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# Dealing with unfair terms in consumer contracts: The search for a new regulatory model

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*Once it is recognised that the equitable doctrine of unconscionability and the existing statutory prohibitions against unconscionable conduct have a procedural unconscionability bias, it becomes readily apparent that these are not the right vehicles for dealing with claims based solely on the substantive unfairness of contractual terms. Indeed, in the absence of a legally recognisable disabling condition affecting the consumer during the contract-making process, the courts will rarely, if ever, rely on the equitable doctrine or existing statutory provisions against unconscionable conduct to deal with allegedly unfair terms in a consumer contract. With the equitable doctrine and the existing statutory provisions against unconscionable conduct being so ineffective in dealing directly with unfair terms in consumer contracts, the time has come to adopt a new regulatory general model to deal with such unfair terms. Such a model should not only provide a vehicle for dealing with unfair terms in a timely and cost-effective manner, but should also offer clear guidance as to when a term will be considered unfair. Given that new regulatory models already exist in the United Kingdom and Victoria, it is opportune to consider their operation and possible additions to such models with a view to identifying the most appropriate model for dealing directly with unfair terms in consumer contracts.*

## INTRODUCTION

As the use of standard form contracts in consumer contracts has grown, so has the need to ensure that such contracts are not abused. Indeed, with standard form contracts now so prevalent in consumer dealings and, given the obvious temptation on the part of the modern corporation to include terms in such contracts that go beyond what is reasonably necessary to protect its legitimate interests, the need to prevent abuses of standard form contracts has gained a sense of urgency. With this sense of urgency undoubtedly related to the judicial reluctance to rely on the equitable doctrine of unconscionability and the existing provisions against unconscionable conduct to deal directly with unfair terms in consumer contracts, it is not surprising to find that a new regulatory general model is now being sought to deal with such unfair terms. Such a model would not only be specifically targeted to allow objective consideration of the fairness or otherwise of the terms of the consumer contract, but would also provide consumers and regulatory agencies a much-needed vehicle for challenging the fairness of a term without the need to demonstrate the presence of procedural unconscionability. In short, while claims of procedural unconscionability can quite easily continue to be dealt with under either the equitable doctrine of unconscionability or existing provisions against unconscionable conduct, a new regulatory general model is needed to deal directly with consumer concerns relating solely to the fairness or otherwise of contractual terms.

Once the need for a new regulatory general model is acknowledged,<sup>1</sup> 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

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<sup>1</sup> See Zumbo F, "Dealing with Unfair Terms in Consumer Contracts: Is Australia Falling Behind?" (2005) 13 TPLJ 70.

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 United Kingdom 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. While these models share many common elements, each has a number of distinctive elements which distinguishes one from the another. With this in mind, the article will not only consider the operation of each of these models, but also will discuss how the models differ from one another. Possible additions to the models to make them more effective in dealing directly with unfair terms in consumer contracts will also be discussed.

## THE UNITED KINGDOM EXPERIENCE

The present UK model for dealing with unfair terms in consumer contracts is found in the *Unfair Terms in Consumer Contracts Regulations 1999* (UK).<sup>2</sup> These replaced the earlier the *Unfair Terms in Consumer Contracts Regulations 1994* (UK) which had come into force on 1 July 1995. While both were intended to implement in the United Kingdom the European Council Directive 93/13/EEC on unfair terms in consumer contracts, the 1999 Regulations were intended to follow more closely the wording of the European Directive.

From the outset, Reg 4(1) provides that the UK model applies to unfair terms in contracts between a consumer and a seller or supplier. Under Reg 3(1) a “consumer” means “any natural person who, in contracts covered by these Regulations, is acting for purposes which are outside his trade, business or profession” and a “seller or supplier” means “any natural or legal person who, in contracts covered by these Regulations, is acting for purposes relating to his trade, business or profession, whether publicly owned or privately owned”. Under Reg 4(2), however, the Regulations do not apply to contractual terms which reflect:

- (a) mandatory statutory or regulatory provisions (including such provisions under the law of any Member State or in Community legislation having effect in the United Kingdom without further enactment);
- (b) the provisions or principles of international conventions to which the Member States or the Community are party.

Under Reg 9, the UK model will apply to a consumer contract having a close connection to the United Kingdom.

### Choice of law clauses

9. These Regulations shall apply notwithstanding any contract term which applies or purports to apply the law of a non-Member State, if the contract has a close connection with the territory of the Member States.”

Regulation 5 is the key Regulation under the UK model as it defines an unfair contractual term:

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.

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<sup>2</sup> *Unfair Terms in Consumer Contracts Regulations 1999* (UK) <http://www.legislation.hms.gov.uk/si/1999/19992083.htm> viewed 28 October 2005.

(5) Schedule 2 to these Regulations contains an indicative and non-exhaustive list of the terms which may be regarded as unfair.

Under the UK model, a contractual term will be unfair if it has not been individually negotiated, is contrary to the requirement of good faith, and causes a significant imbalance between the rights and obligations between the parties to the detriment of the consumer. Because individually negotiated contractual terms are not within the ambit of the Regulations, it is clear that the UK model is targeting the use of unfair terms in standard form contracts. Importantly, Reg 5 includes a number of safeguards to ensure that only terms genuinely negotiated between the parties will be considered to be “individually negotiated” with the onus, where such a claim is made, falling on the seller or supplier to show that the terms were actually individually negotiated.

Turning to what constitutes an unfair term, it is readily apparent that the expression “causes a significant imbalance between the rights and obligations between the parties to the detriment of the consumer” is a key element in any assessment of the fairness or otherwise of the term in question. This expression has received judicial consideration in *Director General of Fair Trading v First National Bank plc* [2001] UKHL 52, a case involving the earlier version of the UK Regulations.<sup>3</sup> At [17] of that case, Lord Bingham made the following comments regarding the expression:

The requirement of significant imbalance is met if a term is so weighted in favour of the supplier as to tilt the parties’ rights and obligations under the contract significantly in his favour. This may be by the granting to the supplier of a beneficial option or discretion or power, or by the imposing on the consumer of a disadvantageous burden or risk or duty. The illustrative terms set out in [the] Schedule ... to the regulations provide very good examples of terms which may be regarded as unfair; whether a given term is or is not to be so regarded depends on whether it causes a significant imbalance in the parties’ rights and obligations under the contract. This involves looking at the contract as a whole. But the imbalance must be to the detriment of the consumer; a significant imbalance to the detriment of the supplier, assumed to be the stronger party, is not a mischief which the regulations seek to address.

In these comments, Lord Bingham points to the tilting of the contractual rights significantly in the corporation’s favour, or the imposition on the consumer of a disadvantageous burden, risk or duty as the measure of “significant imbalance”. This tilting of the rights or the imposition of a disadvantageous burden clearly looks to whether the terms of the consumer contract have been drafted in a manner that is unjustifiably detrimental to the consumer.

The expression “contrary to the requirement of good faith” is the other key element in the definition of an unfair term. This expression was also considered by Lord Bingham (at [17]) of *Director General of Fair Trading v First National Bank plc* [2001] UKHL 52:

The requirement of good faith in this context is one of fair and open dealing. Openness requires that the terms should be expressed fully, clearly and legibly, containing no concealed pitfalls or traps. Appropriate prominence should be given to terms which might operate disadvantageously to the customer. Fair dealing requires that a supplier should not, whether deliberately or unconsciously, take advantage of the consumer’s necessity, indigence, lack of experience, unfamiliarity with the subject matter of the contract, weak bargaining position or any other factor listed in or analogous to those listed in [the] Schedule ... Good faith in this context is not an artificial or technical concept ... It looks to good standards of commercial morality and practice.

In dealing with the concept of good faith, Lord Bingham emphasised the qualities of openness and fair dealing in relation to consumer contracts. With openness concerned with transparency in the use of contractual terms, particularly those operating “disadvantageously to the customer”, and with fair dealing concerned with the corporation not taking advantage of its superior position, it is evident that Lord Bingham saw the concept of good faith as one focused on the corporation acting fairly in the drafting of consumer contracts in circumstances where the consumer is in a vulnerable contractual position in relation to the corporation. To Lord Bingham, the concept focuses attention on whether the corporation, in drafting the consumer contract, uses its superior position to exploit the vulnerability of the consumer.

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<sup>3</sup> See *Unfair Terms in Consumer Contracts Regulations 1994* (UK).

Importantly, Lord Bingham also emphasised the utility of the examples of possibly unfair terms included in the Schedule to the Regulations. Under the present Regulations, the indicative and non-exhaustive list of terms which may be regarded as unfair is found in Sch 2. The list, now found in Item 1 of Sch 2, is wide ranging and provides considerable guidance as to the type of terms that may be seen as unfair under the UK model. In addition to outlining a list of terms that may be considered unfair, Sch 2 also provides clarification as to when particular terms can be used without being seen as unfair. Indeed, Item 2 of Sch 2 provides that certain terms may, in the right circumstances, be legitimately used in consumer contracts. In doing so, the UK model strikes a balance between seeking to disallow particular terms in circumstances where they operate unfairly, while allowing their use in appropriate circumstances and with suitable safeguards. Clearly, it is the unfairness of a term that is being targeted by the UK model and not the use of terms that are reasonably necessary to protect the legitimate interests of the corporation dealing with the consumer.

**Schedule 2**

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.

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.

Once a term is found to be unfair, the term will not be binding on the consumer. While the corporation will not be able to enforce the particular term against the consumer, the remainder of the contract will, whenever possible, continue to be binding on the parties. The effect of an unfair term is dealt with under Reg 8.

**Effect of unfair term**

- 8. (1) An unfair term in a contract concluded with a consumer by a seller or supplier shall not be binding on the consumer.
- (2) The contract shall continue to bind the parties if it is capable of continuing in existence without the unfair term.

Clearly, the UK model targets only unfair terms in a contract and in no way affects the validity of the remainder of the contract, provided that the remainder of contract can operate without the unfair terms.

In addition to targeting unfair terms, the UK model seeks to promote greater transparency in consumer contracts by requiring plain English drafting of such contracts. Under Reg 7, corporations

are required to use plain and understandable language in a consumer contract and a failure to do so means that, with the exception of court proceedings, the terms of the contract may be interpreted in a manner that is most favourable to the consumer:

**Written contracts**

7. (1) A seller or supplier shall ensure that any written term of a contract is expressed in plain, intelligible language.

(2) If there is doubt about the meaning of a written term, the interpretation which is most favourable to the consumer shall prevail but this rule shall not apply in proceedings brought under regulation 12.

The promotion of plain English drafting of consumer contracts is seen as a key ingredient in any new regulatory model dealing with unfair terms in consumer contracts. By seeking to prevent corporations from hiding behind dense and unintelligible language, a plain English drafting requirement aims to promote greater transparency within consumer contracts.

Further guidance as to the fairness or otherwise of a term is provided by Reg 6. Under Reg 6, the issue of a term's fairness is to be considered by reference to such factors as the nature of the goods or services involved, the other terms of the contract and the content of any other contract connected to the one being reviewed. Significantly, subject to one proviso, Reg 6 also operates to exclude from the scope of the UK model any contractual term relating to either the subject matter of the contract or the price of the goods or services involved. That proviso requires that a term dealing with the contract's subject matter or price be drafted in plain and understandable language. Reg 6 states:

**Assessment of unfair terms**

6. (1) Without prejudice to regulation 12, the unfairness of a contractual term shall be assessed, taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent.

(2) In so far as it is in plain intelligible language, the assessment of fairness of a term shall not relate:

- (a) to the definition of the main subject matter of the contract; or
- (b) to the adequacy of the price or remuneration, as against the goods or services supplied in exchange.

Once again, the UK model focuses attention on the type of contractual terms used by the corporation having specific regard to their drafting and the nature of the particular consumer transaction. Indeed, while terms dealing with the subject matter of the contract and the price of the goods or services are not intended to be covered by the UK model, such terms may still face scrutiny if not drafted in plain English. Again, the onus is on the corporation to use "plain intelligible language" in consumer contracts.

While the UK Office of Fair Trading (the OFT) is the primary government agency responsible for enforcing the UK model, it is interesting to note that other government agencies, and even non-government agencies, are given a role in the enforcement of the model. These agencies are referred to as "qualifying bodies" and are defined in Reg 3(1) to mean "a person specified in Schedule 1" of the Regulations. Schedule 1, in turn, is divided into two parts; Pt 1 listing a number of other government agencies having consumer protection responsibilities;<sup>4</sup> and Pt 2 listing one private body – the Consumers' Association.

The involvement by other government and non-government agencies is a unique feature of the UK model. While this may allow for wider enforcement of the UK model, it does raise the issue of appropriate coordination between the agencies. This is achieved by requiring the OFT – previously the Director General of Fair Trading under Reg 3(1) – to consider any complaint under the Regulations unless the OFT has been notified that a qualifying body will consider the complaint. At

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<sup>4</sup> These government agencies now include the Information Commissioner's Office; the Office of Gas and Electricity Markets (Ofgem); Office of Communications (Ofcom); the Office of Water Services (Ofwat); the Office of Rail Regulation; the Department of Enterprise, Trade and Investment; the Financial Services Authority; and every weights and measures authority in Great Britain.

this point, it should be noted that, following the enactment of the *Enterprise Act 2002* (UK), the Office of the Director General of Fair Trading was abolished<sup>5</sup> and its functions transferred to the OFT.<sup>6</sup> Pursuant to s 2(3) of the *Enterprise Act 2002* (UK), any reference to the Director General of Fair Trading (or the “Director”) in the UK Regulations should now be read as a reference to the OFT. With this in mind, Reg 10 places the OFT under a duty to consider a complaint unless the complaint is frivolous or vexatious, or a qualifying body is involved and the OFT has been made aware of that involvement. In the absence of the involvement of a qualifying body, the OFT must consider the complaint and decide whether or not to move against the unfair term which has led to the complaint. The OFT’s ability to secure enforceable undertakings from the corporation is a matter that the OFT may wish to consider in deciding whether or not to seek an injunction. In short, Reg 10 outlines the OFT’s key responsibilities under the Regulations:

**Complaints – consideration by Director**

10. (1) It shall be the duty of the Director to consider any complaint made to him that any contract term drawn up for general use is unfair, unless:

- (a) the complaint appears to the Director to be frivolous or vexatious; or
- (b) a qualifying body has notified the Director that it agrees to consider the complaint.

(2) The Director shall give reasons for his decision to apply or not to apply, as the case may be, for an injunction under regulation 12 in relation to any complaint which these Regulations require him to consider.

(3) In deciding whether or not to apply for an injunction in respect of a term which the Director considers to be unfair, he may, if he considers it appropriate to do so, have regard to any undertakings given to him by or on behalf of any person as to the continued use of such a term in contracts concluded with consumers.

To ensure that a complaint is pursued by a qualifying body, the Regulations provide that a qualifying body listed in Pt 1 of the Schedule, ie one of the listed government agencies, is under a duty to consider a complaint it has notified to the OFT. In carrying out this duty, the relevant qualifying body has the same OFT obligation to provide reasons for the body’s decision regarding whether or not to take action against the unfair term. The duty on other involved government agencies in relation to complaints is found in Reg 11:

**Complaints – consideration by qualifying bodies**

11. (1) If a qualifying body specified in Part One of Schedule 1 notifies the Director that it agrees to consider a complaint that any contract term drawn up for general use is unfair, it shall be under a duty to consider that complaint.

(2) Regulation 10(2) and (3) shall apply to a qualifying body which is under a duty to consider a complaint as they apply to the Director.

To assist in their consideration of complaints, the OFT and the other involved government agencies are given the power to request documents and other information about the use of a contractual term. These information-gathering powers can also be used to monitor compliance with any undertakings given regarding the use of a particular contractual term. These powers are found in Reg 13:

**Powers of the Director and qualifying bodies to obtain documents and information**

13. (1) The Director may exercise the power conferred by this regulation for the purpose of:

- (a) facilitating his consideration of a complaint that a contract term drawn up for general use is unfair; or
- (b) ascertaining whether a person has complied with an undertaking or court order as to the continued use, or recommendation for use, of a term in contracts concluded with consumers.

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<sup>5</sup> See *Enterprise Act 2002* (UK), s 2(2).

<sup>6</sup> See *Enterprise Act 2002* (UK), s 2(1).

(2) A qualifying body specified in Part One of Schedule 1 may exercise the power conferred by this regulation for the purpose of:

- (a) facilitating its consideration of a complaint that a contract term drawn up for general use is unfair; or
- (b) ascertaining whether a person has complied with:
  - (i) an undertaking given to it or to the court following an application by that body; or
  - (ii) a court order made on an application by that body,

as to the continued use, or recommendation for use, of a term in contracts concluded with consumers.

(3) The Director may require any person to supply to him, and a qualifying body specified in Part One of Schedule 1 may require any person to supply to it:

- (a) a copy of any document which that person has used or recommended for use, at the time the notice referred to in paragraph (4) below is given, as a pre-formulated standard contract in dealings with consumers;
- (b) information about the use, or recommendation for use, by that person of that document or any other such document in dealings with consumers.

(4) The power conferred by this regulation is to be exercised by a notice in writing which may:

- (a) specify the way in which and the time within which it is to be complied with; and
- (b) be varied or revoked by a subsequent notice.

(5) Nothing in this regulation compels a person to supply any document or information which he would be entitled to refuse to produce or give in civil proceedings before the court.

(6) If a person makes default in complying with a notice under this regulation, the court may, on the application of the Director or of the qualifying body, make such order as the court thinks fit for requiring the default to be made good, and any such order may provide that all the costs or expenses of and incidental to the application shall be borne by the person in default or by any officers of a company or other association who are responsible for its default.

There can be little doubt that adequate information powers are critical to the proper investigation of complaints and for the monitoring of compliance with undertakings, particularly where the corporation involved is being uncooperative. While it is expected that a corporation will be forthcoming in any investigation of a complaint, there may be instances where the corporation either does not voluntarily provide the necessary information or is not agreeable to giving an undertaking in relation to the contractual term in question. When left with no other option, the OFT or a qualifying body may be compelled to pursue court action. In such instances, Reg 12 enables the OFT or other body to seek an injunction:

**Injunctions to prevent continued use of unfair terms**

12. (1) The Director or, subject to paragraph (2), any qualifying body may apply for an injunction (including an interim injunction) against any person appearing to the Director or that body to be using, or recommending use of, an unfair term drawn up for general use in contracts concluded with consumers.

(2) A qualifying body may apply for an injunction only where:

- (a) it has notified the Director of its intention to apply at least fourteen days before the date on which the application is made, beginning with the date on which the notification was given; or
- (b) the Director consents to the application being made within a shorter period.

(3) The court on an application under this regulation may grant an injunction on such terms as it thinks fit.

(4) An injunction may relate not only to use of a particular contract term drawn up for general use but to any similar term, or a term having like effect, used or recommended for use by any person.



While the OFT and a qualifying body are able to apply for an injunction to prevent use of an unfair contractual term, this power is, in practice, often used only as a last resort. Indeed, the OFT has placed considerable effort into trying to secure undertakings regarding the use of allegedly unfair terms. This is readily apparent from a review of the regular Bulletins published by the OFT in which it outlines the undertakings it has secured over a particular period of time.<sup>7</sup> The Bulletins span many years and demonstrate the effectiveness of undertakings in dealing with unfair contractual terms.

As the securing of undertakings is seen as a valuable mechanism under the UK model, it is important that the OFT and other listed government agencies have sufficient power to obtain and enforce such undertakings. Clearly, the securing of undertakings is a pro-active and cost-effective way to deal with unfair contractual terms. Not only do undertakings deliver a more immediate result than court action, but also they become a valuable source of guidance as to those terms that may be unfair. In view of the importance of undertakings under the UK model, a qualifying body is obliged to notify the OFT of any undertaking the body has secured. Under Reg 14, such an obligation extends to notifying the OFT of the outcome of any application for an injunction made by the qualifying body pursuant to Reg 12.

**Notification of undertakings and orders to Director**

14. A qualifying body shall notify the Director:

- (a) of any undertaking given to it by or on behalf of any person as to the continued use of a term which that body considers to be unfair in contracts concluded with consumers;
- (b) of the outcome of any application made by it under regulation 12, and of the terms of any undertaking given to, or order made by, the court;
- (c) of the outcome of any application made by it to enforce a previous order of the court.

The importance of undertakings under the UK model is highlighted by the fact that the OFT is obliged to publish details of all undertakings that have been obtained in relation to an allegedly unfair term. The OFT is also obliged to publish details of any court application in which an injunction is sought against an allegedly unfair term. The wide-ranging obligations of the OFT to publicise the work undertaken on unfair contractual terms are outlined in Reg 15.

**Publication, information and advice**

15. (1) The Director shall arrange for the publication in such form and manner as he considers appropriate, of:

- (a) details of any undertaking or order notified to him under regulation 14;
- (b) details of any undertaking given to him by or on behalf of any person as to the continued use of a term which the Director considers to be unfair in contracts concluded with consumers;
- (c) details of any application made by him under regulation 12, and of the terms of any undertaking given to, or order made by, the court;
- (d) details of any application made by the Director to enforce a previous order of the court.

(2) The Director shall inform any person on request whether a particular term to which these Regulations apply has been:

- (a) the subject of an undertaking given to the Director or notified to him by a qualifying body; or
- (b) the subject of an order of the court made upon application by him or notified to him by a qualifying body,

and shall give that person details of the undertaking or a copy of the order, as the case may be, together with a copy of any amendments which the person giving the undertaking has agreed to make to the term in question.

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<sup>7</sup> United Kingdom Office of Fair Trading Bulletins can be accessed at <http://www.crw.gov.uk/Other+legislation/Unfair+contract+terms/unfair+contract+terms+%2D+bulletins.htm> viewed October 2005.

(3) The Director may arrange for the dissemination in such form and manner as he considers appropriate of such information and advice concerning the operation of these Regulations as may appear to him to be expedient to give to the public and to all persons likely to be affected by these Regulations.

The dissemination of information regarding the operation of the UK model is a vital element in dealing effectively with unfair terms in consumer contracts. Not only do businesses and consumers need to know about the model's existence, they also need to understand how it impacts on them. From a business perspective, an understanding of the type of contractual terms that may be potentially unfair is essential to compliance with the model. From a consumer perspective, information about the UK model enables consumers to make the OFT or a qualifying body aware of potentially unfair terms so that they may be investigated in a timely manner and, if found to be unfair, dealt with decisively and effectively.

## THE VICTORIAN EXPERIENCE

The Victorian model for dealing with unfair terms in consumer contracts is found in the Pt 2B of the *Fair Trading Act 1999* (Vic) which came into force on 9 October 2003. Part 2B is entitled "Unfair terms in consumer contracts" and is the first of its kind to be enacted by any Australian jurisdiction. From the outset, it is clear that, like the UK model, the Victorian model directly targets unfair contractual terms. This is done through s 32Y of the Act:

### 32Y. Effect of unfair term

- (1) An unfair term in a consumer contract is void.
- (2) A prescribed unfair term in a standard form contract is void.
- (3) The contract will continue to bind the parties if it is capable of existing without the unfair term or the prescribed unfair term.
- (4) Subsection (1) applies to any consumer contract entered into on or after the commencement of section 12 of the *Fair Trading (Amendment) Act 2003*.
- (5) Subsection (2) applies to any standard form contract whether entered into before or after the term is prescribed.

The Victorian model not only makes void any unfair term in a consumer contract, but also makes void a "prescribed unfair term in a standard form contract". This ability to prescribe a term as an unfair term is a key difference between the Victorian and the UK models. Importantly, the Victorian model allows the contract in which an unfair term is found to continue to bind the parties if the contract is capable of doing so without the unfair term. This clearly seeks to limit the impact of the legislation to any unfair terms without in any way undermining contracts able to stand without the unfair term. While the Victorian model applies to an unfair term in a contract entered into on or after the 9 October 2003 – the date of commencement for s 12 of the *Fair Trading (Amendment) Act 2003* (Vic) – a prescribed unfair term in a standard form contract will be void irrespective of when the standard form contract was entered into by the parties.

The concepts of "consumer contract", "prescribed unfair term", "standard form contract" and "unfair term" have been defined in the Victorian model. Thus, "consumer contract" is defined in s 3, with the remainder of the terms being defined in s 32U of the Act:

### 3. Definitions

In this Act:

"consumer contract" means an agreement, whether or not in writing and whether of specific or general use, to supply goods or services of a kind ordinarily acquired for personal, domestic or household use or consumption, for the purposes of the ordinary personal, domestic or household use or consumption of those goods or services;

### 32U. Definitions

For the purposes of this Part:

"consumer", in relation to a consumer contract, means a person to whom goods or services have been or are to be supplied under the contract;

...

“prescribed unfair term” means a term that is prescribed by the regulations to be an unfair term or a term to the like effect;

“standard form contract” means 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;

“unfair term” has the meaning given by section 32W.

An unfair term is defined in s 32W by reference to the concept of good faith and consideration of whether or not the term causes a significant imbalance in the rights and obligations of the parties to the detriment of the consumer:

**32W. What is an unfair term?**

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 similar in relation to the reference to good faith and a significant imbalance between the parties to the detriment of consumers, the Victorian model definition differs from the definition in the UK model by not automatically excluding individually-negotiated contracts from its scope. Under the Victorian model, reference is made to a term in a “consumer contract”, while the UK model applies only to a contractual term that has not been individually negotiated. The Victorian model does, however, include whether the term was individually negotiated as a relevant factor for a court or tribunal to take into account when assessing whether a term is unfair. Despite this difference in wording of the respective definitions, it is submitted that the comments by Lord Bingham in *Director General of Fair Trading v First National Bank* [2001] UKHL 52, discussed above in relation to the previous UK Regulations, will offer some guidance on concepts of “good faith” and “significant imbalance” as used in the Victorian model.

Indeed, the Director of Consumer Affairs Victoria has drawn on those comments of Lord Bingham in producing its guidelines on the operation of the Victorian model.<sup>8</sup> In doing so, the Director adopts the following definition of “good faith”:

A principle of fair and open dealing; that is “playing fair”, especially when one party is in a position of dominance over a consumer who is vulnerable relative to that dominance or power.<sup>9</sup>

The notion of “playing fair” as used by the Director again looks to whether the corporation, when drafting the consumer contract, uses its superior position to exploit the vulnerability of the consumer.

A wide-ranging list of factors which a court or tribunal may take into account in determining whether a term of a consumer contract is unfair is found in s 32X of the Act:

**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;

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<sup>8</sup> Consumer Affairs Victoria, *Preventing unfair terms in consumer contracts: Preliminary guidelines for suppliers* (November 2003) p 29.

<sup>9</sup> Consumer Affairs Victoria, n 8, p 4.

- (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.

Importantly, each of these factors point to the one-sided nature of the contractual term. In each instance, the supplier is seeking to tilt the rights and obligations under the contract significantly in its favour. Thus, by seeking to reserve, for its sole benefit, rights or powers under the contract, or by placing the consumer under a disadvantageous burden, risk or duty, the supplier is creating a significant imbalance in the parties' rights and obligations under the contract to the obvious detriment of the consumer. Clearly, these factors provide very good examples of the type of terms that may be regarded as unfair and, as such, offer both suppliers and consumers a valuable guide as to the nature of the substantive unfairness being targeted by the Victorian model.

While ordinarily broad in its scope, the Victorian model contains a number of express exclusions. In particular, s 32V applies to exclude a contract governed by the *Consumer Credit (Victoria) Act 1995* (Vic), or any contractual term required or expressly permitted by law.

#### **32V. Application of Part**

This Part does not apply to contractual terms:

- (a) contained in a contract (other than a contract in a prescribed class of contract) to which the *Consumer Credit (Victoria) Act 1995* applies;
- (b) that are required or expressly permitted by law, but only to the extent required or permitted.

Thus, if a contractual term is required by law, then such a term has, for whatever reason, been accepted as being in the public interest and, irrespective of whether or not it would have otherwise been unfair under the Act, the term is nevertheless outside the scope of the Victorian model.

While both the UK and the Victorian models directly target unfair terms through the provision of clear 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 a standard form contract. Given that 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", the Victorian model provides a ready mechanism for seeking to stamp out existing unfair terms or for moving quickly against newly emerging unfair terms. Significantly, the Victorian model creates an offence prohibiting both the use and enforcement of a prescribed unfair term in a standard form contract.

#### **32Z. Offences relating to prescribed unfair terms**

- (1) A supplier must not use in relation to a consumer a standard form contract containing a prescribed unfair term.

Penalty:        10 penalty units, in the case of a natural person.  
                     20 penalty units, in the case of a body corporate.

- (2) A person must not attempt to enforce a prescribed unfair term in a standard form contract whether entered into before or after the term is prescribed.

Penalty:        10 penalty units, in the case of a natural person.  
                     20 penalty units, in the case of a body corporate.

Clearly, the Victorian model not only takes a firm stance against prescribed unfair terms but also views the prescription of unfair terms as a valuable mechanism for dealing with them swiftly and effectively.

Under the Victorian model, the Director of Consumer Affairs Victoria is given very extensive powers not only to enforce the legislation but also to collect information regarding the use or continuing use of unfair terms. The ability of the Director to seek an injunction, declaration or advisory opinion in relation to unfair terms from the Victorian Civil and Administrative Tribunal are dealt with in ss 32ZA, 32ZC and 32ZD respectively.

**32ZA. Injunctions to prevent continued use of unfair terms**

- (1) The Director may apply to the Tribunal for an injunction against any person who, in the Director's opinion, is using, or recommending the use of:
  - (a) an unfair term in consumer contracts; or
  - (b) a prescribed unfair term in standard form contracts.
- (2) The Tribunal, if it is satisfied that, in all the circumstances, it is just and convenient to do so, may by order grant an injunction under this section on such terms as it considers appropriate.
- (3) Section 123(2) to (7) of the *Victorian Civil and Administrative Tribunal Act 1998* applies as if an injunction under this section were an injunction under that section.
- (4) An injunction may relate not only to the use of a particular term in a consumer contract or standard form contract, but to any similar term or to a term having like effect, used or recommended for use by any person.

**32ZC. Declaration by the Tribunal**

- (1) The Director may apply to the Tribunal for an order declaring that:
  - (a) a contract is a consumer contract or standard form contract;
  - (b) a term of a consumer contract is an unfair term;
  - (c) a term of a standard form contract is a prescribed unfair term.
- (2) The Tribunal may make a declaration in relation to a matter under sub-section (1) or any related matter.
- (3) The Tribunal's power to make a declaration under this section is exercisable only by a presidential member.

**32ZD. Advisory opinion by the Tribunal**

- (1) The Director may, in writing, refer to the Tribunal for an advisory opinion any matter, including but not limited to:
  - (a) whether a contract is a consumer contract or standard form contract;
  - (b) whether a term of a consumer contract is an unfair term;
  - (c) whether a term of a standard form contract is a prescribed unfair term.
- (2) The Tribunal may provide an advisory opinion in relation to a matter under sub-section (1) or any related matter.

The Director's powers of enforcement are quite extensive and readily exercisable in the more user-friendly forum of the Victorian Civil and Administrative Tribunal. Indeed, the Director is able to deal more swiftly with unfair terms as and when they arise. This ability to move quickly in enforcing the Victorian model, combined with the ability to prescribe unfair terms means that the Victorian model can be pressed into action against unfair terms in a timely and cost-effective manner.

The information gathering powers of the Director in relation to unfair terms are found in s 32ZB of the Act.

**32ZB. Director may require the supply of information**

- (1) The Director may exercise the powers conferred under this section for the purposes of:
  - (a) facilitating the Director's consideration of a complaint that:
    - (i) a term in a consumer contract is an unfair term; or

- (ii) a term in a standard form contract is a prescribed unfair term; or
- (b) ascertaining whether a person has complied with a Tribunal order as to:
  - (i) the continued use, or recommendation for use of a term in a consumer contract; or
  - (ii) the continued use of a prescribed unfair term in a standard form contract.
- (2) The Director may, by notice in writing, require any person to supply to the Director:
  - (a) a copy of the document that is the subject of the complaint or order referred to in subsection (1);
  - (b) information about the use or recommendation for use by that person of that document in dealings with consumers.
- (3) The notice referred to in subsection (2) may be varied or revoked by the Director by a subsequent notice in writing.
- (4) A person to whom the notice is addressed must comply with the notice within 14 days of receiving it.
- (5) A person must not, without reasonable excuse, refuse or fail to comply with a requirement of the Director under this section within the required time.  
Penalty: 60 penalty units.
- (6) It is a reasonable excuse for a natural person to refuse or fail to give information or do any other thing that the person is required to do by or under this section, if the giving of the information or the doing of that other thing would tend to incriminate the person.
- (7) Despite subsection (6), it is not a reasonable excuse for a natural person to refuse or fail to produce a document that the person is required to produce by or under this section, if the production of the document would tend to incriminate the person.

It is readily apparent that the Director has a key role to play under the Victorian model. Indeed, the expectation is that, like the UK model, the Director will be pro-active in identifying and dealing with unfair terms in consumer contract. In doing so, the Director has a variety of options at its disposal. These include:

- having the terms prescribed as unfair;
- seeking an injunction for the Tribunal to prevent a supplier from using an unfair term;
- seeking an declaration from the Tribunal that the term is unfair;
- obtaining an advisory opinion from the Tribunal; and
- seeking the cooperation of a supplier to remedy perceived concerns with a term used by the supplier.

While the Director may at times be compelled to pursue the matter through the Tribunal, the UK model does reveal the considerable benefits from a cooperative approach. Indeed, under the UK model, enforcement proceedings are undoubtedly the exception, with matters ordinarily resolved in a cooperative manner with the supplier typically giving enforceable undertakings to settle the matter. In view of the success of the cooperative approach under the UK model, one would expect the same to be the case under the Victorian model. No doubt the Director will, like the OFT, also pursue an active educative role aimed at assisting both suppliers and consumers in understanding the Victorian model.<sup>10</sup>

In summary, the Victorian model seeks to deal with unfair terms in consumer contracts in a number of ways. First, it makes void an unfair term in a consumer contract and allows a term to be prescribed as unfair for the purposes of a standard form contract and makes void that prescribed term. Second, it empowers the Director of Consumer Affairs Victoria to take both administrative and court action against unfair terms. Third, the Victorian model creates a new civil action for consumers against an unfair term in a consumer contract as well as a prescribed unfair term in standard form

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<sup>10</sup> Consumer Affairs Victoria, n 8. See also Consumer Affairs Victoria, *Fair trading: Unfair terms in vehicle rental agreements* (2005).

contract. Finally, the Victorian model emphasises the importance of clarity in consumer contracts. Indeed, Pt 2B of the *Fair Trading Act 1999* (Vic) in which the Victorian model has been complemented by a new s 163 of the Act dealing with clarity of consumer documents provides:

**163. Consumer documents to be clear**

- (1) In this section “consumer document” means:
  - (a) a consumer contract; or
  - (b) a statement, notice or other document required by this Act to comply with this section.
- (2) A consumer document does not include a contract to which the *Consumer Credit (Victoria) Act 1995* applies;
- (3) A consumer document:
  - (a) must be easily legible; and
  - (b) to the extent that it is printed or typed, must use a minimum 10 point font; and
  - (c) must be clearly expressed.
- (4) If the Tribunal is satisfied, on application by the Director, that any provision of a consumer contract does not comply with the requirements of this section, the Tribunal may by order prohibit a supplier from using the provision in the same or similar terms in consumer contracts.
- (5) A supplier must comply with an order under this section.

Penalty:       60 penalty units, in the case of a natural person.  
                  120 penalty units, in the case of a body corporate.

It is particularly noteworthy that s 163(3)(a) and (c) seek to operate to mandate a plain English drafting style in consumer documents. Given the apparent trend towards more complex consumer contracts, such a plain English drafting mandate must surely send a message to contract drafters to focus on simplifying contractual language rather than seeking to hide behind dense legal language that may be difficult to decipher. Such a provision requires that more attention be given to seeking to use language capable of being understood by the type of consumer to which the goods or services are normally to be sold.

## **A NEW REGULATORY MODEL FOR DEALING WITH UNFAIR TERMS IN CONSUMER CONTRACTS: KEY ELEMENTS**

Having considered the UK and Victorian regulatory models, it is readily apparent that any new model for dealing with unfair terms in consumer contracts must have the following minimum elements in order to be effective:

- a clear definition of what constitutes an unfair term;
- a sole focus on substantive unfairness;
- a comprehensive listing of potentially unfair terms;
- an ability to prescribe unfair terms;
- a penalty for using a prescribed unfair term;
- a well-resourced government agency enforcing the model;
- guidance and education to both businesses and consumers;
- an allowance for enforceable undertakings to be provided to a government agency;
- an allowance for advisory opinions by a quasi-judicial body;
- an allowance for private enforcement;
- a requirement for plain English drafting of contracts;
- an allowance for advisory opinions by government agency; and
- an allowance for the use of model contracts.

Each of these elements forms an integral part of any new regulatory model. In particular, these elements allow the regulatory model to target and deal with unfair terms in a timely and

comprehensive manner. In doing so, they enable the model to provide a readily accessible and transparent mechanism for identifying and dealing with unfair terms in consumer contracts. Importantly, the elements allow the new regulatory model to respond to unfair terms in a way that has not been possible under the equitable doctrine of unconscionability and the existing statutory prohibitions against unconscionable conduct. In short, it is the combination of the identified elements that allows the new regulatory model to respond to unfair terms in a direct and measured manner.

Given the importance of each of these elements to the operation of a new regulatory model, it is important to understand the role of each of the elements.

### **A clear definition of what constitutes an unfair term**

A clear definition is fundamental to the successful operation of a new regulatory model. Such a definition ensures that the scope of the model is understood by both businesses and consumers. The definition should clearly target the type of unfair terms sought to be covered by the model. Indeed, a clear definition of what constitutes an unfair term should leave no doubt that the model deals solely with the fairness or otherwise of contractual terms. It also confirms that the focus of the model is on whether the particular term or terms in question seek to tilt or shift the contractual rights unjustifiably in favour of the corporation. By focusing attention on such matters as an imbalance of contractual rights to the detriment of the consumer, a lack of transparency surrounding contractual terms and an absence of fair and open dealing by the corporation towards the consumer, a new regulatory model is able to deal with contractual terms that seek to exploit the consumer's vulnerability in transactions with the modern corporation.

### **A sole focus on substantive unfairness**

In view of the courts' natural tendency towards a procedural unconscionability bias when considering the equitable doctrine or existing statutory prohibitions, it is not surprising that concerns surrounding procedural unconscionability within consumers' transactions have long been dealt with by the courts. Indeed, the operation of the equitable doctrine or existing statutory prohibitions means that consumers already have redress in cases of alleged procedural unconscionability. In view of this existing redress for procedural unconscionability, it is clear that the new regulatory model need only deal with the issue of substantive unfairness. The new regulatory model must be focused solely on the question of whether or not the corporation has included terms in a consumer contract that go beyond what is reasonably necessary to protect the legitimate interests of the corporation. In doing so, the model focuses the spotlight squarely on the question of whether the corporation has exploited the vulnerability of the consumer by drafting a contract or parts of the contract in a way that unjustifiably tilts or shifts the balance of the contractual rights in the corporation's favour. By ensuring that the focus of the regulatory model is solely on substantive fairness, the model can fill what has clearly been recognised by the UK and Victoria as a significant gap in the consumer protection area.

### **A comprehensive listing of potentially unfair terms**

The new regulatory model must provide a comprehensive listing of potentially unfair terms. Such a list is vital to an understanding of the type of unfair terms that are potentially covered by the model. Importantly, such a list allows considerable scope for alerting businesses and consumers to examples of potentially unfair terms, thereby facilitating a better understanding of the intended operation of the model. By doing so, the list becomes a valuable tool for educating both businesses and consumers about those terms that may potentially go beyond what is reasonably necessary in protecting the legitimate interests of the corporation. Indeed, a comprehensive list, when used to support to a clear definition of what constitutes an unfair term, also significantly reduces any uncertainty associated with a new regulatory model. The use of a list could also introduce some flexibility to the model by allowing the opportunity to indicate the circumstances in which it may be legitimate to use a particular term that would otherwise be potentially unfair. In short, the more guidance that can be provided, the more effective the model will be in promoting compliance on the part of the corporation.



### **An ability to prescribe unfair terms**

The power to prescribe unfair terms provides an extremely valuable mechanism for moving swiftly against existing or newly emerging unfair terms. This is particularly advantageous where the term is in widespread use across a particular industry. Thus, when a term is seen as potentially unfair and a cooperative approach by the government enforcement agency has failed to secure any modification to or withdrawal of the term across the industry, the prescription of the term as unfair can be used as a cost-effective and timely way to move against the continued use of the term. Similarly, once a term has been found to be unfair by the relevant judicial or quasi-judicial body under the model, the prescription of the term as unfair can be used to prevent the term's use in other consumer contracts generally or in all other contracts within a particular industry. The prescription of the term as unfair clearly means that a finding of unfairness in one case can be given wider effect by preventing the term's continued use in all other contracts in which the term appears. There is no longer a need to secure a finding of unfairness in each and every case in which the same term has been used. The ability to prescribe a term as unfair therefore becomes a powerful weapon in moving quickly against known unfair terms.

### **A penalty for using a prescribed unfair term**

Given that the prescription of a contractual term as unfair will only occur where there is a very good reason for it to be prohibited, it is critical that the term does not continue to be used in consumer contracts after its prescription. Not only would its continued use be detrimental to consumers, but also the failure to stamp out the use of the particular term would significantly undermine the effectiveness of the regulatory model. Indeed, once a particular term is found to be unfair, it should not be allowed to be used in any other consumer contract. While the prescription of a term is an important first step in preventing the term's continued use, its prescription must be backed by an effective deterrent against those continuing to use the term in consumer contracts. In these circumstances, merely relying on the use of an injunction against the continued use of prescribed terms in consumer contracts does not send a strong enough signal to those businesses continuing to use contractual terms already found to be unfair. Such a signal is better given by the imposition of a penalty for using a prescribed term. The possibility of a penalty being imposed reinforces the seriousness with which the new regulatory model treats unfair terms and is a further powerful weapon in stamping out continued use of known unfair terms.

### **A well-resourced government agency to enforce the model**

A well-resourced government agency is critical not only in educating businesses and consumers about the new regulatory model, but also in ensuring that there is a body available to secure industry cooperation with the new model. Such a cooperative approach is an important aspect of dealing with allegedly unfair terms. By pursuing this approach, the government agency can move against all uses of an allegedly unfair term in a cost-effective manner. Thus, the government agency is not merely left to deal with individual cases of a term's use but can, if properly resourced, have an industry-wide impact against unfair terms in consumer contracts. Clearly, a properly resourced government agency can act quickly against unfair terms and do so in a manner that prevents continued use of such terms in other consumer contracts. Through appropriate education strategies and an ability to secure enforceable undertakings from corporations, as well as the ability to deal with an unfair term across industries, a well-resourced government agency can secure timely redress for all consumers faced with the same unfair term.

### **Guidance and education to both businesses and consumers**

A comprehensive education strategy needs to be implemented in order to ensure that the operation of the new regulatory model is understood by both businesses and consumers. Such a strategy must involve the dissemination of information both in printed and electronic form. A user-friendly website is clearly a cornerstone of any education campaign.<sup>11</sup> The ready availability of a range of publications

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<sup>11</sup> See eg the United Kingdom Office of Fair Trading, *Consumer Regulations Website*:

describing the application of the model to particular consumer contracts is equally important. For example, the OFT has produced detailed publications in relation to guidance on unfair terms regarding tenancy agreements, health and fitness club agreements, home contracts, entertainment contracts,<sup>12</sup> package holiday contracts and holiday caravan agreements, all of which are available on its website.

Similarly, Consumer Affairs Victoria has produced the following two publications, also available on its website:<sup>13</sup>

- “Preventing unfair terms in consumer contracts – preliminary guidelines for suppliers”; and
- “Unfair terms in vehicle rental agreements for cars, 4WDs, motor homes and vans”.

Both the OFT and Consumer Affairs Victoria have also produced brief summaries of the operation of their respective models. These summaries, along with other more detailed publications, go a long way to facilitating a better understanding of the models and in turn promoting compliance with the models.

### **An allowance for enforceable undertakings by a government agency**

The securing of enforceable undertakings ensures that allegedly unfair contractual terms are dealt with in a cooperative manner without recourse to the courts. This saves time and valuable resources and produces a quicker and more direct result on behalf of consumers. Not only can a complaint be resolved in a shorter timeframe than through court action, but also the use of undertakings can lead to greater flexibility in the way the corporation addresses any negative impact on consumers arising from the use of an unfair term. Thus, depending on the level of cooperation from the corporation, undertakings may be used to resolve complaints about unfair contractual terms in a timely manner and in a way that provides consumers with appropriate redress for any detriment suffered.

### **An allowance for advisory opinions by a quasi-judicial body**

The ability to seek an advisory opinion from the relevant quasi-judicial body aims to allow another mechanism for obtaining guidance as to the fairness or otherwise of a particular contractual term. Such guidance may be useful in those instances where a particular contractual term is in widespread use within an industry but corporations within the industry do not necessarily agree with the concerns the relevant government agency may have in relation to the term. While the government agency may choose to bring court action in relation to the term to resolve the matter, it may be better for the agency to seek an advisory opinion on the particular term for the benefit of the whole industry and its consumers rather than take court action against an individual corporation or to bring multiple proceedings.

### **An allowance for private enforcement**

The opportunity for consumers to privately enforce the new regulatory model provides them with another way to seek redress against allegedly unfair contractual terms. Although it may ordinarily be more effective for the relevant government agency to pursue such terms, particularly where they affect a large number of consumers, it may not always be possible for the agency to seek immediate redress against an allegedly unfair term. Given that there may be those instances where a consumer may need to secure more immediate redress, an ability to privately enforce the model becomes a further valuable mechanism for the affected consumer. Thus, while a consumer may generally prefer the relevant government agency to deal with the allegedly unfair term, a consumer faced with a corporation seeking to enforce the term may need to move quickly in challenging the term as unfair under the model.

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[http://www.crw.gov.uk/Other+legislation/Unfair+contract+terms/unfair+terms+in+consumer+contracts\\_home.htm](http://www.crw.gov.uk/Other+legislation/Unfair+contract+terms/unfair+terms+in+consumer+contracts_home.htm) viewed 28 October 2005.

<sup>12</sup>See UK Office of Fair Trading publications at: <http://www.crw.gov.uk/Other+legislation/Unfair+contract+terms/unfair+contract+terms+%2D+guidance.htm> viewed 28 October 2005.

<sup>13</sup> See Consumer Affairs Victoria publications at: <http://www.consumer.vic.gov.au/CA256EB5000644CE/page/Listing-Resource-Reports+&+Guidelines?OpenDocument&l=Home~&2=~&3=~&REFUNID=~> viewed 28 October 2005.

### **A requirement for plain English drafting of contracts**

The clarity and legibility of consumer contracts should undoubtedly be important objectives in the drafting of such contracts. Unless consumer contracts are intelligible to the consumer, there will always be the risk that the consumer will not understand the full dimensions of the contract being entered into with the corporation. In this regard, plain English drafting of a contract is very much part of the disclosure of vital information to the consumer. With adequate disclosure of information depending to a large degree on the comprehension of that information, the use of contractual language capable of being understood by the consumer should be a feature of all consumer contracts. In turn, the promotion of such plain English drafting is an essential part of any new regulatory model aimed at bringing about greater transparency and fairness in consumer contracts.

### **An allowance for advisory opinions by government agency**

The ability to approach the relevant government agency to seek an opinion in relation to particular contractual terms would be a useful way to not only promote greater fairness in consumer contract, but also provide businesses with confidence that the contractual terms in question will not be considered unfair under the model. In doing so, businesses can be proactive in seeking guidance and approval from the relevant government agency on the use of particular contractual terms. Rather than simply waiting for a contractual term to be called into question, a business can approach the relevant government agency and secure an opinion from it that the term will not be considered unfair. Such an opinion could be sought on either an informal or formal basis, and should give the business comfort that the term can be legitimately used. Of course, an advisory opinion by the relevant government agency must only be issued after an open and transparent process has been followed whereby the particular term is closely scrutinised. The process must be a public one and allow all interested parties the opportunity to either support or challenge the particular term. Such a process would strike an appropriate balance between safeguarding the public interest in not allowing the use of unfair terms in consumer contracts and providing businesses with upfront advice on the use of particular terms.

### **An allowance for use of model contracts**

The ability to seek an advisory opinion on particular contractual terms can be complemented by allowing the opportunity for model contracts to be approved for use by the relevant government agency in a particular industry. Such model contracts could be approved following a formal review process in which all interested parties have the opportunity to either support or challenge the contract. Once approved, the terms of the model contract could not be challenged as unfair. Importantly, an approved model contract would provide a template of contractual terms that could be legitimately used in consumer contracts within a particular industry.

Overall, therefore, the focus of any new regulatory model for dealing with unfair terms in consumer contracts should be on dealing decisively and promptly with those terms of a consumer contract that are not reasonably necessary to protect the legitimate interests of the corporation. Not only should such a regulatory model seek to clearly define what constitutes an unfair term under the model, but also it should provide clear examples of the type of terms that may be unfair. Importantly, the regulatory model needs to empower the relevant government enforcement agency to move swiftly to prevent the continued use of allegedly unfair terms. While it is still early days for the Victorian model, the UK experience is particularly positive as the OFT has had considerable success in securing enforceable undertakings from corporations whereby they agree to voluntarily modify or refrain from using allegedly unfair terms in consumer contracts. This experience shows that a regulatory model which directly targets unfair terms clearly offers the benefit of timely relief from substantive unfairness within consumer contracts. To consumers on the receiving end of abuses of contractual power, such benefits are more tangible and longer lasting than those that could ever be secured under the equitable doctrine of unconscionability or the existing statutory prohibitions against unconscionable conduct. For this reason alone, there is much to be gained from a consumer point of view by all Australian jurisdictions adopting a new and uniform regulatory model for dealing with unfair terms in consumer contracts.

## CONCLUSION

With the UK and Victorian models providing a more targeted and effective mechanism for dealing directly with unfair terms in consumer contracts than the equitable doctrine of unconscionability and the existing statutory prohibitions against unconscionable conduct, it is clear that these models offer ready examples of how unfair terms in a consumer context can be dealt with in a way that does not undermine the use of contractual terms that are reasonably necessary to protect the legitimate interests of the corporation. Unlike the equitable doctrine and existing statutory prohibitions against unconscionable conduct, the UK and Victorian models focus solely on substantive unfairness within consumer contracts, thereby allowing the relevant government enforcement agency to deal with such unfairness in a direct and transparent manner. In doing so, the enforcement agency has the ability to directly approach those dealing with consumers and seek their cooperation in modifying an allegedly unfair term. Where such a cooperative approach fails, however, the enforcement agency needs sufficient powers to act against the continued use of the allegedly unfair term. Such an ability to move swiftly against unfair terms in consumer contracts undoubtedly benefits consumers by ensuring that they are not on the receiving end of abuses of contractual power.

Indeed, as the use of standard form contracts has grown, so has the temptation for corporations to draft contractual terms that seek to shift the balance of contractual rights more and more towards the corporation. While, of course, the corporation is entitled to include terms that are reasonably necessary to protect its legitimate interests, questions should arise where the corporation seeks to go beyond what is reasonable necessary. As consumers have traditionally had little or no ability to renegotiate terms of consumer contracts, it is apparent that, in the absence of any effective legislative or judicial restriction against the use of unfair terms, the corporation is left to judge for itself whether or not to go beyond what is reasonable necessary to protect its interests. Although there will be those corporations who show appropriate self-restraint and seek only to do what is reasonable necessary to protect their interests, there are those corporations which will seek to draft contractual terms in a way that goes beyond self protection. With the equitable doctrine and the existing statutory provisions against unconscionable conduct being of extremely limited use where the consumer's concern relates solely to the substantive unfairness of a contractual term, it is readily apparent that a new regulatory model is needed to deal directly with unfair terms in consumer contracts. With the well-established UK model already producing tangible benefits for consumers, it is clear that such a new regulatory model is now available for dealing with unfair terms in consumer contracts. Given that similar benefits are now being enjoyed by Victorian consumers, there can be no doubt of the benefits that would flow to all Australian consumers from the timely adoption of a new and uniform regulatory model for dealing with unfair terms in consumer contracts.