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*Law and Public Policy: Taming the Unruly Horse?*

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**PROMOTING FAIRER CONSUMER CONTRACTS: AN ASSESSMENT OF THE  
ALTERNATIVE REGULATORY MODELS**

FRANK ZUMBO\*

**I INTRODUCTION**

With the Productivity Commission currently reviewing Australia's consumer policy framework,<sup>1</sup> it is opportune to consider the issue of unfair terms in consumer contracts and, in particular, to assess the alternative regulatory models available to deal with this issue. In doing so, the paper will consider why the issue of unfairness in contract terms arises and whether or not existing concepts of unconscionability have offered consumers an appropriate framework for dealing with potentially unfair contract terms. In reviewing the operation of the existing concepts of unconscionability particular attention will be given to how the courts have increasingly emphasized procedural unconscionability under such concepts thereby reducing significantly the impact that those concepts may have had in promoting fairer contract terms. With this in mind, the availability of alternative regulatory models for promoting fairer contract terms will be explored and an assessment made of their effectiveness.

One such alternative model involves enacting a new legislative framework for dealing directly with allegedly unfair contract terms in a timely and targeted manner and in a way that does not undermine the certainty of consumer contracts. Such a new legislative framework can, along with clear guidance from the relevant enforcement agency, enhance certainty of consumer contracts by promoting transparency, clarity and fairness of contractual terms in a way that the existing concepts of unconscionability have been unable to do so. In this way consumers would be less likely to question the operation or fairness of contractual terms as they would have available to them a readily accessible

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<sup>1</sup> See <<http://www.pc.gov.au/inquiry/consumer>> at 6 February 2008.

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mechanism for having potentially unfair contract terms scrutinized for their clarity or potential for shifting contractual risks or obligations disproportionately onto the consumer.

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

Either way, the ever expanding bargaining power of businesses over consumers may lead to a temptation on the part of businesses to increasingly slant contract terms in favour of the business. Absent any legal restraint on businesses intent on abusing their contractual power, consumers are left to rely on any self restraint that may be exercised by a business. Consumers typically cannot walk away as the prevalence of standard form contracts across industries means that contract terms, including allegedly unfair terms, will be standard across industries.<sup>2</sup> There is of course the further issue of whether consumers can understand the nature and operation of all contract terms that they face; a

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<sup>2</sup> See generally Consumer Affairs Victoria, *Preventing unfair terms in consumer contracts: Guidelines on unfair terms in consumer contracts (November 2003)* <[http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV\\_Publications\\_Fair\\_Trading/\\$file/old\\_fair\\_trading\\_guidelines.pdf](http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV_Publications_Fair_Trading/$file/old_fair_trading_guidelines.pdf)> at 6 February 2008. See also Consumer Affairs Victoria, *Unfair contract terms in Victoria: Research into their extent, nature, cost and implications (October 2007)* <[http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV\\_Publications\\_Shopping\\_and\\_Services/\\$file/Research\\_paper\\_UCT.pdf](http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV_Publications_Shopping_and_Services/$file/Research_paper_UCT.pdf)> at 6 February 2008.

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task that is becoming more challenging given the “legalese” often used in even the most basic consumer contracts. The cost of consumers seeking legal advice on contract terms or seeking to negotiate with the business over the contract terms would often greatly outweigh the cost of the goods or services involved.

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

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

Historically, the Courts have not, in the absence of procedural unconscionability or other accepted grounds for intervention such as duress or undue influence, been interested in whether or not contract terms themselves may offend good conscience. The Courts have held firm to principles of freedom of contract and the view that the parties are best able to

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look after their own interests or decide to walk away from the proposed contract. Unfortunately, while everyone would agree on the importance of maintaining certainty of contracts, the judicial view of freedom of contract reflects an era (i) where businesses and consumers were more likely to be equals than the modern era where the bargaining power of businesses over consumers has grown considerably; (ii) where standard form contracts were not as widely used as today, and (iii) where contracts were more likely to be for one-off transactions rather than be for the ongoing or long term supply of goods or services.

In view of this judicial reluctance to consider solely questions of substantive unconscionability under the equitable doctrine of unconscionability or existing statutory provisions dealing with unconscionable conduct, it is clear that a new legislative framework for dealing with unfair terms in consumer contracts is needed nationally. Such a legislative framework is already in place in the United Kingdom<sup>3</sup> and Victoria.<sup>4</sup> This framework is operating effectively in these places<sup>5</sup> and based on that experience would undoubtedly operate effectively on an Australia-wide basis. Indeed, a New South Wales Parliamentary Inquiry has recommended that, in accordance with the approach taken in Victoria, the *Fair Trading Act 1987* (NSW) be amended to deal with unfair terms in consumer contracts.<sup>6</sup> Building on that experience it would be submitted that any new legislative for dealing with unfair terms in consumer contracts should have the following minimum elements:

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<sup>3</sup> *The Unfair Terms in Consumer Contracts Regulations 1999* (UK).

<sup>4</sup> Part 2B of the *Fair Trading Act 1999* (Vic).

<sup>5</sup> The effectiveness of the United Kingdom framework can be seen from the numerous amendments and deletions of unfair contract terms that have been secured by the United Kingdom Office of Fair Trading. The amendments and deletions are outlined in the Bulletins published by the United Kingdom Office of Fair Trading: See

< <http://www.crw.gov.uk/Other+legislation/Unfair+contract+terms/unfair+contract+terms+%2D+bulletins.htm> > at 6 February 2008.

<sup>6</sup> Legislative Council Standing Committee on Law and Justice, New South Wales Parliament, *Unfair Terms in Consumer Contracts*, November 2006

<[http://www.parliament.nsw.gov.au/prod/PARLMENT/Committee.nsf/0/3ecd89db93b4314eca25722f000b8bc9/\\$FILE/Unfair%20terms%20in%20consumer%20contracts%20Report%2032.pdf](http://www.parliament.nsw.gov.au/prod/PARLMENT/Committee.nsf/0/3ecd89db93b4314eca25722f000b8bc9/$FILE/Unfair%20terms%20in%20consumer%20contracts%20Report%2032.pdf)> at 6 February 2008 [6.9].

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

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

## **II WHY ARE UNFAIR TERMS IN CONSUMER CONTRACTS OF CONCERN?**

At its simplest, unfair terms in consumer contracts are of concern where they are imposed in an attempt to significantly alter in favour of the business the relative balance of rights and obligations under the contract in circumstances where that is not reasonably necessary for the protection of the legitimate interests of the business.<sup>7</sup> It is the combination of denying the consumer the ability to genuinely negotiate the contract, especially in standard form contracts, and then seeking to shift significantly the relative

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<sup>7</sup> For examples of the types of contract terms that may be considered unfair see generally Consumer Affairs Victoria, [Preventing unfair terms in consumer contracts: Guidelines on unfair terms in consumer contracts \(November 2003\)](http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV_Publications_Fair_Trading/$file/old_fair_trading_guidelines.pdf) <[http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV\\_Publications\\_Fair\\_Trading/\\$file/old\\_fair\\_trading\\_guidelines.pdf](http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV_Publications_Fair_Trading/$file/old_fair_trading_guidelines.pdf)> at 6 February 2008.

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balance of rights and obligations under the contract in favour of the business in a way that goes beyond what is reasonably necessary to protect the legitimate interests of the business that places the conduct of the business under the spotlight. Clearly, then, it is this combination that not only holds the key to, but also reveals the challenges with, dealing with unfair terms in consumer contracts.

Indeed, while it may be easy to suggest that consumers should be given the ability to genuinely negotiate with a business, in reality consumers and business are, not as a general statement, equally matched in terms of bargaining power and ability to understand the nature and scope of contract terms fully. Of course, where consumer contracts are genuinely negotiated between equally matched and resourced parties, such contracts should, in the absence of some other vitiating factor, ordinarily escape scrutiny from an unfair contract term point of view. In practice, it would not be surprising to find that consumer contracts are often standard form contracts presented on a “take it or leave it” basis.<sup>8</sup> In such circumstances, the contract is not the result of genuine negotiation and, more importantly, even if the consumer did have the opportunity to read and fully understand the terms of the standard form contract, there is typically no opportunity to renegotiate individual terms of the contract.

Faced with a standard form contract presented on a take it or leave it basis, the consumer has little real choice but to acquiesce. To walk away is often a futile gesture as the consumer on seeking to deal with another business is in all likelihood going to be faced with a similarly drafted standard form contract again presented on a take it or leave it basis. Clearly, any suggestion that consumers ordinarily have the ability to walk away or seek to renegotiate the standard form contract is a fanciful one. Not only does the industry wide imposition of basically similar standard form contracts operate to effectively deny the consumer the ability to walk away from such contracts, but once the

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<sup>8</sup> See generally Consumer Affairs Victoria, *Unfair contract terms in Victoria: Research into their extent, nature, cost and implications (October 2007)* <[http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV\\_Publications\\_Shopping\\_and\\_Services/\\$file/Research\\_paper\\_UCT.pdf](http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV_Publications_Shopping_and_Services/$file/Research_paper_UCT.pdf)> at 6 February 2008.

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consumer is locked into a contract, the consumer has little, if any, real ability to walk if the business chooses to utilize an unfair contract term. In short, there is little, if any, practical value in the consumer walking away from a standard form contract presented by one business only to find another business seeking to rely on similarly drafted standard form contract. While, of course, some may suggest that the consumer could decline to enter into any standard form contract it finds objectionable or simply seek to renegotiate its terms, such a suggestion is equally fanciful as not only would the cost to the consumer of seeking legal advice on the contents of the standard form contract typically far outweigh the value of the goods or services, but as standard form contracts within a particular industry are often drafted in the same manner any consumer walking away from one such contract would simply be denied access to those particular goods or services. Such industries are likely to include mobile phones, internet services, utilities, insurance, and finance providers.<sup>9</sup>

Once it is accepted that consumers have little, if any, ability to walk away or seek to renegotiate standard form contracts, it is rather pointless to suggest that changes in the drafting of standard form contracts can be promoted or secured through consumer action. Given the very limited bargaining power of individual consumers; the general inability to renegotiate terms of a standard form contract; and the importance to consumers of having reasonable access to the goods or services, little, if anything, would be gained from any suggestion that consumers should be better educated about, or more willing to challenge the use of, standard form contracts. Little is gained from such suggestions for the simple reason that businesses presently have no real incentive to redraft standard form contracts. More importantly, no amount of pressure from individual consumers is going to create such an incentive. In short, consumers threatening to walk away or seeking to challenge the use of standard form contracts will have very little, if any, impact where standard

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<sup>9</sup> For a comprehensive list of the types of industries in which standard form contracts are likely to be used see Consumer Affairs Victoria, [Unfair contract terms in Victoria: Research into their extent, nature, cost and implications \(October 2007\)](http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV_Publications_Shopping_and_Services/$file/Research_paper_UCT.pdf) <[http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV\\_Publications\\_Shopping\\_and\\_Services/\\$file/Research\\_paper\\_UCT.pdf](http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV_Publications_Shopping_and_Services/$file/Research_paper_UCT.pdf)> at 6 February 2008.

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form contracts are the industry norm. From the point of view of the business either the consumer accepts the standard form contract in its entirety, or the business refuses to supply the consumer.

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

Clearly, where low-priced consumer goods or services are involved, the potential cost of seeking to renegotiate the terms of a standard form contract may outweigh the potential benefits of doing so from both the consumer's and the business' point of view. Not only would the consumer typically need legal advice as to the nature and scope of some of the more complex terms of the standard form contract, but the consumer would need to spend time and effort with a business representative that was properly authorized to renegotiate the terms of the contract. Would a consumer spend such time and money where the cost of doing so was greater than the value of the goods or services? Similarly, would the business spend time and money on allowing consumers to renegotiate standard form contracts where the business was trading on thin profit margins in relation to the goods or services? Clearly, in both cases it would not serve the interests of either the consumer or business to pursue a strategy where the potential cost outweighs the potential benefit. This is particularly so if consumers were to be denied reasonable access to low-priced

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goods or services as result of business having to withdraw supply or raise prices to cover increased transactions costs flowing from consumers seeking to renegotiate standard form contracts. After all, businesses would argue that the lower transaction costs associated with using standard form contracts enables them to offer more competitive pricing on their goods or services than they could otherwise offer if they individually negotiated the terms of a contract with each and every consumer.

In response, consumers would no doubt accept there are benefits associated with the use of standard form contracts. In particular, consumers would recognize that transactions can be completed in a more timely and efficient manner where standard form contracts are used. Given such advantages, consumers would not generally be opposed to standard form contracts per se, but rather are growing increasingly concerned that the advantages are being outweighed by the disadvantages that they may face as a result of unfair terms in such contracts. In other words, if consumer concerns regarding the imposition of unfair terms through standard form contracts could be addressed, then consumers would be much more comfortable with the use of such contracts. In short, most, if not all, consumers would not have a problem with standard form contracts provided that their contents sought to strike a reasonable balance between the respective rights and obligations of the consumer and the business.<sup>10</sup>

Once the potential advantages of standard form contracts to both the consumer and the business are recognized, then progress can be made towards seeking to address the potential disadvantages to consumers arising from such contracts without in the process disadvantaging the business. In this regard, the key issue appears to be how best to deal with the issue of unfair terms within standard form contracts. While consumers may seek to renegotiate such terms, it is readily apparent that consumers are ordinarily ill-equipped

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<sup>10</sup> For examples of the types of clauses in consumer contracts that may or may not strike a balance between a consumer and the business see Consumer Affairs Victoria, [Preventing unfair terms in consumer contracts: Guidelines on unfair terms in consumer contracts \(November 2003\)](http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV_Publications_Fair_Trading/$file/old_fair_trading_guidelines.pdf) <[http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV\\_Publications\\_Fair\\_Trading/\\$file/old\\_fair\\_trading\\_guidelines.pdf](http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV_Publications_Fair_Trading/$file/old_fair_trading_guidelines.pdf)> at 6 February 2008.

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to do so and/or the value of doing so outweighs the potential benefits to the consumer. This of course assumes that the business would allow such individual renegotiation, something that would detract from the benefits to the business from using standard form contracts. Besides, it could be argued that, even if they could, consumers would not generally want to individually renegotiate the terms of a standard form contract provided they believed that the standard form contract was reasonably balanced in that the business did not go beyond what was reasonably necessary to protect the legitimate interests of the business.

Given that allowing the consumer the ability to genuinely renegotiate terms of a standard form contract is arguably not the best response to dealing with unfair terms in such contracts, then clearly the alternative to dealing with unfair terms is to deal in some manner with the attempt by the business to impose such terms in the first place. Since the essence of an unfair term is the attempt by the business to significantly alter in its favour the relative balance of rights and obligations under the contract in circumstances where that is not reasonably necessary for the protection of the legitimate interests of the business, then providing a mechanism for dealing with such attempts by the business is arguably the key to dealing with unfair terms in consumer contracts.

After all, the immediate question that arises is why must the business go beyond what is reasonably necessary to protect its legitimate interests. Surely it is appropriate for a business to limit itself to doing what is reasonably necessary to protecting its legitimate interests in circumstances where to show such restraint not only minimizes or possibly even removes consumer concerns with standard form contracts, but does so in a manner that would not disadvantage the business. Indeed, self regulation has always been, and will continue to be, an available option for businesses wishing to show self restraint by choosing not to use unfair terms. It is only where a business refuses to show such self restraint that self-regulation fails and there arises a need to explore alternatives to self-regulation.

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

### **III WHY IS A NEW LEGISLATIVE FRAMEWORK FOR DEALING WITH UNFAIR TERMS IN CONSUMER CONTRACTS NEEDED?**

A quick review of the key events during the past twenty five years reveals how the initial excitement surrounding the enactment of the *Contracts Review Act 1980* (NSW) or equivalent provisions in the *Trade Practices Act 1974* (Cth) has slowly turned to a growing realization that the procedural unconscionability bias adopted by the Courts means that neither the equitable doctrine nor the *Contracts Review Act* or the *Trade Practices Act* can presently be used to directly target allegedly unfair contract terms. A convenient starting point is provided by the following comments by Mason J in the landmark High Court decision in *Commercial Bank of Australia Ltd v Amadio* (1983) 46 ALR 402 at 412-413 where his Honour appeared to suggest that, in relation to the equitable doctrine of unconscionability the Courts, should be moving with the times. Not only do the comments state that the categories of special disadvantage were not closed,

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but they even offered hope that the time had come when the use and abuse of standard form contracts would be considered by the Courts:

“Because times have changed, new situations have arisen in which it may be appropriate to invoke the underlying principle. Take, for example, entry into a standard form of contract dictated by a party whose bargaining power is greatly superior, a relationship which was discussed by Lord Reid and Lord Diplock in *A Schroeder Music Publishing Co Ltd v Macaulay* [1974] 1 WLR 1308 at 1314–5, 1316: see also *Clifford Davis Management Ltd v WEA Records Ltd* [1975] 1 WLR 61 at 64–5. In situations of this kind it is necessary for the plaintiff who seeks relief to establish unconscionable conduct, namely that unconscientious advantage has been taken of his disabling condition or circumstances.”

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

Thus, the continued emphasis on procedural unconscionability means that little, if anything, of substance has changed with the equitable doctrine of unconscionability since the *Amadio* case. Not only have the Courts consistently restricted themselves to consideration of the long established categories of special disadvantage as the basis for granting relief under the equitable doctrine, but the High Court has emphatically refused to consider inequality of bargaining power, even a major disparity of bargaining power, as sufficiently ‘special’ to constitute a disabling condition permitting the equitable doctrine’s intervention. For example, in its decision in *ACCC v C G Berbatis Holdings Pty Ltd* (2003) 197 ALR 153 the High Court has made it clear that an inequality of bargaining power on its own will not give rise to a special disadvantage. Provided a

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person is capable of understanding the nature of the transaction, an inequality of bargaining or even a taking advantage of that inequality of bargaining power by the stronger party will not be sufficient to invoke the equitable doctrine. This position clearly emerges from the following comments by Gleeson CJ in that case at 157.

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

...

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

In short, the High Court's emphasis on procedural unconscionability or the requirement that there be a disabling condition recognizable by the Courts means that in the absence of such a disabling condition the equitable doctrine has no role to play in dealing with unfair consumer terms.

Ironically, such faded hopes for the equitable doctrine of unconscionability were being expressed in the late seventies and early eighties<sup>11</sup> and were being responded to by Australian legislatures at that time; first, by the New South Wales Parliament<sup>12</sup> and then followed closely by the Federal Parliament.<sup>13</sup> Indeed, there can be little doubt that these legislative responses were intended to expand the notion of unconscionability to one more responsive to what were perceived as the 'modern' needs of the time. Even in the early eighties the equitable doctrine was viewed as a very narrow one based on notions of procedural unconscionability restricted essentially to whether or not the consumer was under a recognizable disabling condition in the lead up to the making of the contract. To the consumer of the time, however, the issue was more one of increasingly being presented with a standard form contract on a 'take it or leave it' basis with next to no

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<sup>11</sup> See generally Peden J. *Harsh and Unconscionable Contracts*, Report to Minister for Consumer Affairs and Co-operative Societies and the Attorney-General for New South Wales (1976).

<sup>12</sup> See *Contracts Review Act 1980* (NSW).

<sup>13</sup> See s 51AB of the *Trade Practices Act 1974* (Cth).

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opportunity to renegotiate any terms considered to be unfair. That the standard form contract was being used more and more at an industry wide level made matters worse as the ability to shop around on the basis of contract terms was fast diminishing, if not already largely removed. In the eighties the modern corporation was getting bigger, industry was getting more concentrated and the standard form contract was becoming ubiquitous. Faced with a narrow equitable notion of unconscionability and a judicial unwillingness to broaden the scope of that doctrine, it was generally considered that only statutory intervention would bring about a doctrine of unconscionability more responsive to the then `modern' concerns arising from a growing inequality of bargaining power, standard form contracts and substantive unconscionability.

In seeking to deal with these `modern' concerns, the Federal Parliament enacted a new provision for the benefit of consumers in the *Trade Practices Act 1974* (Cth), now known as s 51AB. A number of points can immediately be made regarding s 51AB. First, it refers to conduct that is in all the circumstances `unconscionable' and lists a number of non-exhaustive matters that the Courts may take into account when considering whether or not the conduct is unconscionable under the provision. Secondly, the matters listed in subsection 51AB (2) raise both procedural and substantive unconscionability issues. Thirdly, and more importantly, as the matters in subsection 51AB(2) are neither exhaustive nor restricted to procedural unconscionability there was some hope that the Courts could seek to develop a broader notion of unconscionability that could also deal with allegations based solely on the substantive unfairness of the terms of the contract. In practice, however, there has, as in the case of the *Contracts Review Act 1980* (NSW), been a natural inclination by the Courts to emphasize procedural unconscionability in cases under s 51AB.

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

“31 Before sections 51AA, 51AB or 51AC will be applicable, there must be some circumstance other than the mere terms of the contract itself that would render reliance on the terms of the contract ‘unfair’ or ‘unreasonable’ or ‘immoral’ or ‘wrong’.”

In short, s 51AB cannot be used by a party to prevent the enforcement of a contractual term unless there is some additional circumstance arising from the particular case that would render the enforcement of that term unconscionable. Thus, for the purposes of s 51AB a party to a contract is, in the absence of procedural unconscionability on their part, able to rely on the term of a contract. Clearly, substantive unconscionability or the alleged unfairness of a contractual term will not, on its own, be enough to bring an action under s 51AB. Once again, the Courts have focused on the events leading up to the making of the contract and will only intervene under s 51AB where those events reveal that in the making of the contract a party was on the receiving end of conduct or behaviour that would make it unconscionable for the contract to be subsequently enforced against that party.

As procedural unconscionability is now well and truly dealt with by the equitable doctrine of unconscionability and more than ably supported by the existing statutory prohibitions against unconscionable conduct,<sup>14</sup> the time has come to properly deal with long standing consumer concerns regarding unfair terms with a new legislative framework for dealing such unfair terms.

**IV THE UNITED KINGDOM AND VICTORIAN LEGISLATIVE FRAMEWORKS FOR  
PROMOTING FAIRER TERMS IN CONSUMER CONTRACTS**

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<sup>14</sup> See e.g s 51AB of the *Trade Practices Act 1974* (Cth).

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From the outset, it is readily apparent that the United Kingdom<sup>15</sup> and Victorian<sup>16</sup> frameworks have been drafted to specifically target unfair terms in consumer contracts. Indeed, the sole focus of these frameworks is to make void or unenforceable unfair terms in consumer contracts. Both begin by defining unfair terms primarily by reference to the concept of good faith and a significant imbalance in the contractual rights and obligations of the parties to the detriment of the consumer. Notwithstanding these common elements to the definition of an unfair term, there are some differences in the definitions adopted in the two frameworks. For example, the United Kingdom framework targets unfair terms in standard form contracts, while Victorian framework targets unfair terms in consumer contracts generally. In particular, under Regulation 5 of the United Kingdom framework the focus is on terms not individually negotiated by the parties:

“5. - (1) A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.

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

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

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

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<sup>15</sup> *The Unfair Terms in Consumer Contracts Regulations 1999* (UK).

<sup>16</sup> Part 2B of the *Fair Trading Act 1999* (Vic).

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unfair under the Victorian framework. A similar list is provided in Schedule 2 of the United Kingdom Regulations.

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

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

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In practice, the United Kingdom and Victorian legislative frameworks have been effective in promoting fairer terms in consumer contracts. From a review of the experience under those frameworks, there is ample evidence to suggest that they have resulted in the rewriting of many contract terms so as to remove any alleged unfairness. Such rewriting of contracts has been clearly beneficial to consumers who would have otherwise been victims of the allegedly unfair terms with little or no legal recourse open to them. The best example of this is found in the recent Victoria Civil and Administrative Tribunal decision in *Director of Consumer Affairs v AAPT Ltd (Civil Claims)* [2006] VCAT 1493 (2 August 2006). In that case, it is important to note that the terms eventually found to be unfair were, because of the intervention of the Director of Consumer Affairs, rewritten to address the Director's concerns. This is a clear example where the Victorian framework has had a positive impact on the drafting of consumer contracts. While still early days for the Victorian framework, the United Kingdom experience is particularly positive as the United Kingdom Office of Fair Trading has had a great deal of success in securing enforceable undertakings from sellers and suppliers agreeing to modify or refraining from using allegedly unfair terms.<sup>17</sup> Clearly, the United Kingdom experience demonstrates that regulatory frameworks directly targeting unfair terms do offer consumers considerable benefits. Such benefits are not only much more tangible and long lasting than could ever be the case under the equitable doctrine of unconscionability and the existing statutory prohibitions against unconscionable conduct, but have been secured in a very timely manner.

## V CONCLUSION

Overall, it is readily apparent that existing concepts of unconscionability have such a procedural unconscionability focus that the application of such concepts has become essentially confined to the most extreme forms of harsh or oppressive conduct that may

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<sup>17</sup> The United Kingdom Office of Fair Trading publishes regular Bulletins on all concluded cases, including undertakings, under the Regulations: See < <http://www.crw.gov.uk/Other+legislation/Unfair+contract+terms/unfair+contract+terms+%2D+bulletins.htm>> at 6 February 2008.

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arise in the making or during the course of a contract. In practice, this has meant that these existing concepts of unconscionability have been interpreted in a way that has provided little or no scope to deal directly with allegations based solely on substantive unconscionability. Faced with this judicial reluctance to move the existing concepts of unconscionability away from their procedural unconscionability focus, it is clear that a new legislative framework is needed to deal solely with allegedly unfair contract terms. In this regard, the paper has sought to highlight that (i) the issue of unfair terms in consumer contracts is of critical importance to all Australian consumers; (ii) the implementation of a new legislative framework dealing with unfair terms in consumer contracts is vital if Australia is to be at the forefront of consumer law and policy; (iii) Australian consumers should not continue to be disadvantaged by a lack of legislative framework to deal with unfair terms in consumer contracts in circumstances where consumers in the United Kingdom and Victoria already enjoy such a framework; and (iv) that there are well established international precedents in support of a new legislative framework to deal with unfair terms in consumer contracts.