanation where assistance or explanation is necessary. The common characteristic seems to be that they have the effect of placing one party at a serious disadvantage vis-à-vis the other.

Likewise Kitto J (at 415) spoke of it as "a well-known head of equity" which

> applies whenever one party to a transaction is at a special disadvantage in dealing with the other party because illness, ignorance, inexperience, impaired faculties, financial need or other circumstances affect his ability to conserve his own interests, and the other party unconscientiously takes advantage of the opportunity thus placed in his hands.

> It is not to be thought that relief will be granted only in the particular situations mentioned by their Honours. It is made plain enough, especially by Fullagar J, that the situations mentioned are no more than particular exemplifications of an underlying general principle which may be invoked whenever one party by reason of some condition or circumstance is placed at a special disadvantage vis-à-vis another and unfair or unconscientious advantage is then taken of the opportunity thereby created. I qualify the word "disadvantage" by the adjective "special" in order to disavow any suggestion that the principle applies whenever there is some difference in the bargaining power of the parties and in order to emphasize that the disabling condition or circumstance is one which seriously affects the ability of the innocent party to make a judgment as to his own best interests, when the other party knows or ought to know of the existence of that condition or circumstance and of its effect on the innocent party.
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> Because times have changed, new situations have arisen in which it may be appropriate to invoke the underlying principle. Take, for example, entry into a standard form of contract dictated by a party whose bargaining power is greatly superior, a relationship which was discussed by Lord Reid and Lord Diplock in *A Schroeder Music Publishing Co Ltd v Macaulay* [1974] 1 WLR 1308 at 1314–5, 1316: see also *Clifford Davis Management Ltd v WEA Records Ltd* [1975] 1 WLR 61 at 64–5. In situations of this kind it is necessary for the plaintiff who seeks relief to establish unconscionable conduct, namely that unconscientious advantage has been taken of his disabling condition or circumstances.

While clearly outlining what his Honour considered to be the underlying principle in relation to the equitable doctrine, Mason J had, back in 1983, specifically identified standard form contracts as a "new situation" in which the underlying principle could be invoked. However, that underlying principle in which there is a need to show a special disadvantage along with an unconscientious taking advantage of that "disabling condition" remains the same today, while the promising language by Mason J regarding standard form contracts remains just that, after over 20 years, and must now be viewed as simply reinforcing the need under the equitable doctrine for a party to demonstrate the existence of procedural unconscionability before the court will even consider the terms of the contract itself.

In short, the continued emphasis on procedural unconscionability means that little, if anything, of substance has changed with the equitable doctrine of unconscionability since the *Amadio case*. Not only have the courts consistently restricted themselves to consideration of the long-established categories of special disadvantage as the basis for granting relief under the equitable doctrine, but the High Court has emphatically refused to consider inequality of bargaining power, even a major disparity of bargaining power, as sufficiently "special" to constitute a disabling condition permitting the equitable doctrine's intervention. Indeed, in its recent decision in *ACCC v CG Berbatis Holdings Pty Ltd* (2003) 214 CLR 51; 197 ALR 153 the High Court has made it clear that an inequality of bargaining power on its own will not give rise to a special disadvantage. Provided a person is capable of understanding the nature of the transaction, an inequality of bargaining power, or even a taking advantage of that inequality of bargaining power by the stronger party, will not be sufficient to invoke the equitable doctrine. This position clearly emerges from the following comments by Gleeson CJ in that case at 64 and 157, respectively.

> [11] One thing is clear ... A person is not in a position of relevant disadvantage … simply because of inequality of bargaining power.
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> …

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> [14] Unconscientious exploitation of another's inability, or diminished ability, to conserve his or her own interests is not to be confused with taking advantage of a superior bargaining position. There may be cases where both elements are involved, but, in such cases, it is the first, not the second, element that is of legal consequence.

Similar comments were made by Gummow and Hayne JJ in their joint judgment at 77 and 168, respectively.

> [55] … It will be apparent that the special disadvantage of which Mason J spoke in [the *Amadio case*] was one seriously affecting the ability of the innocent party to make a judgment as to that party's own best interests.
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> [56] In the present case, the respondents emphasise that point and stress that a person in a greatly inferior bargaining position nevertheless may not lack capacity to make a judgment about that person's own best interests. The respondents submit that the facts in the present case show that Mr and Mrs Roberts [as tenants] were under no disabling condition which affected their ability to make a judgment as to their own best interests in agreeing to the stipulation imposed by the owners for the renewal of the lease, so as to facilitate the sale by Mr and Mrs Roberts of their business. Those submissions should be accepted.

As the tenants understood the nature of the transaction that was before them, the High Court considered that they were able to make a decision about what was in their best interest notwithstanding the great disparity of bargaining power between the parties and that the stipulation offered by landlord for the renewal of the lease was effectively done so on a take it or leave it basis. Clearly, under the equitable doctrine the focus of the inquiry is on whether or not one of the parties is affected by a disabling condition recognisable by the courts. Accordingly, therefore, the equitable doctrine has no role to play where, absent a recognisable disabling condition, a consumer understands or is capable (for example, through independent legal advice) of understanding the nature of the transaction. A gross inequality of bargaining power and having no real choice but to accept are not in themselves "special" enough for the equitable doctrine. In summary, the High Court's emphasis on procedural unconscionability or the requirement that there be a disabling condition recognisable by the courts means that in the absence of such a disabling condition the equitable doctrine has no role to play in dealing with unfair consumer terms.

Ironically, such faded hopes for the equitable doctrine of unconscionability were being expressed in the late 1970s and early 1980s,[3] and were being responded to by Australian legislatures at that time; first, by the New South Wales Parliament, followed closely by the Federal Parliament. Indeed, there can be little doubt that these legislative responses were intended to expand the notion of unconscionability to one more responsive to what were perceived as the "modern" needs of the time. Even in the early 1980s the equitable doctrine was viewed as a very narrow one based on notions of procedural unconscionability, restricted essentially to whether or not the consumer was under a recognisable disabling condition in the lead up to the making of the contract. To the consumer of the time, however, the issue was more one of increasingly being presented with a standard form contract on a "take it or leave it" basis with next to no opportunity to renegotiate any terms considered to be unfair. That the standard form contract was being used more and more at an industry-wide level made matters worse, as the ability to shop around on the basis of contractual terms was fast diminishing, if not already largely removed. In the 1980s the modern corporation was getting bigger, industry was getting more concentrated, and the standard form contract was becoming ubiquitous. Faced with a narrow equitable notion of unconscionability and a judicial unwillingness to broaden the scope of that doctrine, it was generally considered that only statutory intervention would bring about a doctrine of unconscionability more responsive to the then "modern" concerns arising from a growing inequality of bargaining power, standard form contracts and substantive unconscionability.

In seeking to deal with these "modern" concerns and in particular unjust contracts, the New South Wales Parliament enacted the *Contracts Review Act 1980* (NSW) (the Act). For the purposes of the Act, "unjust" is defined in s 4 of the Act to include "unconscionable, harsh or oppressive" with

[3] See generally Peden J, Report to Minister for Consumer Affairs and Co-operative Societies and the Attorney-General for New South Wales, *Harsh and Unconscionable Contracts* (1976).

"injustice" to "be construed in a corresponding manner". Under s 7 of the Act the Supreme Court is empowered to grant relief where the contract is found to be unjust. For present purposes, s 7 relevant provides:

> (1) Where the Court finds a contract or a provision of a contract to have been unjust in the circumstances relating to the contract at the time it was made, the Court may, if it considers it just to do so, and for the purpose of avoiding as far as practicable an unjust consequence or result, do any one or more of the following:
>
> (a) it may decide to refuse to enforce any or all of the provisions of the contract,
>
> (b) it may make an order declaring the contract void, in whole or in part,
>
> (c) it may make an order varying, in whole or in part, any provision of the contract,
>
> (d) it may, in relation to a land instrument, make an order for or with respect to requiring the execution of an instrument that:
>
> (i) varies, or has the effect of varying, the provisions of the land instrument, or
>
> (ii) terminates or otherwise affects, or has the effect of terminating or otherwise affecting, the operation or effect of the land instrument.
>
> (2) Where the Court makes an order under subsection (1) (b) or (c), the declaration or variation shall have effect as from the time when the contract was made or (as to the whole or any part or parts of the contract) from some other time or times as specified in the order.

In deciding whether or not to grant relief under the Act the court is to have regard to the matters set out in s 9 of the Act:

> (1) In determining whether a contract or a provision of a contract is unjust in the circumstances relating to the contract at the time it was made, the Court shall have regard to the public interest and to all the circumstances of the case, including such consequences or results as those arising in the event of:
>
> (a) compliance with any or all of the provisions of the contract, or
>
> (b) non-compliance with, or contravention of, any or all of the provisions of the contract.
>
> (2) Without in any way affecting the generality of subsection (1), the matters to which the Court shall have regard shall, to the extent that they are relevant to the circumstances, include the following:
>
> (a) whether or not there was any material inequality in bargaining power between the parties to the contract,
>
> (b) whether or not prior to or at the time the contract was made its provisions were the subject of negotiation,
>
> (c) whether or not it was reasonably practicable for the party seeking relief under this Act to negotiate for the alteration of or to reject any of the provisions of the contract,
>
> (d) whether or not any provisions of the contract impose conditions which are unreasonably difficult to comply with or not reasonably necessary for the protection of the legitimate interests of any party to the contract,
>
> (e) whether or not:
>
> (i) any party to the contract (other than a corporation) was not reasonably able to protect his or her interests, or
>
> (ii) any person who represented any of the parties to the contract was not reasonably able to protect the interests of any party whom he or she represented,
>
> because of his or her age or the state of his or her physical or mental capacity,
>
> (f) the relative economic circumstances, educational background and literacy of:
>
> (i) the parties to the contract (other than a corporation), and
>
> (ii) any person who represented any of the parties to the contract,
>
> (g) where the contract is wholly or partly in writing, the physical form of the contract, and the intelligibility of the language in which it is expressed,

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(h) whether or not and when independent legal or other expert advice was obtained by the party seeking relief under this Act,

(i) the extent (if any) to which the provisions of the contract and their legal and practical effect were accurately explained by any person to the party seeking relief under this Act, and whether or not that party understood the provisions and their effect,

(j) whether any undue influence, unfair pressure or unfair tactics were exerted on or used against the party seeking relief under this Act:

(i) by any other party to the contract,

(ii) by any person acting or appearing or purporting to act for or on behalf of any other party to the contract, or

(iii) by any person to the knowledge (at the time the contract was made) of any other party to the contract or of any person acting or appearing or purporting to act for or on behalf of any other party to the contract,

(k) the conduct of the parties to the proceedings in relation to similar contracts or courses of dealing to which any of them has been a party, and

(l) the commercial or other setting, purpose and effect of the contract.

(3) For the purposes of subsection (2), a person shall be deemed to have represented a party to a contract if the person represented the party, or assisted the party to a significant degree, in negotiations prior to or at the time the contract was made.

(4) In determining whether a contract or a provision of a contract is unjust, the Court shall not have regard to any injustice arising from circumstances that were not reasonably foreseeable at the time the contract was made.

(5) In determining whether it is just to grant relief in respect of a contract or a provision of a contract that is found to be unjust, the Court may have regard to the conduct of the parties to the proceedings in relation to the performance of the contract since it was made.

From the outset, it is apparent that the *Contracts Review Act* has been drafted to allow the Supreme Court (and other courts through other legislation) to consider a wide range of matters in deciding whether or not a contract or any of its provisions are unjust. These include having regard to the circumstances in which the contract was made, issues of procedural and substantive unconscionability and the public interest. In doing so, the courts were intended to have a wider mandate than the equitable doctrine of unconscionability. As noted by McHugh J in the landmark case of *West v AGC (Advances) Ltd* (1986) 5 NSWLR 610 at 621:

> The *Contracts Review Act 1980* is revolutionary legislation whose evident purpose is to overcome the common law's failure to provide a comprehensive doctrinal framework to deal with "unjust" contracts. Very likely its provisions signal the end of much of classical contract theory in New South Wales. Any contract or contractual provision, not excluded from the operation of the Act and which the court considers is unjust in the circumstances existing at the time when it was made, may be the subject of relief under the Act.

While clearly revolutionary in the sense that the court was given a new power to grant relief in relation to an "unjust" contract covered by the Act, the application and scope of the Act was always going to be determined by what the courts viewed as "unjust". In this regard, even McHugh J appeared, at 622, to consider the notion of "unjust" to be a narrower one than "unfair":

> under this Act, a contract will not be unjust as against a party unless the contract or one of its provisions is the product of unfair conduct on his part either in the terms which he has imposed or in the means which he has employed to make the contract. In this respect it stands in marked contrast with the provisions of the *Industrial Arbitration Act 1940*, s 88F, which provides, inter alia, that the Industrial Commission may declare certain types of contract or arrangements void on the ground that they are "unfair".

To McHugh J, an unjust contract was more likely to arise from a combination of procedural and substantive unconscionability:

> Under s 7(1) a contract may be unjust in the circumstances existing when it was made because of the way it operates in relation to the claimant or because of the way in which it was made or both. … More often, it will be a combination of the operation of the contract and the manner in which it was made that renders the contract or one of its provisions unjust in the circumstances. Thus a contract may be unjust under the Act because its terms, consequences or effects are unjust. This is substantive injustice. Or a contract may be unjust because of the unfairness of the methods used to make it. This is procedural injustice. Most unjust contracts will be the product of both procedural and substantive injustice.

This likely combination of procedural and substantive unconscionability as the basis for relief under the Act appears to be emphasised by McHugh J at 621:

> If a defendant has not been engaged in conduct depriving the claimant of a real or informed choice to enter into a contract and the terms of the contract are reasonable as between the parties, I do not see how that contract can be considered unjust simply because it was not in the interest of the claimant to make the contract or because she had no independent advice.

Interestingly, the apparent distinction McHugh J draws between the notions of "unjust" and "unfair" seems to operate to emphasise the view that a finding that a contract is unjust under the Act ordinarily requires attention to both procedural and substantive unconscionability issues. With references to "real or informed choice" and "means employed to make the contract" clearly raising questions of procedural unconscionability, his Honour seems to point to the important role that such questions will play under the Act. The comparison with the then s 88F of the *Industrial Arbitration Act 1940* (NSW), now s 106 of the *Industrial Relations Act 1996* (NSW),[4] is particularly noteworthy as "unfair" as used in those provisions appears to be viewed by his Honour as a broader notion more related to questions of substantive unconscionability. In short, while mindful of the role of substantive unconscionability under the Act, McHugh J appears to suggest that questions of procedural unconscionability will often not be too far away from any assessment of whether or not a contract is unjust under the Act. After all, his Honour did express the view that "most unjust contracts will be the product of both procedural and substantive injustice".

With now well over 20 years of experience with the *Contracts Review Act*, it appears that McHugh J was prophetic back in 1986 in pointing to the continuing role to be played by procedural unconscionability under the Act. Indeed, according to Beazley JA in *Elkofairi v Permanent Trustee Co Ltd* (2003) 11 BPR 20,841; [2002] NSWCA 413 at [78] the courts have increasingly looked to the circumstances in which the contract was made in assessing whether or not the contract is unjust under the Act:

> It would appear that the trend of authority since *West* is that the *Contract Review Act* permits a court not only to look at the terms of the contract per se, to see its terms are unjust, but to look at the circumstances in which the contract was made and its effect, having regard to those circumstances.

Thus, given that the Act requires an assessment of whether or not the contract or its provisions are "unjust in the circumstances relating to the contract at the time it was made", it was inevitable that the courts would, as part of that assessment, consider whether or not there was some procedural injustice in the events leading up to the making of the contract. Once the circumstances leading up to the making of the contract become a focus of the inquiry, it immediately becomes apparent that the range of circumstances that may be presented to the court in cases under the Act will vary enormously and, in turn, will diminish the precedent value of any positive finding under the Act. If, as stated by Mahoney P in *Elders Rural Finance Ltd v Smith* (1996) 41 NSWLR 296 at 298, "the meaning of injustice under the Act lies in the reaction of the individual judge, informed by what has been said to

[4] For present purposes s 106 relevantly provides that:
(1) The Commission may make an order declaring wholly or partly void, or varying, any contract whereby a person performs work in any industry if the Commission finds that the contract is an unfair contract.
(2) The Commission may find that it was an unfair contract at the time it was entered into or that it subsequently became an unfair contract because of any conduct of the parties, any variation of the contract or any other reason.
(3) A contract may be declared wholly or partly void, or varied, either from the commencement of the contract or from some other time.

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those to whom he should pay regard", then clearly the reaction of the individual judge will vary according to the range of circumstances brought before the court. Indeed, Kirby P in *Beneficial Finance Corp Ltd v Karavas* (1991) 23 NSWLR 256 at 268 cautions that exact repetition of issues is unlikely in cases under the Act:

> each case will depend upon its own particular facts. The facts of this case are quite special. Their exact repetition is unlikely. Particularly where the facts are tendered in support of a contention that a contract is "unjust", it is inevitable that a wide range of issues will be canvassed. These are unlikely to be the same in any two cases. Thus care must be taken in deducing from the result of one case general rules of universal application to others.

More recently, the comments by Kirby P have been echoed by Dunford J in *St George Bank Ltd v Trimarchi* [2003] NSWSC 151 at [77]:

> I was referred to a number of cases, but to a large extent such cases depended on their own facts, and care must be taken in deducing from the result of one case general rules of universal application to others.

In summary, while the courts are able to consider substantive unconscionability under the *Contracts Review Act*, they rarely do so without also considering the impact of procedural unconscionability. As the Act specifically refers to the "circumstances relating to the contract at the time it was made", it is apparent that the courts are drawn to considering the facts leading up to the making of the contract. That such facts will vary from case to case is acknowledged, as is the "trend of authority" for the courts to examine the circumstances leading up to the making of the contract rather than merely confining themselves to looking at the terms of the contract per se. Clearly, after more than 20 years the concept of procedural unconscionability remains a key aspect of cases under the Act and, as a result, works to severely limit the ability of the Act to deal directly with unfair terms in consumer contracts. In other words, given that the fact situations in cases under Act will vary considerably, it is not surprising that positive findings under the Act will normally be confined to their facts and, in turn, are likely to have little, if any, impact on those corporations intent on using unfair terms in consumer contracts.

The enactment of the *Contracts Review Act 1980* was subsequently followed by the enactment of a new provision for the benefit of consumers in the *Trade Practices Act 1974* (Cth) (TPA), now known as s 51AB. The provision – originally inserted into the TPA in 1986 – currently states:

> (1) A corporation shall not, in trade or commerce, in connection with the supply or possible supply of goods or services to a person, engage in conduct that is, in all the circumstances, unconscionable.
>
> (2) Without in any way limiting the matters to which the Court may have regard for the purpose of determining whether a corporation has contravened subsection (1) in connection with the supply or possible supply of goods or services to a person (in this subsection referred to as the *consumer*), the Court may have regard to:
>
> (a) the relative strengths of the bargaining positions of the corporation and the consumer;
>
> (b) whether, as a result of conduct engaged in by the corporation, the consumer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the corporation;
>
> (c) whether the consumer was able to understand any documents relating to the supply or possible supply of the goods or services;
>
> (d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the consumer or a person acting on behalf of the consumer by the corporation or a person acting on behalf of the corporation in relation to the supply or possible supply of the goods or services; and
>
> (e) the amount for which, and the circumstances under which, the consumer could have acquired identical or equivalent goods or services from a person other than the corporation.
>
> (3) A corporation shall not be taken for the purposes of this section to engage in unconscionable conduct in connection with the supply or possible supply of goods or services to a person by reason only that the corporation institutes legal proceedings in relation to that supply or possible supply or refers a dispute or claim in relation to that supply or possible supply to arbitration.

(4) For the purpose of determining whether a corporation has contravened subsection (1) in connection with the supply or possible supply of goods or services to a person:

(a) the Court shall not have regard to any circumstances that were not reasonably forseeable at the time of the alleged contravention; and

(b) the Court may have regard to conduct engaged in, or circumstances existing, before the commencement of this section.

(5) A reference in this section to goods or services is a reference to goods or services of a kind ordinarily acquired for personal, domestic or household use or consumption.

(6) A reference in this section to the supply or possible supply of goods does not include a reference to the supply or possible supply of goods for the purpose of re-supply or for the purpose of using them up or transforming them in trade or commerce.

(7) Section 51A applies for the purposes of this section in the same way as it applies for the purposes of Division 1 of Part V.

A number of points can immediately be made regarding s 51AB. First, it refers to conduct that is in all the circumstances "unconscionable" and lists a number of non-exhaustive matters that the courts may take into account when considering whether or not the conduct is unconscionable under the provision. Second, the matters listed in s 51AB(2) raise, as in the case of the *Contracts Review Act*, both procedural and substantive unconscionability issues. Third, and more importantly, as the matters in s 51AB(2) are neither exhaustive nor restricted to procedural unconscionability, there was some hope that the courts could seek to develop a broader notion of unconscionability that could also deal with allegations based solely on the substantive unfairness of the terms of the contract. In practice, however, there has, as in the case of the *Contracts Review Act*, been a natural inclination by the courts to emphasise procedural unconscionability in cases under s 51AB.

Indeed, the courts have noted that the terms of a contract cannot, on their own, form the basis of an action under s 51AB. In the words of the Full Federal Court in *Hurley v McDonald's Australia Ltd* [2000] ATPR 41-741; [1999] FCA 1728 at [24]–[31] something more is required than merely pointing to the terms of the contract:

> 24. No allegation of unconscionable conduct is made in … relation to the making of the alleged contracts between McDonalds, on the one hand, and the Applicant and the group members, on the other. The allegation is simply that it would be unconscionable for McDonalds to rely on the terms of such contracts.
>
> …
>
> 29. There is no allegation of any circumstance that renders reliance upon the terms of the contracts unconscionable. For example, it might be that, having regard to particular circumstances it would be unconscionable for one party to insist upon the strict enforcement of the terms of a contract. One such circumstance might be that an obligation under a contract arises as a result of a mistake by one party. The mistake is an additional circumstance that might render strict reliance upon the terms of the contract unconscionable. Mere reliance on the terms of a contract cannot, without something more, constitute unconscionable conduct.
>
> …
>
> 31. 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*".
>
> (emphasis in original)

These comments have more recently been echoed by Nicholson J in *Australian Competition and Consumer Commission v Lux Pty Ltd* [2004] FCA 926 at [94]:

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

In short, s 51AB cannot be used by a party to prevent the enforcement of a contractual term unless there is some additional circumstance arising from the particular case that would render the enforcement of that term unconscionable. Thus, for the purposes of s 51AB a party to a contract is, in

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the absence of procedural unconscionability on that person's part, able to rely on the term of a contract. Clearly, substantive unconscionability or the alleged unfairness of a contractual term will not, on its own, be enough to bring an action under s 51AB. Once again, the courts have focused on the events leading up to the making of the contract, and will only intervene under s 51AB where those events reveal that in the making of the contract a party was on the receiving end of conduct or behaviour that would make it unconscionable for the contract to be subsequently enforced against that party.

Having considered both the *Contracts Review Act 1980* (NSW) and s 51AB of the *Trade Practices Act 1974* (Cth) and having come to realisation that, even after more than 20 years, procedural unconscionability remains the focus of the judicial approach to such legislation, the consumer of today may be forgiven for thinking that the "modern" needs of the 1980s consumer in terms of inequality of bargaining power, standard form contracts and substantive unconscionability remain the modern needs of consumers today. That procedural unconscionability remains the focus of these provisions after more than 20 years must clearly mean that these provisions now have a much more limited application than was ever considered or hoped to be the case. Given the courts have intuitively interpreted notions of unconscionability as used in these provisions as ones firmly based on the court's long established notions of procedural unconscionability, it is clear that the modern needs of consumers today regarding inequality of bargaining power, standard form contracts and substantive unconscionability would be better served by focusing entirely on what new objective criteria could be adopted for identifying and dealing effectively with unfair terms. As procedural unconscionability is now well and truly dealt with by the equitable doctrine of unconscionability and more than ably supported by the existing statutory prohibitions against unconscionable conduct, the time has come to properly deal with long-standing consumer concerns regarding *unfair terms*.

Overall, therefore, it is submitted that the following factors combine to support the case for a new regulatory model for dealing with unfair terms in consumer contracts:

- A lack of ability by consumers to negotiate or renegotiate terms of standard form contracts, especially where faced with increasingly complex varieties of such contracts used on an industry wide basis;
- The inefficiencies that would arise, from both a consumer and corporation point of view, were consumers generally able to renegotiate the terms of a standard form contract;
- The expensive and time consuming nature of litigation to test the application of the equitable doctrine of unconscionability and the existing statutory prohibitions against unconscionable conduct, particularly given the fact specific nature of such cases and the emphasis on procedural unconscionability;
- The procedural unconscionability bias of the equitable doctrine and existing statutory prohibitions against unconscionable conduct, which means that claims based only on substantive unconscionability or the unfairness of a contractual term are rarely, if ever, tested;
- The limited precedent value of cases decided with respect to equitable unconscionability or the existing statutory prohibitions against unconscionable conduct. As the range of circumstances giving rise to procedural unconscionability is endless, a finding that a corporation has engaged in unconscionable conduct in a particular case will inevitably be limited to the particular set of circumstances and be of little or no value in a different set of circumstances. In turn, such a positive finding under equitable unconscionability or the existing statutory prohibitions against unconscionable conduct will be of little or no value in promoting behavioural change amongst corporations intent on using unfair terms in standard form contracts;
- With the courts having not only steadfastly adhered to their procedural unconscionability bias when applying the existing statutory prohibitions against unconscionable conduct, but having also refused, under those prohibitions, to consider the growing use and abuse of standard form contracts from a contract theory point of view, it is clear that a new regulatory model is needed. After all, over two decades of experience with existing statutory prohibitions against unconscionable conduct have passed, and during that time the courts have continued to adhere to a view of contract that assumes the parties are capable of fully understanding the terms of a standard form contract and are equally capable of renegotiating any of its terms considered to be

unfair. The courts have, when applying the existing statutory prohibitions against unconscionable conduct, been very careful not to stray far, if at all, from pre-existing notions of procedural unconscionability and no length of time or additional cases are likely to change this state of affairs. In short, unless there is an element of procedural unconscionability, the existing statutory prohibitions against unconscionable conduct will continue to be of little or no value in dealing directly with unfair terms in standard form contracts;

- While of course trade and commerce must, in the words of Lord Coleridge CJ in *Mogul Steamship Co Ltd v McGregor, Gow & Co* (1888) 21 QBD 544 at 553, "be in a sense selfish", and one would fully expect the modern corporation to do what is reasonably necessary to protect its legitimate interests, surely to refrain from dealing directly with unfair terms in standard form contracts in circumstances where such contracts are increasingly used and abused runs the risk of condoning oppressive or exploitative conduct by the corporation. Selfishness in seeking to protect one's legitimate interests is one thing, but to stand by and allow the use of excessively one-sided contractual terms offered on a take it or leave it basis in relation to common consumer products, is to allow standard form contracts to be used in an oppressive or exploitative manner for no reason other than the corporation can presently simply "get away with it". Importantly, therefore, dealing with unfair terms is essentially about seeking to restrain the oppressive or exploitative use of standard form contracts, and is not in any way aimed at preventing such contracts from being used as a vehicle for promoting efficient trade or commerce in a manner where the corporation (as the supplier of the consumer product) is entitled to reasonably protect its legitimate interests;
- Given that any new regulatory initiatives to deal with unfair terms in consumer contracts can be drafted to impact only on those corporations that continue to include unfair terms in such contracts, any uncertainty associated with introducing such initiatives could easily be minimised or even eliminated. Thus, with self-regulation having failed in these instances and with existing statutory prohibitions against unconscionable conduct being of limited or no value in prompting behavioural change, it becomes appropriate to consider regulatory initiatives that seek to deal with such unfair terms in an easily understood and objective manner. Clearly, such initiatives can be specifically targeted to deal only with those contractual terms that go beyond what is reasonably necessary to protect the corporation's legitimate interests. In doing so, such initiatives can be drafted in a manner that does not undermine or jeopardise the certainty of contracts. Not only can such regulatory initiatives be drafted to clearly identify the types of terms that run the risk of being considered unfair, but objective criteria can readily be provided to ensure that the focus falls squarely on those contractual terms that go beyond what is reasonably necessary to protect the corporation's legitimate interests.

Once the need for a new regulatory model for dealing with unfair terms in consumer contracts is accepted, the question quickly turns to whether or not such a model already exists and, if so, whether or not such a model could be adopted across all Australian jurisdictions. Within this context, the regulatory models adopted in the United Kingdom and more recently in Victoria, provide clear examples of how unfair terms in consumer contracts can be dealt with in an effective and targeted manner. Of the two models, the UK model was implemented first and is now found in the *Unfair Terms in Consumer Contracts Regulations 1999* (UK). These Regulations came into force on 1 October 1999. The Victorian model is found in Pt 2B of the *Fair Trading Act 1999* (Vic) and came into force on 9 October 2003.

THE UNITED KINGDOM AND VICTORIAN MODELS: A NEW APPROACH TO UNFAIR TERMS IN CONSUMER CONTRACTS

From the outset, it is readily apparent that the UK and Victorian models have been drafted to specifically target unfair terms in consumer contracts. Indeed, the sole focus of these models is to make void or unenforceable unfair terms in consumer contracts. Both begin by defining unfair terms primarily by reference to the concept of good faith and a significant imbalance in the contractual rights and obligations of the parties to the detriment of the consumer. Notwithstanding these common elements to the definition of an unfair term, there are some differences in the definitions adopted in the two models. For example, the UK model targets unfair terms in standard form contracts, while the

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Victorian model targets unfair terms in consumer contracts generally. In particular, under Reg 5 of the UK model the focus is on terms not individually negotiated by the parties:

> **5.** (1) A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.
>
> (2) A term shall always be regarded as not having been individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term.
>
> (3) Notwithstanding that a specific term or certain aspects of it in a contract has been individually negotiated, these Regulations shall apply to the rest of a contract if an overall assessment of it indicates that it is a pre-formulated standard contract.
>
> (4) It shall be for any seller or supplier who claims that a term was individually negotiated to show that it was.

Regulation 5 includes a number of safeguards to ensure that only genuinely negotiated terms will be considered to be individually negotiated, with the onus falling on the seller or supplier. In comparison, s 32W of the Victorian model refers to a consumer contract which can include both standard and individually negotiated terms:

> A term in a consumer contract is to be regarded as unfair if, contrary to the requirements of good faith and in all the circumstances, it causes a significant imbalance in the parties' rights and obligations arising under the contract to the detriment of the consumer.

Although the Victorian model does not directly exclude individually negotiated terms from its coverage, the issue of whether the term is individually negotiated remains, along with other matters, a factor to be taken into account by the court or tribunal under the Victorian model. This list of factors is found in s 32X and is particularly noteworthy as it provides a valuable guide of the types of terms that may be considered unfair under the Victorian model:

> **32X. Assessment of unfair terms**
>
> Without limiting section 32W, in determining whether a term of a consumer contract is unfair, a court or the Tribunal may take into account, among other matters, whether the term was individually negotiated, whether the term is a prescribed unfair term and whether the term has the object or effect of –
>
> (a) permitting the supplier but not the consumer to avoid or limit performance of the contract;
>
> (b) permitting the supplier but not the consumer to terminate the contract;
>
> (c) penalising the consumer but not the supplier for a breach or termination of the contract;
>
> (d) permitting the supplier but not the consumer to vary the terms of the contract;
>
> (e) permitting the supplier but not the consumer to renew or not renew the contract;
>
> (f) permitting the supplier to determine the price without the right of the consumer to terminate the contract;
>
> (g) permitting the supplier unilaterally to vary the characteristics of the goods or services to be supplied under the contract;
>
> (h) permitting the supplier unilaterally to determine whether the contract had been breached or to interpret its meaning;
>
> (i) limiting the supplier's vicarious liability for its agents;
>
> (j) permitting the supplier to assign the contract to the consumer's detriment without the consumer's consent;
>
> (k) limiting the consumer's right to sue the supplier;
>
> (l) limiting the evidence the consumer can lead in proceedings on the contract;
>
> (m) imposing the evidential burden on the consumer in proceedings on the contract.

A similar list is provided in Sch 2 of the UK Regulations. The following terms are listed in the UK model as being an indicative and non-exhaustive list of the terms which may be regarded as unfair:

1. Terms which have the object or effect of –

(a) excluding or limiting the legal liability of a seller or supplier in the event of the death of a consumer or personal injury to the latter resulting from an act or omission of that seller or supplier;

(b) inappropriately excluding or limiting the legal rights of the consumer vis-à-vis the seller or supplier or another party in the event of total or partial non-performance or inadequate performance by the seller or supplier of any of the contractual obligations, including the option of offsetting a debt owed to the seller or supplier against any claim which the consumer may have against him;

(c) making an agreement binding on the consumer whereas provision of services by the seller or supplier is subject to a condition whose realisation depends on his own will alone;

(d) permitting the seller or supplier to retain sums paid by the consumer where the latter decides not to conclude or perform the contract, without providing for the consumer to receive compensation of an equivalent amount from the seller or supplier where the latter is the party cancelling the contract;

(e) requiring any consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation;

(f) authorising the seller or supplier to dissolve the contract on a discretionary basis where the same facility is not granted to the consumer, or permitting the seller or supplier to retain the sums paid for services not yet supplied by him where it is the seller or supplier himself who dissolves the contract;

(g) enabling the seller or supplier to terminate a contract of indeterminate duration without reasonable notice except where there are serious grounds for doing so;

(h) automatically extending a contract of fixed duration where the consumer does not indicate otherwise, when the deadline fixed for the consumer to express his desire not to extend the contract is unreasonably early;

(i) irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract;

(j) enabling the seller or supplier to alter the terms of the contract unilaterally without a valid reason which is specified in the contract;

(k) enabling the seller or supplier to alter unilaterally without a valid reason any characteristics of the product or service to be provided;

(l) providing for the price of goods to be determined at the time of delivery or allowing a seller of goods or supplier of services to increase their price without in both cases giving the consumer the corresponding right to cancel the contract if the final price is too high in relation to the price agreed when the contract was concluded;

(m) giving the seller or supplier the right to determine whether the goods or services supplied are in conformity with the contract, or giving him the exclusive right to interpret any term of the contract;

(n) limiting the seller's or supplier's obligation to respect commitments undertaken by his agents or making his commitments subject to compliance with a particular formality;

(o) obliging the consumer to fulfil all his obligations where the seller or supplier does not perform his;

(p) giving the seller or supplier the possibility of transferring his rights and obligations under the contract, where this may serve to reduce the guarantees for the consumer, without the latter's agreement;

(q) excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract.

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2. Scope of paragraphs 1(g), (j) and (l)

(a) Paragraph 1(g) is without hindrance to terms by which a supplier of financial services reserves the right to terminate unilaterally a contract of indeterminate duration without notice where there is a valid reason, provided that the supplier is required to inform the other contracting party or parties thereof immediately.

(b) Paragraph 1(j) is without hindrance to terms under which a supplier of financial services reserves the right to alter the rate of interest payable by the consumer or due to the latter, or the amount of other charges for financial services without notice where there is a valid reason, provided that the supplier is required to inform the other contracting party or parties thereof at the earliest opportunity and that the latter are free to dissolve the contract immediately.

Paragraph 1(j) is also without hindrance to terms under which a seller or supplier reserves the right to alter unilaterally the conditions of a contract of indeterminate duration, provided that he is required to inform the consumer with reasonable notice and that the consumer is free to dissolve the contract.

(c) Paragraphs 1(g), (j) and (l) do not apply to:

– transactions in transferable securities, financial instruments and other products or services where the price is linked to fluctuations in a stock exchange quotation or index or a financial market rate that the seller or supplier does not control;

– contracts for the purchase or sale of foreign currency, traveller's cheques or international money orders denominated in foreign currency;

(d) Paragraph 1(l) is without hindrance to price indexation clauses, where lawful, provided that the method by which prices vary is explicitly described.

Where a term is found to be unfair, Reg 8 of the UK model provides that (i) the term will be unenforceable against the supplier, and (ii) the remainder of the contract is binding provided it can continue without the unfair term. Under s 32Y of the Victorian model an unfair term in a consumer contract is void, with the contract also continuing to bind the parties where it is capable of existing without the unfair term.

While both the UK and the Victorian models directly target unfair terms and provide important guidance as to what may be regarded as an unfair term, the Victorian model goes a step further by providing that not only can a term be prescribed as unfair, but that such a prescribed unfair term will be void under s 32Y when used in an standard form contract. Within this context, s 32U of the Victorian model defines a "prescribed unfair term" as "a term that is prescribed by the regulations to be an unfair term or a term to the like effect", and a "standard form contract" is defined 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"' Under s 32Z it also becomes an offence for a supplier to either use or enforce against a consumer a prescribed unfair term in a standard form contract containing it. Thus, not only does the Victorian model take a firm position against prescribed unfair terms, but by allowing for the prescription of unfair terms it has established a valuable mechanism for dealing swiftly and effectively with unfair terms.

In summary, the UK and Victorian models provide a more targeted and effective mechanism for dealing directly with unfair terms in consumer contracts than do the equitable doctrine of unconscionability and the existing statutory prohibitions against unconscionable conduct. Indeed, dealing with unfair terms in a consumer context is the sole focus of both the UK and Victorian models, and this allows the enforcement agency in the particular jurisdiction to go after such terms in a direct manner. In doing so, the enforcement agency has the ability to directly approach sellers and suppliers and seek their cooperation in modifying a term perceived to be unfair under the terms of the model. Although a cooperative approach is expected to be used in the overwhelming majority of cases, the enforcement agency in each jurisdiction is given sufficient powers to take enforcement action against the continued use of the allegedly unfair term. There can be no doubt that this ability under the UK and Victorian model to proactively deal with unfair terms in consumer contracts in a timely manner is of considerable benefit to consumers. Not only do these regulatory models seek to clearly define the nature of an unfair term covered by the model and provide examples of the type of terms likely to be unfair, but each model empowers the enforcement agency to take appropriate action

to prevent the continued use of the allegedly unfair term. While it is still early days for the Victorian model, the UK experience is particularly positive as the UK Office of Fair Trading has had a great deal of success in securing enforceable undertakings from sellers and suppliers agreeing to modify or refraining from using allegedly unfair terms.[5] Clearly, the UK experience demonstrates that regulatory models directly targeting unfair terms do offer consumers considerable benefits. Such benefits are not only much more tangible and long lasting than could ever be the case under the equitable doctrine of unconscionability and the existing statutory prohibitions against unconscionable conduct, but have been secured in a very timely manner.

CONCLUSION

With the growth in the use of standard form contracts, it was inevitable that corporations would seek to draft terms that were not only favourable to the corporation, but went further in tilting the balance of contractual rights and obligations significantly in favour of the corporation. That terms may be favourable to the corporation is to be expected and, of course, the corporation is entitled to include terms that are reasonably necessary to protect its legitimate interests. To go beyond that, however, runs the risk that contracts are being used in an oppressive or exploitative manner. As consumers ordinarily have little or no ability to renegotiate terms of a standard form contract, particularly in view of the growing disparity of bargaining power between them and the modern corporation, it is clear that, in the absence of any legislative or judicial restriction against the use of unfair terms, the corporation is effectively left to its own devices in deciding whether or not to go beyond what is reasonably necessary to protect its interests. While clearly some corporations will show self-restraint, there are those corporations which will always seek to increasingly push the boundaries in their favour. With the equitable doctrine of unconscionability and the existing statutory provisions against unconscionable conduct having a procedural unconscionability bias, it is readily apparent that these existing judicial and legislative mechanisms are of extremely limited use where the consumer concern relates solely to the substantive unfairness of a contractual term. Indeed, with existing mechanisms typically only relevant where there is procedural unconscionability or, at least a mixture of procedural and substantive unconscionability, it is clear that a new regulatory model is needed to deal directly with unfair terms in consumer contracts.

With both the United Kingdom and Victoria having already enacted such a model, and with the more established UK model already producing considerable benefits for consumers, it is readily apparent that unfair terms in consumer contracts can be targeted in a direct and timely manner. With such models providing important guidance on the types of terms that run the risk of being considered to be unfair, and with the ample scope under the models for adopting a cooperative approach to allegedly unfair terms, there can be no doubt that such new regulatory models provide a very user-friendly mechanism for proactively dealing with allegedly unfair terms in a way that does not detract from a corporation's ability to do what is reasonably necessary to protect its legitimate interests. In view of these clear advantages from the UK and Victorian models, any delay in adopting elsewhere a new regulatory model not only means that consumers in the jurisdiction continue to be exposed to unfair contractual terms in circumstances where something meaningful could immediately be done to prevent such exposure, but also raises serious concerns that the particular jurisdiction has fallen behind in this increasingly important area of consumer protection.

[5] The UK Office of Fair Trading publishes regular Bulletins on all concluded cases, including undertakings, under the Regulations, at http://www.crw.gov.uk/Other+legislation/Unfair+contract+terms/unfair+contract+terms+%2D+bulletins.htm viewed 5 May 2005.

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