

**Productivity Commission**

**INQUIRY INTO AUSTRALIA'S  
CONSUMER POLICY FRAMEWORK**

**Submission  
by**

**Associate Professor  
Frank Zumbo**

**School of Business Law and Taxation  
University of New South Wales**

**May 2007**

---

While the Commission's Inquiry raises a range of critical issues in relation to the future direction of Australian consumer law and policy, I would at this stage like to focus on the vital role that can be played by an Australia-wide legislative framework for dealing with unfair terms in consumer contracts. I have a longstanding interest in the area and I have already provided the Inquiry with two published articles of mine on the issue: (i) Zumbo, F., (2005), "Dealing with Unfair Terms in Consumer Contracts: Is Australia Falling Behind?" *Trade Practices Law Journal*, Vol. 13, pp. 70-89 and (ii) Zumbo, F., (2005), "Dealing with Unfair Terms in Consumer Contracts: The search for a new regulatory model," *Trade Practices Law Journal*, Vol. 13, pp. 194-213. I ask that these articles be treated as part of this submission. A third article on the issue is to be published in June 2007 and I will be happy to provide the Inquiry with a copy once it is published.

In this submission I have focused on the issue of unfair terms in consumer contracts as this is of critical importance to all Australian consumers. In particular, it will be submitted that (i) the implementation of a legislative framework dealing with unfair terms in consumer contracts is vital if Australia is to be at the forefront of consumer law and policy; (ii) Australian consumers should not continue to be disadvantaged by a lack of legislative framework for dealing with unfair terms in consumer contracts in circumstances where consumers in the United Kingdom and Victoria already enjoy such a framework; and (iii) that there are well established international precedents in support of a new legislative framework for dealing with unfair terms in consumer contracts.

Based on these considerations it would be submitted that there is a compelling case for the enactment of an Australia-wide legislative framework for dealing directly with allegedly unfair contract terms in a timely and targeted manner and in a way that does not undermine the certainty of consumer contracts. Indeed, a new legislative framework can, along with clear guidance from the enforcement agency, enhance certainty of consumer contracts by promoting transparency, clarity and fairness of contractual terms. Thus, consumers are less likely to question the operation or fairness of contractual terms if there is a mechanism for such terms to be scrutinized and reviewed for their clarity or potential to shift contractual risks or obligations disproportionately onto the consumer.

In short, Australian consumers would undoubtedly benefit from a new legislative framework that recognized that contractual terms can be drafted by businesses in a way that goes beyond what is reasonably necessary to protect the legitimate interests of the business. There will, of course, be businesses that will endeavour to draft terms in consumer contracts in a way that seeks to share the contractual risks and rewards in a balanced manner. It is not these "good" businesses we are concerned about and such businesses will have nothing to fear from a new legislative framework for dealing with unfair contract terms. It is, however, those businesses that do seek to shift the contractual risks disproportionately onto consumers that are of concern. These businesses may more readily do so in standard form contracts, but could also seek to do so even in contracts purportedly "negotiated" with a consumer.

Either way, it is the ever expanding bargaining power of businesses over a consumer that leads to the temptation on the part of businesses to increasingly slant contractual terms in favour of the business. Absent any legal restraint on businesses intent on abusing their contractual power, consumers are left to rely on any self restraint that may be exercised by a business. Consumers typically cannot walk away as the prevalence of standard form contracts across industries means that contract terms, including allegedly unfair terms, will be standard across industries. That is assuming that consumers can understand the nature of all contract terms that they face, particularly the “legalese” often used in even the most basic consumer contracts. The cost of consumers seeking legal advice on contractual terms or seeking to negotiate with the business over the contractual terms would often greatly outweigh the cost of the goods or services involved.

In short, for the consumer to walk away from a contract on the basis of alleged unfair terms would in many cases amount to the consumer having to walk away from having the goods or services themselves. For example, as contract terms regarding mobile phones would tend to be standard across the industry, a consumer that had an issue with allegedly unfair terms in such contracts would effectively have to forgo having a mobile phone as the ability to shop around on contract terms or to seek to renegotiate the terms would be very marginal or completely non-existent.

Unfortunately, as matters currently stand consumers are left to rely on the self restraint of businesses in relation to allegedly unfair contract terms. Existing legislation such as the *Contracts Review Act 1980* (NSW), s 51AB of the *Trade Practices Act 1974* (Cth) (or its State and Territory equivalents), are increasingly being interpreted by the Courts as requiring consumers to establish an element (and at times even a very strong element) of procedural unconscionability before being able to challenge contractual terms. In this regard, procedural unconscionability is concerned merely with whether or not the consumer was under some legal recognizable disability or whether the conduct of the business in the making of the contract or during of the course of the contract was so reprehensible as to offend good conscience.

These are very high standards to establish and under these provisions “procedural unconscionability” must be established for each individual case, thereby limiting the precedent value of any finding in favour of consumers (findings which are very rare given the cost of bringing actions under these existing laws). Importantly, the Courts have not been inclined to allow these existing laws to be used to challenge a contractual term solely on grounds of alleged unfairness. Thus, under these existing laws consumers are unlikely to succeed in any action based solely on claims of substantive unconscionability. In this sense, substantive unconscionability is concerned with the fairness or otherwise of the terms of the contract.

Historically, the Courts have not, in the absence of procedural unconscionability or other accepted grounds for intervention such as duress or undue influence, been interested in whether or not contractual terms themselves may offend good conscience. The Courts have held firm to principles of freedom of contract and the view that the parties are best able to look after their own interests or decide to walk away from the proposed contract. Unfortunately, while everyone would agree on the importance of maintaining certainty of contracts, the judicial view of freedom of contract reflects an era (i) where businesses and consumers were more likely to be equals than the modern era where the bargaining power of businesses over consumers has grown considerably; (ii) where standard form contracts were not as widely used as today, and (iii) where contracts were more likely to be for one-off transactions rather than be for the ongoing or long term supply of goods or services.

In view of this judicial reluctance to consider solely questions of substantive unconscionability under the equitable doctrine of unconscionability or existing statutory provisions dealing with unconscionable conduct, it is clear that a new legislative framework for dealing with unfair terms in consumer contracts is needed nationally. Such a legislative framework is already in place in the United Kingdom and in Victoria. This framework is operating effectively in these places and based on that experience would undoubtedly operate effectively on an Australia-wide basis. Building on that experience it would be submitted that any new legislative for dealing with unfair terms in consumer contracts should have the following minimum elements:

- a clear definition of what constitutes an unfair term;
- be solely focused on substantive unfairness;
- provide a comprehensive listing of potentially unfair terms;
- contain an ability to prescribe unfair terms;
- impose a penalty for using a prescribed unfair term;
- have a well resourced Government agency enforcing the model;
- provide guidance and education to both businesses and consumers;
- allow for enforceable undertakings to be provided to Government agency;
- allow for advisory opinions by quasi-judicial body;
- enable private enforcement;
- require plain English drafting of contracts;
- allow for advisory opinions by Government agency; and
- allow for the use of model contracts.

Each of these elements forms an integral part of any new legislative framework. In particular, these elements allow the legislative framework to target and deal with unfair terms in a timely and comprehensive manner. In doing so, they enable the framework to provide a readily accessible and transparent mechanism for identifying and dealing with unfair terms in consumer contracts. Importantly, the elements allow the new legislative framework 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 legislative framework to respond to unfair terms in a direct and measured manner.

## Incidence of unfair terms in consumer contracts: The evidence

There is ample evidence to show that unfair terms are included in consumer contracts. For example, the UK Office of Fair Trading publishes regular Bulletins and information updates providing examples of contract terms considered to be unfair and indicating how such terms have been dealt with by the particular business following intervention by the Office.<sup>1</sup> Similarly, the Victorian Minister for Consumer Affairs has issued a number of media releases in which allegedly unfair terms have been identified and subsequently modified by the business in question. In a recent media release - dealing with allegedly unfair terms in consumer loyalty contracts - the following comments were made by Minister Thomson:

“As a result of the gift voucher and loyalty program work done by Consumer Affairs Victoria:

- **Dymocks Bookstores** has agreed to revise the terms and conditions of its Booklover Loyalty Program – a program that allows consumers to earn 'reward points' on purchases which can later be exchanged for discounts on future purchases. The main issue was that Dymocks could vary, suspend or terminate the scheme at any time and without obligation to honour accumulated reward points.
- **Hilton Hotels** has agreed to remove several terms in its Hilton Premium Club contracts that allowed the business to not provide what it had promised, change the Club contract, and change the benefits a consumer might receive by joining the Club. They also further amended membership agreements so consumers could obtain a pro-rata refund if Hilton Hotels made changes to which the consumer had not agreed.
- **Langham Hotels** has agreed to review the terms and conditions of its gift vouchers after the agency conciliated an agreement for a consumer who had accidentally thrown away a \$150 voucher. The voucher number was tracked by Langhams electronic systems proving the consumer had paid despite the voucher term that stated it would not be replaced if lost or stolen. Consumer Affairs Victoria advised this was unfair and Langhams agreed to re-issue the voucher and alter its practices.”<sup>2</sup>

Another example is provided in Minister Thomson's media release relating to hire car contracts:

---

<sup>1</sup> See

<http://www.crw.gov.uk/Other+legislation/Unfair+contract+terms/list%5Fof%5Fconcluded%5Funfair%5Fterms%5Fcases.htm>

<sup>2</sup> <http://www.consumer.vic.gov.au/CA256F2B00231FE5/page/Listing-cavOctober2006-04-10-2006+-+VICTORIAN+CONSUMERS+PROTECTED+ON+LOYALTY+CONTRACTS?OpenDocument&1=73-2006~&2=12-October~&3=~&REFUNID=50037C69E8E5280BCA2571FB0023A341~>

“CAV has worked closely with the major industry players to ensure contracts are easy to read, are printed in legible font sizes and use clear typefaces to make them consumer friendly. As well we have worked to ensure that the rights of suppliers and consumers are more evenly balanced.

The changes implemented in the Backpacker, Britz and Maui contracts, which came into effect from 1st April 2005 include:

- The unilateral right to vary prices and other terms and conditions has been eliminated;
- The consumer is not obliged to pay a fee if the supplier directs them to another drop off point in the event of weather etc;
- The consumer no longer has to acknowledge that the vehicle is in sound mechanical order and other consequential amendments have been made to ensure the supplier is liable for pre existing conditions;
- Restrictions on use have been narrowed and made explicit;
- Allocation of risks between the supplier and the consumer in relation to damage to the vehicle is more balanced; and
- The contracts spell out a procedure for ascertaining and paying for accident damage that means the consumer will not be met with unexpected debits to their credit card.”<sup>3</sup>

Finally, in the recent Victoria Civil and Administrative Tribunal decision in *Director of Consumer Affairs v AAPT Ltd* (Civil Claims) [2006] VCAT 1493 (2 August 2006) we see examples of terms of mobile phone contracts found to be unfair. The following comments by Justice Stuart Morris, President of the Tribunal outline such terms and the reasons for being considered unfair:

**“Are terms in AAPT contracts unfair terms?”**

49 The Director has pointed to numerous provisions in the contracts entered into by AAPT, in respect of both the mobile phone service and the prepaid mobile phone service, which he says were unfair terms. Having regard to my ultimate conclusions, it is unnecessary to separately analyse each term said to have been unfair. However it is clear that many of the terms identified by the Director were unfair terms within the meaning of section 32W of the FTA and are void. It is desirable to deal with some of these terms in order to illustrate why they were unfair.

Variations to Agreement

50 Clause 1.3 of the mobile services standard form of agreement (“mobile SFOA”) provided:

---

<sup>3</sup> <http://www.consumer.vic.gov.au/CA256F2B00231FE5/page/Listing-cavApril2005-22-04-2005+-+VICTORIA+DRIVES+HIRE+CAR+CONTRACT+REFORM?OpenDocument&1=74-2005~&2=18-April~&3=~&REFUNID=B24156D41CFCE554CA256FE40008692E~>

**Variations:** We may vary any term of this Agreement at any time in writing. To the extent required by any applicable laws or determinations made by the Australian Communications Authority (ACA), we will notify you of any such variation.

This term is unfair because it permits AAPT, but not the customer, to change the contract unilaterally. The term has the effect of permitting AAPT, but not the consumer, to avoid or limit the performance of the contract: see section 32X(a) of the FTA. AAPT pointed to the fact that it has no mobile phone network of its own, but simply resells services supplied by Telstra, Optus and Vodafone. Under the terms of AAPT's supplier contracts, terms may be imposed upon AAPT on relatively short notice, which might make it commercially necessary for AAPT to seek changes consequential upon new terms imposed on AAPT. Be this as it may, it provides no justification for a term as broad as clause 1.3, which permits AAPT to vary any term of the agreement, at any time, for *any* cause.

#### Suspension of service

51 Clause 3.10 of the mobile SFOA provided:

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

I accept the submission made by AAPT that there are two fundamental obligations under the contract, namely:

- (1) AAPT provides a mobile telephony service to the customer; and
- (2) the customer pays AAPT in consideration for receiving that service.

Hence I do not accept that the first sentence of this term is unfair. However the second sentence of the term goes too far, as it provides that AAPT may charge a reconnection fee for "any other reason": and this could embrace a reason which does not involve any breach by the customer of its obligations under the contract. To this extent, clause 3.10 is an unfair term. 52 Clause 9 of the mobile SFOA provided:

9.1 We may from time to time and without notice or liability to you suspend any of the Services (and at our discretion disconnect the relevant SIM cards from the Network) in any of the following circumstances:



(a) during any technical failure, modification or maintenance of the Network (but in that event we will procure resumption of the Services as soon as reasonably practicable);

(b) if you fail to comply with any of these terms and conditions (including failure to pay charges due) until the breach (if capable of remedy) is remedied;

(c) if you do, or allow to be done, anything which in our reasonable opinion may have the effect of jeopardising the operation of those Services; or

(d) if the amount outstanding under this Agreement at any time (whether or not its payment has fallen due) exceeds the credit limit set by us under clause 3.14.

9.2 Notwithstanding any suspension of the Services under this clause you shall remain liable for all charges due hereunder throughout the period of suspension (including without limitation all monthly access fees, and regardless of whether or not any SIM card has been disconnected from the Network) unless we in our sole discretion determine otherwise.

AAPT told the tribunal that clauses 9.1(a), (b) and (c) simply reflect the terms upon which mobile services are provided to AAPT by Telstra, Optus and Vodafone. But even if this is so, it cannot justify the term contained in clause 9.2 whereby the customer remains liable for all charges throughout the period in which the service is suspended unless AAPT, in its sole discretion, determines otherwise. Circumstances could arise where service is suspended for a technical failure and the nature of the failure (and suspension of service) is such that AAPT is not required to pay a fee to the ultimate service supplier. Yet, because clause 9.2 gives AAPT a discretion as to whether or not to charge its customer during the period of suspension, that term is clearly unfair. Thus it is unnecessary to reach any conclusion on whether a term would be unfair if it turned on whether or not AAPT was liable to the ultimate supplier during a period of suspension.

#### Immediate termination

53 Clause 10 of the mobile SFOA provided:

10.2 **Immediate termination:** We may terminate this Agreement immediately by notice to you if:

(a) you have breached this Agreement;

(b) ...; or

(c) you change your address or billing contact details without notifying us in accordance with clause 7.4.

10.4 You remain liable for all charges payable under the Agreement in respect of Services up to the time of termination.

These provisions potentially have broad application. A customer may have breached the Agreement in a manner which is inconsequential, yet faces the prospect of having the service terminated. Further, if the customer changes his or her address (which will not necessarily be the address for the receipt of billing information), this will also provide a ground to AAPT to terminate the Agreement. Because these provisions are so broadly drawn, and are one sided in their operation, they are unfair terms within the meaning of the FTA.

#### Variations to prepaid mobile service

54 Clause 1.3 of the prepaid mobile service standard form of agreement (“prepaid mobile SFOA”) provided:

**1.3 Variations:** To the extent permitted by law, AAPT may change a Supplier or its products, or vary our charges from time to time without notice to you. Otherwise, AAPT may vary these terms on 30 days written notice to you.

This term causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer. For example, it would enable AAPT to reduce the number of calls that a person could make pursuant to a prepaid mobile phone service which the person had entered into in good faith. This term was an unfair term.”<sup>4</sup>

---

<sup>4</sup> See *Director of Consumer Affairs v AAPT Ltd* (Civil Claims) [2006] VCAT 1493 (2 August 2006) which can be accessed at: <http://www.austlii.edu.au/au/cases/vic/VCAT/2006/1493.html>

### **Why are unfair terms in consumer contracts of concern?**

At its simplest, unfair terms in consumer contracts are of concern where they are imposed in an attempt to significantly alter in favour of the business the relative balance of rights and obligations under the contract in circumstances where that is not reasonably necessary for the protection of the legitimate interests of the business. It is the combination of denying the consumer the ability to genuinely negotiate the contract, especially in standard form contracts, and then seeking to shift significantly the relative balance of rights and obligations under the contract in favour of the business in a way that goes beyond what is reasonably necessary to protect the legitimate interests of the business that places the conduct of the business under the spotlight. Clearly, then, it is this combination that not only holds the key to, but also reveals the challenges with, 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 business, in reality consumers and business 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, 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 negotiation 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 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 business 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 business chooses to utilize 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 business only to find another business 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 it finds 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 or secured through consumer initiative. 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 businesses 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 use of standard form contracts will have very little, if any, impact where standard form contracts are the industry norm. From the point of view of the business either the consumer accepts the standard form contract in its entirety, or the business 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 neither given the time to read the standard form contract nor the opportunity to renegotiate it. In fact, the standard form contract inevitable contains terms to the effect that the written contract represents the whole of the contract or 'entire agreement' between the parties and that the business representative or salesperson 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 business' 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 business representative that was properly authorized 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 business spend time and money on allowing consumers to renegotiate standard form contracts where the business 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 business 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 business having to withdraw supply or raise prices to cover increased transactions costs flowing from consumers seeking to renegotiate standard form contracts. After all, businesses 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 recognize 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 business.

Once the potential advantages of standard form contracts to both the consumer and the business are recognized, then progress can be made towards seeking to address the potential disadvantages to consumers arising from such contracts without in the process disadvantaging the business. 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 business would allow such individual renegotiation, something that would detract from the benefits to the business 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 believed that the standard form contract was reasonably balanced in that the business did not go beyond what was reasonably necessary to protect the legitimate interests of the business.

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 attempt by the business to impose such terms in the first place. Since the essence of an unfair term is the attempt by the business

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 legitimate interests of the business, then providing a mechanism for dealing with such attempts by the business is arguably the key to dealing with unfair terms in consumer contracts.

After all, the immediate question that arises is why must the business go beyond what is reasonably necessary to protect its legitimate interests. Surely it is appropriate for a business to limit itself to doing what is reasonably necessary to protecting its legitimate interests in circumstances where to show such restraint not only minimizes or possibly even removes consumer concerns with standard form contracts, but does so in a manner that would not disadvantage the business. Indeed, self regulation has always been, and will continue to be, an available option for businesses wishing to show self restraint by choosing not to use unfair terms. It is only where a business 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 with unfair terms in consumer contracts shifts quickly to considering ways that businesses 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 may be standard form contracts in which there are no unfair terms. In these contracts, the business has willingly chosen not to go beyond what is reasonably necessary to protect the legitimate interests of the business. In such instances, self regulation has clearly worked well. Unfortunately, there will be those businesses 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 businesses that prompts concern regarding the ineffectiveness of present laws dealing with unconscionable conduct to deal with allegedly unfair terms in consumer contracts. This ineffectiveness is outlined in the next section of this submission.

### **Why is a new legislative framework for dealing with unfair terms in consumer contracts needed?**

With twenty five years having now gone by since the flurry of activity in the early eighties regarding the equitable doctrine of unconscionability and the lead taken by New South Wales in enacting the *Contracts Review Act*, we are now well placed to reflect on whether the interpretation of either that equitable doctrine or legislation like the *Contracts Review Act* has if, at all, evolved to deal with the contemporary challenges faced by consumers in view of the growing use and abuse of standard form contracts. In doing so, it must from the outset be noted that this flurry of activity in the early eighties did create a level of excitement that the legislature and even the Courts were moving towards a notion of unconscionability better able to deal with, or at least more responsive, to the contemporary challenges arising from consumer contracts. Unfortunately, these initial hopes have been frustrated by the procedural unconscionability bias adopted by the Courts. This procedural unconscionability bias remains a critical limitation on using the equitable doctrine or the existing statutory prohibitions against unconscionable conduct to deal with unfair terms in consumer contracts.

A quick review of the key events during the past twenty five years reveals how the initial excited has slowly turned to a growing realization that the procedural unconscionability bias adopted by the Courts means that neither the equitable doctrine nor the *Contracts Review Act* or the *Trade Practices Act* can be used to target directly allegedly unfair contract terms. A convenient starting point is provided by the following comments by Mason J in the landmark High Court decision in *Commercial Bank of Australia Ltd v Amadio* (1983) 46 ALR 402 at 412-413 where his Honour appeared to suggest that, in relation to the equitable doctrine of unconscionability the Courts, should 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.

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. Of course, 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, and therefore the promising language by Mason J regarding standard form contracts remains just that after over twenty 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 C G Berbatis Holdings Pty Ltd* (2003) 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 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 157.

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

...

[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. at 168.

"[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.

[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 recognizable by the Courts. Accordingly, therefore, the equitable doctrine has no role to play where, absent a recognizable 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 recognizable 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 seventies and early eighties<sup>5</sup> and were being responded to by Australian legislatures at that time; firstly, by the New South Wales Parliament and then 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 eighties 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 recognizable 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 eighties 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*. For the purposes of the Act 'unjust' is defined in s 4 of the Act to include 'unconscionable, harsh or oppressive' with 'injustice' to 'be construed in a corresponding manner.' Under s 7 of the Act the 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:

---

<sup>5</sup> See generally Peden J. *Harsh and Unconscionable Contracts* Report to Minister for Consumer Affairs and Co-operative Societies and the Attorney-General for New South Wales (1976).

- (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,
  - (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 *Contract Review Act* has been drafted to allow the Courts 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 an ‘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 emphasized 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.”

With now twenty five 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* [2002] NSWCA 413 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:

“78 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 the 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 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 Corporation 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 Limited v Trimarchi* [2003] NSWSC 151:

“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 ‘tread of authority’ for the Courts to examine the circumstances leading up to the making of the contract rather than merely confine themselves to looking at the terms of the contract *per se*. Clearly, after more than twenty 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), now known as s 51AB. The provision – originally inserted into the Act 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 foreseeable 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. Firstly, 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. Secondly, the matters listed in subsection 51AB (2) raise, as in the case of the *Contracts Review Act*, both procedural and substantive unconscionability issues. Thirdly, and more importantly, as the matters in subsection 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 emphasize 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* [1999] FCA 1728 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’.”

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

“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 the absence of procedural unconscionability on their 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 realization that, even after twenty five 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 eighties' 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 twenty 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 with a new legislative framework for dealing such unfair terms.

### **The United Kingdom and Victorian legislative frameworks have been effective in promoting fairer terms in consumer contracts**

There is no doubt that the United Kingdom and Victorian legislative frameworks have been effective in promoting fairer terms in consumer contracts. As noted above, there is ample evidence to suggest that these legislative frameworks have resulted in the rewriting of many contract terms so as to remove any alleged unfairness. Such rewriting of contracts has been clearly beneficial to consumers who would have otherwise been victims of the allegedly unfair terms with little or no legal recourse open to them. The best example of this is found in the recent Victoria Civil and Administrative Tribunal decision in *Director of Consumer Affairs v AAPT Ltd* (Civil Claims) [2006] VCAT 1493 (2 August 2006). In that case, it is important to note that the terms eventually found to be unfair were, because of the intervention of the Director of Consumer Affairs, rewritten to address the Director's concerns. This re-writing was undoubtedly a direct result of the Victorian legislation and its enforcement by the Victorian Director of Consumer Affairs. This was certainly the view of the Justice Stuart Morris, the Tribunal President hearing the case:

“8 The Director [of Consumer Affairs] brought the present proceeding on 13 December 2004. AAPT had in fact commenced to review the terms and conditions of its mobile phone contracts several months earlier. As part of the review process several meetings were held with the Director and his staff in the period December 2004 to March 2005. Further, AAPT prepared a series of new terms and conditions, which came into force on 1 May 2005. The new terms and conditions were no doubt intended to address the concerns held by the Director. All contracts entered into since 1 May 2005 – in relation to both the consumer and small business customers of AAPT – have been pursuant to the new terms and conditions. Further, the new terms and conditions wholly replace the terms and conditions previously in place between AAPT and customers (which I take to be both consumer and small business customers) where the contract had been entered into before 1 May 2005. These customers have been advised that if they can identify a situation or event that occurred prior to May 2005 in which they would have received a more favourable outcome had the new terms and conditions applied to that situation or event, then, as long as it is practicable, the new terms and conditions will apply to that situation or event.”

This is a clear example where the Victorian legislation has had a positive impact on the drafting on consumer contracts.

## **The importance of uniformity across Australia**

In considering a new legislative framework for dealing with unfair terms in consumer contracts, it is important that regard be given to a legislative framework that is consistent with the existing framework operating in Victoria. The Victorian framework is operating well and is already producing benefits for consumers in that State and, indirectly, across Australia in relation to those consumers of businesses affected by the Victorian legislation that operate nationally. A compelling reason for such uniformity is that such businesses may already be familiar with the Victorian legislation and would incur no additional costs if consistent legislation was enacted across Australia. Such legislation would give all Australian consumers direct access to the remedies under the legislation and extend those remedies to consumers dealing with businesses operating solely within a particular Australian jurisdiction having the legislation.

## **The value of building on uniform legislation**

While the enactment of uniform legislation is important, that is not to say that an Australia-wide framework should not consider building on the Victorian legislation in positive and constructive ways. For example, an Australia-wide framework could allow businesses to secure binding opinions from the Government agency enforcing legislation; and/or to develop model contracts containing “fair” terms that could be adopted industry wide.

### *Advisory opinions by Government agency*

The ability to approach the relevant government agency under Australia-wide legislation 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 to be 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 contractual terms to be called into question, a business can approach the relevant government agency and secure an opinion from it that the terms will not be considered to be 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 scrutinized. 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.

*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 by the relevant government agency for use 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 cannot be challenged as unfair. Importantly, an approved model contract would provide a template of contractual terms that can be legitimately used in consumer contracts within a particular industry.