

UNFAIR TERMS IN BUSINESS TO BUSINESS CONTRACTS INVOLVING SMALL BUSINESSES: EXPLORING THE CASE FOR REFORM

FRANK ZUMBO*

I. INTRODUCTION

The question of whether the judiciary or the legislature should intervene to deal with unfair terms in business to business contracts involving small businesses has long been debated. This debate has its origins in the early 1990s and directly led to the enactment of s 51AA of the *Trade Practices Act* and continued through the 1990s with the subsequent push to enact s 51AC of the *Trade Practices Act*. At the heart of the debate is the need to balance long held notions of freedom of contract against a growing realization that the contractual vulnerability of a small business may be exploited by larger businesses through the inclusion of terms in contracts that are not reasonably necessary for the protection of the larger business's legitimate commercial interests. This debate was most notably acknowledged in a Report by the House of Representatives Standing Committee on Industry, Science and Technology that was tabled in May 1997. In that Report the Committee specifically considered the competing issues and, in particular, noted the vulnerability of small businesses in their dealings with larger businesses.¹

In Australia the question of fairness within business to business contracts involving small businesses has traditionally been confined to judicial and statutory concepts of unconscionable conduct. These existing concepts have, in turn, focused on procedural unconscionability. Indeed, the focus has been on the larger business's behaviour towards the small business in the making of the contract or during the course of their relationship rather than specifically on the fairness or otherwise of the actual terms of the contract. This judicial and statutory emphasis on procedural unconscionability has resulted in very little attention having been placed on substantive unconscionability or unfairness of contract terms.

This steadfast refusal by Australian Courts to review claims based specifically on the alleged unfairness of contract terms has resulted in such claims being rarely tested before the Courts. This refusal by Australian Courts to consider the fairness or otherwise of contract terms in their own right is clearly seen in the Full Federal Court decision in *Hurley v McDonald's Australia Ltd.*² While there may be examples of where claims involving substantive unconscionability in consumer contracts and business to business contracts involving small businesses may come before the Courts, these only tend to occur where procedural unconscionability is also being alleged by the weaker party. This is not only the case in relation to sections 51AB and 51AC of the *Trade Practices Act*, but is also the case in relation to the *Contracts Review Act 1980* (NSW). Consequently, the procedural unconscionability bias of the existing judicial or statutory concepts of unconscionable conduct has meant that unfair contract terms in both consumer contracts and business to business contracts involving small businesses have received scant judicial attention. Failing such judicial scrutiny, there has been a surge in interest amongst law reform and other policy development bodies, both in Australia and the United Kingdom, as to whether or not there should be a new legislative framework dealing with unfair contract terms. This surge of interest can be seen from the various reports discussed below in which the issue of

* Associate Professor, School of Business Law and Taxation, Australian School of Business, University of New South Wales, Australia.

1 House of Representatives Standing Committee on Industry, Science and Technology, Parliament of Australia, *Finding a balance: Towards Fair Trading in Australia* (1997) [6.35].

2 [1999] FCA 1728.

unfair terms, especially within business to business contracts involving small businesses, has been raised.

Within this setting the paper will explore the limitations of the existing concepts of unconscionable conduct in relation to business to business contracts involving small businesses and assess the work by law reform and other policy development bodies regarding the need for a new legislative framework to deal with unfair terms in business to business contracts involving small businesses such as franchise agreements and retail leases. In such contracts, small businesses are vulnerable to abuses of contractual power in the same manner as traditional consumers are in their dealings with large businesses. It is this vulnerability that has been identified in the work of law reform and policy development bodies both in the UK and in Australia as the basis for the need to review the fairness or otherwise of contract terms in business to business contracts involving small businesses.

II. SHOULD THE COURTS OR THE LEGISLATURE BE CONCERNED WITH THE FAIRNESS OR OTHERWISE OF CONTRACT TERMS?

While the courts and legislatures have allowed allegations of procedural unconscionability to be reviewed, this willingness has generally not been extended to consideration of the fairness or otherwise of the contract terms themselves.³ No doubt, this is simply because of the adherence to the long held notions of freedom of contract where the Court will in the absence of a vitiating factor seek to give effect to the terms of the contract.⁴ This notion has come under increasing attack as legislatures and law reform bodies around the world have as outlined below recognized that the growing disparity in the bargaining power of the parties in some contracts could result in conduct by the stronger party that is unethical rather than 'unconscionable' as narrowly defined by the courts. Thus, we find more and more that both consumers and small businesses are being viewed by legislatures as being increasingly vulnerable to exploitative or unethical conduct by large businesses. While initially such concern was confined to consumers, more recently such concerns have as outlined below increasingly been raised in relation to small businesses in dealings with larger businesses.

Such concerns have undoubtedly been related to the growing use of standard form contracts and the inability of consumers and small businesses to renegotiate the terms of such contracts. These concerns led directly to the United Kingdom⁵ and more recently Victoria⁶ enacting legislation dealing directly with unfair terms in consumer contracts. With the sole focus of this legislation being to deal with unfair terms in consumer contracts, it is readily apparent that the legislation provides a targeted mechanism for dealing with contract terms that go beyond what is reasonably necessary to protect the legitimate commercial interests of the stronger party.

Importantly, the enactment of this consumer oriented legislation has prompted considerable debate as to whether a growing imbalance of bargaining power between small businesses and large businesses may similarly lead to those larger businesses drafting contracts which include unfair contract terms in their dealings with small businesses. This debate has been fueled by discussion papers prepared by law reform bodies in both Australia and the United Kingdom. In January 2004 the Australian Standing Committee of Officials of Consumer Affairs (SCOCA) released a discussion paper on the issue of unfair contract terms in which it called for comment on the possible inclusion of business to business contracts in any legislation dealing with unfair contract terms.⁷ Likewise, in 2002

3 Ibid.

4 Ibid.

5 The UK legislation was implemented first and is now found in the *Unfair Terms in Consumer Contracts Regulations 1999*. These Regulations came into force on 1st October 1999.

6 The Victorian legislation is found in Part 2B of the *Fair Trading Act 1999* and came into force on 9 October 2003.

7 See also The Standing Committee of Officials of Consumer Affairs (SCOCA), *Unfair contract terms: A discussion paper*, 2004, 54.

the English Law Commission issued a consultation paper on unfair terms in contracts in which it considered extending the protection against unfair contract terms to businesses.⁸

Both papers have identified unfair terms in business to business contracts involving small business as a significant issue needing to be urgently addressed. In short, while both papers recognized the commercial character of business to business contracts and the possibly greater commercial sophistication of small businesses as compared to consumers,⁹ both papers expressed concern that small businesses in many cases faced comparable imbalances in bargaining power in dealing with larger businesses as the imbalances faced by consumers when dealing with large businesses.¹⁰

Likewise, both papers also felt that the increasing use of standard form contracts offered on a take it or leave it basis within a business to business context could, as in the case of consumer contracts, possibly lead to the inclusion of unfair terms in contracts between small businesses and larger businesses.¹¹ In both papers standard form contracts were seen as a particular problem area as these types of contracts restricted the ability of the small business to readily renegotiate the terms of the standard form contract.

Importantly, both papers identified examples of what could potentially be seen as unfair contract terms in a business to business environment. For instance, the English Law Commission identified the following contract terms as potentially going beyond what was reasonably necessary to protect the legitimate interests of the larger business:

- deposits and forfeiture of money paid clauses;
- high default rates of interest;
- clauses allowing unilateral variation in price;
- termination clauses allowing one party to terminate in a wider set of circumstances than allowed for the other party;
- unequal notice periods; and
- arbitration and jurisdictional clauses which seek to severely restrict the rights of a party to choose the forum for dispute resolution.¹²

Thus, while both papers acknowledged that the potential problems with unfair contract terms could, when compared to consumer contracts, be less severe in business to business contracts involving small businesses, such problems did arise and, accordingly, needed to be addressed.¹³

III. DO EXISTING LAWS ALLOW THE COURTS TO DEAL DIRECTLY WITH UNFAIR CONTRACT TERMS?

The reluctance of the Court to rely on statutory notions of unconscionable conduct to deal with the issue of substantive unconscionability is readily seen from a brief review of some key Australian cases. Such cases reveal that procedural unconscionability remains the focus of even the statutory prohibitions against unconscionable conduct. Indeed, in its decision in *ACCC v C G Berbatis Holdings Pty Ltd*¹⁴ a commercial tenancy case, the High Court has made it clear that an inequality of bargaining power on its own will not give rise to a special disadvantage under s 51AA of the *Trade Practices Act*. Provided a person is capable of understanding the nature of the transaction, an inequality of bargaining or even a taking advantage of that inequality of bargaining power by the stronger party will not be sufficient to invoke the equitable doctrine of unconscionable conduct. This position clearly emerges from the following comments by Gleeson CJ in that case.

8 See for example The Law Commission, *Unfair terms in contracts: A joint consultation paper*, Consultation Paper No 166, London, England, 2002 <<http://www.lawcom.gov.uk/docs/cp166.pdf>> at 15 August 2008.

9 Ibid 16.

10 Ibid.

11 Ibid.

12 Ibid.

13 Ibid.

14 (2003) 197 ALR 153.

[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.¹⁵

Similar comments were made by Gummow and Hayne JJ:

[55] ... It will be apparent that the special disadvantage of which Mason J spoke in [the *Amadio* case] was one seriously affecting the ability of the innocent party to make a judgment as to that party's own best interests.

[56] In the present case, the respondents emphasise that point and stress that a person in a greatly inferior bargaining position nevertheless may not lack capacity to make a judgment about that person's own best interests. The respondents submit that the facts in the present case show that Mr and Mrs Roberts [as tenants] were under no disabling condition which affected their ability to make a judgment as to their own best interests in agreeing to the stipulation imposed by the owners for the renewal of the lease, so as to facilitate the sale by Mr and Mrs Roberts of their business. Those submissions should be accepted.¹⁶

As the retail tenants in the case understood the nature of the transaction in which they were involved, the High Court considered that they were able to make a decision about what was in their best interest even in the face of the obvious disparity of bargaining power between the landlord and tenant and despite being in a take it or leave it situation.

Such a rigid approach is increasingly being applied to the supposedly broader s 51AB and s 51AC of the *Trade Practices Act*. Indeed, the Federal Court has noted that the terms of a contract cannot, on their own, form the basis of an action under s 51AB and s 51AC of the *Trade Practices Act*. According to the Full Federal Court in *Hurley v McDonald's Australia Ltd*¹⁷ something more is required than merely pointing to the terms of the contract:

24 No allegation of unconscionable conduct is made in ... relation to the making of the alleged contracts between McDonalds, on the one hand, and the Applicant and the group members, on the other. The allegation is simply that it would be unconscionable for McDonalds to rely on the terms of such contracts.

...

29 There is no allegation of any circumstance that renders reliance upon the terms of the contracts unconscionable. For example, it might be that, having regard to particular circumstances it would be unconscionable for one party to insist upon the strict enforcement of the terms of a contract. One such circumstance might be that an obligation under a contract arises as a result of a mistake by one party. The mistake is an additional circumstance that might render strict reliance upon the terms of the contract unconscionable. Mere reliance on the terms of a contract cannot, without something more, constitute unconscionable conduct.

...

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

These comments have more recently been repeated by Nicholson J in *Australian Competition and Consumer Commission v Lux Pty Ltd*¹⁸

15 Ibid 157.

16 Ibid 168.

17 [1999] FCA 1728.

18 [2004] FCA 926.

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

Thus, existing statutory prohibitions against unconscionable conduct such as s 51AB and s 51AC of the *Trade Practices Act* cannot be used by a party to prevent the enforcement of a contract term unless that party can point to some additional circumstance arising from the particular case that would render the enforcement of that contract term unconscionable. Clearly, under s 51AB and s 51AC of the *Trade Practices Act* a party to a contract is, in the absence of procedural unconscionability on their part, unable to challenge a contract term as unfair. In such circumstances, absent procedural unconscionability, existing statutory prohibitions against unconscionable conduct will be of little or no value in dealing directly with unfair terms in for example business to business contracts involving small businesses.

Significantly, this judicial restraint has equally applied to the interpretation of the *Contracts Review Act 1980* (NSW). Indeed, McHugh J in *West v AGC (Advances) Ltd* stated that:

... under this Act, a contract will not be unjust as against a party unless the contract or one of its provisions is the product of unfair conduct on his part either in the terms which he has imposed or in the means which he has employed to make the contract.¹⁹

In short, the focus on procedural unconscionability equally remains the central consideration of matters under the *Contracts Review Act (1980)*.

IV. A GROWING ACKNOWLEDGEMENT OF THE PRESENCE OF UNFAIR TERMS IN CONTRACTS INVOLVING SMALL BUSINESS

The difficulty of bringing action under s 51AC of the *Trade Practices Act* has been recently acknowledged in a number of State Government reports and discussion papers discussed below. In each case, the consensus is that s 51AC or equivalent State and Territory provisions is being too onerously interpreted by the Courts and, as a result, there is a need to either reform those provisions or adopt a new approach to unfairness in business to business contracts involving small businesses.

One example of the growing acknowledgement that s 51AC has not been interpreted in keeping with its original parliamentary intention is found in a recent report by the South Australian Parliament into the franchising sector. In its report titled – *Franchises* – the Economic and Finance Committee of the South Australian House of Assembly made the following observations:²⁰

The problem with section 51AC, as put to the Committee, is that the section has not been effective despite its broader remit. The Committee was told that despite the inducements in the provision to consider a wider definition, judicial interpretation of statutory unconscionability has tended to rely on so-called ‘procedural’ aspects of unconscionability, restricting its scope to cases of serious misconduct during the formation and performance of the contract.²¹ That approach seems to exclude instances where harsh contractual terms have been inserted in otherwise procedurally valid contracts.²²

Controversy surrounding the application of the section is provoked by the cautious approach adopted by Australian judges to interpreting it.²³

19 (1986) 5 NSWLR 610, 622.

20 The Economic and Finance Committee of the South Australian House of Assembly Report, *Franchises*, May 2008, 42-43.

21 Frank Zumbo, ‘Promoting Fairer franchise agreements: A way forward?’ (2006) 14 *Competition and Consumer Law Journal* 127.

22 *Garry Rogers Motors (Aust) Pty Ltd v Subaru (Aust) Pty Ltd* (1999) 21 ATPR 41-703.

23 Liam Brown, ‘The impact of section 51AC of the Trade Practices Act 1974 (Cth) on commercial certainty’ [2004] 20 *Melbourne University Law Review* at <<http://www.austlii.edu.au/cgi-bin/sinodisp/au/journals/MULR/2004/20.html?query=impact%20of%20section>> at 15 August 2008).

The Report especially identified the omission of a definition of the concept of ‘unconscionable conduct’ as representing a considerable challenge in taking action under s 51AC of the *Trade Practices Act*:

The fact the *TPA* does not provide a definition of the term “unconscionable conduct” appears to represent a challenge for the ACCC, the agency responsible for enforcement of the prohibition. While the ACCC is responsible for developing and testing the law in this area, the understanding of the provision remains very limited ten years after its introduction. However, as some witnesses pointed out, the reason for that lack of success may be the original construction of the provision and a lack of guidelines pointing to the intended meaning of the term “unconscionability”. Many of those who contributed to the inquiry also stressed that the uncertainty surrounding the meaning of unconscionability makes litigators and lawyers very reluctant to rely on section 51AC as a chosen cause of action. The inability to resort to any other similar provision creates a situation where businesses are denied legal remedies in disputes that often severely impact their interests.²⁴

In view of these concerns and of the considerable evidence put before the Committee, the Report took the position that legislative reform of s 51AC of the *Trade Practices Act* was required.²⁵

The Committee is of the opinion that section 51AC of the *TPA*, as it currently stands, is not being effectively utilised because of a combination of drafting imprecision and judicial caution. The section has the potential to provide a clear course for redress for franchise disputes and those factors currently obstructing its use should be identified and resolved, even if this requires revisiting the Act. Any such examination of the Act should be done in consultation with the franchising industry, with the needs of franchisees given equal weight with those of franchisor advocates.

The Committee recommends section 51AC of the *Trade Practices Act 1974 (Cth)* be amended by the inclusion of a statutory definition of unconscionability or alternatively by the insertion in the Act of a prescribed list of examples of the types of conduct that would ordinarily be considered to be unconscionable.

In short, the Report provides further recognition of the limitations of s 51AC of the *Trade Practices Act* and, in particular, of how the provision has been narrowly interpreted by the Courts.

A further example of the growing acknowledgement that s 51AC or equivalent provisions are too narrowly interpreted by the Courts or Tribunals is found in a recent discussion paper issued in New South Wales in relation to the retail leasing industry in that State. Indeed, the discussion paper titled - *Issues affecting the retail leasing industry in NSW: Discussion paper – February 2008* – specifically acknowledged the onerous interpretation being given to the New South Wales equivalent to s 51AC. That provision, which is found in s 62B of the *Retail Leases Act 1994*, was described in the following terms in the discussion paper:

Section 62B sets out a non-exhaustive list of matters to which the Administrative Decisions Tribunal may have regard in assessing whether particular conduct is unconscionable:

...

Since 2002, the Administrative Decisions Tribunal has heard 29 cases alleging unconscionable conduct. These authorities indicate that a finding of unconscionable conduct under s 62B can only be made if the conduct can be described as ‘highly unethical’ and involves ‘a high degree of moral obloquy’ — s 62B unconscionable conduct

²⁴ Ibid 44-45.

²⁵ Ibid 46.

will not be found simply because conduct is 'unfair' or 'unjust'.²⁶ The outcomes of the 29 cases were as follows:

- Unconscionable conduct was found in five cases (however two of these were overturned on appeal on grounds unrelated to the unconscionable conduct claims);
- One matter was transferred to the Supreme Court;
- The unconscionable conduct claims were withdrawn in five cases;
- Unconscionable conduct was held not to be made out in 13 cases;
- It was held unnecessary to consider the question of unconscionable conduct in six cases.

Analysis of the unconscionable conduct cases heard by the Administrative Decisions Tribunal to date indicates the test is onerous and the threshold for a finding of unconscionable conduct is very high. Because of the narrow interpretation of s 62B in accordance with equitable doctrine, the unconscionable conduct provisions have not operated as intended. There are many instances of unfair conduct on the part of landlords where tenants are unable to avail themselves of the remedy in s 62B due to the onerous test imposed.²⁷

Significantly, the discussion paper raised similar concerns with s 51AA of the *Trade Practices Act*:

Similar criticisms have been levelled at s 51AA of the *Trade Practices Act 1974* (Cth), which contains specific provisions aimed at providing increased protection where there may be an imbalance of bargaining power between small businesses and their larger business suppliers or customers. This section was introduced in 1992 to extend the unconscionability provisions. The ACCC noted in its submission to the 2007 Productivity Commission inquiry that it had been anticipated these provisions would be of particular use to tenants and franchisees in unequal bargaining positions with their landlords or franchisors. It noted however that s 51AA had not lived up to its expectations in respect of retail leasing matters due to the court's limited interpretation of s 51AA in accordance with equitable doctrine. Despite making enforcement of s 51AA a priority, the ACCC has been unable to build a single case that would succeed in relation to complaints from retail tenants in shopping centres.²⁸

Having recognized these concerns, the discussion paper takes the view that there is scope for legislative reform in dealing with unfair conduct within a retail leasing context:

Given that neither s 62B of the *Retail Leases Act* nor s 51AA of the *Trade Practices Act* have operated to provide the protection intended, there is clearly scope for legislative reform in this area.

There are a number of legislative reforms that could be introduced in order to protect parties from unfair conduct. One option is to extend and clarify the criteria to which the ADT may refer in determining whether conduct is unconscionable.

A second option is to introduce a test to deal with unfair conduct in an effective and efficient manner.

A third option is to introduce a provision into the Act which allows the Administrative Decisions Tribunal to vary or void any unjust provisions in the lease agreement (similar to s 106 of the *Industrial Relations Act 1996* or ss 7 and 8 of the *Contracts Review Act 1980*).²⁹

Clearly, while such proposals are aimed at dealing with unfair conduct, they fall short of providing a new legislative framework for dealing with unfair contract terms in a direct and proactive matter. Further, the proposals are limited to retail leasing agreements and do

²⁶ *Attorney General of New South Wales v World Best Holdings Ltd* (2005) 63 NSWLR 557, 583.

²⁷ *Issues affecting the retail leasing industry in NSW: Discussion paper – February 2008*, 17-18.

²⁸ *Ibid* 19.

²⁹ *Ibid* 19-20.

not extend generally to business to business contracts involving small businesses. This is a significant limitation as any proposals for dealing with unfair terms in business to business contracts involving small business would need to apply beyond merely the retail leasing sector for the simple reason that the vulnerability of small businesses is also found in other sectors of the economy, most notably within the franchising sector.

Further recognition of the need to implement a new national legislative framework dealing with unfair contract terms can be found in the Productivity Commission's report following its review of Australia's consumer policy framework.³⁰ Given the nature of the Commission's Inquiry, this recognition relates merely to 'consumer' contracts, with the Commission referring only to possible benefits to small businesses as 'consumers' of goods or services rather than recommending that small businesses be explicitly included in their own right in any new legislative framework dealing with unfair contract terms.³¹ Thus, any benefits to small businesses under the Productivity Commission's recommendation in relation to unfair consumer contract terms would only arise if small businesses were considered consumers of products sold by larger businesses rather than by explicitly applying a new legislative framework against unfair terms to business to business contracts involving small businesses. Ultimately such alleged benefits depend on what definition of a 'consumer' is adopted and given that the Productivity Commission has recommended that the current thrust of the definition of a 'consumer' continue under the Commission's proposed generic national consumer law such benefits to small businesses may in reality be illusory.³²

A further limitation of the Productivity Commission's recommendation dealing with a new legislative provision dealing with unfair consumer contract terms is that its recommended provision diverges from existing legislative frameworks in the UK and Victoria dealing within unfair terms in consumer contracts.³³ In doing so, the Commission's recommendation creates business uncertainty and will require time to be tested in court. In contrast, as discussed below, the UK and Victorian legislative frameworks for dealing with unfair contract terms have been in place for many years and, accordingly, provide an existing body of law that can be readily drawn upon if a new legislative framework against unfair contract was extended to explicitly cover business to business contracts involving small businesses.

V. NEW DIRECTIONS IN DEALING WITH UNFAIR TERMS IN CONTRACTS INVOLVING SMALL BUSINESS

In view of the growing acknowledgement of the judicial reluctance to use existing notions of unconscionable conduct to consider allegations based solely on the unfairness of contract terms, the question arises as to whether or not a suitable legislative framework is available to deal directly and effectively with such allegations. In dealing with this question, the recent enactment of a new statutory framework by the United Kingdom and Victoria for dealing with unfair terms in consumer contracts provides clear evidence of the availability a legislative framework that could easily be applied within a commercial context.

Significantly, the UK and Victorian legislative frameworks begin with a definition of what constitutes an unfair term. The inclusion of a clear definition of what constitutes an unfair contract term is essential in any legislative framework dealing with unfair contract terms in business to business contracts involving small businesses. Indeed, as noted above the failure of the legislature to define the concept of 'unconscionable' in the existing statutory prohibitions such as s 51AC of the *Trade Practices Act* has led the courts to take

30 Productivity Commission, *Review of Australia's Consumer Policy Framework*, Report No 45 (2008).

31 Ibid vol 2, 320.

32 Ibid 4.

33 Ibid 168-169.

a narrow view of the concept. This experience should be avoided by including a clear definition of 'unfair contract term' in a new legislative framework to deal with unfair contract terms.

In the UK and Victorian legislation unfair terms are defined 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. Within this context, the concept of good faith is a key part of the definition of an unfair contract terms that must be applied by the Court rather than mentioned as merely a factor that could possibly be considered by the Court as is the case under s 51AC of the *Trade Practices Act*.³⁴ While the two pieces of legislation have these common elements to the definition of an unfair term, there are some differences in the definitions. For example, the UK legislation targets unfair terms in standard form contracts, while Victorian legislation targets unfair terms in consumer contracts generally. In particular, under Regulation 5 of the UK legislation the focus is on terms not individually negotiated by the parties:

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

(2) A term shall always be regarded as not having been individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term.

(3) Notwithstanding that a specific term or certain aspects of it in a contract has been individually negotiated, these Regulations shall apply to the rest of a contract if an overall assessment of it indicates that it is a pre-formulated standard contract.

(4) It shall be for any seller or supplier who claims that a term was individually negotiated to show that it was.

Regulation 5 of the UK legislation includes various safeguards to ensure that only genuinely negotiated contract terms will be considered to be individually negotiated, with the onus under the UK legislation falling on the seller or supplier. In comparison, s 32W of the Victorian legislation 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.

Under the Victorian legislation 'consumer contract' is defined to mean 'an agreement, whether or not in writing and whether of specific or general use, to supply goods or services of a kind ordinarily acquired for personal, domestic or household use or consumption, for the purposes of the ordinary personal, domestic or household use or consumption of those goods or services.'³⁵ This clearly excludes business to business contracts involving small businesses.

Although the Victorian legislation 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 under the Victorian legislation. This list of factors is found in s 32X of the Victorian legislation and is particularly significant as it provides valuable insight as to the types of contract terms that may be considered unfair under the Victorian legislation:

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—

³⁴ See for example s 51AC(3)(k) of the *Trade Practices Act 1974* (Cth)

³⁵ See s 3 of the *Fair Trading Act 1999* (Vic).

- (a) permitting the supplier but not the consumer to avoid or limit performance of the contract;
- (b) permitting the supplier but not the consumer to terminate the contract;
- (c) penalising the consumer but not the supplier for a breach or termination of the contract;
- (d) permitting the supplier but not the consumer to vary the terms of the contract;
- (e) permitting the supplier but not the consumer to renew or not renew the contract;
- (f) permitting the supplier to determine the price without the right of the consumer to terminate the contract;
- (g) permitting the supplier unilaterally to vary the characteristics of the goods or services to be supplied under the contract;
- (h) permitting the supplier unilaterally to determine whether the contract had been breached or to interpret its meaning;
- (i) limiting the supplier's vicarious liability for its agents;
- (j) permitting the supplier to assign the contract to the consumer's detriment without the consumer's consent;
- (k) limiting the consumer's right to sue the supplier;
- (l) limiting the evidence the consumer can lead in proceedings on the contract;
- (m) imposing the evidential burden on the consumer in proceedings on the contract.

A similar list is provided in Schedule 2 of the UK legislation. Where a term is found to be unfair, Regulation 8 of the UK legislation 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 legislation 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.

VI. CONCLUSION

In conclusion, the UK and Victorian legislative frameworks could be used a model for drafting a new legislative framework for dealing with unfair terms in business to business contracts involving small businesses. The reason for drawing on these UK and Victorian legislative frameworks is that they provide a targeted mechanism for dealing directly with unfair contract terms. Indeed, dealing with unfair contract terms is the sole focus of both the UK and Victorian frameworks and this allows the enforcement agency in the jurisdiction to pursue such unfair contract terms in a direct manner. This ability to proactively deal with unfair contract terms in a timely manner has been of considerable benefit to consumers in both the UK and Victoria. Not only do the UK and Victorian legislative frameworks clearly define the nature of an unfair contract term covered by the framework, but the legislation also provides valuable guidance on the types of contract terms likely to be considered unfair. These are considerable advantages that would equally be valuable within the context of a new legislative framework dealing with unfair terms in business to business contracts involving small businesses such as franchise agreements and retail leases. Importantly, these advantages are backed up by the ability under the UK and Victorian frameworks to take timely action to prevent the continued use of unfair contracts terms. Once again, this ability to take timely action would be of considerable benefit in relation to unfair terms in business to business contracts involving small businesses. In such circumstances, the UK and Victorian frameworks could easily be used a model for a new legislative framework for dealing with unfair contract terms in business to business contracts involving small businesses.