

# **Unfair Contract Terms**

**A DISCUSSION PAPER**

**Standing Committee of Officials of Consumer Affairs  
Unfair Contract Terms Working Party**

**January 2004**

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## INTRODUCTION

It was reported to the Ministerial Council on Consumer Affairs (MCCA) in August 2002 that fair trading and consumer protection jurisdictions across Australia share a growing number of problems with unfair terms in consumer contracts in various areas of the marketplace. Consumer contracts are increasingly complex and it is becoming correspondingly difficult for consumers to identify important terms, rights and responsibilities and potential costs associated with purchase agreements. New technologies and borderless markets further complicate the picture.

At its 2002 meeting MCCA therefore directed the Standing Committee of Officials of Consumer Affairs (SCOCA) to establish a national working party to investigate policy options to address unfair terms in consumer contracts and the merits of adopting a more nationally consistent and effective regulatory regime.

Currently, Queensland and Victoria jointly chair the Unfair Contract Terms Working Party (the Working Party). All State and Territory fair trading agencies are represented, together with nominees from Commonwealth Treasury, the Australian Competition and Consumer Commission and the Australian Securities and Investment Commission.

The Working Party reported back to the 2003 MCCA meeting. MCCA agreed to its recommendation that a national regulatory response to unfair contract terms through consistent State and Territory legislation be developed subject to the completion of a Regulatory Impact Statement confirming the need for such regulation.

The purpose of this Discussion Paper (the Paper) is to seek the views of the wider community on the need for unfair contract terms regulation and the best model for achieving this.

**Part A** of the Paper considers the nature and incidence of unfair contract terms, and current responses to the problem as identified in Australia and overseas, in particular, the European Union and the United Kingdom.

**Part B** of the Paper considers five options with respect to unfair contract terms, including the model from the United Kingdom which has influenced provisions recently enacted into the Victorian *Fair Trading Act 1999*. It also discusses whether, unfair terms regulation should extend to business to business transactions.

From the end of Part A of the Paper, respondents are asked to address key issues. However, respondents are encouraged to raise any other matters that they consider relevant to the debate. A Questionnaire located after the Appendices incorporates all the questions in the Paper.

### **National Competition Policy Requirements**

In April 1995, the Commonwealth, State and Territory Governments signed a set of agreements to implement National Competition Policy (NCP). Under NCP, each participating jurisdiction committed to implementing a series of competition reforms, including the review and reform, where necessary, of all legislation which contained provisions restricting competition. Each jurisdiction also agreed to subject all new

legislative proposals that contained measures restricting competition to a public benefit test (PBT).

The guiding principle for the NCP review of legislation is that legislation should not restrict competition unless it can be demonstrated that:

- the benefits of the restriction to the community as a whole outweigh the costs; and
- the objectives of the legislation can only be achieved by restricting competition.

The Paper identifies the costs and benefits of each option to regulate unfair contract terms. Feedback is sought on the options and the preliminary analysis of the identified costs and benefits of each option. A final PBT Report, which will incorporate all stakeholder feedback, will then be prepared and released.

## **Regulatory Impact Statement Requirements**

In addition to each State and Territory's NCP obligations, a Regulatory Impact Statement (RIS) must be prepared on any proposed nationally agreed legislation. The Paper will form the basis of the RIS. The cost-benefit analysis may be amended to reflect any information gained through consultation and there may be a need for further targeted consultation on the options to meet the RIS requirements.

## **Consultation**

Consultation with stakeholders is an integral part of the policy development process and of both the NCP/RIS processes. Regulation of unfair contract terms would apply across the marketplace. It will therefore be relevant to all consumers, businesses, industry bodies and representative groups as well as MCCA/SCOCA and all State and Territory fair trading agencies.

The Paper is available from the Queensland Office of Fair Trading and MCCA websites. State and Territory fair trading agencies in the other jurisdictions will place the Discussion Paper on their sites or provide information and appropriate reference on how to access the Paper. All jurisdictions will also be able to distribute hard copies on request for those who cannot access the Paper electronically.

Letters will be sent to industry bodies and representative stakeholder groups to alert them to the Paper. Advertisements will be placed in newspapers in each State and Territory.

Meetings with local stakeholders (eg industry and consumer groups) will be conducted by State and Territory agencies in their jurisdictions, at the discretion of the agency.

After analysing submissions, the Working Party will draft the final RIS/PBT Report, based on the material in the Paper, incorporating the feedback on the outcome of consultation.

The contents of submissions made to the Unfair Contract Terms Working Party may be discussed in the final Report, which will be made publicly available. Submissions may also be subject to Freedom of Information and other laws, which should be taken into consideration when making submissions.

## **Lodging Submissions**

Submissions should be lodged no later than Friday, **5<sup>th</sup> March 2004** and should be forwarded -

- **by post** to:

Unfair Contract Terms Working Party  
Office of Fair Trading  
Policy and Legislation Division  
GPO Box 3111  
BRISBANE QLD 4001

Marked 'For the attention of Janet Wight'

(Telephone: 07 3119 0012)

- **by facsimile** to:

Unfair Contract Terms Working Party  
Office of Fair Trading  
Policy and Legislation Division

Marked 'For the attention of Janet Wight'

07 3119 0019

- **by email** to

uct\_submissions@otrft.qld.gov.au

## EXECUTIVE SUMMARY

Queensland and Victoria jointly chair the Unfair Contract Terms Working Party (the Working Party) which was set up in late 2002 by the Standing Committee of Officials of Consumer Affairs (SCOCA) at the direction of the Ministerial Council on Consumer Affairs (MCCA). All State and Territory fair trading agencies are represented on the Working Party, together with nominees from Commonwealth Treasury, the Australian Competition and Consumer Commission and the Australian Securities and Investments Commission.

The Working Party is investigating the need for nationally consistent regulation of unfair terms in contracts and the best model to achieve this if a need should be demonstrated. The purpose of this Discussion Paper (the Paper) is to seek the views of the wider community on these issues.

**Part A** of the Paper considers the nature and incidence of unfair contract terms, and current responses to the problem as identified in Australia and overseas, in particular, the European Union and the United Kingdom. This discussion is intended to inform answers to the questions as to whether regulation of unfair contract terms is necessary, and if so, what model of regulation would be appropriate.

For the purposes of this Paper, unfair contract terms are those terms in a contract which are to the disadvantage of one party but which are not reasonably necessary for the protection of the legitimate interests of the other party.

The Paper notes that standard form contracts, in particular, are problematic. There is little, if any real freedom of choice or negotiation of terms.

The United Kingdom Office of Fair Trading and the Australian Consumers' Association both report that the use of unfair terms is increasingly widespread and crosses all types of industry – mobile phones, vehicle hire, home improvements, software sales, package holidays, air travel, and financial services to name a few.

In Australia, there has been some ability for relief in relation to unfair contracts by way of 'unconscionable conduct' both at common law and the broader protection afforded by the Commonwealth *Trade Practices Act 1974* as mirrored in State and Territory fair trading legislation. New South Wales has its *Contracts Review Act 1980* and the Uniform Consumer Credit Code also includes an ability to review unfair contracts in a very similar manner to the *Contracts Review Act*.

The courts have tended to require that there must be some aspect of procedural unfairness (a problem surrounding the circumstances leading up to and at the time of the making of the contract) for a successful court action; that is, there is a reluctance to find a term unfair in itself (substantive unfairness). In addition, the remedy is on a case by case basis. There is currently no effective mechanism to effect systemic changes of practice in the marketplace (except possibly in Victoria - see below).

Victoria has recently amended its *Fair Trading Act 1999* to include provisions on unfair terms, based to a large degree on the United Kingdom (UK) *Unfair Terms in Consumer Contracts Regulations 1999* but with some significant amendments.



In the overseas context, the Paper discusses the UK model and, more briefly, the situation in New Zealand, the United States, Canada, and Thailand.

This review of the incidence of unfair contract terms and their management to date indicates that:

- the issue of unfair terms in contracts is a phenomenon experienced in many countries including Australia;
- unfair terms are commonly found in a diverse range of industry types across the marketplace;
- to date, Australian law has responded to unfair contracts which have an element of procedural unfairness, that is, where the circumstances leading up to and at the time of the making of the contract create unfairness;
- under the current legal regimes in Australia, the courts have been reluctant to find unfairness solely on substantive grounds, that is, on the basis that the unfairness of the actual terms of the contract leads to an injustice; and
- there is no effective Australia-wide mechanism to promote systemic changes in the marketplace.

**Part B** of the Paper considers five options with respect to unfair contract terms:

***Option 1 – No additional regulation***

This would mean keeping the status quo of reliance on section 51AB *Trade Practices Act 1974* (unconscionable conduct) (and its mirror provisions in the State and Territory fair trading statutes) and section 70 Uniform Consumer Credit Code. In New South Wales, subject to its review, the CRA would continue to apply, and in Victoria the new provisions in relation to unfair contract terms in its *Fair Trading Act 1999* will be taking effect.

***Option 2 – Self regulation***

This would allow self regulation by business and industry through mechanisms such as guidelines or voluntary codes.

***Option 3 – United Kingdom model and variants***

This model and its variants prohibit the use of unfair terms in consumer contracts and provide a mechanism for determining whether a term is unfair. There is provision for not only individuals to take action but also for fair trading agencies to deal with unfair terms systemically. The Victorian variation also allows for a ‘black list’ of terms which will be regarded as unfair and for prosecution for use of such terms.

***Option 4 – Contracts Review Act 1980 (NSW)***

The NSW *Contracts Review Act 1980* (CRA) provides a mechanism for individual consumers to take action with respect to unjust contracts and for the State fair trading agency to take systemic action.

### Option 5 – Composite model

This model considers using those provisions from the CRA which address issues of concern prior to and at the time of making the contract and the aspects from the UK model and variants which consider the actual unfairness of the term itself. It would allow for both an individual and systemic response to unfair contract terms.

### Preliminary analysis of costs and benefits of the options

<b>Option 1 – No additional regulation</b>		
<b>Government</b>	<b>Business</b>	<b>Consumer</b>
<p>Nil impact in terms of cost of compliance and enforcement.</p> <p>Lower levels of confidence in the marketplace because of consumer concern at not knowing their liabilities under contracts and/or being forced to accept unfair terms and therefore continued pressure from consumers to intervene.</p>	<p>Nil impact in terms of compliance.</p> <p>There would be inconsistencies between the States and Territories legislative responses (for example, the CRA in NSW, unfair terms provisions in the Victorian <i>Fair Trading Act</i>) which may create uncertainty for business.</p> <p>Lower levels of confidence in the marketplace because of consumer concern at not knowing their liabilities under contracts and/or being forced to accept unfair terms.</p>	<p>Consumers will continue to find themselves being taken by surprise, either financially due to extra charges or by discovering that effectively they bear most, if not all, of any risk. Suppliers will continue to have rights without either corresponding rights being given to the consumer or appropriate boundaries being placed on the exercise of the supplier's rights.</p> <p>Consumers will continue to bear the cost individually of unfair terms which are likely to be in all contracts of a similar nature or relating to the same industry and also the cost of challenging such terms. As a result, many consumers will not complain and therefore bear the cost of the unfairness of the term.</p> <p>Some consumers may not be aware that they have rights which are enforceable because the contracts purport to deny them these rights.</p>

<b>Option 2 – Self regulation</b>		
<b>Government</b>	<b>Business</b>	<b>Consumer</b>
<p>Nil impact in terms of cost of compliance and enforcement.</p> <p>Lower levels of confidence in the marketplace if consumers cannot be confident that self-regulation is working.</p> <p>Higher levels of confidence in the industry or business if it can show that self regulation is</p>	<p>One-off cost of re-drafting contracts and staff training.</p> <p>Cost of development of the mechanism chosen for self regulation and possible cost in administering and ensuring compliance, depending on the mechanism.</p> <p>Possible imbalance across the</p>	<p>Self regulation requires commitment from all market participants and this may be difficult to achieve since unfair contract terms involves most, if not all, market segments. It therefore may not address reduced consumer confidence in the marketplace</p>

addressing consumer detriment reducing pressure from consumers to intervene.	marketplace as not all businesses or industries may participate Higher levels of confidence in the industry or business if it can show that self regulation is addressing consumer detriment.	There would be limited benefit to consumers if the detriment caused by unfair terms was only addressed by some businesses and some industries.
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<b>Option 3 – UK model and variants</b>		
<b>Government</b>	<b>Business</b>	<b>Consumer</b>
<p>Cost involved in regulation may be significant. However, it could be argued that this can be used as a co-regulatory option, as in practice in the UK, court costs have been avoided by negotiating with business.</p> <p>By following the Victorian provisions which allow for some clauses to be prescribed, more certainty would be created for business and there will be less need to negotiate on all terms.</p> <p>Higher levels of consumer confidence across the marketplace as consumer detriment capable of being addressed in a systemic manner.</p>	<p>One-off cost of re-drafting contracts and staff training. Once contracts are acceptable, there would be no further compliance work required.</p> <p>A reduction in consumer complaints could be expected and therefore dispute resolution costs; consumers should better understand their rights and obligations; and therefore make more informed choices.</p> <p>Higher levels of consumer confidence across the marketplace.</p> <p>All businesses would be subject to same requirements therefore no inequity between businesses or industry.</p>	<p>The ability to have unfair terms addressed systemically, either by government negotiation or action in relation to a business or industry or by prescribing certain terms as unfair would reduce the cost on individual consumers in addressing the matter.</p> <p>The detriment to consumers would also be addressed more swiftly and across the marketplace.</p> <p>There may be increased costs to consumers where business has kept prices low by the use of unfair terms. However, this may be balanced out by the extra costs and risks consumers would otherwise have borne as a result of the unfair terms.</p>

<b>Option 4 – CRA model</b>		
<b>Government</b>	<b>Business</b>	<b>Consumer</b>
<p>Is a comparatively low cost method of addressing unfair contracts (compare UK provisions which are resource intensive for Government) as responsibility for enforcing the legislation is the responsibility of the courts at the instigation of the consumer.</p> <p>Changing behaviour is slow because of the reliance on consumer initiated, individual action.</p> <p>There is a cost in the allocation of resources in terms of the</p>	<p>May create uncertainty for business as to whether contracts would be challenged.</p> <p>There are costs to business where terms are challenged by consumers.</p> <p>Is compatible with UCCC therefore providing a level of uniformity.</p>	<p>Consumers are provided with a mechanism which allows them to take action in the situation of an unjust contract. Court decisions may also have a deterrent impact on business. This may have lead to a decrease in the use of such contracts and an increase in consumer confidence in the market.</p> <p>Courts are requiring an element of procedural unfairness for a successful action. Likelihood of success where only the term</p>

<p>court and legal systems to enable consumers to pursue an action.</p> <p>Provides a mechanism for addressing unjust contracts systemically. However, there is a question over its effectiveness to date.</p> <p>Is compatible with UCCC therefore providing a level of uniformity.</p>		<p>itself is unfair appears small.</p> <p>There are costs to individual consumers in taking court action which will then only impact on their particular case. Costs incurred by business in challenges may be passed on to consumers generally.</p> <p>Changing business behaviour on a case by case basis is often a slow process.</p> <p>Provides a mechanism for addressing unjust contracts systemically. However, there is a question over its effectiveness to date.</p>
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<b>Option 5 – Composite model</b>		
<b>Government</b>	<b>Business</b>	<b>Consumer</b>
<p>Government would not be responsible for procedural unfairness as this would still be for the individual consumer to take action.</p> <p>Cost involved in regulation of substantive unfairness may be significant. However, in practice in the UK, court costs have been avoided by negotiating with business.</p> <p>By following the Victorian provisions which allow for some clauses to be prescribed, more certainty would be created for business and there would be less need to negotiate on all terms.</p> <p>Higher levels of consumer confidence across the marketplace.</p>	<p>Since this model would provide greater clarity and align with the UCCC provisions in relation to the procedural aspects, it should create more certainty for business.</p> <p>One-off cost of re-drafting contracts with respect to substantive issues and staff training. Once contracts are acceptable, there is no further compliance work required.</p> <p>A reduction in consumer complaints could be expected and therefore dispute resolution costs; consumers should better understand their rights and obligations; and therefore make more informed choices.</p> <p>Higher levels of consumer confidence across the marketplace.</p> <p>All business would be subject to same requirements therefore no inequity between businesses or industry.</p>	<p>Consumers would retain the ability to take action on procedural unfairness but there would be greater clarity. There would also be greater certainty for consumers who only had substantive issues to pursue.</p> <p>The ability to have unfair terms addressed systemically, either by government negotiation or action in relation to a business or industry or by prescribing certain terms as unfair would reduce the cost on individual consumers in addressing the matter.</p> <p>The detriment to consumers would also be addressed more swiftly and across the marketplace.</p> <p>There may be increased costs to consumers where business has kept prices low by the use of unfair terms.</p>

### ***Working Party***

The Working Party considered it useful to look at the UK model in some detail. It addresses the issue of substantive unfairness, which is proving to be problematic in the Australian context, and has been used as a model for the recent amendments to the

*Victorian Fair Trading Act 1999*. The Working Party also considered the changes which the Victorian provisions make to the model and posited additional changes. The detailed discussion around the model and the relevant variations is contained in the Schedule at the end of Part B.

### ***Regulation of contracts between business entities***

Standard form contracts are widely used in transactions between business entities for the supply of goods and services (described as “business to business” or B2B). These contracts pose problems similar to those affecting contracts between business and consumers (consumer contracts). Prohibiting terms in consumer contracts while allowing identical terms in B2B contracts may put small businesses at a disadvantage.

It is argued, on the other hand, that B2B contracts are of a more commercial character and there may be a greater opportunity and capacity for business to negotiate terms. The question may be whether the protections afforded by unfair terms regulation should only cover ‘small business’.

The costs and benefits of covering B2B are generally similar to those for business/consumer contracts. However, this would be affected by whether or not B2B contracts are regulated in exactly the same way as business/consumer contracts and the degree to which government might intervene in this situation.

### **Public comment**

From the end of Part A of the Paper, respondents are asked to comment on the key issues, including the preliminary cost benefit analysis, however, respondents are encouraged to raise any other matters that they consider relevant to the debate. There is a Questionnaire at the end of the Paper, for the assistance of respondents, which incorporates all the questions in the Paper.

## **PART A**

This part considers the nature and incidence of unfair contract terms and current responses to the problem as identified. This discussion is intended to inform answers to the questions whether regulation of unfair contract terms is necessary, and if so, what model of regulation would be appropriate.

### **The issue**

In the broad, unfair contract terms for the purposes of this Discussion Paper (the Paper) would be those terms in a contract which are to the disadvantage of one party (usually the purchaser of goods or services) but which are not reasonably necessary for the protection of the legitimate interests of the other party (usually the supplier).

For example, the general terms and conditions in a holiday package contract which:

- fail to make clear what was included in the price of the holiday and what the consumer is expected to pay for at the resort;
- grant the supplier the right to alter most aspects of the holiday without notice;
- exclude liability for failing to honour verbal and written representations made by anyone other than the supplier;
- make the sending of the holiday confirmation by Special Delivery compulsory, thereby acting as an unfair and unnecessary formality requirement;
- make the consumer liable for significant charges in excess of the cost of the holiday in the event of cancellation but fail to notify the consumer of the existence of these charges from the outset;
- suggest that the taking of the supplier's travel insurance is compulsory;
- use legal terms inappropriately and in a manner which may be misleading.

In relation to a car hire contract:

- allows a limitation on mileage to be imposed during the rental period;
- contains an excess mileage charge which is a potentially an unfair financial burden;
- allows for recovery for loss and damage from both the consumer and under the damage protection programme;
- contains an interest rate which has the potential to act as a financial penalty;
- has the potential to bind the consumer to the terms and conditions of the supplier's insurance and damage protection programme, which the consumer has not had a real opportunity to become acquainted with before being bound;
- allows supplier to claim damages from the consumer for failure to meet the conditions of the agreement without any reference to reasonableness or the duty to mitigate its loss;
- gives the supplier the right to re-possess the vehicle without any qualification on the exercise of the right.

In relation to a phone contract:

- authorises the supplier to complete, on behalf of the purchaser, any part of the form not completed by the purchaser and the purchaser agrees to be bound by

the completed form as if the purchaser had completed all parts of the form before signing it;

- provides for certain additional terms to apply to special promotions and offers of other products accepted by the purchaser but such terms are only made available on the request of the purchaser;
- allows the supplier to vary charges or rates or charge the purchaser any taxes or duties imposed in relation to the services at any time without prior notice to the purchaser;
- allows the supplier to impose a credit limit on the purchaser's account and/or requires the payment of a security deposit or interim payment at the supplier's sole discretion and at any time.

In these situations, the detriment to the purchaser of the goods or service is that they may find themselves subject to extra charges, or effectively bearing most, if not all, of any risk. Rights are given to the supplier without either corresponding rights being given to the purchaser or appropriate boundaries being placed on the exercise of the supplier's rights.

The purchaser may consider that a certain product is good value for the price, but this may have been achieved by the inclusion of onerous terms, which, in the end, may prove a greater cost to the purchaser.

This results in an unbalanced relationship. Purchasers also find themselves in the position that they may not have fair and reasonable access to goods and services in the marketplace. Even if they are aware of terms which are significantly to their disadvantage, a supplier may not provide them with the goods or services they are seeking unless they are prepared to agree to such terms. Generally, suppliers do not compete on terms and therefore the purchaser may not be in any better position by going to another supplier.

### **Policy objective**

The policy objective is to increase fair and reasonable access to goods and services for purchasers by reducing the presence of unfair contract terms in the marketplace. In achieving this objective, due regard will be had to the principle that total benefits should exceed total costs.

## **1. NATURE AND INCIDENCE OF UNFAIR CONTRACT TERMS**

### **1.1 Background**

*It is an underlying theme of the common law that contracts freely entered into will be enforced by the courts. The doctrine of contract has two key aspects: that every person is free to enter into a contract with any person they choose and to contract on any terms they want. Presumably it could also be said that every person has the freedom to refuse to contract if either the terms or the other party are not suitable. This doctrine, along with the principle of caveat emptor (let the buyer beware) arose*

*from the law merchant because the courts saw their role as one of upholding contracts.*<sup>1</sup>

However, this philosophy implies that the parties are able to negotiate on an equal footing, have equal bargaining power, are equally able to look after their own interests and have a full understanding of the consequences of their actions and the terms of the contract. In reality, this may not always be the case.

Lack of true consent has been addressed over time through the development of the common law principles of illegality, incapacity, duress, undue influence, mistake, misrepresentation and deceit. The acknowledgement of the existence of “harsh and/or unconscionable” contracts can be traced back to seventeenth century England where relief was sought with respect to “catching bargains with expectants”, that is, where heirs of noble families entered contracts to borrow money against their future inheritance, often at extraordinary cost. The cases related to an *unconscientious use of power arising out of such circumstances and conditions*.<sup>2</sup> The doctrine of unconscionable conduct, of which unconscionable contracts are one aspect, has developed since that time and has also been incorporated into statute law in Australia. This is discussed in more detail below.

## 1.2 Recent developments

In more recent times, it is the development of the standard form contract which has become the focus of allegations of unfairness. The use of standard form contracts was a consequence of the industrial revolution with its exponential growth in the mass production of goods and the provision of services. Businesses with a large number of customers clearly found it more convenient to have a pre-printed, standard contract to be used in all dealings rather than negotiating each contract on an individual basis. In this situation, it is the **terms** of the contract, rather than the circumstances in which the contract is made, which are under consideration.

Standard form contracts can have advantages to both supplier and purchaser provided that a fair balance is achieved between both parties to the contract. They reduce transaction costs for the supplier which would otherwise be passed on to the purchaser. They allow for lengthy and detailed contracts to be finalised with the minimum of time and by lay persons who only need to negotiate the specifics such as price, description of goods and services and delivery times. Over a period of time, people become familiar with the contracts because they are standard and may encourage a general understanding of trading practice.

However, standard form contracts do pose problems. These types of contract will usually have been drafted by professionals on behalf of the supplier. Generally, the purchaser has no time or opportunity to read the contract before signing, let alone obtain the same standard of advice as the supplier. If there is time to read it, it is

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<sup>1</sup> Pentony B, Graw S, Lennard J, Parker D (1999) *Understanding Business Law* 2<sup>nd</sup> Ed Butterworths (Australia)

<sup>2</sup> Ibid



doubtful whether the purchaser will understand the meaning and impact of each term in the light of the whole contract. Even if the putative purchaser did read and understand the contract, the supplier may not be prepared to change clauses at their request. This ‘take it or leave it’ attitude places purchasers in a difficult position: agree to the terms or forgo the product or service. Although, at law, there may not be a circumstance of duress, for example, or unconscionable conduct on the part of the supplier prior to or at the time that the contract is made, the purchaser may have no option but to agree if he or she wants the product.

It has become increasingly clear that many such standard form contracts contain clauses which are unfair or unnecessarily one-sided to the detriment of the purchaser. One reason that these have become so prevalent is that there is little, if any, competition in this regard. Purchasers do not usually “shop around” on the basis of the best contract terms: it would be too impractical an exercise for the vast majority of people to decide, for example, which hire-car company to use based on the best contract terms. Purchasers predominantly focus on price and the quality or characteristics of the product. They may not appreciate that a “good” price has been achieved through the imposition of onerous terms. As a result, terms may well be standard across an industry and even if the purchaser went elsewhere, they would be faced with a similar situation.

In 1976, Professor John Peden was asked by the then NSW Minister for Consumer Affairs and Attorney General to prepare a report (the Peden Report) on a possible legislative response to harsh and unconscionable contracts. He found that:

- the form of many contracts had become standardised so that there was often little actual freedom of choice or negotiation of terms;
- the courts generally had no power to review the fairness of such standard form contracts nor treat them any differently from contracts resulting from free bargaining between parties of equal power and knowledge;
- the gap between the knowledge of a supplier and a customer in terms of the product had become wider with a correspondingly greater opportunity for abuse;
- the courts had felt the need to develop a number of devices to do justice in individual cases. However, the result was not a frontal attack on the problem of unjust contracts but a multitude of individual decisions; and
- the ability to grant relief in respect of harsh contracts conferred by other NSW legislation had been confined to specific areas and had generally proved to be largely ineffectual because of inadequate drafting and judicial reluctance.<sup>3</sup>

When the European Commission commenced analyses of standard term contracts in its Member States in 1993, the studies...*not only demonstrated the ubiquity of unfair terms in standard form contracts but also the enormous difficulty of getting hold of the contractual terms before concluding a contract .....*

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<sup>3</sup> Peden J (1976) *Harsh and Unconscionable Contracts* Report to the Minister for Consumer Affairs and Co-operative Societies and the Attorney General for New South Wales pp 4, 5, 6, 19, 20

On the adoption of the Unfair Terms in Consumer Contracts Directive in 1993 (see below), the European Commission set up the European Database on Case Law about Unfair Contract Terms (referred to as the CLAB database) to monitor its enforcement. It includes court judgments, decisions of administrative bodies, voluntary agreements, out of court settlements and arbitration awards. As at 2000, it contained 7,649 cases. Appendix A to this Discussion Paper contains Annex III to the *Report from the Commission on the Implementation of Council Directive 93/13/EEC of April 1993 on Unfair Terms in Consumer Contracts*<sup>4</sup> (the EU review report) which sets out the data from CLAB to that point in time.

The Law Commission for England and Wales and the Scottish Law Commission in their Joint Consultation Paper<sup>5</sup>(the Law Commissions' Paper) noted that .....*like every Western system of law,[the UK] has found it necessary to provide some controls over unfair terms, at least in standard form consumer contracts. In fact these controls extend beyond both consumer contracts and standard form contracts* ..... Statistics from the United Kingdom Office of Fair Trading (UK OFT) indicate that conservatively around 27,000 complaints are received annually in relation to unfair terms.<sup>6</sup>

There is no systematic collection of data on the incidence of the use of unfair terms in Australia at the present time. However, in 2002, the Australian Consumers' Association (the ACA) commented on the issue of unfair contract terms in its submission to the Committee of Inquiry into the Competition Provisions of the *Trade Practices Act 1974* (the Dawson Inquiry). It contended that unfair terms also have an adverse effect on competition. It noted that the use of unfair terms is increasingly widespread and crosses all types of industry – mobile phones, vehicle hire, home improvements, software sales, package holidays, air travel, and financial services to name a few. Attachment 2 to its submission sets out a number of examples of unfair terms used in contemporary standard contracts from mainstream lenders, the telecommunications industry and in e-commerce. It also sets out a 'black' list of consumer unfriendly terms in relation to telecommunications contracts and a 'white' list of consumer friendly terms.<sup>7</sup>

The ACA submission also drew attention to the fact that a term may, in reality, be unenforceable if a purchaser chose to challenge it in court. However, because it is written in the contract, he or she may well not realise that this is a possibility. Therefore, terms go unchallenged. In addition, small business is as significantly affected by unfair terms as the individual consumer.

The ACA concluded that:

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<sup>4</sup> Brussels 27.04.2000: COM(2000) 248 final

<sup>5</sup> *Unfair Terms in Contracts* (2002) The Law Commission of England and Wales (Consultation Paper 166); The Scottish Law Commission (Discussion Paper 119)

<sup>6</sup> See Appendices B and H to this Discussion Paper

<sup>7</sup> See Submission 105 Australian Consumers' Association - Attachment 2 at <http://tpareview.treasury.gov.au/submissions.asp>

*In short, the area of non-core<sup>8</sup> standard terms is one characterised by market failure, often leading to quasi-monopolistic practices. It is generally recognised that regulatory intervention is appropriate in such circumstances.*

In addition:

*In our view, the issue of abrasive standard terms needs to be addressed more directly than it is under the current consumer protection provisions of the TPA. It also needs to be addressed in a way that facilitates action by the regulator to deal with unfair terms at a general or systemic level.*

Some specific examples in the Australian context are:

- **Mobile Phones**

The Australian Bureau of Statistics reports that 61% of Australian households had at least one mobile phone in the year 2000. Fair trading agencies, the ACCC and the Telecommunications Industry Ombudsman receive complaints as to unfair and inflexible contractual arrangements.

Research findings from ACNeilson, Legal Aid and the Consumer Law Centre in Victoria revealed that contracts typically included provisions allowing telecommunication companies to change services or charges without notice, including those services or charges which were the major initial selling point. It was reported that penalties were often arbitrary, difficult to understand and subject to change for calls over a certain time, which exceeded the preset 'free' call level or for call diversions. Contracts were usually in small print and there was pressure to sign them.

Approximately twenty five percent of the complaints to the Telecommunications Ombudsman for the last two financial years related to mobile phone contracts. However, it is not known the degree to which these related to unfair terms.

It should be noted that in December 2002 the Australian Communications Industry Forum (ACIF) published a Guideline on Consumer Contracts which aimed to address complaints of unfair terms. This is discussed in more detail later.

- **Car Rental Industry**

The SCOCA Car Rental Industry Working Party has examined a sample of consumer complaints as well as contracts used by rental operators in a number of jurisdictions in Australia. Its preliminary findings show that consumer complaints relating to car rentals commonly involve:

- disputed vehicle damage and liabilities;
- complex and poorly laid out contracts with key provisions often being obscured in small print eg insurance coverage and circumstances of full liability;
- absence of transparent processes for vehicle inspection and damage assessment; and
- contracts containing unreasonably harsh provisions.

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<sup>8</sup> That is, terms which relate to something other than the price or the goods or services which are being purchased (model, features, etc.).

The Working Party reported that there is *an imbalance of information and one-sided practices are evident across the industry. Complex contracts in small print obscure important terms eg regarding damage liabilities. They are not usually available until arrival at the rental desk and, if in doubt about the contents, there is little opportunity to shop around.*

*Contracts commonly provide for subsequent automatic deductions from the renter's credit card account for alleged liabilities such as for damage, irrespective of whether the renter disputes liability. With no transparent processes for assessing vehicle condition before and after rental or for costing damages, this leaves consumers in a highly vulnerable position, particularly those returning interstate or overseas.*

- **Unilateral change clauses**

Consumer Affairs Victoria (CAV) prepared a paper for a meeting of the Uniform Consumer Credit Code Management Committee (UCCCMC) in Brisbane in October 2002 in relation to unilateral change clauses. It reported that CAV had received a complaint in September 2001 in relation to a clause in a Bank's *Usual Terms and Conditions of Lending* (UTC) which allowed the Bank to "change any other terms and conditions". The paper notes:

*Though the unilateral change clause in the UTC did not contravene the Code, a consumer could be forgiven for thinking that at any tick of the clock, the [Bank] can peremptorily change fundamental aspects of the contract. This is an unnerving prospect for a debtor, which begs the question whether credit providers really need a wide ranging catch-all provision when they invariably address - separately - the obvious candidates for change such as interest rate, amount of fees and charges and frequency of repayment.*

### **1.3 Possible future developments**

Finally, the development of technology means that the focus may now have to be transferred to 'non-negotiated' rather than 'standard' clauses. The advent of computers allows for contracts to be printed off as and when needed. This may allow for some variation of agreements and therefore allow for the argument that a particular contract is not 'standard form', that is, one that has been pre-printed and there is no variation at all. The questions which then need to be addressed are:

- to what degree was any clause negotiated or able to be negotiated on an equal footing by both parties; or
- was a real opportunity afforded to the purchaser to read and understand the contract and its consequences?

## 2. REGULATORY RESPONSES TO DATE

The issue of unfair contract terms is not an exclusively Australian phenomenon. A cursory look finds that Israel enacted the *Standard Contracts Law* in 1964; Sweden, an *Act Prohibiting Improper Contract Terms* in 1971; Germany, the *Law on Standard Contract Terms* which came into effect in 1977; UK, the *Unfair Contract Terms Act 1977*; Ireland, the *Sale of Goods and Supply of Services Act 1980*; Luxembourg introduced a law identifying 20 types of unfair term in 1983; Portugal developed law on general contract terms in 1985; the European Union, the *Unfair Terms in Consumer Contracts Directive* in 1993 (although the issue was first raised by the Council of Europe in 1976); and Thailand, the *Unfair Contract Terms Act* in 1997.

### 2.1 Australia

#### 2.1.1 Unconscionability

There is some ability for individual relief in relation to unfair contracts by way of ‘unconscionable conduct’ both at common law and the broader protection afforded by the Commonwealth *Trade Practices Act 1974* (TPA) as mirrored in State and Territory fair trading legislation.

It should be noted that there are two contrasting aspects to unconscionable conduct as it relates to contracts:

- firstly, procedural unfairness which is concerned with the circumstances leading up to and at the time of the making of the contract; and
- secondly, substantive unfairness which is concerned with the unfairness of the terms of the contract themselves which lead to an injustice.

#### Common law

Case law indicates that three factors need to be present for equity to intervene in a contractual situation on the basis of unconscionable conduct:

- one party was at a serious disadvantage in relation to the second party and the second party knew, or should have known in the circumstances, that this was so;
- the second party has exploited or taken advantage of this situation; and
- the resulting contract is unconscionable or oppressive (for example: *Commercial Bank of Australia Ltd v Amadio*<sup>9</sup>).

Circumstances indicating a “serious disadvantage” would include drunkenness, age and infirmity, lack of education, illiteracy or poor English, intellectual disability, low income, emotional vulnerability and psychological problems. The fundamental principle is *that equity will not permit a party having a legal right to exercise it in such a way that the exercise amounts to unconscionable conduct.*<sup>10</sup>

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<sup>9</sup> (1983) 151 CLR 447; 46 ALR 402; 57 ALJR 358)

<sup>10</sup>Carter JW *Contract* Halsbury’s Laws of Australia, at <http://www.butterworthsonline.com>

Where they find that there has been unconscionable dealing, the courts are able to grant relief through their equitable jurisdiction. *In doing so they balance the public policy of holding parties to their contracts against the need to protect the weak in cases of inequality of bargaining power where one party unconscientiously takes advantage of another. Thus, if one party to a contract suffers a special disadvantage and this is sufficiently evident to the other, it will be unconscionable for that other party to procure or accept an agreement that is not fair and just.*<sup>11</sup>

Thus, the common law is concerned with procedural injustice.

### **Statute law**<sup>12</sup>

Section 51AB TPA, together with its mirror provisions in State and Territory fair trading legislation, prohibits conduct which is, in all the circumstances, unconscionable, in relation to certain defined situations. In deciding whether the conduct in a particular case is unconscionable, the court may have regard to matters such as:

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

As a result of this list, statutory unconscionable conduct is somewhat broader than the common law, especially as it appears to include substantive injustice (see, for example, the fourth and fifth points 4 and 5 above).

It has been stated:

*There is a question whether and to what extent, s 51AB is concerned with the bargaining process and/or contractual outcomes. The equitable doctrine is confined to procedural unconscionability, that is, unfairness in the bargaining process, but the statute is not necessarily limited in that way and may permit relief from contracts which are unfair in their terms or operation, despite the absence of any unfairness in the bargaining process. No policy choice is made plain in the legislation on this point. The section directs the court's attention to a number of factors, some of which go to the negotiations and others to the outcome of them. The factors in ss 51 AB(2)(b) and (e) suggest that the court may have regard purely to unfairness in the contract (substantive).....<sup>13</sup>*

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<sup>11</sup> *Commercial Bank of Australia Ltd v Amadio*

<sup>12</sup> In its comments in this regard, the Working Party acknowledges the use of the analysis contained in *Unfair Practices and Telecommunications Consumers* (2001) Communications Law Centre Research Report

<sup>13</sup> *Parkinson Laws of Australia*

However, in practice, the courts have been reluctant to base a decision on s 51AB solely on substantive grounds. See, for example, the decision of the Full Court of the Federal Court in *Hurley v McDonald's Australia*<sup>14</sup> where it was said:

*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'.....*

This may well be a result of the inclusion of the words *in all the circumstances* in the section and/or that, since there is no definition of 'unconscionable' in the TPA or its equivalents, the courts will tend to look to the common law for some guidance.

Under the TPA and the State and Territory mirror provisions, the court can make any order it sees fit including compensation (but not damages); an order avoiding or refusing to enforce the contract in total or in part; an order varying the contract; an order directing the return of monies or property; an order for the repair of, or parts for, goods or for the supply of services. Applications for injunctions can be made generally for the purpose of restraining a person from engaging in conduct in contravention of the TPA by both consumers and fair trading agencies on behalf of consumers. The ACA states that this remedy has not been used for the purpose of restraining the use of unfair contract terms to date.<sup>15</sup>

### **Impact of the concept of unconscionability on unfair contract terms**

As noted above, common law unconscionability does not address substantive issues. Therefore the doctrine has no impact where terms are unfair in themselves but there is no associated procedural unfairness.

In addition, there is currently a reluctance on the part of the courts, with respect to statutory unconscionability, to find in favour of complainants with purely substantive contract term issues. In practice, the impact of the statute law on the regulation of unfair terms is probably no greater than for than common law unconscionability in this respect.

Even if it were possible to take action in respect of substantive unconscionability alone, unlike most other TPA provisions in relation to unfair trading practices (and the State and Territory equivalents), unconscionable conduct is not a criminal offence. Therefore, the enforcement mechanism is one of civil action, either by the fair trading authority or the aggrieved party. Whilst civil action can result in an injunction and orders for compensation which may be significant, changing behaviour in this way is a slow process and can only relate to the particular parties involved. It does not address the issue in any systemic way.

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<sup>14</sup> [1999] FCA 1728

<sup>15</sup> Australian Consumers' Association (2000) Submission to the Review of the Competition Provisions of the *Trade Practices Act 1974* (the Dawson Inquiry)

### 2.1.2 Contracts Review Act 1980 (NSW)

Whilst there have been examples of control of contract terms in specific situations,<sup>16</sup> until 2003 NSW was the only Australian jurisdiction to have legislation in relation to unfair or unjust consumer contracts in general. It should be noted that the *Contracts Review Act (CRA)*<sup>17</sup> was enacted before the unconscionable conduct provisions were included in the TPA<sup>18</sup> and the corresponding mirror provisions in the State and Territory fair trading legislation. Indeed, whilst the TPA focuses on **conduct** and the CRA ostensibly focuses on the **contract** (the former being therefore somewhat broader in scope) there is significant similarity in the matters set out to be considered by the court in deciding whether conduct is unconscionable or the contract is unjust, although expressed differently. Under the CRA the court must take these matters into account, but under the TPA the list is only advisory.

In general, the CRA provides that a court can grant relief in relation to a consumer contract if it finds *the contract or a provision of the contract to have been unjust in the circumstances relating to the contract at the time it was made*. The CRA operates concurrently with the Uniform Consumer Credit Code.

“Unjust” is defined as *includ[ing] unconscionable, harsh or oppressive*.

Sub-section 9(1) of the CRA sets out the matters which the court must consider in determining if the contract or a term is unjust: *the public interest and ... 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.*

The court, where relevant, under sub-section 9(2) is also to have regard to procedural issues such as material inequality of bargaining power; relative economic circumstances; educational background; literacy of the parties; any unfair pressure; whether or not legal or expert advice was sought; but also substantive issues such as:

- (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; and*
- (g) *where the contract is wholly or partly in writing, the physical form of the contract, and the intelligibility of the language in which it is expressed.*

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<sup>16</sup> See, for example, Queensland *Hire Purchase Act 1959* gives the court the power to re-open hire purchase transactions *where it appears to the court that the transaction is harsh and unconscionable or is otherwise such that the Supreme Court would give relief on an equitable ground the court may reopen the transaction and take an account between the parties thereto*; NSW *Industrial Relations Act 1996* which allows for relief, in relation to work related contracts, where they are harsh, or unconscionable or against the public interest; the uniform Consumer Credit legislation, which allows a transaction to be re-opened where the court considers it to be unjust; etc..

<sup>17</sup> See Appendix D for the full text of the CRA.

<sup>18</sup> s 51AB was inserted in 1986 as s52A); s51AA in 1992; and s51AC relating to business to business unconscionability was not inserted until 1998.



The CRA is not limited to “standard” terms although whether a term was negotiated or not is a consideration for the court. Sub-sections 9(2)(d) and (g) in particular lean towards the substantive. A person’s rights under the Act cannot be excluded or restricted in any way.

Where the court finds a contract or a provision of a contract to have been unjust, it may, if it considers it just to do so, and for the purpose of avoiding as far as practical an unjust consequence or result: refuse to enforce any or all of the provisions of the contract; declare the contract void, in whole or in part; vary any provision of the contract, in whole or in part (effective from the time of the making of the contract unless otherwise specified); or require execution of an instrument that varies or terminates a land instrument (section 7).

When making an order under section 7 it may also make orders, inter alia, for the disposition of property; the payment of money (whether or not by way of compensation) to a party to the contract; the compensation of a person who is not a party to the contract and whose interest might otherwise be prejudiced by a decision or order under the CRA; and the supply or repair of goods or the supply of services.

As well as providing a mechanism for relief by an individual consumer on a case by case basis, systemic relief is possible under section 10:

*Where the Supreme Court is satisfied, on the application of the Minister or the Attorney General, or both, that a person has embarked, or is likely to embark, on a course of conduct leading to the formation of unjust contracts, it may, by order, prescribe or otherwise restrict, the terms upon which that person may enter into contracts of a specified class.*

The CRA provides the Supreme Court and the District Court with jurisdiction to consider contracts under the CRA (and the Local Court and the Consumer, Trader and Tenancy Tribunal in more limited circumstances). The District Court's jurisdiction depends on its monetary jurisdictional limit. In general, the provisions of the CRA may be used either in actions commenced specifically or by way of defence in other proceedings arising out of, or in relation to, the contract.

### **Impact of CRA on unfair terms**

Only 6 years into the life of the CRA, the judiciary was describing it as:

*...revolutionary legislation whose evident purpose is to overcome the common law’s failure to provide a comprehensive doctrinal framework to deal with ‘unjust’ contracts.<sup>19</sup>*

It was also noted that cases should be considered *without preconceived notions of conditions on which a court may set aside a contract derived exclusively from established doctrines.....*<sup>20</sup>

Overall, however, procedural concerns seem to have continued to play a significant role. Carlin<sup>21</sup> undertook an examination of the CRA after 20 years of operation. Some

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<sup>19</sup> *West v AGC (Advances)* (1986) 5 NSWLR 610, per McHugh JA at 621

<sup>20</sup> *Sharman v Kunert* (1985) 1 NSWLR 225, per Holland J at 231

160 cases were identified and a sample of 60 reviewed. Forty four cases involved mortgage contracts, of which 18 were successful. Only one of these was held to be unjust solely on the basis of substantive concerns. Again, the use of the phrase *in all the circumstances* may have resulted a bias in favour of the procedural.

In relation to cases since 2000, the NSW Office of Fair Trading undertook a preliminary examination of 20 cases chosen at random which were decided with reference to the CRA. Of these, 12 related to mortgages, and the rest to various other types of contracts. Again, procedural considerations figured prominently.

The CRA relies on litigation as a mechanism for enforcing consumer rights. According to the Australian Securities and Investments Commission, the limitations of litigation as a mechanism for enforcing consumer rights are that:

- whether by private individuals or regulatory bodies representing consumers, litigation is costly and time-consuming. There will only ever be a trickle of cases;
- individual consumers will rarely be prepared, or resourced, to undertake litigation and they will never do so in relation to smaller value transactions;
- individual cases only bind the parties to the case, the decision does not directly impact on other traders using the same or similar terms;
- unconscionable conduct cases turn on their particular circumstances which are readily distinguished for one another, thus limiting their precedential value; and
- where precedents do build up, some businesses may begin to take heed of them, but many others will either not be aware of the precedent or will proceed regardless on the basis that they are unlikely to be proceeded against.<sup>22</sup>

With respect to the ability to deal with unfair terms in a systemic manner, Peden noted in 1982<sup>23</sup> that *an ongoing process is required involving more than one unjust contract in order to justify an application under this section* and that the meaning of the phrase *contracts of a specified class* in section 10 was not clear. He considered then that the section was limited in that it can only affect future dealings, does not adjust existing contractual rights and that separate proceedings would have to be brought in respect of each contract.

As at 2001 there had only been one reported use of the section 10 process.<sup>24</sup> The Communications Law Centre<sup>25</sup> has argued that since “unjust” means *unconscionable, harsh or oppressive* the threshold may simply be too high evidentially, particularly where there is a large number of persons contracting, or there is significant diversity

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<sup>21</sup> Carlin T (2001) *The Contract Review Act 1980 (NSW) - 20 years on* Sydney Law Review Volume 23 p 133

<sup>22</sup> Australian Securities and Investments Commission (2002), Submission to the Department of Consumer and Employment Protection of Western Australia's Review of the *Consumer Affairs Act 1971* and the *Fair Trading Act 1987*, p 20

<sup>23</sup> *Law of Unjust Contracts: including the Contracts Review Act 1980 (NSW)* (1982)

<sup>24</sup> *Unfair Practices and Telecommunications Consumers* (Jan. 2001) Communications Law Centre Research Report, Sydney

<sup>25</sup> *Ibid*

within a group of such persons: it concluded.....*the section would seem to have less potential for effecting control over the use of harsh terms in consumer contracts than one might initially expect.*

Goldring et al have noted that .....*The Contracts Review Act and by inference the other legislation [TPA and Uniform Consumer Credit Code] has been criticised for failing to distinguish between procedural and substantive unconscionability as “[t]he list of factors to which the court is required to have regard, in determining whether a contract is unjust, is a mish-mash of process-orientated and outcome-oriented considerations”*.<sup>26</sup>

### 2.1.3 Uniform Consumer Credit Code (UCCC)

In 1993 the States and Territories made the Uniform Credit Laws Agreement. The Queensland Parliament passed the template legislation in 1994. Other jurisdictions followed and the uniform system came into effect on 1 November 1996. It therefore applies across Australia.

The UCCC in general applies to the provision of credit to a natural person or strata corporation by a credit provider who provides credit in the course of, or incidental to, a business where a charge is made for providing the credit so long as the credit is predominantly for personal, domestic or household purposes (sub-section 6(1)). This applies to real property as well as goods and services and therefore housing loans may be covered. However, investment by a debtor is not for personal, domestic or household purposes (sub-section 6(4)). The UCCC also applies to consumer leases, related insurance contracts and related sales contracts (as defined).

Unjust contracts can be re-opened under section 70.<sup>27</sup> The definition of “unjust” is the same as that in the CRA, that is, it *includes unconscionable, harsh or oppressive.*

Section 70 of UCCC is concerned with procedural and substantive injustice. The list of matters which **may** be taken into account by the court under sub-section 70(2) are very similar to those which the court **must** take into account under sub-section 9(2) CRA. Whether or not a term was the subject of negotiation is a matter the court can consider.

If the court considers that a matter is unjust, it may *re-open the transaction that gave rise to the contract*.....It may then, inter alia: re-open an account; relieve the debtor from payment to the degree it considers reasonable; *set aside wholly or in part or revise or alter an agreement*; make an order for payment of an amount it thinks is *justly due to the party under the contract*... (section 71). There is no ability to deal with unjust contracts in a systemic way. Action is only available to the individual debtor.

Under section 72, the court may review unconscionable interest, fees or charges.

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<sup>26</sup> Quoting Duggan, “Some reflections on Consumer Protection and the Law Reform Process” (1991) 17 Mon LR at 274

<sup>27</sup> section 70 is set out in full at Appendix E

## **Impact of UCCC on unfair terms**

Enquiries to date have not revealed any significant use of section 70. It would seem that disputes are settled before they reach the courts and have not therefore been subject to judicial scrutiny. Consequently, it is difficult to comment on the impact of UCCC in this regard.

It is interesting to note that a significant proportion of cases brought under the CRA in NSW are mortgage related even since the introduction of the UCCC.

### **2.1.4 Fair Trading Amendment Act 2003 (Victoria)**

In May this year, Victoria amended its *Fair Trading Act 1999* to include provisions to address unfair contract terms.<sup>28</sup> The provisions draw heavily on the United Kingdom Unfair Terms in Consumer Contracts Regulations (these are discussed in detail below) but there are some key differences.

The provisions cover "consumer contracts": *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, for the purposes of the ordinary personal, household or domestic use of those goods or services*

In brief:

- a term is unfair *if contrary to the requirement of good faith and in all the circumstances it causes a significant imbalance in the parties' rights and obligations under the contract, to the detriment of the consumer;*
- if a consumer believes a term to be unfair, he or she can take the issue to court; a term found to be unfair is void: the rest of the contract continues to bind the parties if it is capable of existing without the term;
- in assessing whether a term is unfair, the court can have regard to whether the term was individually negotiated; whether it is a prescribed term; and whether it has an object or effect set out in the Act;
- standard form contract terms can be prescribed as unfair by regulation and it is an offence to use or recommend the use of a prescribed term;
- the Director can apply for an injunction where it is believed that a person is using or recommending the use of an unfair term in a consumer contract or a prescribed term;
- an oral contract is covered with respect to consumer contracts;
- a term relating to price is covered by the provisions;
- a contract to which the UCCC applies is not covered; and
- business to business contracts are not covered.

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<sup>31</sup> The relevant provisions are set out in full in Appendix F. Victoria initially introduced a Bill containing the provisions in October 2002 but it lapsed due to a State election being called.

Whilst the individual consumer can take their contract to court, CAV can deal with matters systemically in relation to standard form contracts. Unlike the United Kingdom, Victoria has the ability to develop a 'black' list of terms through regulations which prescribe unfair terms and is also able to prosecute if these are used.

Under s163, a general provision in the Victorian *Fair Trading Act 1999*, a written contract must be easily legible, in a minimum of 10 point if printed and must be clearly expressed. The Director can apply to the Victorian Civil and Administrative Tribunal if it is believed that a term does not comply with this section. The Tribunal can prohibit the supplier using the provision and there is a penalty for failure to comply with the order.

### **Impact of Victorian provisions on unfair terms**

The Victorian provisions came into force on 9<sup>th</sup> October 2003. Due to the short time which has elapsed, it has not been possible to assess the impact of the provisions for the purposes of the Paper.

### **2.1.5 Non-government intervention**

The Australian Communications Industry Forum (ACIF) is the industry organisation which develops Industry Codes for the telecommunications industry. It has this role under the regulatory policy established by the Commonwealth *Telecommunications Act 1997* to promote the greatest practicable use of industry self-regulation.

In December 2002, ACIF published an Industry Guideline on Consumer Contracts (the Guideline).<sup>29</sup> ACIF was of the view that suppliers and consumers would benefit from additional and specific guidance on issues of contractual fairness, particularly as consumer supply contracts in the telecommunications industry are commonly prepared in advance by the supplier and there is little or no scope for these to be individually varied.

A working committee was set up to provide guidance on industry best practice for contract provisions and guidance on unfair and unintelligible contract terms generally and in specific contexts. It stated that its work was significantly influenced by the report of the Communications Law Centre *Unfair Practices and Telecommunications Consumers* and the United Kingdom regulation of unfair terms (see below). The Guideline notes:

*Fair contract terms are likely to increase consumer satisfaction, benefit competition and reduce consumer complaints. Further, suppliers benefit from dealing openly with consumers and disclosing all necessary information so that people can make informed decisions about purchasing telecommunication services and the financial commitment that entails. Contracts that appropriately and fairly balance the interests of suppliers and consumers*

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<sup>29</sup> ACIF G601 December 2002. Information in this section is taken from documentation on ACIF's website - <http://www.acif.org.au>

*create an environment of shared and realistic expectations about the supply of services.*

The Guideline relates to contracts between consumers and suppliers, with consumer defined as *an existing or potential customer of telecommunications goods and/or services for a residential or small business purpose.....* It draws on the terminology of the United Kingdom legislation. A term is unfair if it causes a significant and unreasonable imbalance in the parties' rights and obligations arising under the Contract to the detriment of the Consumer. Examples are provided of terms which might be unfair.

The Guideline includes a section on **Intelligibility and Clarity of Contract Information** and gives some explicit recommendations as to how terms should be written. It also has a section on providing information to people with speech and communication difficulties and from non-English speaking backgrounds.

### **Impact of the ACIF Guideline on unfair terms**

ACIF appears to have taken the issue of unfair contract terms seriously. However, it should be noted that all major consumer groups withdrew from the ACIF working party in late 2001. The Australian Consumers Association and the Consumer Law Centre Victoria, in a joint submission on the draft Guideline, were critical of the fact that the document is only a guideline and therefore is not binding on members of the industry. It remains to be seen the degree to which it is capable of effecting a change in behaviour by the suppliers of telecommunications services.

The Australian Communications Authority (the Authority) undertook a preliminary review of the effectiveness of the Guideline in early 2003. At that stage, the Authority considered that there had been little impact on the industry but acknowledged that the period since introduction had been short. It is undertaking a further review which will report in November 2003 which the Authority considered would indicate a *high degree of compliance* and a *demonstrable improvement in the position of the consumer in relation to contractual matters*. It warned that if this was not the case, it may have to consider a Code under the *Telecommunications Act 1997*.<sup>30</sup>

## **2.2 United Kingdom (and the European Union)**

Statutory intervention in the United Kingdom (the UK) has also focussed on the substantive rather than the procedural. There is no equivalent in UK consumer protection/fair trading legislation to the unconscionability provisions in Australian statutes discussed above.

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<sup>30</sup> Since the writing of the Paper, the second review has been completed. The report can be found at [http://www.aca.gov.au/aca\\_home/publications/reports/CLC\\_Report.pdf](http://www.aca.gov.au/aca_home/publications/reports/CLC_Report.pdf). The Authority has requested ACIF to develop an Industry Code. A draft is to be available for public comment by 26 February 2004 and the Code is to be submitted for registration by 26 May 2004.

### **2.2.1 Supply of Goods (Implied Terms) Act 1973 and Unfair Contract Terms Act 1977**

The Law Commissions' Paper<sup>31</sup> notes that unfair terms in the UK have been regulated by legislation as far back as 1854, but with a focus on exclusion and limitation of liability clauses. By virtue of the *Supply of Goods (Implied Terms) Act 1973* (SOGITA), all sellers were prevented from excluding or restricting liability:

- generally with respect to the implied obligation as to title;
- in relation to consumers with respect to the implied obligations of merchantability, fitness for purpose, correspondence with sample; and
- for non-consumer sales with respect to the implied obligations of merchantability, fitness for purpose, correspondence with sample, only to the degree that it could be shown to be fair and reasonable.

The *Unfair Contract Terms Act 1977* (UCTA) in general incorporates the SOGITA provisions. Whilst it applies to both consumer and business to business contracts (as well as to terms and notices excluding certain liabilities for negligence), irrespective of whether the terms are negotiated or standard, it only covers exclusion and limitation of liability clauses (and indemnity clauses in consumer contracts). It makes certain exclusions or restrictions of no effect at all and subjects others to a test of reasonableness.<sup>32</sup>

“Reasonableness” means .....*the term shall have been a fair and reasonable one to be included having regard to the circumstances which were, or ought to have been, known to or in the contemplation of the parties when the contract was made.* It is left to the aggrieved individual to bring legal action and so there is no opportunity to deal with unfair terms systemically. The consequence of a term being found to be unfair is that the contract is viewed as if the term never existed. There is nothing under UCTA to prevent a party, aware that a term is probably unfair, from including it in a contract and simply waiting to see if it is challenged. As at 1999 few cases had been brought.<sup>33</sup>

### **2.2.2 Unfair Terms in Consumer Contracts Regulations 1999<sup>34</sup>**

The United Kingdom *Unfair Terms in Consumer Contracts Regulations 1999*<sup>35</sup> (the UK Regulations) (replacing those of 1994) are an enactment into UK law of the EU

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<sup>31</sup> See footnote 5 above.

<sup>32</sup> *Unfair Terms in Contracts* op cit

<sup>33</sup> *Report on the practical implementation of Directive 93/13/EEC in the United Kingdom and the Republic of Ireland* - Rapporteur: Brian St. J. Collins, University of Ulster, Magee College, Londonderry, Northern Ireland – Annexe to Minutes for Proceedings of the Conference “The Unfair Terms Directive: 5 years on” – 1-3 July 1999

<sup>34</sup> It should be noted that the EU Directive is under review by the European Commission and the UK UTCC Regulations through a joint process by the Law Commission and the Scottish Law Commission. The latter has provisionally recommended a model which would combine the UTCC Regulations and the UCTA.

<sup>35</sup> See Appendix G for full text of Regulations.

Directive on Unfair Terms in Consumer Contracts.<sup>36</sup> The UK Regulations operate in addition to UCTA.

The EU Directive and therefore the UK Regulations cover:

- contracts involving consumers – any natural person who is acting for purposes other than his (sic) trade, business or profession; and
- contractual terms which have not been individually negotiated, particularly pre-formulated standard contracts;
- oral and written contracts;

and provide that:

- written contracts must be in plain intelligible language; and
- unfair terms are not binding on the consumer.

The declared purpose of the UK Regulations is to *protect consumers against one-sided contracts favouring businesses*.<sup>37</sup> They provide that:

- a contractual term which has not been individually negotiated is unfair *if contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract, to the detriment of the consumer*. The Guidance to the UK Regulations notes that in the first case brought under the UK Regulations the Court of Appeal stated that the requirement of good faith embodied a general *principle of fair and open dealing* and is not limited to a term being used in a deceitful manner;
- a consumer is not bound by a term which is unfair. The rest of the contract is binding if it is capable of continuing in existence without the unfair term;
- if a term is individually negotiated, it is not covered by the UK Regulations, but any non-negotiated terms within the same contract are covered;
- if a consumer believes a term to be unfair, he or she can take the issue to court or can use it as defence in court proceedings against them;
- where a term has been drawn up for general use, the United Kingdom Office of Fair Trading (UK OFT) (or the main sectoral regulators and the 200 local authority trading standards services) can seek an undertaking or apply for an injunction to stop businesses using unfair terms.

The UK Regulations do not cover:

- price setting – provided it is in plain, intelligible language;
- terms defining the product – provided they are in plain, intelligible language;
- terms required by law or explicitly allowed by law;
- specially negotiated terms;
- business to business agreements;
- sales by private individuals; or
- terms in non-consumer contracts such as employment agreements.

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<sup>36</sup> 93/13/EEC

<sup>37</sup> [www.oft.gov.uk/html/about/unfairstandardterms.html](http://www.oft.gov.uk/html/about/unfairstandardterms.html)



Examples of unfair terms are contained in a so-called ‘grey’ list in Schedule 2 of the UK Regulations. The list is not exhaustive and a term is not unfair simply because it is on the list. The UK OFT has issued detailed guidance on how and why some terms could be considered unfair.

The Law Commissions’ Paper notes .....*it must be the case that substantive unfairness alone can make a term unfair under [the UK Regulations]. This is because the Director General of Fair Trading (“DGFT”) and the bodies listed in Schedule 1 have power to prevent the use of unfair terms and this may be done ‘in the abstract’, in the sense that the precise way in which the clause is presented to the consumer may not be known. If there had to be procedural unfairness this preventive power could only be used when the procedure was known to the DGFT or other body. Equally, the indicative list would lose much of its force. It is clearly aimed at terms which, for the most part, are thought to be unfair in substance. It makes separate provision for terms which have been incorporated by unfair procedure, such as “irrevocably binding the consumer to terms with which he has no real opportunity of becoming acquainted before the conclusion of the contract”.*

This view that procedural fairness is not a necessary requirement was supported by the Court of Appeal in *DGFT v First National Bank plc*.<sup>38</sup> The House of Lords did not contradict this position even though the decision in relation to the fairness of the clause in question was reversed.<sup>39</sup>

It should be noted that whilst the EU Directive sets out the provisions as to when and how a term is to be regarded as unfair, it is left up to member states to *bring into force the laws, regulations and administrative provisions necessary to comply with this Directive*<sup>40</sup> ..... The UK Regulations provide for the individual consumer to be able to take their contract to court but also for UK OFT to deal with matters systemically in the general interests of consumers and competitors. Indeed, the UK OFT is mandated to deal with any complaint in relation to a contract term *drawn up for general use* and has set up a unit within UK OFT for this purpose.<sup>41</sup> If the UK OFT considers a complaint valid, it can apply for an injunction preventing the trader from using the term or obtain an undertaking from the trader as to future use of the term. A court can grant an injunction on any terms it deems fit, not only in relation to the particular trader but to an industry sector.

The Law Commissions’ Paper also notes.....*the work of the OFT’s Unfair Contract Terms Unit has had a major impact on the market. The OFT has secured the removal of many unfair terms which were almost certainly invalid under UCTA; and this shows that allowing parties to challenge terms in their individual contracts, while invaluable to them, has a limited impact on contracting practice generally.*

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<sup>38</sup> [2000] QB 672 (CA)

<sup>39</sup> [2001] UKHL 52

<sup>40</sup> Article 10.1 of Directive

<sup>41</sup> Under the UK Regulations, UK OFT has had to receive a consumer complaint before it could take a matter to court. Compare this with the Irish Regulations which contain no such restriction and the Irish Director of Consumer Affairs has therefore taken an even more pro-active role. The UK *Enterprise Act 2002* now allows the UK OFT to act without the need for a complaint to be lodged.

An example of success is in the area of mobile phone contracts where negotiations with one phone company led to the removal of a number of offending provisions and others in the market quickly followed. In October 2002, the UK OFT reported another significant success with the travel industry with the Association of British Travel Agents agreeing to revise its model contract. This will deal with problem areas such as surcharging, cancellation rights and compensation. The UK OFT has rarely had to resort to court action, proceeding by way of education, advice/guidance, negotiation, undertaking and threat of court action. The UK OFT identified the widespread use of unfair disclaimers in places such as car parks, especially where a ticket makes reference to rules and conditions not listed on the ticket and of which consumers are often unaware. It contacted over 500 organisations, including local authorities in order to alert them to the possible breach of the UK Regulations.<sup>42</sup>

The UK OFT manages a significant number of complaints. Before the 1994 Regulations, a small number were dealt with in the Small Claims Court. Between July 1995 and December 1998, UK OFT received over 3,000 complaints, of which 75% resulted in some form of action and in 1200 of the matters, the business concerned amended its contract terms in some manner. Complaints related to contracts for a wide variety of goods and services, including double glazing, public broadcasting, educational services, telecommunications, motoring services, credit card services, insurance, holiday and tour operations, football clubs, beauty parlours, car sales, gas supply, burglar alarms and goods ordered via mail order.<sup>43</sup>

For the period January 2002 to March 2003, the Annual Report shows that the UK OFT received 1,310 complaints and 1,649 terms were abandoned or amended as a result of enforcement action. Five formal undertakings were given and 137 informal. Most common of the successfully challenged terms were on the issues of:

- exclusion or limitation of liability for breach of contract, especially liability for defective or misdescribed goods, poor services/work/materials and restrictions on the amount or type of liability;
- plain and intelligible language;
- financial penalties;
- unfair financial burdens; and
- disclaiming liability for employee's statements.

The UK OFT publishes the *Unfair Contract Terms Bulletin* (the Bulletin) on a quarterly basis which contains reports of cases where standard contract terms have been amended or deleted as a result of enforcement action under the UK Regulations. Appendix B contains a breakdown of statistics from the Bulletin for the quarter October to December 2002 by way of example of the work of the UK OFT. During that period, 37 cases were completed by the UK OFT. Four hundred and eighty-four contract terms were abandoned or amended as a result of enforcement action under Regulation 10, in all but 1 case by undertaking. There are also 4 cases completed by other bodies, in which a further 17 terms were revised.

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<sup>42</sup> *Report on the practical implementation of Directive 93/13/EEC in the United Kingdom and the Republic of Ireland* op cit

<sup>43</sup> Ibid

The results where an aggrieved consumer pursues the matter to court themselves are probably less spectacular. The consequence for use of an unfair term in the UK is only that the term in question is not binding on the consumer. The remainder of the contract remains binding on both parties as far as this is possible without the offending provision. Other EU member states have taken a stronger stance; for example, in Luxembourg, the court may declare the terms of a consumer contract null and void and if a trader uses a term which has been so declared in relation to them, they can be subject to a fine. Portuguese and Spanish law prevent the use of certain terms, and if they are used, the whole contract can be declared void.

Similarly, whilst there is a requirement that a written contract be in plain and intelligible language, the term is not regarded as unfair if this is not so. In this situation, the term will be given the meaning most favourable to the consumer. Such an interpretation could still leave the consumer in an unfavourable position.

## **2.3 Other overseas jurisdictions**

### **2.3.1 New Zealand**

New Zealand does not have one specific piece of legislation which protects against unfair terms in consumer contracts. The two main pieces of consumer legislation in New Zealand are the *Fair Trading Act 1986* (NZ FTA) and the *Consumer Guarantees Act 1993* (CGA).

The NZ FTA covers misleading and deceptive conduct in trade, trade descriptions, unfair practices, consumer information and product safety. Liability is strict (as the breach may be innocent). The type and amount of any awarded civil remedy is discretionary. Unlike the TPA, on which it is largely based, it does not have unconscionable conduct provisions.

The CGA applies to the supply of goods or services which are intended for ordinary household use. The Act provides consumers with a number of implied guarantees. It imposes obligations on sellers and manufacturers and provides a number of remedies that enable the consumer to pursue the manufacturer or seller of the goods or services.

Contracting out of either the NZ FTA or the CGA is prohibited in most circumstances. There is no legislative equivalent in New Zealand to the UK Regulations or UCTA.

There are a number of New Zealand statutes that reform the common law approach to contractual relationships.

The *Contractual Remedies Act 1979* allows a party to a contract to recover damages (assessed as if the representation was a term of the contract) for an innocent or negligent misrepresentation which induced the contract and also governs the circumstances in which a party is entitled to cancel a contract. Cancellation of a contract results in all parties being relieved from further performance but the Act also provides the courts with broad discretionary powers to grant remedial relief to any party to prevent injustice when a contract is cancelled.

The *Contractual Mistakes Act 1977* and the *Illegal Contracts Act 1970* largely codify

the established common law rules relating to contracts which are entered into by mistake or contrary to law. Both statutes, however, confer on the court a broad statutory discretion to grant remedial relief in respect of contracts subject to those Acts.<sup>44</sup>

It is understood that the issue of unfair contract terms is potentially one area that the Ministry of Consumer Affairs in New Zealand will be investigating in its proposed review of consumer protection law and its enforcement.

### 2.3.2 United States

The United States have statutory unconscionability which covers 51 of 52 States through adoption of the Uniform Commercial Code, specifically s2-302 (which influenced Peden's proposals in relation to the CRA). It would seem that, similarly to Australia, substantive unconscionability alone is not sufficient, although the US courts may be prepared to take greater note of substantive issues. In the PayPal case<sup>45</sup> it was said:

*Unconscionability has both procedural and substantive components. The procedural component is satisfied by the existence of unequal bargaining positions and hidden terms common in the context of adhesion [standard form] contracts. The substantive component is satisfied by overly harsh or one-sided results that 'shock the conscience'. The two elements operate on a sliding scale such that the more significant one is, the less significant the other need be. A claim of unconscionability cannot be determined merely by examining the face of the contract; there must be an inquiry into the circumstances under which the contract was executed, its purpose and effect.*

It is understood that American jurisdictions do not have legislation comparable to that of the European Union/United Kingdom, although concern has been expressed about the inclusion of clauses in standard form contracts which disable purchasers' rights to pursue legal action in support of their rights by requiring them to go to private arbitration for any dispute rather than pursuing other remedies. The concern is that private arbitration while ostensibly independent may well be fundamentally disadvantageous for the consumer or purchaser. The PayPal case above was concerned with a clause in a contract requiring that consumer complaints be individually arbitrated in accordance with the rules of the American Arbitration Association and in California. The court found the clause to be unconscionable due to lack of mutuality and the practical effect of the clause with respect to costs, venue and consolidation of claims.

In 2002, the North Carolina State legislature was considering a bill for its proposed Fair Bargain Act<sup>46</sup> which sought to address the above problem by making any waivers

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<sup>44</sup> <http://www.rmmb.co.nz/about/about/litigation/nzlegal.asp>

<sup>45</sup> Craig Comb and Roberta Toher v. PayPal Inc and Jeffery Resnick v PayPal Inc C-02-1227 JF (PVT): United States district court for the Northern District of California

<sup>46</sup> Statement prepared by Paul D. Carrington, Professor of Law, Duke University, North Carolina, USA.

of legal or procedural rights revocable and not binding on the party to the contract. Further, it would be unconscionable for standard form contracts to include provisions which would have the effect of disabling a person's procedural rights in the enforcement of their legal rights.

### 2.3.3 Canada

As far as it has been possible to ascertain, Canadian jurisdictions also do not have EU/UK type provisions.

There are examples of consumer protection/fair trading legislation which are relevant to the issue of unfair terms. All common law Provinces have an *Unconscionable Transactions Relief Act* which allows for the re-opening of unfair credit transactions. In Canadian jurisdictions unconscionable conduct is an offence.

The Ontario *Business Practices Act*<sup>47</sup> deems "an unconscionable consumer representation" to be an unfair practice. Unconscionability would include the procedural matters such as physical infirmity, ignorance, illiteracy, and inability to understand the language of an agreement, but also:

*2.2.ii. that the price grossly exceeds the price at which similar goods or services are readily available to like consumers;*

*2.2.v. that the proposed transaction is excessively one-sided in favour of someone other than the consumer; and*

*2.2.vi. that the terms or conditions of the proposed transaction are so adverse to the consumer as to be inequitable.*

The Saskatchewan *Consumer Protection Act*<sup>48</sup> similarly prohibits unfair practices and refers to:

*6(q) Taking advantage of a consumer by including in a consumer agreement terms or conditions that are harsh, oppressive or excessively one sided.*

The Alberta *Fair Trading Act*<sup>49</sup> includes in a list of unfair practices:

*6(2)(d) to charge a price for goods or services that grossly exceeds the price at which similar goods or services are readily available without informing the consumer of the difference in price and the reason for the difference; and*

*6(3)(c) to include in a consumer transaction terms or conditions that are harsh, oppressive or excessively one-sided;*

The *Trade Practice Act*<sup>50</sup> of British Columbia, in determining whether an act or practice is unconscionable, requires a court to consider all the surrounding circumstances of which the supplier knew or ought to have known, including procedural matters and

*4(3)(c) that, at the time the consumer transaction was entered, the price grossly exceeded the price at which similar subjects of similar consumer transactions were readily obtainable by similar consumers; and*

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<sup>47</sup> R.S.O. 1990, c. B. 18 at s2.2

<sup>48</sup> 1996 C-30-1

<sup>49</sup> 1998 c. F-1.05

<sup>50</sup> RSBC 1996 C. 457

*4(3)(e) that the terms or conditions on, or subject to, which the consumer transaction was entered by the consumer are so harsh or adverse to the consumer as to be inequitable;*

British Columbia is proposing a new Consumer Protection Act which will combine a number of current consumer protection statutes.<sup>51</sup> With respect to unfair contracts, it is understood that it will include provisions based on the UK Regulations.<sup>52</sup>

It is not known whether the apparently substantive provisions in the examples above are successful in their own right. However, similarly to Australia, it would seem that Canadian common law jurisdictions have not differentiated between substantive and procedural matters.

The Quebec Civil Code has a different approach to the common law jurisdictions:<sup>53</sup>

*1432. In case of doubt, a contract is interpreted in favour of the person who contracted the obligation and against the person who stipulated it. In all cases, it is interpreted in favour of the adhering party or the consumer.<sup>54</sup>*

*1435. An external clause referred to in a contract is binding on the parties.*

*In a consumer contract or a contract of adhesion, however, an external clause is null if, at the time of formation of the contract, it was not expressly brought to the attention of the consumer or adhering party, unless the other party proves that the consumer or adhering party otherwise knew of it.*

*1436. In a consumer contract or a contract of adhesion, a clause which is illegible or incomprehensible to a reasonable person is null if the consumer or the adhering party suffers injury therefrom, unless the other party proves that an adequate explanation of the nature and scope of the clause was given to the consumer or adhering party.*

*1437. An abusive clause in a consumer contract or contract of adhesion is null, or the obligation arising from it may be reduced.*

*An abusive clause is a clause which is excessively and unreasonably detrimental to the consumer or the adhering party and is therefore not in good faith; in particular, a clause which so departs from the fundamental obligations arising from the rules normally governing the contract that it changes the nature of the contract is an abusive clause..*

*1438. A clause which is null does not render the contract invalid in other respects, unless it is apparent that the contract may be considered only as an indivisible whole.*

The same applies to a clause without effect or deemed unwritten.

### 2.3.4 Thailand

Not only 'western' nations have enacted legislation with respect to unfair contract terms. Thailand enacted unfair contract terms legislation in 1997.<sup>55</sup> Whilst the translation is not the most fluent, it would seem that the intention of the legislation is to address the substantive issue of unfair terms, although the inclusion of the criteria set out in Section 10 could allow for procedural issues too.<sup>56</sup>

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<sup>51</sup> Discussion Paper at <http://www.pssg.gov.bc.ca/legislation/consumers/paper.htm>

<sup>52</sup> From email correspondence with a representative of Compliance and Consumer Services Ministry of Public Safety and Solicitor General, British Columbia, Canada

<sup>53</sup> **CIVIL CODE OF QUÉBEC S.Q.**, 1991, c. 64. **BOOK FIVE OBLIGATIONS TITLE ONE OBLIGATIONS IN GENERAL CHAPTER II CONTRACTS**

<sup>54</sup> Alberta has a similar provision.

<sup>55</sup> Unfair Contract Terms Act B.E. 2540 (1997)

<sup>56</sup> For relevant sections of the Thai legislation, see Appendix C.

### 3. CONCLUSIONS

The review of the incidence of unfair contract terms and their management to date outlined in Part A indicates that:

- a. the issue of unfair terms in contracts is a phenomenon experienced in many countries and there is evidence to indicate that Australia is no exception (see UK OFT Bulletin; data from UK OFT Annual Report; CLAB database; ACA's submission to the Dawson Inquiry; also, the number of countries which have put some control in place);
- b. unfair terms are commonly found in a diverse range of industry types across the marketplace (see UK OFT Bulletin; data from the UK OFT Annual Report; CLAB database; ACA's submission to the Dawson Inquiry);
- c. to date, Australian law has responded to unfair contracts which have an element of procedural unfairness; that is, where the circumstances leading up to, and/or at the time of the making of the contract, create unfairness (see: common law; TPA and equivalents; CRA; UCCC);
- d. under the current legal regimes in Australia, the courts have been reluctant to find unfairness solely on substantive grounds, that is, on the basis that the unfairness of the actual terms of the contract leads to an injustice (see case law in relation to TPA and CRA);
- e. legal regimes to date in Australia have not proven effective in managing unfair contract terms systemically and therefore the impact on the marketplace has been minimal (only the CRA attempts to provide for systemic intervention with no real outcomes to date); and
- f. the current statutory regimes in Australia have created some confusion in practice because of their failure to distinguish between procedural and substantive unfairness (per Goldring et al and Duggan).

#### Question 1:

- (a) Do you have any comments in relation to these conclusions?
- (b) Do you, or does your organisation, agency or business, have any data or other information which would indicate the level of concern in relation to unfair contract terms?

**From this point onwards, a number of questions are posed. There is a Questionnaire containing all the questions at the end of the Paper to assist you in recording your responses.**

## **PART B:**

This Part considers 5 options in relation to unfair contract terms:

- no additional regulation;
- self regulation;
- UK model and variants;
- *Contracts Review Act 1980* (NSW); and
- a composite model.

There is also discussion whether, or to what extent, unfair terms regulation could or should include business to business transactions.

### **4. OPTIONS WITH RESPECT TO FUTURE REGULATION OF UNFAIR CONTRACT TERMS**

#### **4.1 Option 1: No additional regulation**

To reach a conclusion that no further regulation is required in relation to unfair contract terms, there would need to be agreement that:

- there is no identified problem; or
- any identified problem is not causing sufficient detriment in the market place to justify intervention; or
- there is an identified problem but it is being effectively managed through current mechanisms.

Not imposing any additional regulation would mean keeping the status quo of reliance on section 51AB *Trade Practices Act 1974* (unconscionable conduct) (and its mirror provisions) and section 70 Uniform Consumer Credit Code. In New South Wales, subject to its review, the CRA would continue to apply and in Victoria the new provisions in relation to unfair contract terms in its *Fair Trading Act 1999* will be taking effect.

#### **Consequences of option**

A decision not to regulate further in this regard would not affect the ability of consumers to take action in relation to procedural issues which come within the ambit of the TPA and the corresponding provisions in State and Territory fair trading regimes, and the UCCC.

With respect to substantive unfairness and systemic problems associated with unfair contract terms, there is less effective management (although this may soon be addressed in Victoria as a result of its new legislative provisions). Whilst there is currently no systematic collection of statistics on unfair contract term complaints around Australia, the information gathered in Part A would indicate that the issue of unfair terms in contracts is a matter of concern. The indications are that the use of unfair terms, particularly in standard contracts used on a daily basis, is across all industries. In these situations, the consumer may find themselves subject to extra charges or effectively bearing most, if not all, of any risk. Rights are given to the supplier without either corresponding rights being given to the consumer or



appropriate boundaries being placed on the exercise of the supplier's rights. Consumers also find themselves in the position that they may not have fair and reasonable access to goods and services in the marketplace because, unless they are prepared to agree to the terms which are significantly to their disadvantage, the supplier will not provide them.

A decision not to regulate for substantive unfair contract issues would leave this inequity unaddressed. This may lead to a lack of confidence in the marketplace.

There would be no costs or disadvantages to business in not introducing further regulation for unfair terms in a business-consumer context, except that there would be inconsistencies between the States and Territories legislative response, aside from the TPA mirror provisions and UCCC, which may create uncertainty for business.

Since no greater government intervention would be involved if no further regulation was introduced, there would be no extra compliance or enforcement costs. However, agencies would continue to receive complaints as to the unfairness of contract terms and not be able to address these in any systemic way. Their ability to influence behaviour in the market in this regard would be limited.

There may be costs to consumers if there is no further regulation. The only way for them to obtain relief is to undertake potentially expensive litigation. Their chances of success in a case based solely on substantive grounds currently seems small and therefore consumers are likely to be dissuaded from taking action where there are no procedural issues. Case by case reform is also a slow and cumbersome way of changing behaviour across a broad spectrum of the marketplace.

The use of unfair terms may also have financial implications for consumers if they believe, for example, that their rights to legal redress have been taken away under the contract.

Question 2:

Does Australian law, in general, adequately cover the issue of procedural unfairness in contracts? Why/why not?

Question 3:

Is there a need to regulate contract terms which are unfair in themselves? Why/why not?

Question 4:

What do you consider the costs/benefits : advantages/disadvantages to be in not regulating further?

## 4.2 Option 2: Self regulation

Self regulation through, for example, voluntary codes of conduct is a potential mechanism for managing unfair contract terms. The ACIF Guideline is an example of self-regulation of the issue (see 2.1.5 above).

## Consequences of option

A voluntary code has the advantage that market participants have the responsibility of developing and administering the code, rather than government. As a result, government does not incur costs in regulation and the costs to business in complying may be less. Since any cost to business may be passed on to the consumer, this would also have less impact on the latter. There may, however, be a cost to business in the development and enforcement of any code.

For self regulation to be effective, it requires that there be sufficient commitment from business, either individually or through industry associations. It is submitted that since the incidence of unfair terms is so widespread and across such diverse industries, it is unlikely that this would be the case. In any event, attempting to develop codes across the marketplace would be very time consuming and it may well take years before any results are seen.

Voluntary codes can be difficult to enforce. Often, the ultimate sanction is to expel the trader from the industry association. This means that there may be no mechanism to ensure that their conduct is fair if the behaviour is not caught by the general fair trading laws around the country.

It may also be difficult to market the concept that a particular business is better to deal with because its contract terms are fairer as consumers have not tended to focus on comparing the contract terms on offer. However, industries with existing codes could extend them to cover unfair contract terms or include unfair terms in a broader industry code.

The ACIF Guideline does not go as far as a voluntary code as there are no consequences for non-compliance. It is yet to be seen whether it has an effect on the behaviour of the telecommunications industry in relation to unfair terms.<sup>57</sup> ACIF considered that a binding code would not be appropriate as individual suppliers have their own contracts tailored to fit their own commercial situations. It also suggested that a binding code might be regarded as anti-competitive. It noted that the benefits in adopting the ACIF Guideline would include reduction in consumer complaints and dispute resolution; consumers having a better understanding of their rights and obligations; and consumers therefore making more informed choices. The costs to industry were noted as redrafting contracts and some staff retraining.<sup>58</sup>

### Question 5:

Are guidelines, voluntary codes of conduct or any other methods of self regulation by industries an appropriate and effective way to regulate with respect to unfair contract terms? Why/why not?

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<sup>57</sup> See note 50 above.

<sup>58</sup> CCRP/project proposal/7 at <http://www.acif.org.au>

Question 6:

Are you aware of any other industry-based initiatives to manage unfair contract terms? If yes, please provide details.

Question 7:

What do you perceive the costs/benefits : advantages/disadvantages to be in self regulation in relation to unfair contract terms?

### 4.3 Option 3: The United Kingdom model and variations

This model and its variants prohibit the use of unfair terms in consumer contracts and provide a mechanism for determining whether a term is unfair. There is provision for not only individuals to take action but also for fair trading agencies to deal with unfair terms systemically. The Victorian variation also allows for a ‘black list’ of terms which will be regarded as unfair and for prosecution for use of such terms. (See the discussion at sections 2.1.4 and 2.2.2 above.)

The Schedule to the Paper sets out in detail, as variations of one model, the UK Regulations, the Victorian provisions and the views of the SCOCA Unfair Contract Terms Working Party (the Working Party) on the model. Comment is sought on all three aspects.

Question 8:

Is it desirable to adapt the UK model to the Australian context? Why/why not?

If yes, please read the Schedule to the Paper and address the issues raised (questions 9 – 29).

#### Consequences of option

An advantage of the UK/EU model is that, since it has been in existence for at least 8 years, it is possible to evaluate the costs and benefits which flow from it. It is arguable that the model is not a purely “black letter law” response and could be regarded as co-regulatory in practice as it provides a mechanism for entering into dialogue with business which is then proactively involved in trying to solve the identified problems.

#### *Government*

In its submission to the review of the Western Australian *Consumer Affairs Act 1971* and the *Fair Trading Act 1987*, ASIC notes<sup>59</sup> that *(T)he UK experience suggests that passing legislative amendments mirroring the Regulations (in Australian States and Territories) is, of itself, unlikely to have a significant impact in the use of unfair terms. Regulatory agencies would also need to consider establishing appropriate administrative frameworks and actively enforcing the new regime through government action. ....if an administrative model is adopted, significant co-ordination issues will be posed for regulatory agencies, going beyond simply ensuring uniform or consistent legislation.*

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<sup>59</sup> March 2003

The following are comments from UK OFT in response to a request for information for the paper:<sup>60</sup>

*The Unfair Terms Regulations have proved valuable in protecting consumers. Partly this is because the shape of the legislation discourages the search for loopholes. The test of unfairness is a broad one, backed by an indicative but not exhaustive list of terms which may have the object or effect of unfairness, and the underlying EU Directive must be interpreted purposively. Since the most obvious unfair terms are those that attempt to undermine the consumer's legal rights, the legislation has a long reach in dealing with unfair trading practices.*

*There is a big job to do. The lesson of the other UK legislation on unfair terms (eg the Unfair Contract Terms Act 1977) is that nothing changes unless there is some ownership of the legislation demonstrated through a willingness to take enforcement action. UK OFT has the power to seek injunctions to prevent the continued use of unfair terms. Before that the courts could modify a term in particular case, but there was nothing to prevent the company from continuing to use the terms with other consumers. Now it has been possible to bring about permanent change in markets and the trading environment.*

*OFT's approach, like all consumer protection, is a composite one – a mix of regulation and enforcement. Both are needed and are complementary. OFT subscribes to the UK 'Enforcement Concordat' and its principles of proportionate enforcement. [ref: UK Cabinet Office website] It enforces actively where necessary, backed up with published guidance, and the appropriate use of publicity and information campaigns. Guidance helps businesses know what is expected of them and hopefully regulate themselves without OFT intervention, and thus reduces the costs to business and to the OFT. It is doubtful the guidance would be as influential unless the OFT was seen to willing to follow up with enforcement action where appropriate. Cases are prioritised and dealt with in different ways according to the likely detriment to consumers. Cases involving trade associations' recommended terms or where large companies are involved or there is evidence that the terms are actually used to the disadvantage of consumers are dealt with in a 'full approach' where OFT sets out its views on all the unfair terms and require changes. But OFT's approach is consultative: it negotiates and persuades companies to make the necessary changes by agreement wherever possible. Typically there are several exchanges of correspondence and the average time to deal with a case like this is about nine months. Other cases are dealt with by advice or warning referring them to the guidance. Cases involving small businesses will generally be offered back to the relevant local authority (see below).*

*The work is resource intensive. There are eight teams engaged on unfair contract terms cases, each with two or three caseworkers, (a total of 21 staff).*

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<sup>60</sup> From correspondence with Ray Woolley, Deputy Director, Consumer Regulation Enforcement 1, OFT UK

*In addition there is a business support team to log new cases into the casework management database and to provide general administrative support (6 staff – although these also support a third team primarily working on distance selling and doorstep selling legislation). The unfair terms teams report to two Grade 7s (the key middle management level). So there are a total of 30 staff including the Deputy Director (Consumer Regulation Enforcement 1) dealing with unfair contract terms. To this must be added significant professional in-house legal support. The caseworkers are essentially administrators. Some have legal knowledge or legal qualifications but all new cases taken forward are routed through the OFT's lawyers for advice on the case analysis, and a degree of legal support is provided throughout. The legal resource is a significant one in cost terms. The resource applied to unfair contract terms work is now the largest for any OFT consumer function apart from consumer credit.*

*The demand for OFT action would be greater still but for the fact that since 1999 powers have been shared with a range of other enforcement bodies including the main sectoral regulators and the 200 local authority trading standards services. Some useful work is undertaken by trading standards but it is difficult for them to acquire the expertise to deal comprehensively with this area of work. Trading standards officers bring prosecutions for offences (typically under weights and measures and trade descriptions legislation) and are qualified to construct cases without the need to seek legal advice. That means in practice that there may be relatively little local authority provision for the legal advice that may be needed to take a view on unfairness. OFT plugs the gap to some extent eg with the published guidance documents. Caseworkers also give advice to trading standards on the advice that can be given to businesses in their area drawing directly on their own expertise or in consultation with OFT lawyers. Significant resources have been put into training trading standards officers.*

*Planning or estimating the resources that would be required for the task in Australia depends on the scale of the problem of course, and the degree of discretion the fair trading agency will have – that is, whether enforcement authorities have duties or powers. But OFT experience is that this is difficult but worthwhile work that is resource intensive.*

The statistics from OFT UK indicate that in a 12 month period, it would deal with around 1000 complaints.

In addition, as noted above, certain other bodies, such as local authority trading standards services are also able to deal with unfair terms. These bodies voluntarily supply quarterly returns to UK OFT classified by goods, services and trading practices. For the 12 months to 30 September 2001, 26,566 complaints were received by these other bodies who submitted returns in relation to unfair terms including attempts to restrict liability. Appendix H sets out a breakdown of these complaints.<sup>61</sup>

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<sup>61</sup> UK OFT Annual Report 2001 at [www.of.gov.uk](http://www.of.gov.uk)

Assuming that the incidence of unfair terms is comparable to that of the UK and proportionate to the population, it could be guessed that the complaint level in Australia, across the jurisdictions, might be around 9,000 complaints annually. There would therefore be an impact on government in managing these complaints.

It is noted that under the Victorian provisions the Director is **empowered** to take action, rather than **mandated** as under the UK provisions. This would allow for some control over the workload from the point of view of the fair trading agencies, but, as noted above, the impact on the market will depend on the level of activity. However, it has been anticipated that the ability to prescribe unfair terms, which would then carry a threat of prosecution if used, would act as a deterrent to business and require less intervention. The UK legislation does not have a comparable ability.

There would be a cost to business if there was not national consistency in the way that such a regulation is administered and enforced. There would be a cost to government in providing the necessary mechanism to ensure national consistency.

Question 30:

(a) Is the cost to government in implementing regulation of unfair terms under this model justified? Why/ why not? (b) Are there other costs/benefits : advantages/disadvantages to government under this model?

Question 31:

Under such a model, should the relevant fair trading agencies be empowered or mandated to investigate complaints in relation to unfair terms? Why/why not?

### ***Business***

It is not considered that the cost to business would be burdensome. There may be some cost in having current contracts reviewed in order to see whether they infringe the concept of unfair terms. Where terms need to be changed, either at the instigation of the supplier or due to action from a fair trading agency, there may be a cost in re-drafting, re-printing and loss of any current print copies. However, this would be a “once and for all” cost.

An advantage to business may be increased consumer confidence which is always of benefit to the market. The threat of court action would also be removed if contracts were pro-actively amended which would eliminate possible costs and create greater certainty for business. In line with ACIF’s comments previously, there may also be a reduction in consumer complaints and therefore dispute resolution costs; consumers should better understand their rights and obligations and therefore make more informed choices.

Question 32:

(a) What are the costs to business under this model of regulation and are these costs justified? Why/why not? (b) Are there other costs/benefits : advantages/disadvantages to business under this model?

### ***Consumers***

Depending on the cost to business, there could be a positive or negative financial flow on to consumers. However, this should be minimal in light of the discussion above.

The advantage to consumers is that they should be better protected from finding themselves in detrimental contractual circumstances.

The inclusion of a 'black list' in the Victorian variation and the ability for fair trading agencies to act systemically would mean that changes to market behaviour could potentially happen relatively quickly.

Question 33:

(a) Are the benefits to consumers under this model sufficient to justify its adoption? Why/why not? (b) Are there other costs/benefits : advantages/disadvantages to consumers under this model?

#### **4.4 Option 4: *Contracts Review Act 1980 (NSW)***

The CRA model provides a mechanism for individuals to take action with respect to unjust contracts and for the State fair trading agency to take systemic action. (See Section 2.1.2 above for a detailed description of the CRA and its operation.)

##### **Consequences of option**

The CRA may impose uncertainty on businesses that have contracts for the supply of goods and services with consumers. As a result, there may be costs involved in businesses identifying and using terms which are comparatively 'safe' from potential challenge under the CRA. Even though the potential to effect system change offered by section 10 of the CRA has rarely been used, terms may nevertheless be challenged on a case by case basis under the CRA.

There are costs to business in defending actions for relief under the CRA. Costs incurred by businesses as a result of the CRA, including the costs of any relief ordered by the court, may be passed onto consumers in the form of higher prices.

Government has to allocate the appropriate resources in the court and legal systems to enable consumers to bring actions, although the direct cost of the action in general is borne by the individual consumer.

The CRA delivers benefits to consumers in that it offers the potential to avoid unjust terms and it may influence business practice when courts hand down decisions on what would constitute an unjust contract. It may therefore prevent the exploitation of vulnerable consumers by deterring businesses from using certain contractual terms. To the extent that the CRA has led to an increase in the fairness of consumer contracts being offered by businesses, the CRA may have increased consumer confidence and business profitability in particular industries, although this may be difficult to quantify.

The NSW Office of Fair Trading is currently undertaking a review of the Act. As discussed previously, the indicators at present are that the courts have still tended to require an element of procedural unfairness. The systemic possibilities of section 10 have also not produced significant outcomes to this point in time.

Since the CRA is compatible with the UCCC, it could be argued that it would be appropriate to use the model as it would create consistency across the marketplace with respect to individual court actions in relation to unfair contract terms.

Question 34:

(a) Is the CRA a suitable model for a nationally consistent regulatory regime for unfair contract terms? Why/Why not? (b) Would the CRA model benefit from amendment in any way?. Please give reasons and, if yes, detail amendments.

Question 35:

What do you consider the costs/benefits : advantages/disadvantages to be in the CRA model?

## 4.5 Option 5: Composite model

A final option for regulation would be a model which incorporates aspects of all the other models.

Whilst it has been argued that there is probably sufficient coverage of the procedural aspect of unfair contract terms, the criticism noted earlier by Goldring et al, that current Australian legislation is problematic in that it does not distinguish between procedural and substantive issues, is considered to be valid. In order to create clarity, the opportunity might be taken, whilst addressing the issue of unfair contract terms, to rectify this situation.

In this model there would be two parts to any unfair contract legislative provisions.

The first part would deal with procedural issues alone and would refer to “unjust contracts”. This would draw substantially on the provisions of the CRA/UCCC since they refer specifically to unconscionable **contract** situations. The provisions would use the definition common to both of these pieces of legislation. In relation to the matters which the courts take into account in determining whether the contract is unjust, it would take only those matters from section 9 CRA and section 70 UCCC which are procedural in character. It is suggested that, as in the CRA, the court should be mandated to consider these.

The aggrieved individual would take this matter up him or herself, or a fair trading agency could seek an injunction, as is the case currently with the TPA/fair trading equivalents. There would not be a systemic aspect to intervention as each case would turn on its circumstances. There would therefore be no equivalent to section 10 CRA.

The second part of the provisions would deal with substantive issues and would be with respect to “unfair terms”. It would consist substantially of the Victorian/Working Party version of the UK model, without reference to anything which would imply a procedural focus. As a result, there would be both individual consumer redress but a systemic response to the general use of inappropriate terms.

It is suggested that UCCC be amended in line with the first part to ensure consistency but that it be subject to the provisions as to unfair terms in the second part in general. This would then ensure a uniform framework irrespective of whether there was a



credit focus or not. With respect to procedural issues, only NSW currently has this level of uniformity.

It would then be necessary to consider the interrelation of these provisions with the current unconscionable conduct provisions of the TPA and its equivalents. However, it is worthy of note that when the NSW *Fair Trading Act 1987* was enacted, it included section 43 (the mirror provision to section 51AB TPA) although the CRA was operative. Clearly, the conduct provisions would continue to apply to a wider set of situations than the contract itself.

It is suggested that through this model, it would be quite clear that a contract could be challenged on either procedural or substantive grounds, although both could be applicable in particular cases.

### **Consequences of option**

There would be little impact on business, consumers or government in relation to the procedural aspects, but there would be more clarity for all concerned.

There would be better court outcomes for aggrieved individuals due to the differentiation between procedural and substantive matters.

The comments made previously in relation to the UK model and variants made above would be relevant again here.

Question 36:

Is the composite model a suitable model for a nationally consistent regulatory regime for unfair contract terms? Why/why not?

Question 37:

Are there costs/benefits : advantages/disadvantages in relation to the composite model in addition to those raised in options 3 and 4?

Question 38:

(a) Which of the five options listed do you consider is the most appropriate way to proceed? (b) Are there any other options you believe should be considered? Please detail.

Question 39:

If the decision was for government regulation, should nationally consistent legislation for unfair contract terms be uniform or harmonised? Please give reasons.

## 5. POSSIBLE INCLUSION OF BUSINESS TO BUSINESS (B2B) CONTRACTS

The focus of the Paper has been on contracts between business and consumers. However, a number of other countries have provisions covering unfair terms in contracts between business entities. Some Canadian Provinces and the Netherlands include ‘small business’. Swedish, German and Dutch law, whilst aimed at consumers, is translated into the B2B context by the courts. Interestingly, Sweden reports that the powers have often not been needed because informal settlements have been entered into. The US unconscionability provisions in the Uniform Commercial Code can be used in a B2B situation but the courts look to the relative bargaining powers of the parties and only act where one side is in a position of weakness.

It was considered useful, whilst seeking the community’s views on the regulation of business/consumer contracts, to also raise, and seek comment on, the possible regulation of unfair contract terms in the B2B context. However, it is the view of SCOCA, if it should be decided in due course to regulate with respect to B2B, that implementation would not be considered for at least 12 months after any business to consumer regulation might be put in place.

### 5.1 Overview

The provisions in the UK UTCCR, and the Victorian unfair terms provisions in its *Fair Trading Act 1999* apply only to consumer contracts which have not been individually negotiated. The NSW CRA, whilst generally only applying to consumer contracts, does specifically include farming enterprises. The provisions in the UK UCTA, which mainly deal with terms seeking to exclude or limit liability, apply to both B2B and business to consumer (B2C) contracts. The EU Directive does not cover B2B but this is in line with the EU’s overall policy of focussing on consumers.

In many cases business, and in particular small business, face the same imbalances in bargaining power which consumers face when contracting with suppliers of goods and services. Often business will be confronted with standard form contracts on a “take it or leave it” basis.

In a recent submission,<sup>62</sup> the ACCC stated that *it was aware that the use of standard form contracts is not uncommon in agreements such as those between primary producers and processors, newsagents and publishers and franchisors and franchisees; where one large business is contracting with a number of smaller businesses and wishes to promote a uniform distribution or supply system.*

*Although it acknowledges that the use of standard form contracts can be used to promote standards in commercial dealings and reduce transaction costs, the ACCC notes that in some circumstances a larger party unreasonably refusing to negotiate on terms, when using such contracts, may risk contravening Section 51AC.*

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<sup>62</sup> Submission to the Senate Economics References Committee Inquiry into the Effectiveness of the *Trade Practices Act 1974* in Protecting Small Business

In particular, the ACCC expressed concern with respect to unilateral change clauses which are not referable to an external trigger or further negotiation between the parties.

Prohibiting the use of certain terms in consumer contracts, but not in B2B contracts, may increase the disadvantage suffered by business. For example, prohibiting a term in a consumer contract which would allow a retailer to increase the contract price for the goods and services to be provided could cause difficulties for the retailer if his or her supplier/manufacturer is allowed under the contract to unilaterally increase the cost of goods or services to be supplied.

The Law Commissions' Paper outlined a number of terms commonly included in standard form B2B contracts which are often unfair to one party to the contract; These include:

- deposits and forfeiture of money clauses;
- high default rates of interest (unless characterised as a penalty);
- clauses allowing unilateral variation in price;
- termination clauses where the circumstances in which one party to terminate may terminate are much wider than those for the other party;
- unequal notice periods; and
- arbitration and jurisdictional clauses severely restricting the rights of a party to choose a forum in which a dispute may be resolved.

Whilst the Law Commissions' Paper proposed that *all business to business contracts should be subject to control by the courts whatever the size of the business to whose detriment the term operates*, it did question whether authorised agencies should have preventive or systemic powers as for consumers under the UTCCR and if so, whether they should be available to protect all business, regardless of size. It did draw attention to the fact that including B2B coverage by UTCCR type provisions would not be such a great change in the UK because of the control already exerted by UCTA.

## **5.2 Unconscionability and B2B**

### **Common law**

Common law unconscionability applies in the same way as described in business to consumer transactions previously.

### **Statute law**

With respect to statutory unconscionability, B2B transactions are covered by sections 51AA and 51AC TPA.

Section 51AA provides that a corporation must not, in trade or commerce, engage in conduct that is unconscionable within the meaning of the unwritten law of the Australian States and Territories - that is, the general non-statutory or common law as it has evolved through decisions of the courts. 'Unconscionability' is accordingly not defined in the TPA. Section 51AA does not apply to situations covered by section 51AC.

Section 51AC specifically prohibits one business dealing unconscionably with another in the supply or acquisition of goods or services. The provision does not apply to conduct before 1 July 1998, to transactions greater than \$3million, or to transactions in which the business subject to the conduct (target business) is a listed public company.

Although the Act does not define 'unconscionable conduct', section 51AC does include a non-exhaustive list of factors which may be taken into account by the court. Expressed briefly, these are:

- the relative bargaining strengths of the parties;
- whether, as a result of the stronger party's conduct, the other was required to meet conditions not reasonably necessary to protect the stronger party's legitimate interests;
- whether the target business could understand any documentation used;
- the use of any undue influence, pressure or unfair tactics by the stronger party;
- how much the target business would have had to pay/charge, and under what circumstances, to buy/sell identical or equivalent goods or services from/to another supplier;
- the terms and circumstances in which the weaker party could have engaged in a similar transaction with another party;
- the extent to which the stronger party's conduct was consistent with its conduct in similar transactions with other businesses;
- the requirements of any applicable industry code (or of any other code if the target business acted in the reasonable belief that the stronger party would comply with it);
- the extent to which the stronger party unreasonably failed to disclose:
  - any intended conduct that might affect the interests of the target business, or
  - any risks to the target business arising from that conduct which the stronger party should have foreseen would not be apparent to the target business;
- the extent to which the stronger business was willing to negotiate with the target business the terms of any supply contract; and
- the extent to which each party acted in good faith.

It is not understood that the case law has dealt with unconscionability any differently with respect to B2B transactions, that is, the courts require some element of procedural unfairness, not substantive fairness alone.

It should also be noted that in section 51ACA TPA, relating to industry codes of conduct, B2B is included to the extent that franchising is included as an industry.

### **5.3 Contracts Review Act 1980 (NSW)**

The introduction of the Contracts Review Bill into the NSW Parliament in 1978 provoked a storm of outrage, particularly because the operation of the Act would cover all contracts, not merely consumer contracts. As a result, the Bill was withdrawn and reintroduced in an amended form.

It has been argued that the Act should have also applied to business contracts for the following reasons:

- the legislation brings a confusing and arbitrary division in the law of contracts because there is little difference between an individual consumer, partnership of individuals or a small proprietary company. In each case there will often be a lack of sophistication in legal matters and no ready access to legal advice. Indeed, the financial and commercial pressures faced by the small businessperson may make him/her even more vulnerable than the consumer; and
- the problem of the abuse of superior bargaining power, which is at the root of unconscionability, is not selective and even large corporations and government instrumentalities are not immune to exploitation.

The Law Commissions' Paper took the provisional view with respect to the UK legislation that *it would be better to treat all businesses alike in being able to benefit from the protection, allowing the courts to take into account the size of the business, and whether it makes transactions of the kind in question regularly or only occasionally, in assessing the fairness of the terms complained of.*

However, it was considered that this would be limited to terms which have either not been negotiated or are standard. The same formulation in relation to the inclusion of adequacy of price and main subject matter would apply as to B2C transactions.

They did ask the question as to the desirability and practicality of extending the preventive controls over unfair terms to B2B.

#### **5.4 Should unfair terms provisions apply to B2B?**

##### **Arguments in favour**

- Standard form contracts are widely used in B2B transactions for the supply of goods and services and cause problems similar to those affecting consumer contracts.
- In many cases businesses will have a restricted choice of supplier each offering contracts with identical or similar terms.
- Businesses may have little or no understanding of the terms on which they are being invited to contract.
- Businesses often have insufficient financial resources to enforce other remedies where unfair terms are used e.g. unconscionable conduct.
- Business, particularly small business is treated as a consumer for other purposes in other legislation e.g. *Consumer Claims Act 1994* (NSW).
- Prohibiting terms in consumer contracts while allowing identical terms in B2B contracts may put small businesses at a disadvantage.
- There may be difficulty in determining in some cases whether a party is contracting as a consumer or as a business e.g. vehicles bought for both purposes.
- Unfair terms provisions constitute preventative protection for business and lessen the likelihood of disputes occurring.

## Arguments against

- The commercial character of the contract.
- Greater knowledge of contractual terms and principles relative to consumers.
- Greater resources to obtain legal advice and enforce other legal and contractual remedies.
- Collective bargaining power and resources of industry associations.
- Additional compliance costs of publicly funded agencies.
- Business may be able to insure against loss or pass cost incurred as a consequence of an unfair term.
- Business has a greater opportunity to negotiate terms than consumers have.

## Consequences of covering B2B

The costs and benefits of covering B2B would be generally similar to those for business-consumer contracts. However, this will be affected by whether or not B2B contracts are regulated in exactly the same way as business-consumer contracts and the degree to which government might intervene in this situation.

### Question 40:

- a. In principle, should any unfair terms legislation apply to B2B contracts as well as consumer contracts? Why/why not?
- b. Should any such legislation apply to all B2B contracts or just those involving small business – and how would ‘small business’ be defined?
- c. If B2B contracts were to be included, should the legislation apply to individually negotiated contracts/terms or only standard form contracts/terms? Why/why not?
- d. If B2B contracts were covered should the remedies be the same as for consumers?
- e. What, if any, enforcement role and functions should fair trading agencies have if B2B contracts were covered?
- f. Would extending the unfair provisions to B2B contracts simply duplicate existing protections e.g. unconscionable conduct, commercial tenancy legislation etc? Please detail.
- g. What types of contract might be excluded from coverage? (For example: insurance contracts, telecommunications contracts, contracts for the transfer of land, securities, copyright?)
- h. (i) Should adequacy of price be excluded for any B2B contract regulation?  
(ii) Are there other matters which should be excluded? Please detail.
- i. Should unfair terms be prescribed in any regime to regulate B2B contracts if there is an ability to prescribe for consumer contracts? Why/Why not?
- j. Should the onus of proof in the B2B context be on the business disputing the fairness of the term? Why/why not?
- k. How might section 51AC TPA be affected by the composite model?
- l. What do you consider the costs/benefits : advantages/disadvantages to be in regulating unfair contract terms in relation to B2B?

**Thank you for taking the time to read this Paper. Your response to the issues raised would be greatly appreciated. Is there anything else on which you would like to comment?**

# SCHEDULE

## Option 3 – UK model and variants

### Substantive provisions

#### a. Definitions - general

**UK: *Unfair Terms in Consumer Contracts Regulations 1999***<sup>63</sup>

#### **3 Interpretation**

(1) In these Regulations –

**“consumer”** means any natural person who, in contracts covered by these Regulations, is acting for purposes which are outside his trade, business or profession;

**“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;

**“unfair terms”** means the contractual terms referred to in regulation 5.

Criticisms made of the EU provision include the difficulty of knowing whether a person is or is not acting for purposes **relating** to their trade, business or profession. This may be a different test to ‘in the course of’ their business. It was also suggested that it be made clear that it covers the situation where a consumer sells their car to a car dealer.<sup>64</sup>

**Victoria: *Fair Trading Act 1999***<sup>65</sup>

#### **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;

**"consumer contract"** includes a standard form contract<sup>66</sup>;

**(NB. “consumer contract” as defined at s3 - 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, for the purposes of the ordinary personal, household or domestic use of those goods or services.)**

**"injunction"** includes interim injunction;

**"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 **and includes a prescribed unfair term**<sup>67</sup>

<sup>63</sup> The provisions of the EU Directive are the same as the UK Regulations unless marked to the contrary.

<sup>64</sup> *Unfair Terms in Contracts* op cit

<sup>65</sup> The Victorian provisions came into effect on 9 October 2003.

<sup>66</sup> NB: this definition is to be repealed.

<sup>67</sup> NB: this definition is to be amended by deletion of the words in bold.



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

"**standard form contract**" means a consumer contract that has been drawn up for general use in a particular industry or for general use by a supplier, whether or not the contract differs from other contracts used in that industry or by that supplier.

The Working Party made the preliminary recommendation that the Victorian definition of "consumer contract" be amended as indicated in order to ensure that private contracts are not caught by the legislation.

Since some individual suppliers, particularly bigger operators, may have contracts which apply only to their business, not the industry in which they operate, it is also recommended that the definition of "standard form contract" should be amended accordingly.

It is also noted that under the Victorian legislation, a reference to "services" includes interests in land. Not all jurisdictions cover land generally in their fair trading legislation. The Working Party agreed that in principle contracts in relation to land should be covered by UCT provisions but that the matter should be further considered by each jurisdiction before a conclusion is reached on this point.

Question 9:

Do you have any comments on the general definitions above?

Question 10:

- a) Should private contracts be covered?
- b) Should reference be made to standard form contracts used by a particular supplier?
- c) Should contracts in relation to interests in land be covered by the legislation?

In each case, why or why not?

**b. Application****UK: *Unfair Terms in Consumer Contracts Regulations 1999*****4 Terms to which these Regulations apply**

(1) These Regulations apply in relation to unfair terms in contracts concluded between a seller or a supplier and a consumer.

(2) These 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.

The EU review report<sup>68</sup> noted that a number of member states had not transposed the exclusion of mandatory provisions (for example, terms required by law) into their legislation and that this had not proved problematic and therefore questioned the need to retain these exclusions. The UK Government response<sup>69</sup> to the review supported retention of the exclusions but considered that they should be redrafted to make it clear that the exclusions apply to:

- (a) all terms whose use is required or expressly permitted by law, but only to the extent that they do not go beyond what is required or permitted;
- (b) terms which are in substance simply the ‘default rules’ which would apply where there is no express clause on the subject;
- (c) terms that are approved in advance by an independent regulator who has a duty to protect the interests of consumers.

The Law Commissions’ Paper considered that terms which reflect the position of the law if there was no contrary agreement should only be exempt if the terms are in plain language and that terms **required** by regulators should be exempt, but not those merely **approved** by them.

<b>Victoria: Fair Trading Act 1999</b>
32V. <i>Application of Part</i>
This Part does not apply to contractual terms-
(a) contained in a 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.

<b>SCOCA UCT Working Party</b>
This Part does not apply to contractual terms –
<del>(a) contained in a contract to which the Consumer Credit (Victoria) Act 1995 applies</del>
<del>(b)</del> that are required or expressly permitted by law, but only to the extent required or permitted.

As noted previously, the UCCC is uniform across all State and Territory jurisdictions and there is already a capacity to re-open unjust credit contracts. It is arguable that the same considerations regarding substantive unfair terms in consumer contracts generally apply to unfair terms in consumer credit contracts. Exempting consumer credit contracts from general unfair contract terms regulation may send the wrong message to credit providers about unfair terms and may encourage other industries to seek exemptions on the basis that there is other legislation or another consultation process dealing with their contracts. The preliminary recommendation of the Working Party was that consumer credit contracts (which are currently governed by the UCCC) should not be excluded from general unfair terms legislation.

However, it is also noted that by virtue of sections 58 to 64 UCCC, endorsement is given to unilateral change clauses provided that they comply with certain procedures. On the face of it, this would seem to run contrary to general unfair terms provisions.

<sup>68</sup> Report from the Commission on the Implementation of Council Directive 93/13/EEC op cit

<sup>69</sup> UK Response to the European Commission Review of Directive 93/13/EEC on Unfair Terms in Consumer Contracts

This does raise the potential for some industry specific difficulties where there is general legislation.

Question 11:

Do you have any comments on the applicability of unfair terms provisions?

Question 12:

Should consumer credit contracts be covered by general unfair terms legislation? Why/why not?

### c. What is an 'unfair term'

#### **UK: *Unfair Terms in Consumer Contracts Regulations 1999***

##### **5 Unfair terms**

(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 [particularly in the context of a pre-formulated standard contract]<sup>70</sup>.

(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 [nevertheless]<sup>71</sup> 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.

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

##### **6 Assessment of unfair terms**

(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.

<sup>70</sup> The words in brackets appear in the EU Directive but not in the UK Regulations.

<sup>71</sup> The word in brackets appears in the EU Directive but not in the UK Regulations.

**Victoria: Fair Trading Act 1999**

**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.

**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.....

(NB: 32U *Definitions*

"consumer contract" includes a standard form contract<sup>72</sup>

"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)

**SCOCA UCT Working Party**

**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.<sup>73</sup>

There are 3 matters of significance with respect to what is regarded as an unfair term:

- (a) should legislation be limited to terms which have not been individually negotiated as in the UK? That is, should this be a threshold matter or a factor to be taken into consideration as in the Victorian provisions?
- (b) the use of the term 'good faith' (UK and Victoria); and
- (c) the use of the phrase 'in all the circumstances' (Victoria).

• **Individually negotiated terms**

Again, the EU review report found that a number of member states had not limited their provisions to non-negotiated terms and had not experienced problematic consequences. The UK Government's response to the review recommended that individually negotiated terms should be included provided that they would not be regarded as unfair if the trader had taken reasonable steps to ensure that the consumer understood what was agreed and the foreseeable consequences. Not surprisingly, however, in the United Kingdom businesses generally were not in favour of such a proposal and consumer associations were.

***Arguments against extending unfair terms provisions to individually negotiated contracts***

In relation to individually negotiated terms the arguments against the application of unfair terms provisions include the following:

<sup>72</sup> Note: this definition is to be repealed.

<sup>73</sup> It is interesting to note that the ACIF Guideline has the following definition: *A term in a Contract may be unfair if it causes a significant and unreasonable imbalance in the parties' rights and obligations arising under the Contract to the detriment of the Consumer* (clause 4.1).

- existence of opportunity to negotiate terms and freedom to refuse to contract on unacceptable terms;
- operation of market forces where persons seeking to contract on unreasonable terms will exit market;
- regulation unnecessary to protect legitimate interests of contracting parties as they are able to do so themselves;
- existence of other legal protections such as unconscionable conduct, misleading and deceptive conduct, implied warranties, limitations on the legal effect of certain disclaimers and exclusion clauses etc;
- unnecessary interference with freedom to contract;
- existence of industry specific legislation to provide required protection where necessary e.g. UCCC, *Insurance Contracts Act 1984* (Clth); and
- introduction of unnecessary uncertainty into contracting through the use of a “fairness test” (a term that may be unfair in one circumstance may not be unfair in another).

***Arguments in favour of extending unfair terms provisions to individually negotiated contracts***

A number of arguments are put forward in support of the application of unfair terms provisions also applying to individually negotiated contracts. In many cases these are the same as the arguments put forward in support of unfair terms regulation per se. These include:

- the issue is the fairness of the term in all the circumstances surrounding the making of the contract - whether it was individually negotiated is but one circumstance to be taken into account;
- inequality of bargaining power preventing “real and meaningful” bargaining or negotiation;
- freedom to contract may not really exist in any event: public policy considerations; common law doctrines and principles such as with respect to penalty clauses; equitable doctrines such as unconscionability and fraud; and a variety of statutory provisions such as Sale of Goods legislation;
- complexity of contracts and inability to fully understand all terms even those which have been “negotiated”;
- an individual negotiation of a term is but one circumstance to be taken into account in determining whether a term is unfair in all the circumstances;
- increased certainty of contract; and
- ineffectiveness of other protections and remedies such as prohibitions against unconscionable conduct etc.

The Working Party took the preliminary view that, in accordance with the Victorian provisions, the issue of whether a term was individually negotiated should not be a threshold matter. The fact that a term may not have been drafted in advance does not mean that a consumer will have properly been able to understand it and its effect. Since a power imbalance may still remain, it cannot be said definitively that there has been real negotiation.

Question 13:

Should terms which have been individually negotiated be capable of challenge on the grounds that they are unfair? Why/why not?

The Victorian legislation defines “standard form contract” to mean *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* (s 32U). The onus is on the consumer (or the regulator under section 32Z below) to show that a contract is a *standard form contract*. Where a term is prescribed under the provisions, once it has been shown that it is in a standard form contract, the term is unfair ‘per se’.

The UK Regulations give further guidance as to when a term will be *individually negotiated*. In particular:

- **5(2)** - *a term will 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;*
- **5(3)** - *notwithstanding that a specific term or certain aspects of it in a contract has been individually negotiated the UK Regulations will apply to the rest of the contract if an overall assessment of it indicates that it is a pre-formulated standard contract; and*
- **5(4)** - places the onus upon the trader to prove that a term was individually negotiated.

The UK test of *drafted in advance* is a relatively easy concept to prove from an evidentiary standpoint and appears to be broader in its application than the current concept of *standard form contract*.

Evidentially, it may be helpful if the concept of 'drafted in advance' was adopted. Further, from an evidentiary point of view, there is merit in considering reversing the onus of proof in relation to ‘standard form contract’ or ‘drafted in advance’ such that the trader is required to prove that a term or contract was individually negotiated, rather than the consumer being required to prove that the term or contract was not individually negotiated.

Question 14:

Should the concept of 'drafted in advance' be adopted? Why/why not?

Question 15:

Should the onus of proving that a contract was individually negotiated rest with the trader or the consumer? Why/why not?

**“Good faith”**

The UK and Victorian provisions contain a reference to “good faith”. The original 1994 UK Regulations set out in a Schedule the factors which were to be taken into account in assessing “good faith”:

- (a) the strength of the bargaining positions of the parties;
- (b) whether the consumer had an inducement to agree to the term;

- (c) whether the goods or services were sold or supplied to the special order of the consumer, and
- (d) the extent to which the seller or supplier has dealt fairly and equitably with the consumer.

This list does not appear in the 1999 Regulations. The UK OFT does not equate “good faith” with an absence of “bad faith”. The criteria it uses are:

- transparency: the way in which details of the contract are disclosed to the consumer;
- the availability of information prior to the contract enabling consumers to make an informed choice;
- granting of cooling off periods without penalty;
- warnings advising consumers to read the contract before signing; and
- the terminology does not require legal advice.

***The difficulty of reconciling a good faith requirement with the abstract control objective of unfair terms legislation***

In the UK, there has been considerable debate about the correct interpretation of section 5 of the *Unfair Terms in Consumer Contracts Regulations 1999*, which sets out the basic validity test for an unfair term. The debate has turned on the interrelation of the "contrary to good faith" and the "significant imbalance" criteria.

The Law Commissions' Paper<sup>74</sup> identifies no less than four different views in the cases and academic literature regarding the interrelation of the two criteria.<sup>75</sup>

Considering the wording of section 5 in isolation, the correct interpretation would appear to be that "contrary to the requirements of good faith" and "significant imbalance" are two separate but equal requirements under the UK Regulations, the first addressing issues of procedural fairness and the second, substantive fairness. On this view, both elements would have to be established before a term could be regarded as unfair within the meaning of the legislation.

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<sup>74</sup> Unfair Terms in Contracts: A Joint Consultation Paper, The Law Commission (CP no. 166) & The Scottish Law Commission (DP no. 119), August 2002.

<sup>75</sup> Briefly summarised at Ch 3, Section 9, especially 3.57-3.62, the 4 views are that:

- "contrary to the requirements of good faith" and "significant imbalance" are two separate but equal requirements, the first addressing issues of procedural fairness and the other of substantive fairness. Both elements must be present;
- "significant imbalance" is in the nature of a threshold requirement only (insignificant imbalances are excluded, as are situations where the balance is in the consumer's favour). On this view, the "good faith" test can and should be read as an entirely *substantive* test;
- conversely, the critical test is whether there is a significant imbalance to the detriment of the consumer. On this view, the reference to good faith is no more than a "bow in the direction of [the] origins" of unfair terms regulation in German jurisprudence;
- finally, it is suggested that there are two routes to unfairness. A term that itself causes a significant imbalance will be contrary to "good faith" and hence unfair. A term that appears in its substance not to have such an effect may in fact also be unfair if there has been a lack of procedural good faith. This approach allows for both procedure and substance to be considered, but allows certain terms to be ruled unfair per se.

The problem with this approach, however, is that it is not consistent with aspects of the UK Regulations that require, in effect, that substantive unfairness alone can make a term unfair. As has been noted previously,<sup>76</sup> the Law Commissions' Paper takes the view that *substantive unfairness alone can make a term unfair under UTCCR*.

As far as the issue under discussion is concerned, there is no material difference between the UK Regulations and Part 2B—Unfair Terms in Consumer Contracts incorporated into the Victorian *Fair Trading Act 1999* in 2003. Like their UK model, the Victorian provisions are not limited to providing individual consumers with a mechanism for challenging particular contractual terms. They also seek to combat the use of unfair terms in consumer and standard form contracts generally and, to this end, give the Director pre-emptive power to seek injunctions to stop the use of terms that are unfair.<sup>77</sup> Indeed, the Victorian legislation reflects, if anything, an even greater commitment to abstract control by the provision it makes for terms to be prescribed as unfair by regulation.

On the basis of the UK experience, it is suggested that the incorporation of a "good faith" requirement in model unfair terms legislation is likely to produce confusion in relation to the abstract control objective, and to require a good deal of tendentious legal reasoning to ensure its survival.<sup>78</sup> At the same time, it is not clear what positive role or function such a requirement would serve, particularly in the context of the Australian legislative framework. This last point is further considered in the next section.

### ***Defining a distinct role for unfair terms legislation within the Australian legal framework***

The UK Regulations (and the EC Directive from which they have been "carved out") arguably represent an attempt to regulate situations involving either substantive or procedural unfairness, or both. At least one of the four interpretations referred to above suggests that the UK Regulations ought to be read as providing, in essence, two routes to unfairness<sup>79</sup> and this is indicated by elements of the UK Regulations' indicative list and other aspects of the wording.<sup>80</sup> The Law Commissions' Paper also supports this view.<sup>81</sup>

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<sup>76</sup> See page 19.

<sup>77</sup> See section 32ZA. As well as covering particular terms in consumer or standard form contracts, an injunction under the section can extend to any similar terms, or terms having like effect, as used or recommended by any person: 32ZA(4).

<sup>78</sup> See fn 75 above and the sections of the UK Law Commissions' Consultation Paper referred to therein. Not surprisingly, perhaps, the Paper provisionally proposes a new test of validity which does not include explicit reference to good faith. At para. 4.94, it states:

We provisionally propose that the basic test in the new legislation should be whether, judged by reference to the time the contract was made, the term is a fair and reasonable one; and that it is not necessary to include an explicit reference to good faith.

<sup>79</sup> See fn 75 (4<sup>th</sup> dot point) above. The Law Commission Paper refers in particular to S. Bright, *Winning the Battle Against Unfair Contract Terms*, (2000) 20LS 331.

<sup>80</sup> 3.62-3.66, Law Commissions' Consultation Paper

<sup>81</sup> *ibid* at 3.63



A "two routes" approach makes sense in the UK context where, it is understood, there is no equivalent to the statutory unconscionable conduct regimes found in Part IVA, TPA and mirror provisions of the State fair trading legislation. In the Australian context, however, where procedural unfairness is clearly dealt with by these existing regimes, coverage of procedural unfairness within an unfair contract terms legislative framework would create unnecessary duplication. It would also be potentially quite confusing given that the relation between the unconscionable conduct and good-faith standards is, arguably, far from clear. (Presumably, "the requirements of good faith" are more demanding than the prohibition against acting unconscionably, but this is difficult territory, particularly given the uncertainty surrounding the concept of good faith in Australian law, discussed above.)

Recognising the differences between the UK and Australian contexts, the Victorian legislation has appropriately removed most of the procedurally-focussed elements of its model. However, it is argued that the "contrary to the requirements of good faith" requirement is a further element of this kind. In the interests of clearly distinguishing the role of unfair contract terms legislation from that of the unconscionable conduct regimes—among other considerations—it should also be removed.

An approach of requiring both procedural and substantive unfairness<sup>82</sup> would make even less sense than the "two routes" approach against the background of Australian jurisdictions' unconscionable conduct regimes. Under those regimes, although the court's attention is directed to substantive as well as procedural factors as potentially relevant, there is no doubt that conduct may be impugned on the basis of procedural elements alone.<sup>83</sup> There would be little sense, given this, in having a provision requiring that *both* procedural and substantive unfairness be established. This consideration is additional to the issue of inconsistency with the abstract control objective, as discussed above. Again, the point is the lack of a clear role for a good faith requirement.

Question 16:

Should a concept of "good faith" be included when determining whether a contractual term is unfair? Why/Why not?

• **'in all the circumstances'**

The Working Party similarly considered that the use of the phrase "in all the circumstances" has the ability to include procedural issues and for the reasons outlined above in relation to "good faith", this would be neither necessary nor desirable in the Australian context.<sup>84</sup>

Question 17:

Should a reference to "all the circumstances" of the contract be included when determining whether a contractual term is unfair? Why/Why not?

<sup>82</sup> Referred to p. 2 above. See fn 75 (1<sup>st</sup> dot point)

<sup>83</sup> See, eg, JW Carter & DJ Harland, *Contract Law in Australia*, 4<sup>th</sup> ed., Butterworths, 2002

<sup>84</sup> The ACIF Guideline states at clause 4.2 that *the nature of the goods or services in the Contract and all the circumstances surrounding the conclusion of the Contract are relevant to an assessment as to whether a term in a contract is unfair.*

## d. Assessment of unfair terms

### **UK: *Unfair Terms in Consumer Contracts Regulations 1999***

#### **6 Assessment of unfair terms**

(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.

#### **SCHEDULE 2 Regulation 5(5)**

#### **Indicative and non-exhaustive list of terms which may be regarded as unfair**

**1** Terms which have the object or effect of –

- (a) excluding or limiting the legal liability of a seller or supplier in the event of the death of a consumer or personal injury to the latter resulting from an act or omission of that seller or supplier;
- (b) inappropriately excluding or limiting the legal rights of the consumer vis-à-vis the seller or supplier or another party in the event of total or partial non-performance or inadequate performance by the seller or supplier of any of the contractual obligations, including the option of offsetting a debt owed to the seller or supplier against any claim which the consumer may have against him;
- (c) making an agreement binding on the consumer whereas provision of services by the seller or supplier is subject to a condition whose realisation depends on his own will alone;
- (d) permitting the seller or supplier to retain sums paid by the consumer where the latter decides not to conclude or perform the contract, without providing for the consumer to receive compensation of an equivalent amount from the seller or supplier where the latter is the party cancelling the contract;
- (e) requiring any consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation;
- (f) authorising the seller or supplier to dissolve the contract on a discretionary basis where the same facility is not granted to the consumer, or permitting the seller or supplier to retain the sums paid for services not yet supplied by him where it is the seller or supplier himself who dissolves the contract;
- (g) enabling the seller or supplier to terminate a contract of indeterminate duration without reasonable notice except where there are serious grounds for doing so;
- (h) automatically extending a contract of fixed duration where the consumer does not indicate otherwise, when the deadline fixed for the consumer to express his desire not to extend the contract is unreasonably early;
- (i) irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract;
- (j) enabling the seller or supplier to alter the terms of the contract unilaterally without a valid reason which is specified in the contract;
- (k) enabling the seller or supplier to alter unilaterally without a valid reason any characteristics of the product or service to be provided;
- (l) providing for the price of goods to be determined at the time of delivery or allowing a seller of goods or supplier of services to increase their price without in both cases giving the consumer the corresponding right to cancel the contract if the final price is too high in relation to the price agreed when the contract was concluded;
- (m) giving the seller or supplier the right to determine whether the goods or services supplied are in conformity with the contract, or giving him the exclusive right to interpret any term of the contract;

<p>(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;</p> <p>(o) obliging the consumer to fulfil all his obligations where the seller or supplier does not perform his;</p> <p>(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;</p> <p>(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.</p> <p><b>2 Scope of paragraphs 1(g), (j) and (l)</b></p> <p>(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.</p> <p>(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.</p> <p>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.</p> <p>(c) Paragraphs 1(g), (j) and (l) do not apply to:</p> <ul style="list-style-type: none"> <li>– 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;</li> <li>– contracts for the purchase or sale of foreign currency, traveller's cheques or international money orders denominated in foreign currency.</li> </ul> <p>(d) Paragraph 1(l) is without hindrance to price indexation clauses, where lawful, provided that the method by which prices vary is explicitly described.</p>
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<p><b>Victoria: Fair Trading Act 1999</b></p> <p><b>A32X. Assessment of unfair terms<sup>85</sup></b></p> <p>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—</p> <p>(a) permitting the supplier but not the consumer to avoid or limit performance of the contract;</p> <p>(b) permitting the supplier but not the consumer to terminate the contract;</p> <p>(c) penalising the supplier but not the consumer (sic)<sup>86</sup> for a breach or termination of the contract;</p> <p>(d) permitting the supplier but not the consumer to vary the terms of the contract;</p> <p>(e) permitting the supplier but not the consumer to renew or not renew the contract;</p> <p>(f) permitting the supplier to determine the price without the right of the consumer to terminate the contract;</p> <p>(g) permitting the supplier unilaterally to vary the characteristics of the goods or services to be supplied</p>
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<sup>85</sup> The ACIF Guideline contains a list of examples of unfair terms for the assistance of the industry.

<sup>86</sup> This is a typographical error and should read 'penalising the consumer but not the supplier.....' and is to be amended.

- 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.

**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.

**SCOCA UCT Working Party**

32X:

(1) Without limiting section 32W, in determining whether a term of a consumer contract is unfair, a court or the Tribunal ~~may~~ shall take into account, ~~among other matters:~~

(a) the nature of the goods or services to which the contract relates

(b) all the other terms of the contract

(c) any other contract or term in a contract on which the contract containing the subject term is dependent

(d) whether the term was individually negotiated

(e) whether the term is a prescribed term

(f) whether the term has the object or effect of – [list (a) – (m) as currently in 32X]

(n) permitting a supplier but not a consumer to restrict, remove or limit legal liability under the contract

(2) The court or Tribunal may take into account all such other matters as it considers appropriate.

The Working Party took the preliminary view that the court should be directed, not simply enabled, to take certain matters into account in making its assessment in order to ensure clarity and consistency. It was also of the view that the matters to be taken into account should include, as stated in the UK provisions, the nature of the goods or services and all the other terms of the contract or of another contract on which it is dependent. The ‘offending’ term should be placed in the context of the whole contract as it is possible that a term which on its own appears unfair, may, in that context, and for the industry to which it relates, be quite reasonable. As noted previously, however,

the Working Party was not in favour of a reference to ‘all the circumstances attending the conclusion of the contract’, also included in the UK provision.

Question 18:

Should the courts be mandated or enabled to take the matters listed in the Victorian provision into account? Please give reasons.

Question 19:

Do you have a preference for the style of list in the Victorian provision or in the Schedule to the UK Regulations? Please give reasons.

#### **e. Inclusion/exclusion of terms relating to price and the main subject matter**

A significant difference between the UK and Victorian approaches is that in the UK version, the main subject matter of the contract and the price are excluded from an assessment of unfairness provided that such clauses are in plain, intelligible language.

##### **The EU View**

It should be noted that 7 of the 15 EU Member States have not transposed Article 4 of the EU Directive into their legislative models: *the courts of these Member States have not taken it upon themselves to revise prices or meddle with the main subject matter of contracts in a massive or indiscriminate way as had been feared by the proponents of certain doctrines or in certain professional circles.*<sup>87</sup>

It should be noted that the exemption as to price is only as to its *adequacy*, that is, the price/quality ratio. Thus many other terms which are relevant to price, such as the manner in which a price might be altered, are subject to the Directive/UK Regulations.

The EU review report, considered that, generally, the price and the subject matter of the contract (often referred to as ‘core’ provisions) do not raise difficulties resolvable by unfair terms regulation. However, the wording of Article 4 itself was causing some interpretive problems. Insurance was cited as an example: is a term excluding a specified risk from a contract a term as to the subject matter of the contract (which would not be covered by the Directive) or a term limiting liability (which would be covered). The European Commission therefore posed the question as to whether these limitations on the applicability of the Directive should be removed.

The Economic and Social Committee of the EU considered that the exclusions as to price and main subject matter should be removed.<sup>88</sup>

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<sup>87</sup> *Report from the Commission on the Implementation of Council Directive 93/13/EEC on Unfair Terms in Consumer Contracts* – Brussels 27.04.2000 – COM (2000) 248 Final

<sup>88</sup> Opinion of the Economic and Social Committee on the “Report from the Commission on Implementation of Council Directive 93/13/EEC on Unfair Terms in Consumer Contracts” - Official Journal of the European Communities (2001/C 116/25

## The UK View

UK commentators have remarked that the exclusion of the core terms has created some difficulties.

Collins<sup>89</sup> notes that the major difficulty in the UK has been with the application of the *main subject matter*. The OFT UK has taken the view that the only terms that can be regarded as 'core' are those *that are central to how the consumer perceives the bargain* and that the consumer should be given the opportunity to see and read such terms before the contract is entered into.

The Law Commissions' Paper<sup>90</sup> describes the following example:

*In a contract for a 'holiday with travel by air', a clause in the small print allowing the company, in the event of air traffic control strikes, to carry the consumer by rail and sea seems to be reviewable for fairness: but it can be argued that if the holiday is 'with travel by air or, in the event of strikes, by rail and sea', the option of mode of travel might be part of the definition of the main subject matter. In other words, whether the term relates to the definition of 'main subject matter' depends (at least in part) on how the 'deal' was presented to the consumer.*

In *DGFT v First National Bank plc*<sup>91</sup>, Lord Bingham in the House of Lords noted that there is a *distinction between the term or terms which express the substance of the bargain and incidental (if important) terms which surround them.*

In response to the EU review report, the UK Department of Trade and Industry (DTI)<sup>92</sup> (which is responsible for policy development in relation to consumer protection in the UK) requested input from the UK community. All business respondents wanted to continue with the exclusion as it currently stands. They believed that to remove it would considerably increase complaints. However, all the consumer bodies and some trading standards organisations saw no reason why the core terms should not be subject to a 'fairness test'. Problems which could then be corrected include the excessive charging of elderly people by tradespersons.

The response of the UK Government (as expressed through DTI) was that it preferred to retain the exemption with respect to the main subject matter but only *insofar as those terms are central to how the consumer would have interpreted the main characteristics of the deal on offer, taking into account the terms in which they were advertised or sold, the way the contractual terms were presented and what would normally be expected of the type of contract apparently being offered*

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<sup>89</sup> *Report on the practical implementation of Directive 93/13/EEC in the United Kingdom and the Republic of Ireland* – Rapporteur: Brian St. J. Collins, University of Ulster, Magee College, Londonderry, Northern Ireland – Annexe to Minutes for Proceedings of the Conference The "Unfair Terms Directive": 5 years on - 1-3 July 1999

<sup>90</sup> *Unfair Terms in Contracts* – A Joint Consultation Paper – The Law Commission (Consultation Paper No 166); The Scottish Law Commission (Discussion Paper No 119) July 2002

<sup>91</sup> [2000] QB 672 (CA); [2001] UKHL 52, [2002] 1 AC 481 (HL)

<sup>92</sup> *Commission Review of Council Directive 93/13/EEC on Unfair Terms in Consumer Contracts* – Consultation Paper – DTI, Consumer and Competition Policy Directorate.

It also preferred to retain the exemption as to the price/quality ratio because prices can vary considerably. However, in recognition of the abuse of some vulnerable groups, the exemption would only apply if the price was *not exorbitant or grossly contravened the ordinary principles of fair trading*.

The Law Commissions' Paper considered that a reason for not reviewing such clauses is that they are less likely to be a surprise to consumers as they are more likely to be aware of these terms and understand them, providing that they are in plain language. They concurred that it will depend on the way that the 'deal' is presented to the consumer.

The Law Commissions' Paper has provisionally proposed that both exemptions be retained in the following manner:

*"Core terms"*

- (1) The new legislation should exclude the main subject matter from the scope of review, but
- (2) only in so far as
  - (a) it is not substantially different from what the consumer should reasonably expect, and
  - (b) it is stated in plain language (and is otherwise "transparent".....)

The adequacy of the price should not be reviewable under the legislation, where

- (1) having to make the payment, or the way in which it is calculated, is not substantially different from what the consumer, in the light of what he was told when or before the contract was made and all the other circumstances, should reasonably expect, and
- (2) the price is not one contained in a subsidiary term, provided that the price is stated in plain language (and is otherwise "transparent".....)

The Working Party remains divided on the issue of exclusion of price. The majority of the group favoured the Law Commissions' Paper recommendation. However, there is concern that this is not sufficient to cover, in particular, the difficulties which can be experienced by those living in regional and remote Australia. As one member of the group noted, it is not desirable to be able to dispute the price of a business shirt in David Jones in Canberra: however, it may be a different matter where there is little, if any competition, in the supply of goods and services in a regional area and higher prices are less a question of the extra cost of providing the goods and services in this situation but simply an attempt to take advantage of it.<sup>93</sup>

Question 20:

- (a) Should adequacy of price and/or the main subject matter be included in or excluded from coverage of unfair terms regulation? (b) If they should be excluded, what limits, if any, should be placed on that exclusion?

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<sup>93</sup> The ACIF Guideline states that terms specifying prices, fees or charges or the features of any goods or services are *not relevant to an assessment as to whether a term of a Contract is unfair* (clause 4.2.2).

## f. Terms which may be regarded as unfair

Almost all respondents to the UK DTI consultation paper with respect to the EU review report said that the list was useful but needed to be clarified and amplified<sup>94</sup> – including being re-drafted in plain English! In addition, a mechanism to update the list would be useful. Some respondents believed that not all terms should be regarded equally – some matters should always be considered as unfair and put on a “black” list, for example, terms excluding liability for death or personal injury caused by the fault of the other party; penalty clauses; whole agreement clauses; and restrictions on legal remedies. Alternatively, some terms could be presumed to be unfair unless business could show that they were fair. As a result, the UK Government’s response to the review was that the list should be amended to improve its clarity and impact (also recommended by the European Commission in its response); a mechanism should be introduced to allow it to be updated; and there should be a black list of terms which are void in all circumstances. The Law Commissions’ Paper took a similar position.

The Working Party considered that the Victorian version of the model has gone some way to addressing these matters. The list included in section 32X is significantly more understandable than the current UK list. The ability to prescribe terms effectively provides for a ‘black’ list, and, in addition, there is a penalty for their use which gives the legislation significant teeth. The use of regulation to prescribe the void terms means that there is a mechanism to update the ‘black’ list. There is no mechanism to update the general list and it was recommended that there be a regulation power in this respect, too. The Working Party did consider that there may be other matters which should be included in section 32X, for example, that noted as (n) in the Working Party alternative above.

Question 21:

(a) Is the Victorian version of the UK model preferable in this respect? (b) Would you recommend any further changes?

Question 22:

Are there other matters which should be included in the list in section 32X?

## g. Effect of unfair term

**UK: *Unfair Terms in Consumer Contracts Regulations 1999***

### **8 Effect of unfair term**

(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.

<sup>94</sup> For example, one third of the cases on the CLAB database relate to term type 1(b) and therefore it would be helpful if there were more focussed indicative terms here.



**Victoria: Fair Trading Act 1999**

**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) Sub-section (1) applies to any consumer contract entered into on or after the commencement of section 12 of the **Fair Trading (Amendment) Act 2003**.
- (5) Sub-section (2) applies to any standard form contract whether entered into before or after the term is prescribed.

**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.

In the EU review report it was noted that the UK sanction as contained in section 8 of the UK Regulations is quite weak. The Economic and Social Committee in its response to the EU review report stated that whilst it would not support a criminal penalty, it did consider that the onus of proof should be reversed with the wronged party then having to prove the degree of damage suffered. The UK Government in its response stated that court actions are problematic for consumers: there is no penalty for detriment caused for prior use. Whilst it did not, in general, favour punitive damages or criminal penalties, it would be prepared to consider the latter if there was a “black” list.

As noted in the section above, the Victorian provisions are stronger in this regard.

**Question 23:**

- (a) Do you support the use of criminal sanctions where a term has been prescribed by regulation? Why/why not? (b) What other mechanism could be used to ensure that the legislation is taken seriously?

With respect, however, to non-prescribed terms, the Working Party was also concerned that the sanction of the offending terms being void was not sufficient – or would not necessarily leave the consumer in a better position and questioned whether the court should have the ability to vary unfair terms.

It is unclear from the wording of the UK provision whether a court can strike out the offending parts of a clause and leave the rest, but the Law Commissions’ Paper notes that it is likely that the court can do this. It notes that it is likely that the court is entitled under UTCCR to treat a clause as divisible into separate ‘terms’ and to strike

down only those that are unfair, leaving the rest and cites *DGFT v First National Bank plc*<sup>95</sup> as support for this proposition.

The UK UCTA does not contain a specific provision on the effect of an exclusion or restriction being held invalid. Where a term of a contract is held to be invalid, it is simply of no effect and the parties' relationship continues as if the term had not been included in the contract.

The Law Commissions' Paper concluded, on balance, that a term of a contract which offends Part I of the UCTA can remain effective, to the extent that it also contains exclusions or restrictions which do not offend UCTA.

It has been proposed by the Law Commissions' Paper that, if the UTCCR and UCTA are replaced by a single piece of legislation, where a term is void under the legislation, the whole clause should be of no effect to the extent that it is detrimental to the consumer and the contract should continue to bind the parties if it is capable of continuing in existence without the unfair term.

In Australia, the CRA empowers the NSW courts with a range of remedies if it finds a contract to have been unjust in the circumstances relating to the contract at the time it was entered into. The courts' powers are discretionary. A party to the contract may seek relief from a contract or use the provisions of the CRA as a defence.

Section 7 of the NSW CRA, in combination with the ancillary relief provided for in section 8 and the first schedule to the CRA, provides an extremely wide range of remedies.

Once it is satisfied that the contract is unjust, the court may, at its discretion, 'for the purpose of avoiding as far as practicable an unjust consequence or result':

- refuse to enforce any or all of the provisions of the contract;
- make an order declaring the contract void, in whole or in part; and/or
- make an order varying, in whole or in part, any provision of the contract.

Any order may have prospective or retrospective effect.

The UCCC provides at sub-section 71(c) that the court can set aside either wholly or in part or revise or alter an agreement made or mortgage given in connection with the transaction.

Under the TPA and its equivalents, the courts have a general power to void a contract or instrument in whole or in part or to vary it.

An examination of the literature on the law of contracts reveals a considerable body of case law on the issue of void contracts/terms, but very little solely on the issue of the variation of contract terms by the courts. In general, the courts have been reluctant to impose a variation upon the parties to a contract and have instead tended to pass the contract back to the parties to negotiate a variation. It should be noted, however, that the courts in effect vary contracts every time they sever a term for illegality.

In the UK Government response to the EU review report, it was noted that *.....the Government would be concerned at any suggestion that the courts should be required*

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<sup>95</sup> [2001] UKHL 52

*effectively to suggest draft contract terms to replace unfair terms. The court would generally not be in a position to do that. For example, difficulties would arise in a situation where a court gave guidance as to what is a fair contractual term, and the term were later found to be unfair by another court. If the court judgment explains adequately why a particular term is unfair, it should then be relatively clear to the firm what they want to do to rectify that error.*

The Working Party took the preliminary view that the legislation should only provide for a term found to be unfair to be void. There should not be a power for a court/tribunal to vary such a term for the reasons set out above, and also because it was considered that it may create too much uncertainty for business.

However, recognising the weakness of the current provisions, the Working Party also recommended that there should be remedies in addition to the voiding of a term such as being able to order the payment of a sum of money found to be owing by one party to another party; by way of damages; by way of restitution; or to order the refund of any money paid under a void term. Consumers may be reluctant to take proceedings if the only outcome is that the term is void and they have suffered some financial detriment. Similarly, traders might not be sufficiently discouraged from using unfair terms if the most that could occur is the term being found to be void. The wording of the Victorian provision does not create a prohibition as such and therefore other sections in fair trading/consumer protection legislation providing for remedies may not be activated. It was also considered that other equitable remedies contained in such sections may not be suitable for unfair contract terms situations.

Question 24:

Should there be a power for a court/tribunal to vary a term or only declare it void? Please give reasons.

Question 25:

Should there be other remedies available, such as compensation, restitution, damages? Why/why not? If yes, please detail.

Question 26:

What other sanctions would be appropriate in order to make regulation of unfair terms effective?

## **h. Plain and intelligible language**

**UK: *Unfair Terms in Consumer Contracts Regulations 1999***

**7 Written contracts**

(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.

**Victoria: Fair Trading Act 1999**

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.

Again, responses to the EU review report indicate that the sanction for failure to use plain, intelligible language is weak. A consumer can still be disadvantaged by the most favourable of interpretations. The Victorian legislation is stronger. Section 163 is a general provision of the Victorian *Fair Trading Act* which was amended when the provisions as to unfair contract terms were added. The Director can apply to the Tribunal for an order prohibiting a supplier not complying with the section's requirements from using the provision (or similar) again. Failure to comply incurs a penalty of 60 penalty units (120 for a body corporate). It should, however, be noted that 10 point is not a standard size: 10 point in one font can be significantly different to another: for example:

This is 10 point in Baskerville.

**This is 10 point in B Avant Garde Demi.**

*This is 10 point in Bickley Script.*

It should be noted that, despite the weakness of the sanction, the EU and UK bodies involved with unfair term regulation consider the issue of clarity of the contract as fundamental.

The exemption to coverage of core terms in sub-section 6(2) of the UK Regulations is only in so far as the terms are *in plain intelligible language*.

Bradgate<sup>96</sup> noted that this was an aspect of the UK Regulations which was expected to have a significant impact due to the traditional drafting approach of English lawyers. *A contract, after all, is a tool. It ought to be designed to be comprehensible to its intended users.*

<sup>96</sup> *Experience in the United Kingdom* – Robert Bradgate, Reader in Commercial Law, Institute for Commercial Studies, University of Sheffield - THE INTEGRATION OF DIRECTIVE 93/13 INTO THE NATIONAL LEGAL SYSTEMS for the Conference The "Unfair Terms Directive" : 5 years on - 1-3 July 1999

The EU review report<sup>97</sup> stated that Article 5, on which section 7 is based, is itself based on the principle of transparency. This principle also includes the ability of the consumer to obtain all the information they need to make a decision prior to concluding the contract. It expressed concern that breach of section 7 was not regarded as unfair and not penalised in any way, since this would only result in the term being interpreted in the way most favourable to the consumer – which could, in fact, not be of particular benefit to the consumer.

The EU review report therefore asked whether there was a need to *flesh out the notion and function of the principle of transparency?*

The response of the Economic and Social Committee<sup>98</sup> to the above was that *contractual terms must be drafted plainly, clearly and unambiguously, so that they are understandable to the average consumer applying normal diligence* and if they are not, they should be void.

The DTI<sup>99</sup> reported that whilst business respondents understood the need for a requirement that contracts be drafted in plain, intelligible language, no further explanation was required beyond including the legibility of the print. However, overall, it was agreed that it was essential that terms are easy to read and understand and the principle could be more detailed. It was noted that there is no standard against which to judge the requirement.

The UK Government's position (reported by DTI) supports the approach of the OFT UK. Contracts must be intelligible to ordinary consumers without referral to legal advice; they should use normal words with their usual meaning; legal jargon or terminology which the average consumer would not be familiar with should be avoided; sentences should be short and the text broken up with appropriate headings; the print should be of a size and colour that can be read without difficulty.

The Law Commissions' Paper<sup>100</sup> considered that the use of plain and intelligible language was a vital aspect of fairness and that issues of print legibility and the layout of the document are all important aspects of "transparency". It therefore provisionally recommended that transparency should be taken into account when assessing fairness and remain a condition of exemption of the "core" terms. Whilst failure to be transparent would not automatically make a term unfair, it should still be possible for a term to be found to be unfair either solely or principally on that ground. Repetition

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<sup>97</sup> Report from the Commission on the Implementation of Council Directive 93/13/EEC on Unfair Terms in Consumer Contracts – Brussels 27.04.2000 – COM (2000) 248 Final

<sup>98</sup> Opinion of the Economic and Social Committee on the "Report from the Commission on Implementation of Council Directive 93/13/EEC on Unfair Terms in Consumer Contracts" - Official Journal of the European Communities (2001/C 116/25)

<sup>99</sup> Commission Review of Council Directive 93/13/EEC on Unfair Terms in Consumer Contracts – Consultation Paper – DTI, Consumer and Competition Policy Directorate.

<sup>100</sup> *Unfair Terms in Contracts* – A Joint Consultation Paper – The Law Commission (Consultation Paper No 166); The Scottish Law Commission (Discussion Paper No 119) July 2002

of the *contra proferentem* rule<sup>101</sup> is probably not strictly necessary, but the Law Commissions' Paper considered that it would do no harm to re-iterate it.

The Working Party remained divided on how unclear terms should be treated. On the one hand, it was argued that the ability to be able to readily read and understand a contract term is fundamental to fairness in terms of a person having the ability to understand what they have agreed to and therefore it should be in the list in section 32X(1) of the Victorian provisions. On the other hand, it was argued that a term may be difficult to read but be entirely fair in its content – illegibility does not go to the issue of fairness of the term as such: there are two separate issues and should not be included.

It was recommended that, as a minimum, there should be a general clause in fair trading legislation similar to the amended section 163 of the Victorian Act. The Director can seek an order prohibiting a term in breach from future use with a penalty for non-compliance.

It was further recommended that the *contra proferentem* rule should be stated in the provisions. Whilst this may not be strictly necessary, it is useful to state it so that non-lawyers reading the provisions are made aware of this rule.

The ACIF Guideline goes into some detail as to how contracts should be written so that they are in plain and intelligible language as well as print colour and size and so on. It also considers the needs of people from non-English speaking backgrounds and those with disabilities (clauses 6.1, 6.2 and 6.4). It also states where a written term is uncertain, the interpretation that is most favourable to the Consumer should prevail.

Question 27:

(a) Should a term be assessed as unfair because of lack of legibility, clarity, intelligibility, etc? Why/why not? (b) Should there be more detail around what is required?

Question 28:

Should the *contra proferentem* rule be set out in the provisions for the purpose of drawing the attention of suppliers and purchasers to its existence?

## Enforcement Issues

As noted previously, the EU left the mechanics of implementing the unfair term provisions up to each member state. The Working Party took a similar view in terms of implementing provisions in the various Australian jurisdictions. However, there are two significant administrative provisions which would benefit from a consistent approach.

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<sup>101</sup> that where there is doubt about the meaning of a contract term, it should be interpreted in favour of the person who did not draft it.

## a. Injunctions

### **UK: *Unfair Terms in Consumer Contracts Regulation 1999***

#### **10 Complaints – consideration by Director**

(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.

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

(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.

### **Victoria: *Fair Trading Act 1999***

#### **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.

It should be noted that the Victorian Director is enabled to take action whilst the UK Director is mandated to do so. In addition, “qualifying bodies” may apply for an injunction against any person using or recommending the use of an unfair term drawn up for general use in contracts concluded with consumers. The qualifying body must notify the UK Director of its intention to proceed in this way. The definition of “qualifying body” in this context includes the Consumers’ Association as well as

individual industry regulators such as the Director General of Water Services and the Rail Regulator.

Question 29:

(a) Should other bodies be able to apply for injunctions? (b) Should this include designated consumer bodies?

**b. Powers to obtain information and documentation**

<p><b>UK: <i>Unfair Terms in Consumer Contracts Regulation 1999</i></b></p> <p><b>13 Powers of the Director and qualifying bodies to obtain documents and information</b></p> <p>(1) The Director may exercise the power conferred by this regulation for the purpose of -</p> <p>(a) facilitating his consideration of a complaint that a contract term drawn up for general use is unfair; or</p> <p>(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.</p> <p>(2) A qualifying body specified in Part One of Schedule 1 may exercise the power conferred by this regulation for the purpose of -</p> <p>(a) facilitating its consideration of a complaint that a contract term drawn up for general use is unfair; or</p> <p>(b) ascertaining whether a person has complied with -</p> <p>(i) an undertaking given to it or to the court following an application by that body, or</p> <p>(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.</p> <p>(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 -</p> <p>(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;</p> <p>(b) information about the use, or recommendation for use, by that person of that document or any other such document in dealings with consumers.</p> <p>(4) The power conferred by this regulation is to be exercised by a notice in writing which may -</p> <p>(a) specify the way in which and the time within which it is to be complied with; and</p> <p>(b) be varied or revoked by a subsequent notice.</p> <p>(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.</p> <p>(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</p>
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<p><b>Victoria: <i>Fair Trading Act 1999</i></b></p> <p><b>32ZB. Director may require the supply of information</b></p> <p>(1) The Director may exercise the powers conferred under this section for the purposes of--</p> <p>(a) facilitating the Director's consideration of a complaint that--</p> <p>(i) a term in a consumer contract is an unfair term; or</p>
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- (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 sub-section (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 sub-section (2) may be varied or revoked by the Director by a subsequent notice in writing.
- (B) 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 sub-section (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.

## Appendix A

This Appendix contains Annex III to the Report from the Commission on the Implementation of Council Directive 93/13/EEC of April 1993 on Unfair Terms in Consumer Contracts. (Reproduced with the kind permission of the European Communities)

### ANNEX III – Statistics in the CLAB database

This section contains a number of graphs surveying the various data and results entered in CLAB up to now, which currently contains 7 649 cases.

The first set of graphs (1 to 7) simply describes the general data assembled in the base. The following graphs provide a more detailed analysis of the terms themselves (8 to 11) and of their paramount role in certain economic sectors (12.A to 15.B).

**Graph 1** concerns the nature of the decision on the unfairness or otherwise of a contractual term. CLAB contains not only court judgments (though these predominate) but also administrative decisions, arbitration awards, out of court settlements, and sectoral self-regulatory systems in certain Member States.

**Graph 2** concerns the nature of the action. It may be an individual suit (in which one of the contracting parties seeks redress), a preventative measure (notably actions for injunctions, recommendations and self-regulatory systems designed to eliminate the use of unfair terms) or a joint action (in certain Member States, consumer associations may join an individual suit to seek an injunction against the use of unfair terms).

**Graph 3** contains a breakdown of the decisions by outcome (term found to be fair/unfair), including decisions which have not applied the national legislation governing unfair terms to specific cases, on grounds of their being *ultra vires*.

**Graph 4** shows the types of contracts containing the contractual terms which were the subject of a decision: contracts of sale, rental, leasing and services. The latter, which make up the majority of contracts in the database, are further broken down into services relating to goods (repair, installation, maintenance, guarantees and after-sales service, etc.) and services not relating to goods (banking, insurance, credit, transport, electricity, gas, water, health, etc.).

**Graph 5** concerns the nature of the parties. Most of the decisions concern contracts between a professional and a consumer (the notion of consumer either being taken over from the Directive, in the vast majority of cases, or based on national legislation, whose scope is sometimes wider than that of the European instrument). However, CLAB also contains a number of decisions on standard-form contracts concluded between professionals. The main reason for including these contracts is that the same solutions can be applied to consumer contracts.

**Graph 6** shows the number of decisions handed down before and after the deadline for transposition of the Directive. Out of a total of 7 649 cases, approximately 3 000 decisions were made before 1 January 1995 (note that the first case dates back to 4 November 1931 – a judgment handed down by the Icelandic Supreme Court).

**Graph 7** shows the number of actions brought as well as their nature (individual or preventative), with a breakdown by country (Member States of the European Union, plus Iceland and Norway). Hence, preventative actions predominate in Germany, Austria, France and the United Kingdom. Actions of this kind are far less common in Belgium and Spain and do not exist at all in Ireland and Luxembourg.

**Graph 8** provides a breakdown of terms on the basis of whether or not they have been assessed in the light of the Annex to the Directive. Of the 7 649 cases inventoried,

4 497 (59%) were deemed to relate to one or other points in the Annex. This shows not only the importance of the list (and the need to develop it) but also the relevance of the general assessment criterion as to the unfairness of a given term for the remaining 3 152 cases (41%).

**Graph 9** provides a breakdown of the 4 497 cases by each of the 17 points in the Annex (since certain contractual terms may relate to several points in the list, the total number of cases actually amounts to 5 274). The terms most frequently encountered concern point b (exclusion or limitation of the consumer's legal rights in the event of non-performance on the part of the professional), followed by point e (imposition of disproportionate penalties if the consumer fails to perform), point i (binding the consumer to terms that were not communicated to him before conclusion of the contract) and point q (excluding or hindering the consumer's right to take legal action or exercise any other legal remedy).

**Graph 10** provides details as to the nature of the contractual terms considered as unfair.

- 2 443 terms, or 28% out of a total of 8 858, concern obligations imposed by the professional on the consumer. Of these:
  - 1 003 concern exclusions or limitations of rights,
  - 582 concern penalty clauses,
  - 296 prescribe special charges (mainly in contracts concerning commissions, bonds and brokerage),
  - 228 concern liability,
  - 156 concern warranties
  - 91 concern notification procedures imposed on consumers in the event of non-conformity of the good with the contract.

Besides, many terms also concern various "positive" obligations (such as time limits and procedures imposed by the professional in the event of complaints: Clab AT 000012) and "negative" obligations (such as limitations on rights in respect of contracts for hire and contracts for the installation of moveables: Clab SE 000092 and Clab FR 000342).

- 1 380 (16%) concern waiving and limitation of the professional's liability (conformity of the goods delivered or the services provided, damage caused by the professional or third parties, delivery of goods or supply of services, etc.);
- 1 133 (13%) concern the presentation of the general terms and conditions (clarity, intelligibility) and their enforceability by the consumer (terms excluded or included by the professional during the lifetime of the contract);
- 787 (9%) concern the price and its payment (determination, alteration and procedures);

- 787 (9%) concern the termination of the contract (procedures, resolution, extension, withdrawal, etc.);
- 744 (8%) concern procedures for performance of the professional's obligations (characteristics of the products or services, conformity, delivery, etc.);
- 694 (8%) concern the conclusion of the contract (procedures, validity, form, etc.);
- 644 (7%) concern access to justice in the broad sense (courts having jurisdiction, remedies, applicable law, means of proof, etc.);
- 177 (2%) concern interpretation and changes to the contract (modifications, assignment, etc.);
- 69 (1%) concern attempts to circumvent the existing law.

**Graph 11** shows the impact of terms deemed abusive with a breakdown by economic sector. The real estate and financial services sectors are the ones that generate most "jurisprudence" as regards unfair terms. The "other" sector includes miscellaneous types of economic activity such as contracts for subscriptions (newspapers, magazines, pay TV, etc.), repair and maintenance services (keys, locks, clothing, motor vehicles, etc.), manuring, catering trades, film development, lotteries and horse racing, warehousing contracts, parking services, au pair contracts, security systems, mobile telephony, etc.

The subsequent graphs scrutinise certain economic sectors in which unfair terms are most common, namely financial services (graphs 12A and 12B), insurance (graphs 13A and 13B), real estate (graphs 14A and 14B) and basic services (graphs 15A and 15B). The nature of the terms encountered (graph A) is shown for each economic sector, as well as the number of terms deemed abusive, with a breakdown by the different areas linked to the sector in question (graph B). For the "other" sectors, supplementary explanations are provided with a reference to some examples of concrete cases contained in the database.

**Graphs 12A and 12B** concern financial services (with a total of 1 200 unfair terms).

Graph 12A shows that the most frequently encountered unfair terms in financial services concern the obligations imposed on the consumer by the professional (37%), on conclusion of the contract (17%), on presentation and enforceability of the terms in question (10%), on price and payment thereof (9%), and on termination of the contract (8%). The least common unfair terms concern those designed to circumvent the law in force (2%) and those concerning the interpretation and modification of the contract (2%).

Graph 12B shows the abundance of unfair terms in operations linked to consumer credit (37% concerning credit for the purchase of moveables and 8% concerning mortgages). Unfair terms were also found in contracts concerning bank accounts (28%), credit cards and payment cards (9%), investments (2%), cheques (2%) and capital transfer (2%).

Under the rubric "other" (12%) we also find contracts concerning sureties (Clab DE 000004), contracts of guarantee (Clab SE 000043), operations concerning

promissory notes (Clab FI 000179), contracts for management of the recovery of bills of exchange (Clab ES 000341), contracts concerning savings books (Clab AU 000346), and notably contracts for the rental of strongboxes (Clab FR 000210) and financial leasing contracts (Clab BE 000477).

**Graphs 13A and 13B** concern insurance (502 unfair terms in all).

Graph 13A shows the abundance of unfair terms in areas linked to the obligations imposed on consumers (25%), the professional's liability (20%), the presentation and enforceability of terms (16%), procedures concerning performance of the professional's obligation (12%) and procedures for terminating the contract (10%). Finally, there are terms designed to circumvent the applicable law (1%) and terms concerning price and payment (3%).

Graph 13B shows the plethora of unfair terms in contracts for house insurance (21%), motor vehicles (21%), health (15%), liability (13%) and life (8%).

The rubric "others" (31%) includes numerous unfair terms encountered in other insurance policies, notably legal protection insurance (Clab DE 000102 and DE 000972) and holiday insurance (Clab SE 000189). Unfair terms have also been encountered in anti-theft insurance (Clab ES 000074), insurance of moveables other than motor vehicles (Clab IS 000021 and GR 000498), insurance of real estate other than housing (Clab FI 000196), transport insurance (Clab DE 000539), maritime insurance (Clab ES 000562), insurance against bad weather (Clab DK 000007), etc.

**Graphs 14A and 14B** concern real estate (1 336 unfair terms).

Graph 14A shows the frequency of unfair terms governing the obligations imposed by the professional on the consumer (29%), the presentation and enforceability of the contractual terms and conditions (12%), procedures concerning price and payment thereof (12%) and the professional's liability (12%). The least common unfair terms concern circumvention of the applicable law (1%) and terms interpreting and modifying the contract (2%).

Graph 14B concerns unfair terms in building contracts (31%), contracts of sale (16%), contracts for decoration work (10%), contracts for the provision of services by real estate agents (7%) and heating contracts (6%).

The rubric "other" (29%) covers many unfair terms encountered in real estate rental contracts (Clab DE 000017), lift maintenance contracts (Clab ES 000016) and contracts for the connection of alarm systems (Clab NO 00015). Other contractual conditions have been deemed unfair in timeshare contracts (Clab DE 000329), contracts for maintenance and upkeep (Clab GB 000056, BE 000320, DE 001156, FR 000479), contracts for the accommodation of elderly people (Clab FR 000229), etc.

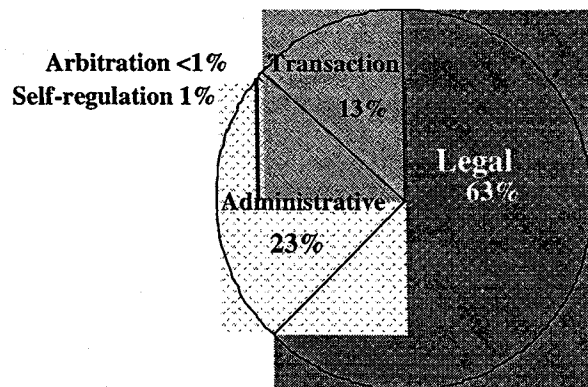
**Graphs 15A and 15B** concern general interest services (480 unfair terms).

Graph 15A highlights the profusion of unfair terms governing the obligations imposed on the consumer by the professional (28%), the presentation of the contractual conditions and their enforceability (15%), the price and payment (13%), termination of the contract (12%) and liability (11%).

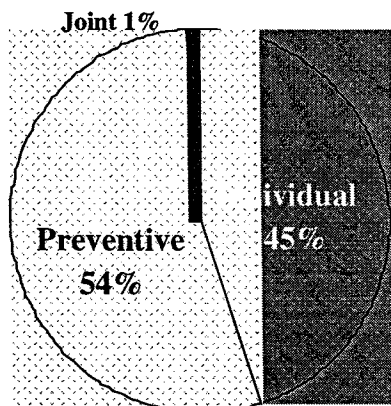
Graph 15B concerns unfair terms in telephone services (31%), water supply (13%), gas (11%), electricity (8%) and postal services (1%), subsectors in which such terms are quite frequently encountered.

The heading "other" (37%) covers numerous unfair terms in cable link-up contracts (Clab DE 000648), Internet services (Clab AT 000655) and heating installation (Clab DE 000601). Besides, unfair terms are also to be found in funeral services (Clab BE 000305), household waste disposal services (Clab DE 001528), installation of cables and gas burners (Clab DE 000431 and DE 000519), etc.

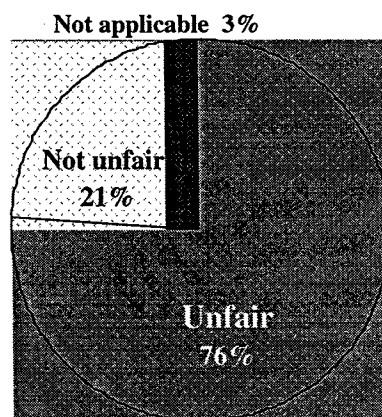
### 1. Nature of the decision



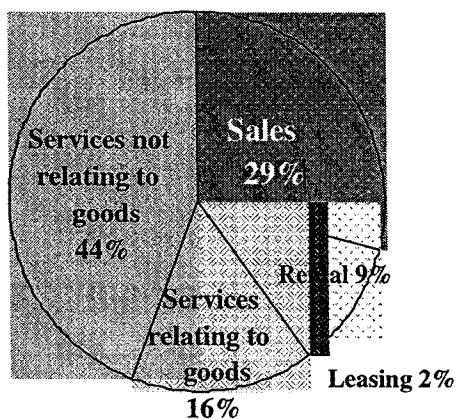
### 2. Type of action



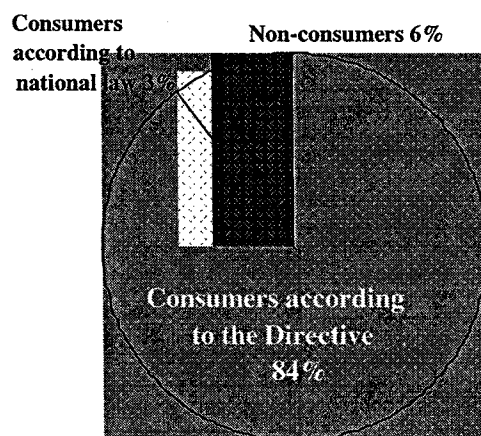
### 3. Assessment



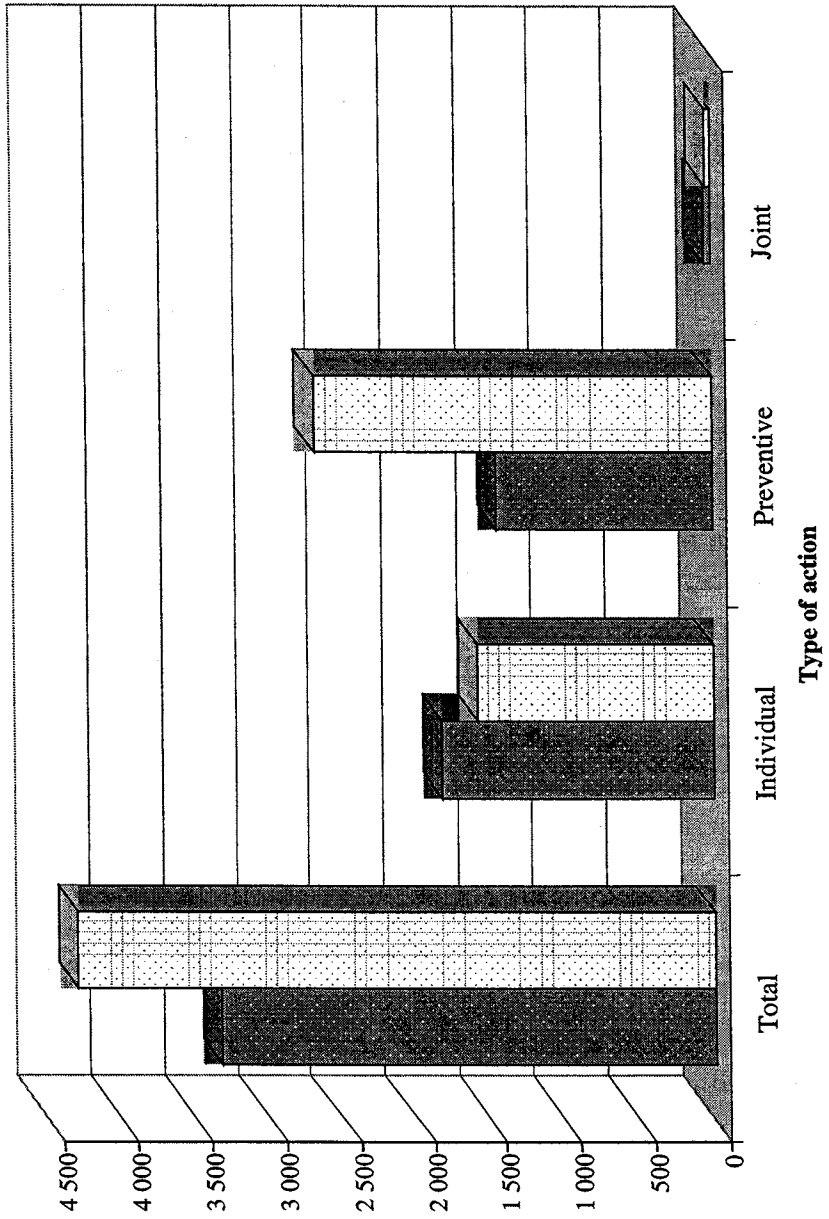
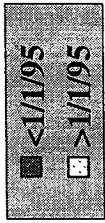
### 4. Type of contract



### 5. Nature of the parties

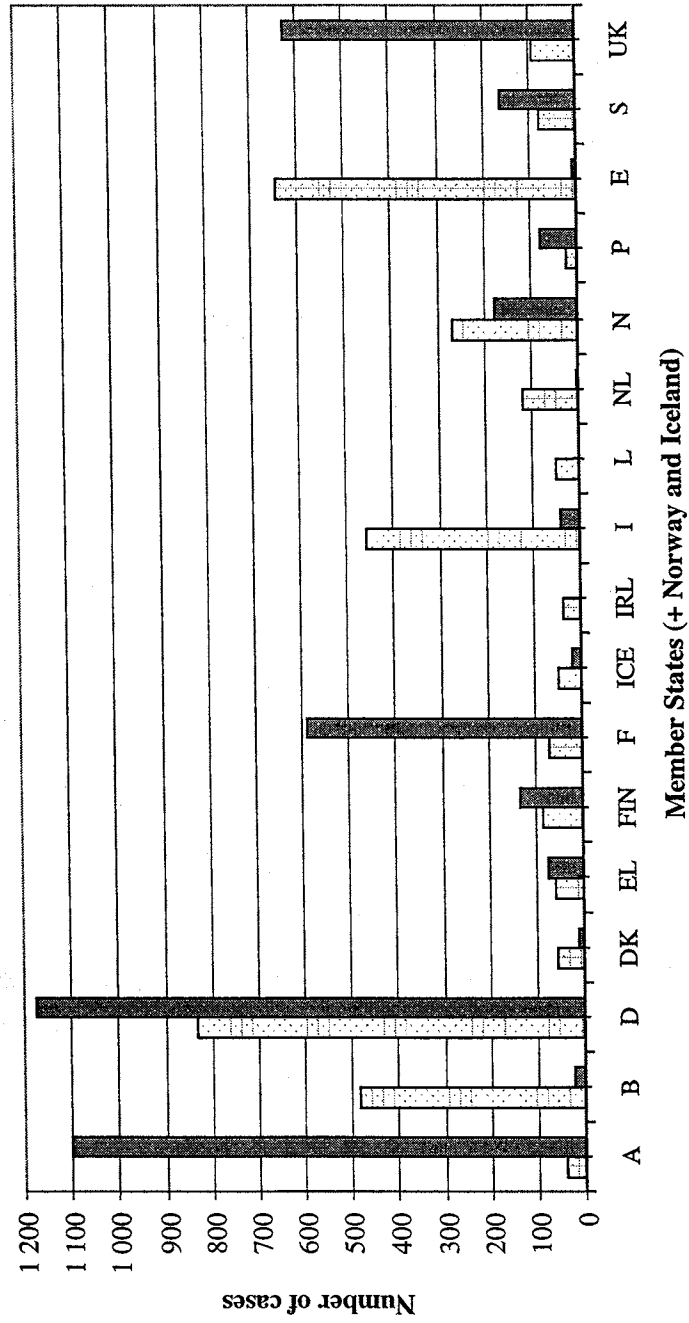
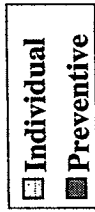


### 6. Number of decisions

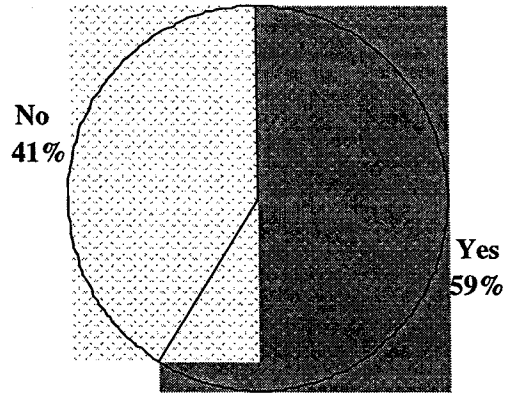




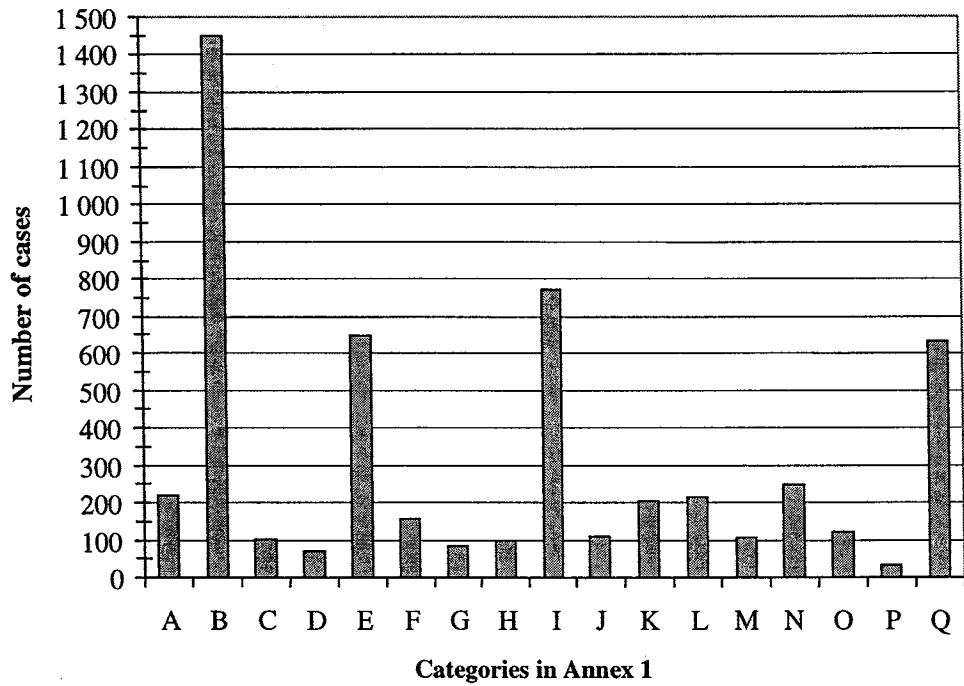
### 7. Type of action



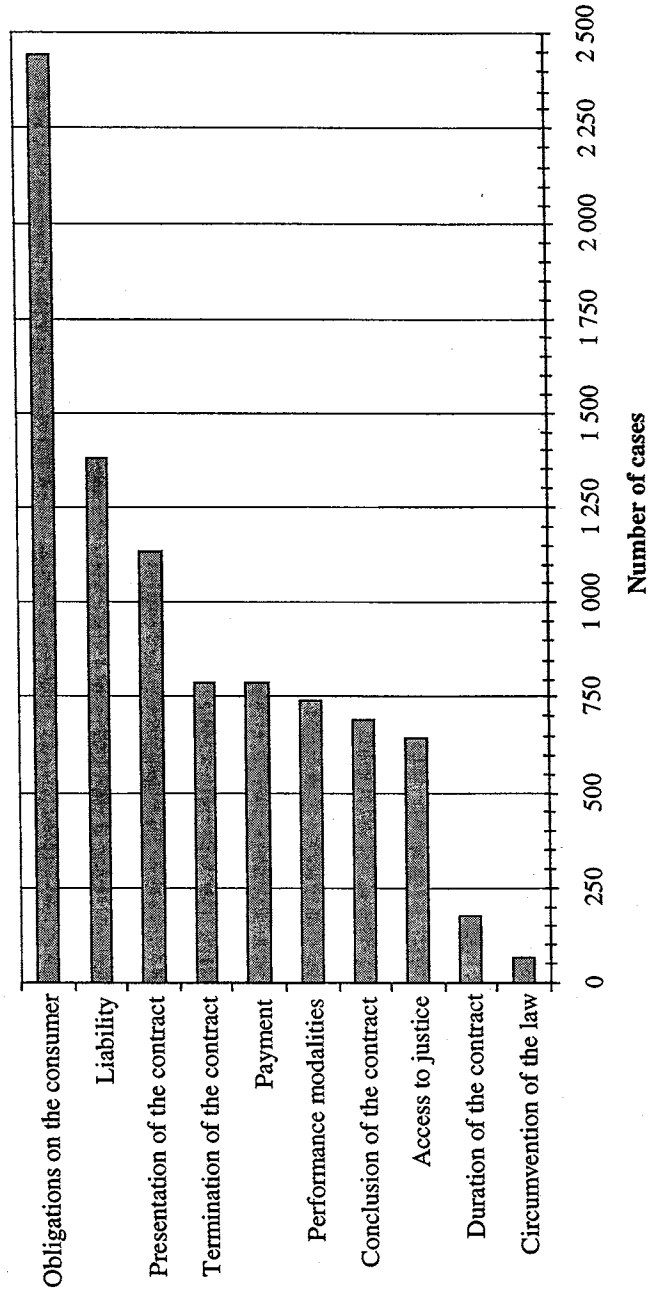
## 8. Terms coming within the scope of Annex 1 of the Directive



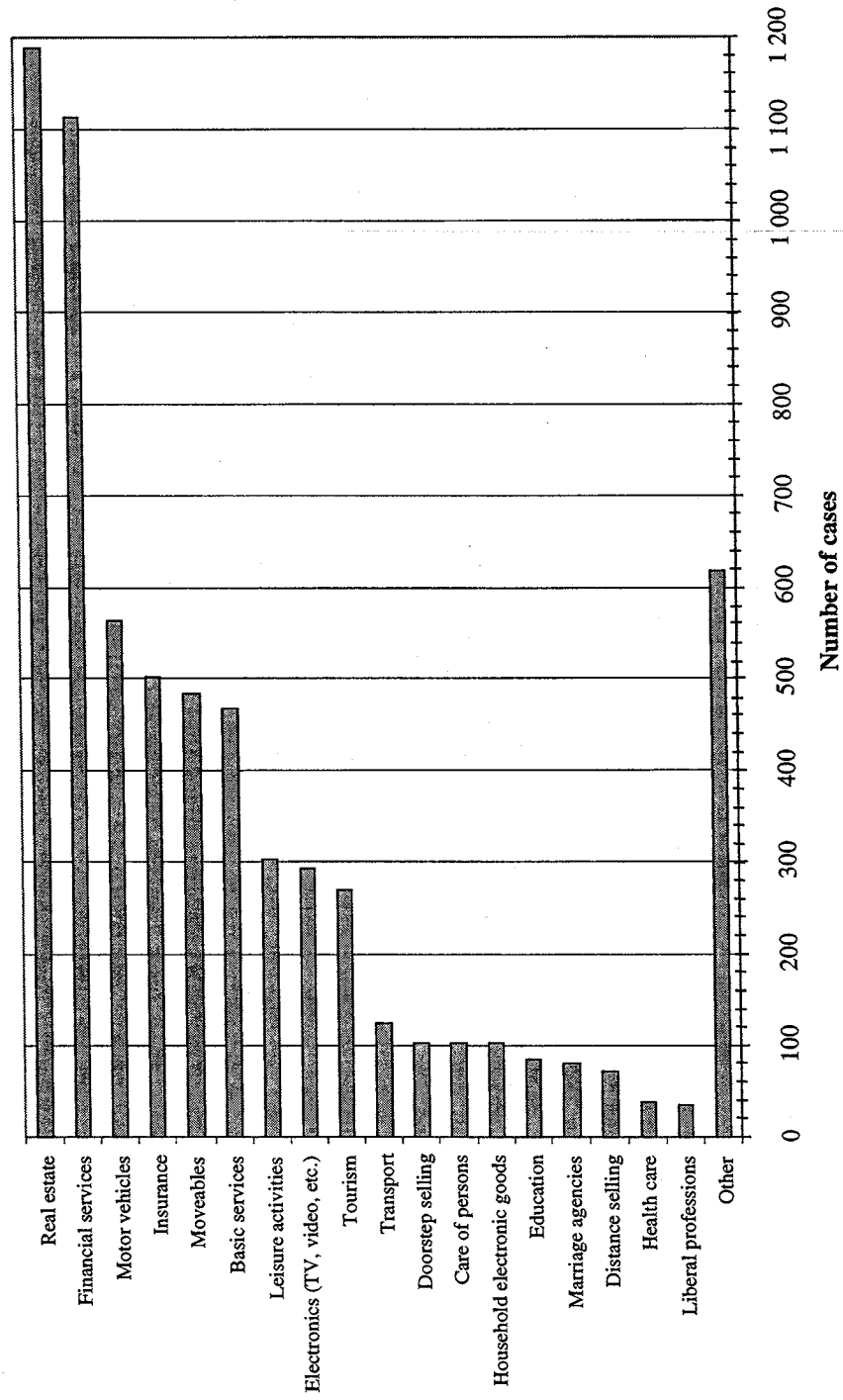
### 9. Annex 1 of the Directive – breakdown by categories

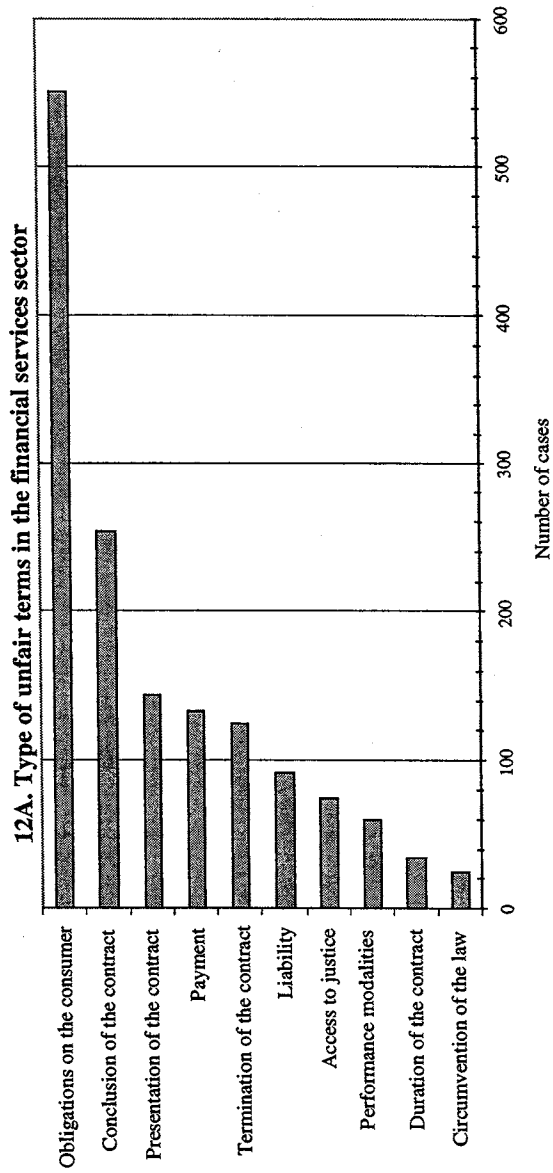


### 10. Types of unfair terms

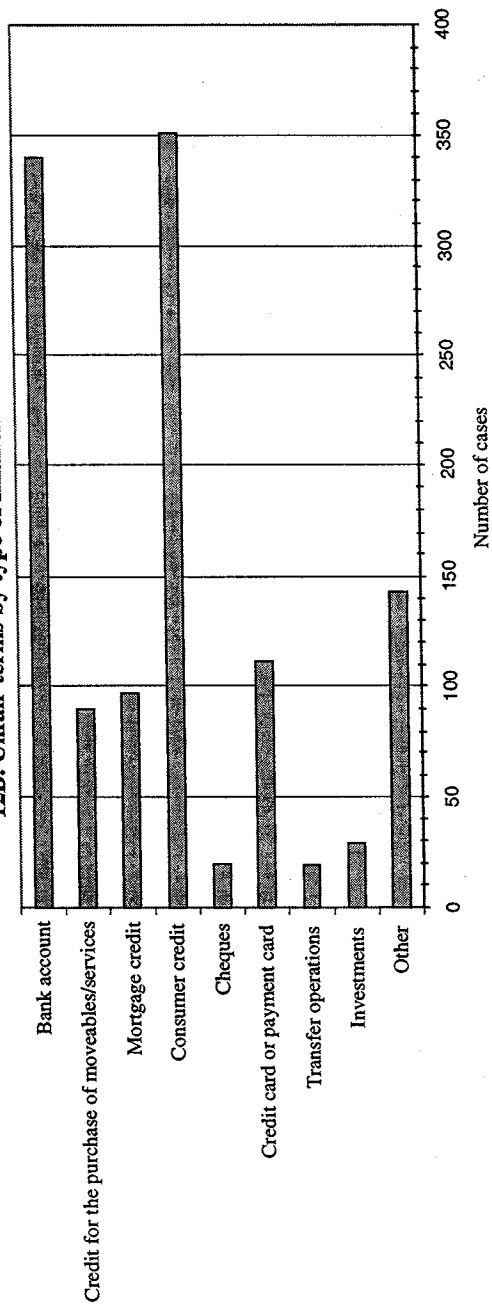


### 11. Unfair terms by economic sector

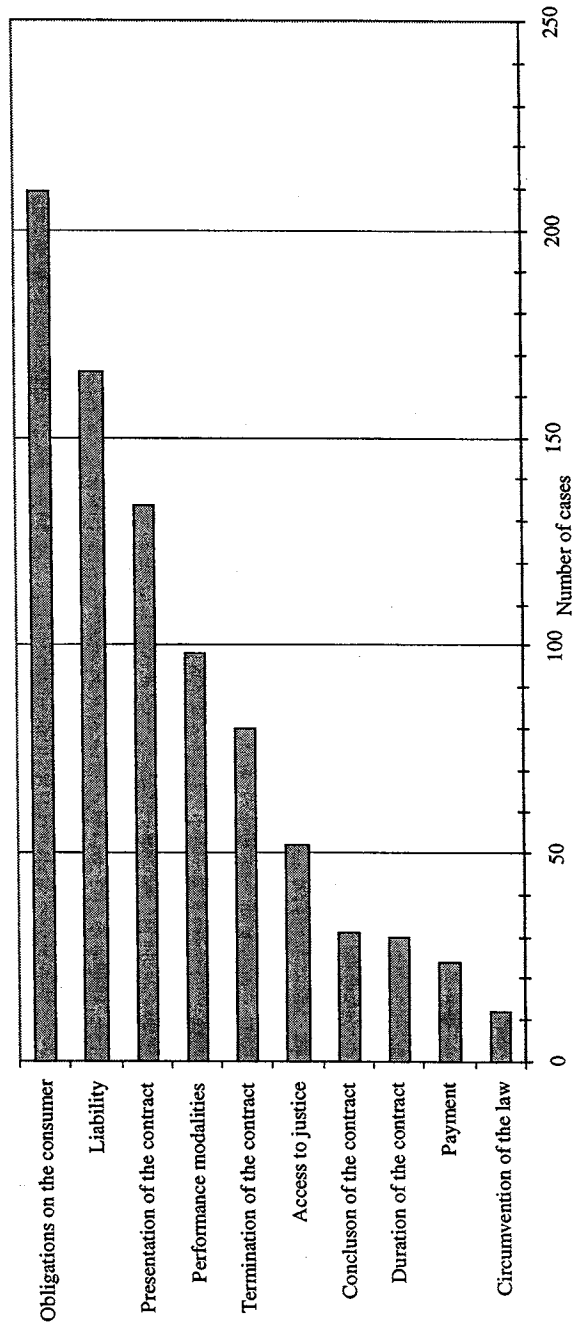




12B. Unfair terms by type of financial service

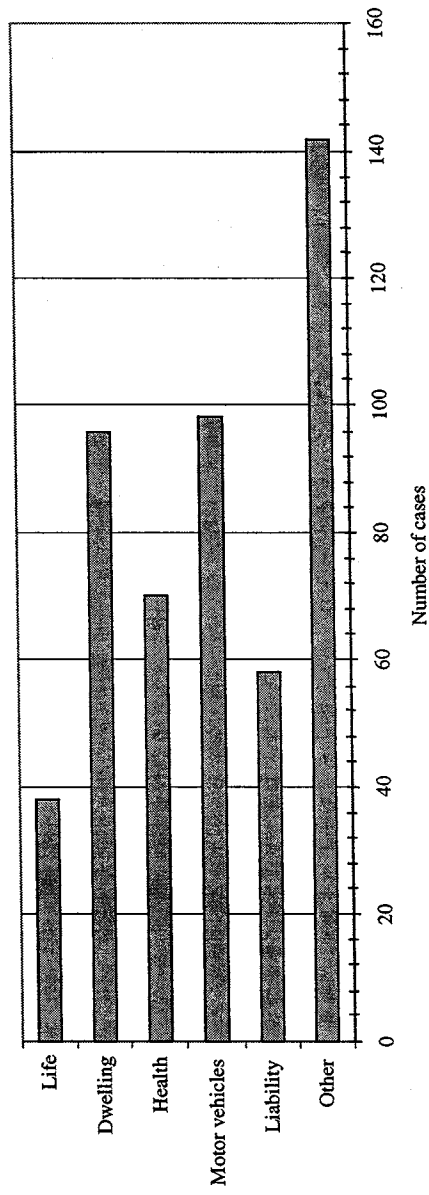


13A. Type of unfair term in the insurance sector

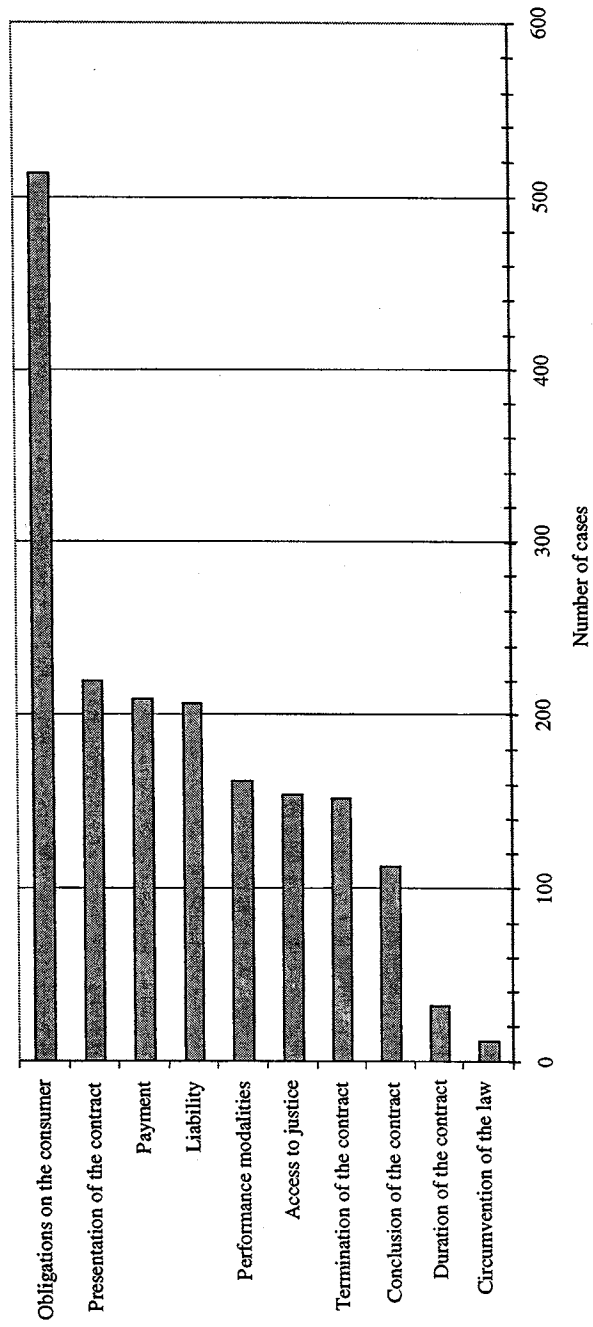




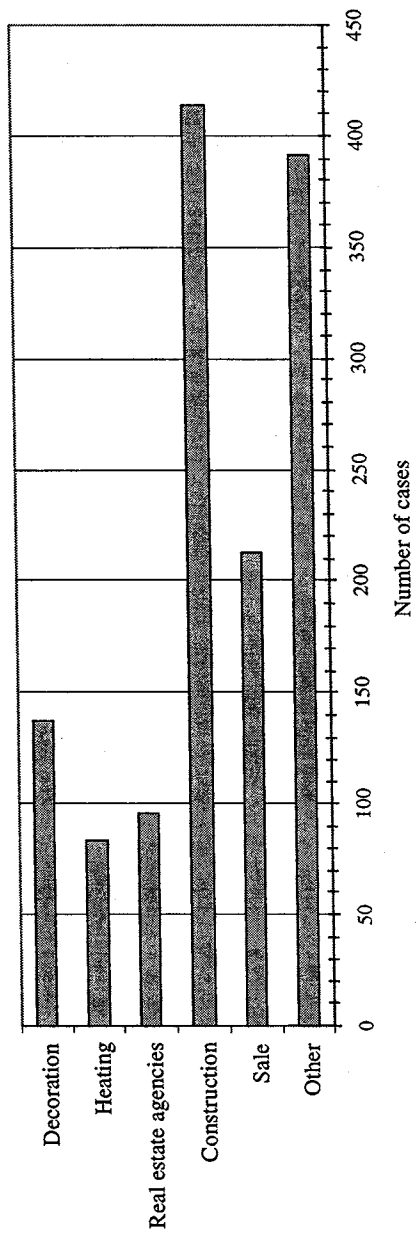
**13B. Unfair terms by type of insurance**



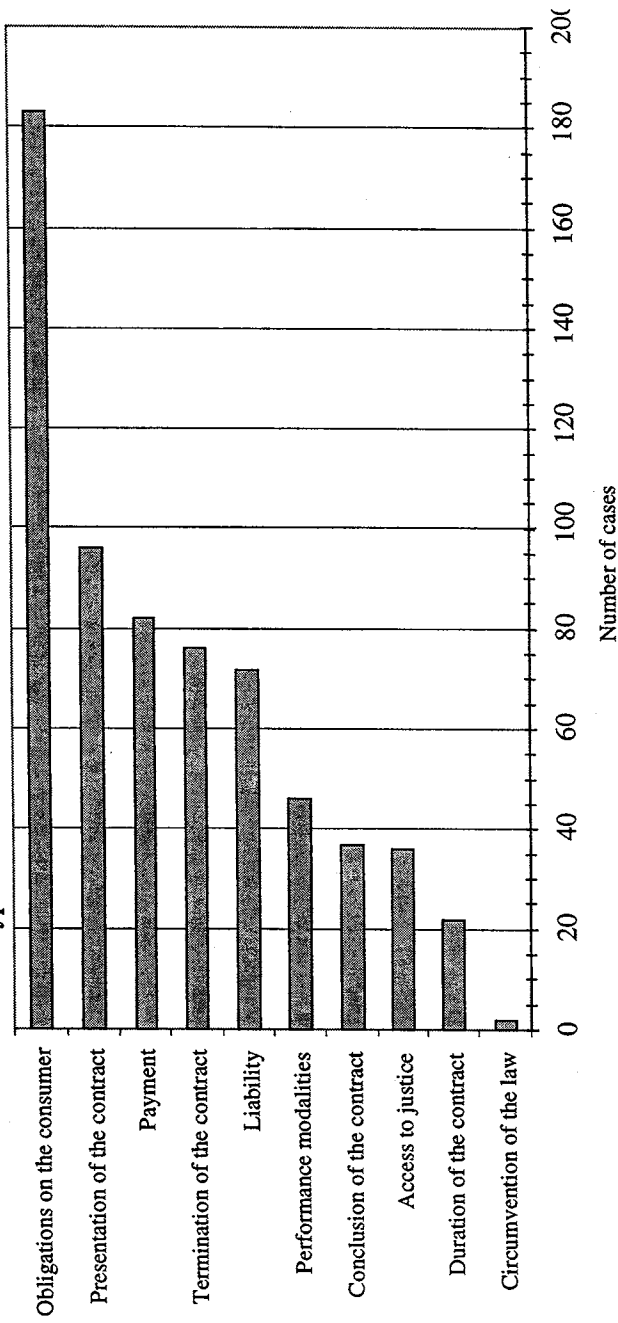
14A. Type of unfair term in the real estate sector



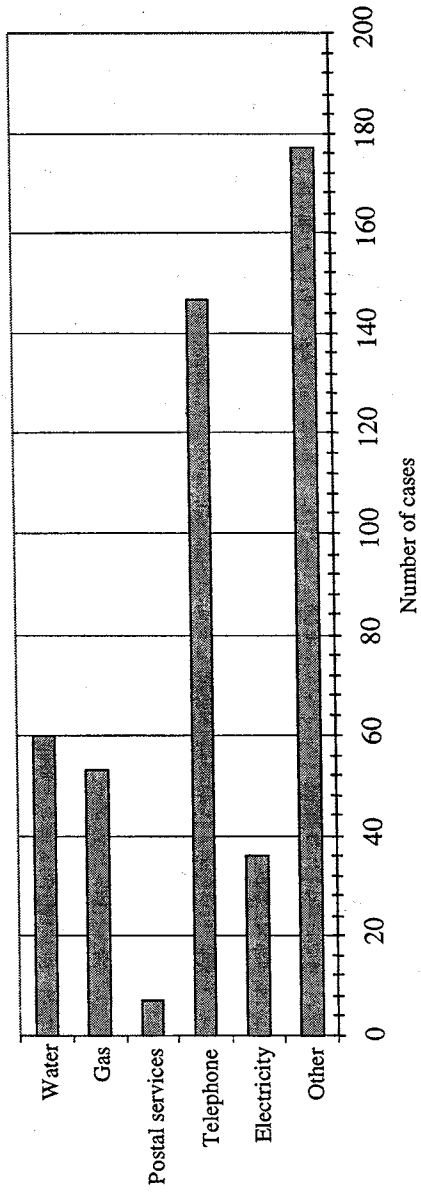
14B. Unfair terms – real estate



15A. Type of unfair term in the basic services sector



15B. Unfair terms by type of basic service



## Appendix B

This Appendix contains statistics from the UK OFT Unfair Contract Terms Bulletin No. 22 which is subject to Crown Copyright.

### 3 STATISTICAL BREAKDOWN OF ACTION ON CASES BY THE OFT

TABLE 3.1: BREAKDOWN OF CASES CLOSED

Case outcome	Oct-Dec 2002	All cases to end Dec 2002
Advice or warning:	90	1,858
advice to consumers/solicitors	25	
advice to TSOs and CABx	7	
advice to Qualifying Bodies	41	
advice to trade associations	2	
warning letter	15	
'Core' terms	5	298
Defective cases	7	209
Duplicate cases	25	1,540
Enquiries	1	53
Excluded terms	13	429
'Formal' undertakings given	2	21
'Informal' undertakings given	36	795
Not about a contract term	7	281
Other legislation	3	300
Other reasons:	35	814
approach made	4	
complex	19	
no approach made	12	
Referred to Qualifying Bodies	24	313
Terms not considered unfair	16	613
<b>Total</b>	<b>264</b>	<b>7,524</b>

#### KEY TO TABLE 3.1

*Advice or warning* includes cases where another regulator (for example, a trading standards service) is able, on the basis of OFT advice, to deal with the matter in exercising its own powers, or where the seriousness of the problem does not warrant a full approach.

*'Advice to TSOs and CABx'* means that OFT letters to TSOs etc are used to advise consumers.

*'Advice to Qualifying Bodies'* means that OFT letters to TSOs etc are used to advise suppliers.

KEY TO TABLE 3.1 continued/...

<i>'Core' terms</i>	refers to cases where the term at issue sets the price or defines the main subject matter of the contract. Core terms are not subject to the test of fairness provided they are in plain and intelligible language - see Regulation 6(2).
<i>Defective</i>	refers to incomplete complaints, eg a copy of the contract was not sent in when requested, or the consumer was uncontactable.
<i>Duplicate</i>	relates to terms already being dealt with.
<i>Excluded terms</i>	refers to contracts that are not between consumers and businesses, or to terms covered by Schedule 2(2).
<i>Other legislation</i>	refers to complaints where action under other legislation under which the OFT has powers or duties is more likely to be effective.
<i>Other reasons</i>	are cases where, for instance, the supplier has gone (or goes) out of business, or is no longer using the terms complained of.
	<i>'approach made'</i> means that the OFT was in negotiations with the supplier at the time the case was closed.
	<i>'no approach made'</i> means that the OFT had not yet entered into negotiations with the supplier at the time the case was closed.

TABLE 3.2: SUMMARY OF CURRENT CASE STATUS

Case status	Total at end last quarter (Sept 2002)	This quarter (Oct-Dec 2002)	Total at end this quarter (Dec 2002)
Cases received	7,915	240	8,155
Cases closed	7,260	263	7,523
Cases carried over to next quarter	655		632

#### 4 ALPHABETICAL INDEX OF BUSINESSES APPROACHED INDICATING TRADING SECTORS

1	Association of Train Operating Companies (ATOC)	road, rail, air and sea travel
2	Aston Court Hotel & Conference Centre	entertainment, catering and accommodation
3	Automobile Association Ltd (AA)	other motoring costs (breakdown services)
4	Beauty First	pharmaceutical products, dental optical and other medical services
-	boxclever	see Home Technology Finance Ltd
5	Bradford & Bingley plc	letting and management agencies
6	British Airways plc	road, rail, air and sea travel
7	British Midland Airways Ltd t/a bmi british midland	road, rail, air and sea travel
8	Carbeth Estate	other recreational goods and services
9	Creative Interiors	home maintenance, repairs and improvements
10	Cyprus Airways Ltd	road, rail, air and sea travel
11	The Destination Group Ltd	holidays
12	Dingwalls	entertainment, catering and accommodation
13	Gateway 2000 Computers Ltd	personal computers and related hardware
14	HFS Loans Ltd	other financial services
15	Havers Ltd t/a Havers Villa Holidays	holidays
16	Hitachi Credit (UK) plc t/a Nova Retail Finance	hire and credit (unsecured)
17	Home Technology Finance Ltd t/a boxclever	hire and credit (unsecured)
18	IBT Travel Group t/a Mountain Travel	holidays



19	Iberia Lineas Aereas de Espana SA	road, rail, air and sea travel
20	Just Kitchens (Knightsbridge) Ltd	home maintenance, repairs and improvements
21	Kenya Airways Ltd	road, rail, air and sea travel
22	Law Pack Publishing Ltd	other professional services (publishers of standard letting agreements)
23	Mather Marshall	letting and management agencies
24	Mean Fiddler Music Group plc	entertainment, catering and Accommodation
-	Mountain Travel	see IBT Travel Group
25	National Exhibition Centre Ltd t/a the NEC Group	entertainment, catering and accommodation
-	Nova Retail Finance	see Hitachi Credit (UK) plc
26	Niagara Therapy (UK) Ltd	furniture; other electrical domestic appliances
27	Optiplan Ltd	home maintenance, repairs and Improvements
28	Orange Personal Communications Services Ltd	mobile phones and services
29	Pinewoods Partnerships	holidays
30	RCI Europe	holidays
31	The Right to Buy Advisory Service Ltd	mortgages and other secured credit
32	J H Sinclair & Co Ltd	furniture
33	Sixt Kenning Ltd	other motoring costs (car hire)
34	Thai Airways International PCL	road, rail, air and sea travel
35	Thomson Legal & Regulatory Europe Ltd t/a Sweet & Maxwell	other professional services (publishers of standard letting agreements)
36	Training for Professionals	letting and management agencies

37	UHSU Solutions Ltd	letting and management agencies (student accommodation)
38	Ultralase Ltd	pharmaceutical products, dental, optical and other medical services
39	Volvo Car UK Ltd	non-life insurance; extended warranties and guarantees
40	Which? Ltd t/a Which? Legal Service	other professional services
41	Worldwide Vacation (UK) Ltd t/a Worldwide Vacations	holidays

## 6 CATEGORIES OF UNFAIR TERM

(on cases where action was taken by the OFT)

Schedule 2:	paragraph 1(a) - Excluding or restricting liability for death or injury	7
Schedule 2:	paragraph 1(b) - Excluding or restricting liability for breaches of contract	
	<i>a Excluding liability for defective or misdescribed goods</i>	17
	<i>b Excluding liability for poor services, or work and material</i>	13
	<i>c Restricting amount or type of liability</i>	20
	<i>d Time limits on claims</i>	3
	<i>e Excluding consumers' right of set-off</i>	10
	<i>f Excluding or restricting liability for delay</i>	9
	<i>g Excluding or restricting liability for a supplier's non-performance</i>	10
	<i>h Excluding or restricting liability via guarantee</i>	2
Schedule 2:	paragraph 1(c) – Binding consumers while allowing suppliers to opt out on a pretext	1
Schedule 2:	paragraph 1(d) - Non-return of prepayments on consumer cancellation	5
Schedule 2:	paragraph 1(e) - Financial penalties	51
Schedule 2:	paragraph 1(f) - Cancellation clauses	15
Schedule 2:	paragraph 1(g) - Supplier's right to cancel without notice	1
Schedule 2:	paragraph 1(h) - Excessive notice periods for consumer cancellation	1
Schedule 2:	paragraph 1(i) - Binding consumers to hidden terms	21
Schedule 2:	paragraph 1(j) - General variation clause	1
Schedule 2:	paragraph 1(k) - Right to change what is supplied	8
Schedule 2:	paragraph 1(l) - Right to increase the price	6
Schedule 2:	paragraph 1(m) - Supplier's right of final decision	3
Schedule 2:	paragraph 1(n) - Entire agreement and formality clauses	
	<i>a Clauses disclaiming liability for employees' statements</i>	11
	<i>b Formality requirements</i>	19

Schedule 2: paragraph 1(o) - Binding consumers where a supplier defaults	1
Schedule 2: paragraph 1(p) – Supplier's right to assign without consent	4
Schedule 2: paragraph 1(q) - Restricting the consumer's remedies	14
Other categories of unfair terms	
<i>a</i> <i>Allowing a supplier to impose an unfair financial burden</i>	28
<i>b</i> <i>Transferring unfair risks (eg: by indemnities) to consumers</i>	6
<i>c</i> <i>Onerous enforcement clauses</i>	19
<i>d</i> <i>Excluding consumers' right to assign</i>	7
<i>e</i> <i>Consumer declarations about contractual circumstances</i>	23
<i>f</i> <i>Excluding consumers' non-contractual rights</i>	2
<i>g</i> <i>Delivery at supplier's discretion</i>	21
<i>h</i> <i>Other</i>	58
Regulation 7 - Plain and intelligible language	67
<b>Total</b>	<b>484</b>

## Notes

The above is a list of commonly occurring types of unfairness identified by the OFT and an indication of the number of terms found during the reporting period that can be placed under these headings. It is based on the 17 items in paragraph 1 of Schedule 2 to the Regulations ('the grey list'). However, two of these headings are sub-divided to reflect the range of terms covered by that heading.

There are two additional groups of terms. One is a miscellaneous category for potential types of unfairness not obviously covered by the 17 headings. The final group is of cases involving possible breaches of the plain language requirement of Regulation 7.

The numbers of terms challenged are to be regarded as broadly indicative, not an exact account, for two reasons. First, in a number of cases unfairness was so extensive and interrelated, and revision of the contract was so comprehensive, that it would be impracticable to list all the particular terms considered unfair and relate them to changes. Secondly, minor changes to wording, mainly designed to improve intelligibility, have generally been ignored.

Examples of the types of unfairness denoted by the headings above are also to be found in previous bulletins and in the *Unfair contract terms guidance* (ref: OFT311).

## Appendix C

This material was downloaded from <http://www.judiciary.go.th/eng/LawsEng1/DE1.html> being the English version of the Judiciary of Thailand website.

### *Unfair Contract Terms Act B.E. 2540 (1997) (Thailand)*<sup>102</sup>

#### *Section 3: In this Act.*

*"Contract terms" means terms, agreement and consent, including announcement and notice excluding or restricting the liability.*

*"Consumer" means a person entering into a contract in the capacity of a buyer, lessee, hire-purchaser, borrower, insured or other person value entering into a contract so as to acquire property, service or any other benefits for however, the said entering into such contract shall not be for trade of such property, service or benefits, and it shall mean to include a person entering into a contract in the capacity of a guarantor of the said person who does not execute the same for trade as well.*

*"Business, trading or professional operator" means a person entering into a contract in the capacity of a seller, lessor, seller by hire-purchase, lender, insurer or any person entering into a contract so as to supply property, service or any other benefits; in any case, such entering into the contract must be for the trade of such property, service or benefits according to their ordinary course of business.*

*"Standard form contract" means written contract in which essential terms have been prescribed in advance, regardless whether being executed in any form, and is used by either contracting party in his business operation.*

*Section 4: The terms in a contract between the consumer and the business, trading or professional operator or in a standard form contract or in a contract of sale with right of redemption which render the business, trading or professional operator or the party prescribing the standard form contract or the buyer an unreasonable advantage over the other party shall be regarded as unfair contract terms, and shall only be enforceable to the extent that they are fair and reasonable according to the circumstances.*

*In case of doubt, the standard form contract shall be interpreted in favour of the party that does not prescribe the said standard form contract.*

*The terms with characters or effects in a way that the other party is obliged to comply or bear more burden than that could have been anticipated by a reasonable person in normal circumstance may be regarded as terms that render an advantage over the other party, such as:*

- (1) terms excluding or restriction liability arising from breach of contract;*
- (2) terms rendering the other party to be liable or to bear more burden than that prescribed by law;*
- (3) terms rendering the contract to be terminated without justifiable ground or granting the right to terminate the contract despite the other party is not in breach of the contract in the essential part;*
- (4) terms granting the right not to comply with any clause of the contract or to comply with the contract within a delayed period without reasonable ground;*
- (5) terms granting the right to a party to the contract to claim or compel the other party to bear more burden than that existed at the time of making the contract;*
- (6) terms in a contract of sale with right of redemption whereby the buyer fixes the redeemed price higher than the selling price plus rate of interest exceeding fifteen percent per year;*
- (7) terms in a hire-purchase contract which prescribe excessive hire-purchasing price or which imposes unreasonable burdens on the part of the hire-purchaser;*
- (8) terms in a credit card contract which compels the consumer to pay interest, penalty, expenses or any other benefits excessively, in the case of default of payment or in the case related thereto;*

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<sup>102</sup> <http://www.judiciary.go.th/eng/LawsEng1/DE1.html>

*(9) terms prescribing a method of calculation of compound interest that cause the consumer to bear excessive burdens.*

**Section 10:** *In determining to what extent the terms be enforceable as fair and reasonable it shall be taken into consideration all circumstances of the case, including:*

*(1) good faith, bargaining power, economic status knowledge and understanding, adeptness, anticipation, guidelines previously observed, other alternatives, and all advantages and disadvantages of the contracting parties according to actual condition*

*(2) ordinary usages applicable to such kind of contract;*

*(3) time and place of making the contract or performing of the contract;*

*(4) the much heavier burden borne by one contracting party when compared to that of the other party.*

## Appendix D

### *Contracts Review Act 1980 (NSW)*

This Appendix contains many, but not all, sections of the CRA. It does not purport to be an official version of the legislation. Copyright in relation to the provisions remains with the State of New South Wales. The CRA can be viewed at <http://www.pco.nsw.gov.au/> or by contacting the NSW Parliamentary Counsel's Office.

#### **4 Definitions**

(1) In this Act, except in so far as the context or subject-matter otherwise indicates or requires:

.....

land instrument means an instrument that transfers title to land, creates an estate or interest in land or is a dealing within the meaning of the Real Property Act 1900.

Tribunal means the Consumer, Trader and Tenancy Tribunal established by the Consumer, Trader and Tenancy Tribunal Act 2001.

unjust includes unconscionable, harsh or oppressive, and injustice shall be construed in a corresponding manner.

(2) .....

#### **5 Act binds Crown**

This Act binds the Crown not only in right of New South Wales but also, so far as the legislative power of Parliament permits, the Crown in all its other capacities.

#### **6 Certain restrictions on grant of relief**

(1) The Crown, a public or local authority or a corporation may not be granted relief under this Act.

(2) A person may not be granted relief under this Act in relation to a contract so far as the contract was entered into in the course of or for the purpose of a trade, business or profession carried on by the person or proposed to be carried on by the person, other than a farming undertaking (including, but not limited to, an agricultural, pastoral, horticultural, orcharding or viticultural undertaking) carried on by the person or proposed to be carried on by the person wholly or principally in New South Wales.

### **Part 2 Relief in respect of unjust contracts**

#### **7 Principal relief**

(1) Where the Court finds a contract or a provision of a contract to have been unjust in the circumstances relating to the contract at the time it was made, the Court may, if it considers it just to do so, and for the purpose of avoiding as far as practicable an unjust consequence or result, do any one or more of the following:

- (a) it may decide to refuse to enforce any or all of the provisions of the contract,
- (b) it may make an order declaring the contract void, in whole or in part,
- (c) it may make an order varying, in whole or in part, any provision of the contract,
- (d) it may, in relation to a land instrument, make an order for or with respect to requiring the execution of an instrument that:
  - (i) varies, or has the effect of varying, the provisions of the land instrument, or
  - (ii) terminates or otherwise affects, or has the effect of terminating or otherwise affecting, the operation or effect of the land instrument.

(2) Where the Court makes an order under subsection (1) (b) or (c), the declaration or variation shall have effect as from the time when the contract was made or (as to the whole or any part or parts of the contract) from some other time or times as specified in the order.

(3) The operation of this section is subject to the provisions of section 19.

## **8 Ancillary relief**

Schedule 1 has effect with respect to the ancillary relief that may be granted by the Court in relation to an application for relief under this Act.

## **9 Matters to be considered by Court**

(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.

## **10 General orders**

Where the Supreme Court is satisfied, on the application of the Minister or the Attorney General, or both, that a person has embarked, or is likely to embark, on a course of conduct leading to the formation of unjust contracts, it may, by order, prescribe or otherwise restrict, the terms upon which that person may enter into contracts of a specified class.

## **Part 3 Procedural and other matters**

### **11 Application for relief**

(1) The Court may exercise its powers under this Act in relation to a contract on application made to it in accordance with rules of court, whether in:

- (a) proceedings commenced under subsection (2) in relation to the contract, or
- (b) other proceedings arising out of or in relation to the contract.

(2) Proceedings may be commenced in the Court for the purpose of obtaining relief under this Act in relation to a contract.

### **12 Interests of non-parties to contract**

(1) Where in proceedings for relief under this Act in relation to a contract it appears to the Court that a person who is not a party to the contract has shared in, or is entitled to share in, benefits derived or to be derived from the contract, it may make such orders against or in favour of that person as may be just in the circumstances.

(2) The Court shall not exercise its powers under this Act in relation to a contract unless it is satisfied:

- (a) that the exercise of those powers would not prejudice the rights of a person who is not a party to the contract, or
- (b) that, if any such rights would be so prejudiced, it would not be unjust in all the circumstances to exercise those powers,

but this subsection does not apply in relation to such a person if the Court has given the person an opportunity to appear and be heard in the proceedings.

### **13 Intervention**

The Minister or the Attorney General, or both, may, at any stage of any proceedings in which relief under this Act is sought, intervene by counsel, solicitor or agent, and shall thereupon become a party or parties to the proceedings and have all the rights of a party or parties to those proceedings in the Court, including any right of appeal arising in relation to those proceedings.

#### **14 Fully executed contracts**

The Court may grant relief in accordance with this Act in relation to a contract notwithstanding that the contract has been fully executed.

#### **15 Arrangements**

In any proceedings in which relief under this Act is sought in relation to a contract, the Court may, if it thinks it proper to do so in the circumstances of the case, and it is of the opinion that the contract forms part of an arrangement consisting of an inter-related combination or series of contracts, have regard to any or all of those contracts and the arrangement constituted by them.

#### **16 Time for making applications for relief**

An application for relief under this Act in relation to a contract may be made only during any of the following periods:

- (a) the period of 2 years after the date on which the contract was made,
- (b) the period of 3 months before or 2 years after the time for the exercise or performance of any power or obligation under, or the occurrence of any activity contemplated by, the contract, and
- (c) the period of the pendency of maintainable proceedings arising out of or in relation to the contract, being proceedings (including cross-claims, whether in the nature of set-off, cross-action or otherwise) that are pending against the party seeking relief under this Act.

#### **Part 4 Miscellaneous**

#### **17 Effect of this Act not limited by agreements etc**

(1) A person is not competent to waive his or her rights under this Act, and any provision of a contract is void to the extent that:

- (a) it purports to exclude, restrict or modify the application of this Act to the contract, or
- (b) it would, but for this subsection, have the effect of excluding, restricting or modifying the application of this Act to the contract.

(2) A person is not prevented from seeking relief under this Act by:

- (a) any acknowledgment, statement or representation, or
- (b) any affirmation of the contract or any action taken with a view to performing any obligation arising under the contract.

(3) This Act applies to and in relation to a contract only if:

- (a) the law of the State is the proper law of the contract,
- (b) the proper law of the contract would, but for a term that it should be the law of some other place or a term to the like effect, be the law of the State, or
- (c) the proper law of the contract would, but for a term that purports to substitute, or has the effect of substituting, provisions of the law of some other place for all or any of the provisions of this Act, be the law of the State.

(4) This Act does not apply to a contract under which a person agrees to withdraw, or not to prosecute, a claim for relief under this Act if:

- (a) the contract is a genuine compromise of the claim, and
- (b) the claim was asserted before the making of the contract.

(5) Without affecting the generality of subsection (1), the Court may exercise its powers under this Act in relation to a contract notwithstanding that the contract itself provides:

- (a) that disputes or claims arising out of, or in relation to, the contract are to be referred to arbitration, or

(b) that legal proceedings arising out of, or in relation to, the contract are justiciable only by the courts of some other place.

## **18 Offence**

(1) Where a person submits a document:

- (a) that is intended to constitute a written contract,
- (b) that has been prepared or procured by the person or on the person's behalf, and
- (c) that includes a provision that purports to exclude, restrict or modify the application of this Act to the document,

to another person for signature by that other person, the person submitting the document is guilty of an offence and liable to a penalty not exceeding 20 penalty units.

(2) Proceedings for an offence against subsection (1) shall be disposed of summarily before a Local Court and may be commenced at any time within 2 years after the offence was committed.

## **19 Orders affecting land**

(1) An order made under section 7 (1) (b) or (c) has no effect in relation to a contract so far as the contract is constituted by a land instrument that is registered under the Real Property Act 1900.

(2) Where an order is made under section 7 (1) (b) or (c) in relation to a contract constituted (in whole or in part) by a land instrument, not being a land instrument registered under the Real Property Act 1900, the regulations made under this Act may make provision for or with respect to prescribing the things that must be done before the order, so far as it relates to the land instrument, takes effect.

(3) The Registrar-General and any other person are hereby authorised to do any things respectively required of them pursuant to subsection (2).

## **21 Application of Act to certain contracts of service and to existing contracts**

(1) This Act does not apply to a contract of service to the extent that it includes provisions that are in conformity with an award that is applicable in the circumstances.

(2) In subsection (1), award means a State industrial instrument, or an award or industrial agreement made under the Conciliation and Arbitration Act 1904 of the Commonwealth.

(3) Schedule 2 has effect.

## **22 Operation of other laws**

Nothing in this Act limits or restricts the operation of any other law providing for relief against unjust contracts, but the operation of any other such law in relation to a contract shall not be taken to limit or restrict the application of this Act to the contract.

## **Schedule 1 Ancillary relief**

### **(Section 8)**

1 Where the Court makes a decision or order under section 7, it may also make such orders as may be just in the circumstances for or with respect to any consequential or related matter, including orders for or with respect to:

- (a) the making of any disposition of property,
- (b) the payment of money (whether or not by way of compensation) to a party to the contract,
- (c) the compensation of a person who is not a party to the contract and whose interest might otherwise be prejudiced by a decision or order under this Act,
- (d) the supply or repair of goods,
- (e) the supply of services,
- (f) the sale or other realisation of property,

- (g) the disposal of the proceeds of sale or other realisation of property,
  - (h) the creation of a charge on property in favour of any person,
  - (i) the enforcement of a charge so created,
  - (j) the appointment and regulation of the proceedings of a receiver of property, and
  - (k) the rescission or variation of any order of the Court under this clause,
- and such orders in connection with the proceedings as may be just in the circumstances.

2 The Court may make orders under this Schedule on such terms and conditions (if any) as the Court thinks fit.

3 Nothing in section 6 limits the powers of the Court under this Schedule.

4 In this Schedule:

disposition of property includes:

- (a) a conveyance, transfer, assignment, appointment, settlement, mortgage, delivery, payment, lease, bailment, reconveyance or discharge of mortgage,
- (b) the creation of a trust,
- (c) the release or surrender of any property, and
- (d) the grant of a power in respect of property,

whether having effect at law or in equity.

property includes real and personal property and any estate or interest in property real or personal, and money, and any debt, and any cause of action for damages (including damages for personal injury), and any other chose in action, and any other right or interest.

## Appendix E

This Appendix contains the relevant sections of the Uniform Consumer Credit Code and is reproduced in accordance with the provisions of the Queensland *Copyright Act 1968* and the *State Copying Agreements*.

### Uniform Consumer Credit Code

#### 70 Court may reopen unjust transactions

(1) Power to reopen unjust transactions. The Court may, if satisfied on the application of a debtor, mortgagor or guarantor that, in the circumstances relating to the relevant credit contract, mortgage or guarantee at the time it was entered into or changed (whether or not by agreement), the contract, mortgage or guarantee or change was unjust, reopen the transaction that gave rise to the contract, mortgage or guarantee or change.

(2) Matters to be considered by Court. In determining whether a term of a particular credit contract, mortgage or guarantee is unjust in the circumstances relating to it at the time it was entered into or changed, the Court is to have regard to the public interest and to all the circumstances of the case and may have regard to the following—

(a) the consequences of compliance, or noncompliance, with all or any of the provisions of the contract, mortgage or guarantee;

(b) the relative bargaining power of the parties;

(c) whether or not, at the time the contract, mortgage or guarantee was entered into or changed, its provisions were the subject of negotiation;

(d) whether or not it was reasonably practicable for the applicant to negotiate for the alteration of, or to reject, any of the provisions of the contract, mortgage or guarantee or the change;

(e) whether or not any of the provisions of the contract, mortgage or guarantee impose conditions that are unreasonably difficult to comply with, or not reasonably necessary for the protection of the legitimate interests of a party to the contract, mortgage or guarantee;

(f) whether or not the debtor, mortgagor or guarantor, or a person who represented the debtor, mortgagor or guarantor, was reasonably able to protect the interests of the debtor, mortgagor or guarantor because of his or her age or physical or mental condition;

(g) the form of the contract, mortgage or guarantee and the intelligibility of the language in which it is expressed;

(h) whether or not, and if so when, independent legal or other expert advice was obtained by the debtor, mortgagor or guarantor;

(i) the extent to which the provisions of the contract, mortgage or guarantee or change and their legal and practical effect were accurately explained to the debtor, mortgagor or guarantor and whether or not the debtor, mortgagor or guarantor understood those provisions and their effect;

(j) whether the credit provider or any other person exerted or used unfair pressure, undue influence or unfair tactics on the debtor, mortgagor or guarantor and, if so, the nature and extent of that unfair pressure, undue influence or unfair tactics;

(k) whether the credit provider took measures to ensure that the debtor, mortgagor or guarantor understood the nature and implications of the transaction and, if so, the adequacy of those measures;

(l) whether at the time the contract, mortgage or guarantee was entered into or changed, the credit provider knew, or could have ascertained by reasonable inquiry of the debtor at the time, that the debtor could not pay in accordance with its terms or not without substantial hardship;

(m) whether the terms of the transaction or the conduct of the credit provider is justified in the light of the risks undertaken by the credit provider;

(n) the terms of other comparable transactions involving other credit providers and, if the injustice is alleged to result from excessive interest charges, the annual percentage rate or rates payable in comparable cases;

(o) any other relevant factor.

(3) Representing debtor, mortgagor or guarantor. For the purposes of subsection (2)(f), a person is taken to have represented a debtor, mortgagor or guarantor if the person represented the debtor, mortgagor or guarantor, or assisted the debtor, mortgagor or guarantor to a significant degree, in the negotiations process prior to, or at, the time the credit contract, mortgage or guarantee was entered into or changed.

(4) Unforeseen circumstances. In determining whether a credit contract, mortgage or guarantee is unjust, the Court is not to have regard to any injustice arising from circumstances that were not reasonably foreseeable when the contract, mortgage or guarantee was entered into or changed.

(5) Conduct. In determining whether to grant relief in respect of a credit contract, mortgage or guarantee that it finds to be unjust, the Court may have regard to the conduct of the parties to the proceedings in relation to the contract, mortgage or guarantee since it was entered into or changed.

(6) Application. This section does not apply to a change in the annual percentage rate or rates payable under a contract, or to an establishment fee or charge or other fee or charge, in respect of which an application may be made under section 72 (Court may review unconscionable interest and other charges). This section does not apply to a change to a contract under this Division.

(7) Meaning of unjust. In this section, “unjust” includes unconscionable, harsh or oppressive.

#### **71 Orders on reopening of transactions**

The Court may, if it reopens a transaction under this Division, do any one or more of the following, despite any settlement of accounts or any agreement purporting to close previous dealings and create a new obligation—

(a) reopen an account already taken between the parties;

(b) relieve the debtor and any guarantor from payment of any amount in excess of such amount as the Court, having regard to the risk involved and all other circumstances, considers to be reasonably payable;

(c) set aside either wholly or in part or revise or alter an agreement made or mortgage given in connection with the transaction;

(d) order that the mortgagee takes such steps as are necessary to discharge the mortgage;

(e) give judgment for or make an order in favour of a party of such amount as, having regard to the relief (if any) which the Court thinks fit to grant, is justly due to that party under the contract, mortgage or guarantee;

(f) give judgment or make an order against a person for delivery of goods to which the contract, mortgage or guarantee relates and which are in the possession of that person;

(g) make ancillary or consequential orders.

#### **72 Court may review unconscionable interest and other charges**

(1) The Court may, if satisfied on the application of a debtor or guarantor that—

a) a change in the annual percentage rate or rates under a credit contract to which section 59(1) or (4) applies; or

(b) an establishment fee or charge; or

(c) a fee or charge payable on early termination of a credit contract; or

(d) a fee or charge for a prepayment of an amount under a credit contract;

is unconscionable, annul or reduce the change or fee or charge and may make ancillary or consequential orders.

(2) For the purposes of this section, a change to the annual percentage rate or rates is unconscionable if and only if it appears to the Court that—

(a) it changes the annual percentage rate or rates in a manner that is unreasonable, having regard to any advertised rate or other representations made by the credit provider before or at the time the contract was entered into, the period of time since the contract was entered into and any other consideration the Court thinks relevant; or

(b) the change is a measure that discriminates unjustifiably against the debtor when the debtor is compared to other debtors of the credit provider under similar contracts.

(3) In determining whether an establishment fee or charge is unconscionable, the Court is to have regard to whether the amount of the fee or charge is equal to the credit provider's reasonable costs of determining an application for credit and the initial administrative costs of providing the credit or is equal to the credit provider's average reasonable costs of those things in respect of that class of contract.

(4) For the purposes of this section, a fee or charge payable on early termination of the contract or a prepayment of an amount under the credit contract is unconscionable if and only if it appears to the Court that it exceeds a reasonable estimate of the credit provider's loss arising from the early termination or prepayment, including the credit provider's average reasonable administrative costs in respect of such a termination or prepayment.

### **73 Time limit**

(1) An application (other than an application under section 72) may not be brought under this Division more than 2 years after the relevant credit contract is rescinded or discharged or otherwise comes to an end.

(2) An application under section 72 may not be brought more than 2 years after the relevant change takes effect or fee or charge is charged under the credit contract or the credit contract is rescinded or discharged or otherwise comes to an end.

### **74 Joinder of parties**

(1) If it appears to the Court that a person other than a credit provider or a mortgagee (a "third party") has shared in the profits of, or has a beneficial interest prospectively or otherwise in, a credit contract or mortgage that the Court holds to be unjust, the Court may make an order about the third party that the Court considers appropriate.

(2) However, before making an order about the third party, the Court must—

(a) join the third party as a party to the proceedings; and

(b) give the third party an opportunity to appear and be heard in the proceedings.

## Appendix F

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### *Fair Trading Act 1999* (Victoria)

#### PART 2B—UNFAIR TERMS IN CONSUMER CONTRACTS

##### **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;

"consumer contract" includes a standard form contract;

"injunction" includes interim injunction;

"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 and includes a prescribed unfair term.

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

This Part does not apply to contractual terms—

- (a) contained in a 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.

##### **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.

##### **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 supplier but not the consumer for a breach or termination of the contract;
- (d) permitting the supplier but not the consumer to vary the terms of the contract;
- (e) permitting the supplier but not the consumer to renew or not renew the contract;
- (f) permitting the supplier to determine the price without the right of the consumer to terminate the contract;
- (g) permitting the supplier unilaterally to vary the characteristics of the goods or services to be supplied under the contract;
- (h) permitting the supplier unilaterally to determine whether the contract had been breached or to interpret its meaning;



- (i) limiting the supplier's vicarious liability for its agents;
- (j) permitting the supplier to assign the contract to the consumer's detriment without the consumer's consent;
- (k) limiting the consumer's right to sue the supplier;
- (l) limiting the evidence the consumer can lead in proceedings on the contract;
- (m) imposing the evidential burden on the consumer in proceedings on the contract.

**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) Sub-section (1) applies to any consumer contract entered into on or after the commencement of section 12 of the Fair Trading (Amendment) Act 2003.
- (5) Sub-section (2) applies to any standard form contract whether entered into before or after the term is prescribed. 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.

**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.

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 sub-section (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 sub-section (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.

#### 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.

## Appendix G

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### ***The Unfair Terms in Consumer Contracts Regulations 1999 (UK)***

#### **Interpretation**

3. - (1) {t2} In these Regulations-

"the Community" means the European Community;

"consumer" means any natural person who, in contracts covered by these Regulations, is acting for purposes which are outside his trade, business or profession;

"court" in relation to England and Wales and Northern Ireland means a county court or the High Court, and in relation to Scotland, the Sheriff or the Court of Session;

"Director" means the Director General of Fair Trading;

"EEA Agreement" means the Agreement on the European Economic Area signed at Oporto on 2nd May 1992 as adjusted by the protocol signed at Brussels on 17th March 1993<sup>[4]</sup>;

"Member State" means a State which is a contracting party to the EEA Agreement;

"notified" means notified in writing;

"qualifying body" means a person specified in Schedule 1;

"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;

"unfair terms" means the contractual terms referred to in regulation 5.

(2) In the application of these Regulations to Scotland for references to an "injunction" or an "interim injunction" there shall be substituted references to an "interdict" or "interim interdict" respectively.

#### **Terms to which these Regulations apply**

4. - (1) These Regulations apply in relation to unfair terms in contracts concluded between a seller or a supplier and a consumer.

(2) These 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.

#### **Unfair Terms**

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.

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

#### **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.

#### **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.

#### **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.

#### **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.

#### **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.

#### **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.

#### **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.

#### **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.

(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.

#### **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.

#### **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.

(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.

## SCHEDULE 2

### Regulation 5(5)

#### INDICATIVE AND NON-EXHAUSTIVE LIST OF TERMS WHICH MAY BE REGARDED AS UNFAIR

##### 1. Terms which have the object or effect of-

- (a) excluding or limiting the legal liability of a seller or supplier in the event of the death of a consumer or personal injury to the latter resulting from an act or omission of that seller or supplier;
- (b) inappropriately excluding or limiting the legal rights of the consumer vis-à-vis the seller or supplier or another party in the event of total or partial non-performance or inadequate performance by the seller or supplier of any of the contractual obligations, including the option of offsetting a debt owed to the seller or supplier against any claim which the consumer may have against him;
- (c) making an agreement binding on the consumer whereas provision of services by the seller or supplier is subject to a condition whose realisation depends on his own will alone;
- (d) permitting the seller or supplier to retain sums paid by the consumer where the latter decides not to conclude or perform the contract, without providing for the consumer to receive compensation of an equivalent amount from the seller or supplier where the latter is the party cancelling the contract;
- (e) requiring any consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation;
- (f) authorising the seller or supplier to dissolve the contract on a discretionary basis where the same facility is not granted to the consumer, or permitting the seller or supplier to retain the sums paid for services not yet supplied by him where it is the seller or supplier himself who dissolves the contract;
- (g) enabling the seller or supplier to terminate a contract of indeterminate duration without reasonable notice except where there are serious grounds for doing so;
- (h) automatically extending a contract of fixed duration where the consumer does not indicate otherwise, when the deadline fixed for the consumer to express his desire not to extend the contract is unreasonably early;
- (i) irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract;
- (j) enabling the seller or supplier to alter the terms of the contract unilaterally without a valid reason which is specified in the contract;
- (k) enabling the seller or supplier to alter unilaterally without a valid reason any characteristics of the product or service to be provided;
- (l) providing for the price of goods to be determined at the time of delivery or allowing a

seller of goods or supplier of services to increase their price without in both cases giving the consumer the corresponding right to cancel the contract if the final price is too high in relation to the price agreed when the contract was concluded;

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

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

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

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

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

## 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.



# APPENDIX H

This Appendix contains statistics from the UK OFT Annual Report 2001 which is subject to Crown Copyright.

Consumer complaints 12 months to 30 September 2001

Table B										Trading Practices	
	1	2	3	4	5	6	8	A	P	Totals	Group Totals
<b>Group A: House fittings and appliances</b>											
AA	2444	359	698	495	81	72	2	89	4,240		
AB	43781	7152	11939	8906	1142	850	86	3663	77,319		
AC	15133	2270	4462	4383	611	163	36	417	27,475		
AD	10300	3695	2753	1799	453	490	19	626	20,135		
AE	23839	4814	3759	4615	733	555	12	548	38,875		
AF	7950	928	1414	1261	270	31	9	326	12,189		
AK	3040	641	1091	470	136	160	5	339	5,882		
AL	20957	2529	5360	4417	889	245	29	1091	35,517		
AM	24663	6431	4979	5364	601	105	21	704	42,868		
AN	21471	1548	2581	4149	453	1162	13	539	31,916		
AO	9884	803	2134	1595	307	1909	10	442	17,064		
AP	4121	1100	810	1014	159	97	10	568	7,879		
	<b>187,563</b>	<b>32,270</b>	<b>41,980</b>	<b>38,468</b>	<b>5,835</b>	<b>5,639</b>	<b>252</b>	<b>9,352</b>		<b>321,359</b>	
<b>Group B: Other household requirements</b>											
BA	8245	422	12723	297	392	4404	488	4752	31,723		
BB	488	58	581	82	40	85	7	211	1,520		
BC	2705	391	4340	555	335	205	12	796	9,338		
BD	1164	179	2718	289	334	37	7	458	5,166		
BE	487	42	319	97	78	432	4	151	1,810		
BF	364	168	288	62	31	1	1	64	979		
BH	2393	160	197	310	44	8	2	56	3,170		
BJ	1555	287	931	248	118	295	21	371	3,826		
BM	4127	530	3288	975	470	29	22	1099	10,540		
BN	14343	1412	6159	2919	1027	47	26	870	26,803		
BO	1652	758	1265	222	172	14	7	230	4,320		
BP	2712	700	1324	381	161	832	26	438	6,574		
BQ	3440	749	1095	460	103	208	5	443	6,503		
	<b>43,673</b>	<b>5,856</b>	<b>35,238</b>	<b>6,857</b>	<b>3,305</b>	<b>6,577</b>	<b>628</b>	<b>9,938</b>		<b>112,072</b>	
<b>Group C: Personal goods and services</b>											
CA	17202	2084	8524	2900	1608	409	54	1721	34,502		
CD	3394	634	2934	459	195	362	20	557	8,555		
CE	1901	273	1105	230	103	672	20	319	4,623		
CF	5026	601	1879	817	314	97	15	387	9,136		
CH	260	58	988	33	22	168	854	209	2,592		
CK	9407	361	1473	1329	349	101	11	407	13,438		
CL	4446	253	629	669	137	1022	3	120	7,279		
CM	493	272	1668	90	85	0	1	18	2,627		
CZ	14971	5377	17293	2714	1338	1875	202	1856	45,626		
	<b>57,100</b>	<b>9,913</b>	<b>36,493</b>	<b>9,241</b>	<b>4,151</b>	<b>4,706</b>	<b>1,180</b>	<b>5,594</b>		<b>128,378</b>	
<b>Group D: Professional and financial services</b>											
DA	1376	84	803	219	265	3	4	99	2,853		
DB	2674	831	5892	883	1761	28	11	612	12,692		
DE	1069	266	1786	239	285	6	5	82	3,739		
DF	289	114	388	55	85	2	2	19	934		
DG	3508	1259	3687	1020	1415	18	7	577	11,471		
DL	460	151	1067	127	287	2	1	105	2,200		
DM	200	74	253	36	43	0	0	13	619		
DN	66	21	76	19	28	4	0	7	221		
DO	556	229	553	323	219	2	1	45	1,928		
DP	1315	189	2611	165	274	26	2	153	4,735		
DQ	780	167	517	198	279	70	0	118	2,129		
DY	3570	1209	5738	690	613	76	20	512	12,428		
DZ	1097	306	1859	231	367	4	3	176	4,043		
	<b>16,960</b>	<b>4,900</b>	<b>25,210</b>	<b>4,205</b>	<b>5,901</b>	<b>241</b>	<b>56</b>	<b>2,518</b>		<b>59,991</b>	
<b>Group E: Transport</b>											
ED	8310	1162	3322	1540	354	124	23	582	15,417		
EE	41152	1586	15066	6593	1325	700	41	1276	67,739		
EF	16820	1121	3144	2396	385	265	34	1321	25,486		
EG	3463	317	906	649	122	110	7	122	5,696		
EH	2065	284	356	320	71	269	2	93	3,460		
EK	1065	66	1302	53	46	267	24	697	3,520		
EM	1050	400	915	194	282	84	10	514	3,449		
EN	445	356	165	91	51	56	1	91	1,256		
EO	3325	788	1139	570	158	224	4	238	6,444		
EY	2013	245	708	311	124	101	0	88	3,590		
EZ	2390	443	1480	445	567	126	10	457	5,928		
	<b>82,098</b>	<b>6,768</b>	<b>28,513</b>	<b>13,162</b>	<b>3,485</b>	<b>2,326</b>	<b>156</b>	<b>5,477</b>		<b>141,985</b>	
<b>Group F: Leisure</b>											
FC	918	358	1359	166	222	14	12	248	3,297		
FD	344	55	261	43	77	42	1	57	880		
FE	1001	332	4342	158	226	6	1	60	6,126		
FG	1094	927	2788	232	189	35	26	342	5,633		
FH	1873	619	1832	227	352	914	22	680	6,519		
FK	8288	2248	18402	1104	1082	104	12	1202	32,422		
FL	2134	516	1039	366	203	326	21	214	4,819		
FM	2567	555	1284	322	151	1903	40	401	7,223		
FN	2108	896	3379	342	203	8	86	381	7,403		
FO	2121	219	1307	143	102	754	4	237	4,887		
FP	1667	691	11787	177	503	7	15	93	14,940		
FQ	1780	566	668	304	83	8	2	179	3,590		
FZ	3830	1199	3685	882	516	1028	275	515	11,910		
	<b>29,725</b>	<b>9,181</b>	<b>52,113</b>	<b>4,466</b>	<b>3,888</b>	<b>5,149</b>	<b>517</b>	<b>4,609</b>		<b>109,649</b>	
<b>Grand Total:</b>	<b>417,119</b>	<b>68,888</b>	<b>219,547</b>	<b>76,399</b>	<b>26,566</b>	<b>24,638</b>	<b>2,789</b>	<b>37,488</b>		<b>873,434</b>	

**Trading Practices key:**

1. Defective goods or substandard service
2. Non-delivery of goods and delay or non-completion of services
3. Selling techniques:
  - misleading claims, representations or advertisements (price, quality, etc.)
  - presentation of goods or services (availability, labelling, packaging)
  - lack of information
4. Difficulty of getting faults put right or offers of inadequate redress
6. Unfair terms and conditions including attempts to restrict liability
8. Safety
- P. Prices and pricing (including value for money)
- A. Age restricted sales

# QUESTIONNAIRE

## QUESTION 1:

(a) Do you have any comments in relation to these conclusions? Please detail.

Yes       No

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(b) Do you, or does your organisation, agency or business, have any data or other information which would indicate the level of concern in relation to unfair contract terms?

Yes       No

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## QUESTION 2:

Does Australian law, in general, adequately cover the issue of procedural unfairness in contracts? Why/why not?

Yes       No

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## QUESTION 3:

Is there a need to regulate contract terms which are unfair in themselves? Why/why not?

Yes       No

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**QUESTION 4:**

What do you perceive the costs/benefits : advantages/disadvantages to be in not regulating further?

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**QUESTION 5:**

Are guidelines, voluntary codes of conduct or other methods of self regulation by industries an appropriate way to regulate with respect to unfair contract terms? Why/why not?

Yes       No

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**QUESTION 6:**

Are you aware of any other industry-based initiatives to manage unfair contract terms? If yes, please provide details.

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**QUESTION 7:**

What do you perceive the costs/benefits : advantages/disadvantages to be in self regulation in relation to unfair contract terms?

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**QUESTION 8:**

Is it desirable to adapt the UK model to the Australian context? Why/why not?

Yes       No

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**Schedule**

**QUESTION 9:**

Do you have any comments on the general definitions?

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**QUESTION 10:**

(a) Should private contracts be covered? Why/why not?

Yes       No

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(b) Should reference be made to standard form contracts used by a particular supplier? Why/why not?

Yes       No

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(c) Should contracts in relation to interests in land be covered by the legislation? Why/why not?

Yes       No

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**QUESTION 11:**

Do you have any comments on the applicability of unfair terms provisions?

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**QUESTION 12:**

Should the UCCC be covered by general unfair terms legislation? Why/why not?

Yes       No

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**QUESTION 13:**

Should terms which have been individually negotiated be capable of challenge on the grounds that they are unfair? Why/why not?

Yes       No

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**QUESTION 14:**

Should the concept of 'drafted in advance' be adopted? Why/why not?

Yes       No

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**QUESTION 15:**

Should the onus of proving that a contract was individually negotiated rest with the trader or the consumer? Why/why not?

Yes       No

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**QUESTION 16:**

Should a concept of "good faith" be included when determining whether a contractual term is unfair? Why/why not?

Yes       No

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**QUESTION 17:**

Should a reference to “all the circumstances” of the contract be included when determining whether a contractual term is unfair? Why/why not?

Yes       No

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**QUESTION 18:**

Should the courts be mandated or enabled to take the matters listed in the Victorian provision into account? Please give reasons.

Mandated       Enabled

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**QUESTION 19:**

Do you have a preference for the style of list in the Victorian provision or in the Schedule to the UK Regulations? Please give reasons.

Victorian Provisions       UK Regulations

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**QUESTION 20:**

(a) Should adequacy of price and/or the main subject matter be included in or excluded from coverage of unfair terms regulation? Please give reasons.

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Included       Excluded

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(b) If they should be excluded what limits, if any, should be placed on that exclusion?

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**QUESTION 21:**

(a) Is the Victorian version of the UK model preferable in this respect (description of unfair terms)? Please give reasons.

Yes       No

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(b) Would you recommend any further changes?

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**QUESTION 22:**

Are there other matters which should be included in the list in section 32X? If yes, please detail.

Yes       No

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**QUESTION 23:**

(a) Do you support the use of criminal sanctions where a term has been prescribed by regulation?  
Why/why not?

Yes       No

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(b) What other mechanism could be used to ensure that the legislation is taken seriously?

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**QUESTION 24:**

Should there be a power for a court/tribunal to vary a term or only declare it void? Please give reasons.

Vary only       Void

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**QUESTION 25:**

Should there be other remedies available, such as compensation, restitution, damages? Why/why not?  
If yes, please detail.

Yes       No

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**QUESTION 26:**

What other sanctions would be appropriate in order to make regulation of unfair terms effective?

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**QUESTION 27:**

(a) Should a term be assessed as unfair because of lack of legibility, clarity, intelligibility, etc?  
Why/why not?

Yes       No

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(b) Should there be more detail around what is required (with respect to plain and intelligible language)? If yes, please detail.

Yes       No

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**QUESTION 28:**

Should the *contra proferentem* rule be set out in the provisions for the purpose of drawing the attention of suppliers and purchasers to its existence?

Yes       No

**QUESTION 29:**

(a) Should other bodies be able to apply for injunctions? Why/why not?

Yes       No

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(b) Should this include designated consumer bodies? Why/why not?

Yes       No

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**Return to body of Paper**

**QUESTION 30:**

(a) Is the cost to government in implementing regulation of unfair terms under this model justified? Why/why not?

Yes       No

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(b) Are there other costs/benefits : advantages/disadvantages to government under this model?

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**QUESTION 31:**

Under such a model, should the relevant fair trading agencies be empowered or mandated to investigate complaints in relation to unfair terms? Why/Why not?

Yes       No

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**QUESTION 32:**

(a) What are the costs to business under this model of regulation and are these costs justified? Why/why not?

Yes       No

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(b) Are there other costs/benefits : advantages/disadvantages to business under this model?

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**QUESTION 33:**

(a) Are the benefits to consumers under this model sufficient to justify its adoption? Why/why not?

Yes             No

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(b) Are there other costs/benefits, advantages/disadvantages to consumers under this model?

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**QUESTION 34:**

(a) Is the CRA a suitable model for a nationally consistent regulatory regime for unfair contract terms? Why/why not?

Yes             No

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(b) Would the CRA model benefit from amendment in any way? Please give reasons and if yes, detail amendments.

Yes             No

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**QUESTION 35:**

What do you consider the costs/benefits : advantages/disadvantages to be in the CRA model?

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**QUESTION 36:**

Is the 'Composite Model' a suitable model for a nationally consistent regulatory regime for unfair contract terms? Why/why not?

Yes       No

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**QUESTION 37:**

Are there costs/benefits : advantages/disadvantages in relation to the composite model in addition to those raised in options 3 and 4?

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**QUESTION 38:**

(a) Which of the five options listed do you consider is the most appropriate way to proceed? Please give reasons.

1       2       3       4       5

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(b) Are there any other options you believe should be considered? Please detail.

Yes             No

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**QUESTION 39:**

If the decision was for government regulation, should nationally consistent legislation for unfair contract terms be uniform or harmonised? Please give reasons.

Uniform         Harmonised

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**QUESTION 40:**

(a) In principle, should any unfair terms legislation apply to B2B contracts as well as consumer contracts? Why/why not?

Yes             No

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(b) Should any such legislation apply to all B2B contracts or just those involving small business – and how would ‘small business’ be defined?

All B2B       Small business only

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(c) If B2B contracts were to be included, should the legislation apply to individually negotiated contracts/terms or only standard form contracts/terms? Please give reasons.

Individually negotiated     Standard form only

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(d) If B2B contracts were covered should the remedies be the same as for consumers. Why/why not?

Yes       No

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(e) What, if any, enforcement role and functions should fair trading agencies have if B2B contracts were covered?

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(f) Would extending the unfair provisions to B2B contracts simply duplicate existing protections e.g. unconscionable conduct, commercial tenancy legislation etc? Please detail.

Yes       No

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(g) What types of contract might be excluded from coverage? (For example: insurance contracts, telecommunications contracts, contracts for the transfer of land, securities, copyright)?

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(h) (i) Should adequacy of price be excluded for any B2B regulation? Why/why not?

Yes       No

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(ii) Are there other matters which should be excluded? Please detail.

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(i) Should unfair terms be prescribed in any regime to regulate for B2B contracts if there is an ability to prescribe for consumer contracts? Why/why not?

Yes       No

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(j) Should the onus of proof for B2B contracts be on the business disputing the fairness of the term? Please give reasons.

Yes       No

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(k) How might section 51AC TPA be affected by the composite model?

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(l) What do you consider the costs/benefits : advantages/disadvantages to be in regulating unfair contract terms in relation to B2B?

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**Thank you for taking the time to respond to the issues raised. Is there anything else on which you would like to comment?**

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