SUBMISSION TO THE AUSTRALIAN CONSUMER LAW REVIEW 2016

Issues Paper 2.2.3 Protecting consumers from unfair contract terms

The following submissions respond to the issues raised on pp 15-16 of the Issues Paper.

Issue One: whether the current approach to determining if a term is 'unfair' and if a contract is a 'standard form contract' is sufficiently clear.

1. The current approach to determining whether a term is unfair should be retained but enhanced by placing the burden of proof on the party advantaged by the term and by making certain terms unfair per se

The approach taken in the ACL to determining whether a term is 'unfair' strikes the right balance between the interest of consumers and those of suppliers[1] and with two qualifications (these are outlined in (b) and (c) below), is superior to that taken in the equivalent provisions in the UK and those promulgated by European Commission. Those provisions are:

- the *Unfair Contract Terms Act 1977* (the UCTA). Despite its broad title, this deals only with exclusion clauses
- the *Consumer Rights Act 2015* (the CRA). Part 2 of this Act 'Unfair Terms' is the nearest equivalent to Part 2-3 of the ACL
- European Council Directive 93/13/EEC on *Unfair Terms in Consumer Contracts* (ECD 93). This was made part of UK law by regulation, the last version of which were the *Unfair Terms in Consumer Contracts Regulations 1999*. It is the progenitor of Part 2-3 of the ACL.

Part 2 of the CRA resulted from two reports of the Law Commission and Scottish Law Commission, namely, *Unfair Terms in Contracts* (2005) and *Unfair Terms in Consumer Contracts: Advice to the Department for Business, Innovation and Skills* (2013). Together with their joint consultation papers, these are instructive on most aspects of legislative attempts to address unfair contract terms.

(a) *The ACL strikes the right balance and is sufficiently clear*.

The definition of unfair in s. 24 the ACL incorporates 'significant imbalance' and 'detriment' elements in a manner similar to ECD 93 and the CRA. This has the advantage of making case law and other learning relating to those elements relevant to understanding and developing the ACL. However, it also incorporates (as they do not) a requirement that the unfair term not be 'reasonably necessary in order to protect the legitimate interests' of the party it advantages. The recognises that there may be cases in which an otherwise unfair term is justified because it does no more than protect a legitimate interest of the party it advantages. Including this element in the definition of 'unfair' means that the ACL does not need to qualify its list of examples of unfair terms (set out in s. 25) in the same manner as the equivalent lists in ECD 93 and the CRA are qualified. As well as making ss. 24 and 25 clearer and simpler, this approach has the advantage of making the definition of

[1] For ease of reference, I have used the descriptions 'consumers' and 'suppliers' to refer, respectively, to the victims and the authors of unfair terms. However, it is important to note, especially with the imminent commencement of the 'small business contract' extensions to Part 2-3 of the ACL, that the victim could be a supplier and the dominant party who authors and insists upon unfair terms, the consumer; for example, when a supermarket chain acquires produce or goods from a small supplier as in *ACCC v Coles Supermarkets Pty Ltd* [2014} FCA 1405.

'unfair' and the list of examples of unfair terms better able to apply in the future to terms and situations that were unforeseen when they were drafted.

When determining whether a term is unfair a court is required to approach the matter in the manner set out in s. 24(2). It is submitted that the approach prescribed by this section is superior to that in ECD 93 and the CRA and should be retained. This approach is to *permit* a court to have regard *any* matter the court thinks relevant but then to *require* it to take into account 'the extent to which the term is transparent' and 'the contract as a whole.' For this purpose, a term is defined as being transparent if it is 'expressed in reasonably plain language; ¨ legible; ¨ presented clearly; and readily available to any party affected by the term'.[2] The inclusion of transparency as a factor that *must* be taken into account when determining unfairness and the meaning assigned to it by s. 24(3), closely mirrors the recommendations of the Law Commissions[3] who argued that 'plain and intelligible language was a vital aspect of fairness'.[4] Furthermore, although the ACL does not so provide expressly, it would appear that a court could find a term to be unfair '*principally* or *solely* because it was not transparent' as they recommended.[5] Also, including a requirement that the court consider all of the other terms of the contract reflects accepted wisdom that because a term's apparent unfairness may be counterbalanced by benefits conferred by other terms, the unfairness of a term should not be determined in isolation from the rest of the contract. For example, a term imposing severe conditions on the transferability of an airline ticket may not, on balance, be unfair where those conditions exist to enable the supplier to provide the consumer with other benefits such as a lower price.[6]

(b) *The party advantaged by a term should bear the burden of showing that it is fair and the role of the court should be made explicit*.

The ACL adopts a nuanced position in relation to the burden of proof by -

- placing the burden of proof in relation to two elements of the definition of 'unfair' in s. 24(1) on the party alleging that the term is of this nature, whilst
- presuming that the third element is satisfied; (ie) presuming that the term is *not* reasonably necessary to protect a legitimate interest of the party it advantages.

It is submitted that because of the interconnection of the three elements of the definition of 'unfair' it would be reasonable and simpler to place the burden of proof on this issue entirely on the party advantaged by the term. Almost certainly, they will be better placed that the consumer to adduce evidence regarding the matters that may, or must, be taken into account when determining this issue, and to have the resources to do so.

Unlike the CRA (in s. 71) the ACL does not impose a duty on the court to consider unfairness in the absence of this being raised by one of the parties. Although this omission may not be significant, in so far as Australian judges can raise for consideration matters not mentioned by the parties, it would be desirable for the ACL to specifically require the court to consider whether a term is fair, even if

[2] See ACL, s. 24(3).
[3] See Law Commissions Report , para 3.97-3.101.
[4] Ibid at para 3.98
[5] Law Commissions' Report at para 3.102.
[6] See *Jetstar Airways Pty Ltd v Free* [2008] VSC 539.

the parties have not raised the issue, at least where they have the factual material before them to enable them to do so.

(c) *Clauses excluding liability for negligence causing personal injury should be made unfair per se*.

Section 64 of the ACL makes void exclusion clauses designed to exclude, restrict or modify a consumer guarantee. In addition, the list of examples of terms that *may* be unfair in s. 25 (in particular, examples (i) and (k)) has the potential to render void, as being unfair, any exclusion clause. However, in contrast to the position in the UK, Part 2-3 of the ACL does not actually prohibit, or render unfair per se, contractual terms that seek to exclude etc. liability for death or personal injury resulting from negligence. In the UK this is achieved via a combination of the CRA and the UCTA. Section 65(1) of the former prevents a *trader* using a term in a consumer contract to exclude or restrict liability for death or personal injury resulting from negligence and s. 65(2) prevents such a term creating a *volenti non fit injuria* defence. A number of exceptions to the scope of these provisions created by s. 66 to cover liability that may arise in connection with a land, insurance or settlement contracts, or out of granting non-commercial access to premises for recreational purposes. Section 2(1) of the UCTA prevents *any person* from relying on a contractual term or a notice to exclude or restrict their liability for death or personal injury resulting from negligence. This is reinforced by s. 2(3) which precludes such a term or notice being used to create a *volenti non fit injuria defence*. However, to prevent overlap with the CRA these provisions does not apply to a term in a consumer contract or notice.[7] It is submitted that the ACL should:

- Make unfair per se (that is without it being necessary to establish that they are unfair under s. 24) any term or notice that seeks to exclude or restrict liability for death or personal injury resulting from negligence. This would make the term automatically void
- leave the validity of terms that seek to exclude or restrict liability for other forms of loss resulting from negligence to be determined by whether they are unfair under s. 24.

2. The requirement in s 23(1)(b) that the contract be 'a standard form contract' is unclear, misleading and prejudicial to the interests of consumers; it should be removed

Unlike the equivalent provisions in the CRA,[8] the ACL can only render a contractual term void on the grounds that it is unfair if the contract is 'a standard form contract': see s. 23(1)(b). Experience in the UK with a similar requirement was that it created uncertainty, made the law more complex, and operated against the interests of consumers who negotiated with their suppliers. As a result, the Law Commissions in 2005 and again in 2013 recommended that unfair terms legislation should apply to contract terms whether or not they were negotiated.[9] This recommendation was implemented when the CRA was passed in 2015.

Although consumers (and now small businesses) are assisted in relation to this requirement by the presumption, created by s. 27(1), that a contract *is* a standard form contract, it is submitted that it should be removed so that the provisions in Part 2-3 apply to contractual terms regardless of whether they are in a standard form contract. This is because –

[7] See s. 2(4). Also, Schedule 1 of the UCTA provides that s. 2 does not apply to a small and miscellaneous list of contracts.
[8] Part 2B of the (now repealed) Victorian *Fair Trading Act 1999* was also not restricted to standard form contracts.
[9] The Law Commission and Scottish Law Commission, *Unfair Terms in Contracts,* (2005) at para. 3.55 and *Unfair Terms in Consumer Contracts: Advice to the Department for Business, Innovation and Skills* (2013) at para 7.66.

- the requirement is unclear, misunderstood and inherently uncertain
- the requirement could be used as a device for avoiding the operation of Part 2-3
- the rational for its existence is erroneous

(a) *The requirement is unclear, misunderstood and inherently uncertain*

The term 'standard form contract' is not defined in the ACL. However, s. 27(2) provides a list of matters that a court must take into account when deciding whether a contract is of this nature and these make it clear that a standard form contract is essentially one that is not negotiated. This interpretation is in line with article 3(1) of ECD 93, from which current Anglo-Australian derives, which applied only to a contractual term 'which has not been individually negotiated'. Unfortunately, the term itself and the operation of s. 27(2) result in the requirement being –

- Misunderstood and unclear
- inherently uncertain in its operation

The term 'standard form contract' creates the misleading impression that the requirement refers to contracts that are generic; that is, ones that are not unique to the parties but are used generally by the supplier when entering into the kind of transaction involved. An example of this misunderstanding is the reference in the Issues Paper (at p. 15) to such contracts 'being generic in nature'. However, as noted above, s. 27(2) makes it clear that the requirement concerns contracts that are not negotiated, rather than those that are generic, so that a contract that is unique to the parties will still be caught if it is pre-prepared by a party with 'all or most of the bargaining power' and the other party had no 'effective opportunity to negotiate the terms' but was instead required to 'accept or reject' them 'in the form in which they were presented.'

The requirement is inherently uncertain because the matters that s. 27(2) allows and requires a court to consider when determining whether a contract is a standard form contract mean that when negotiation has occurred its status will be almost invariably be debateable. The operation of s. 27(2), in effect, sets up a continuum from non-negotiated generic contracts (that are definitely standard form contracts) through to fully and effectively negotiated contracts (which are definitely *not* standard form contracts). However, at what point along this continuum a contract containing negotiated terms, or terms that are unique to the parties,[10] or in respect of which there has been some negotiation, will move from one to the other will always be uncertain. This is harmful to consumers as, notwithstanding s. 27(1), they will not know whether Part 2-3 can assist them and harmful to businesses who will not know whether their terms will be subject to scrutiny. This problem is likely to be especially acute in relation to small business contracts. However, this uncertainty could be avoided by deleting s. 23(1)(b) so that, as is the case in the UK with its equivalent, Part 2-3 applies to contracts whether or not they are negotiated, leaving that matter to be relevant only in relation to the issue of whether the contractual term was unfair.

(b) *The requirement could be used as a device for avoiding the operation of Part 2-3*

The requirement presents unscrupulous businesses with a means of avoiding Part 2-3 by manipulating the manner in which the contract is negotiated For example, by initially proposing outrageously unfair terms and then, when meeting (as anticipated) resistance from the other party,

[10] It is noted that s. 27(2)(c-(e) make it clear that negotiation about price, or the main subject matter of the contract, will not prevent a contract being a standard form contract.

moderating their demands slightly to a point at which they are able to persuade the latter to accept somewhat less unfair terms (or capitulating entirely in relation to terms dealing with one aspect of the contract whilst insisting on those on another aspect). In such a case, the contract might well not fall within any of paragraphs (b)-(e) of s. 27(2) and hence not be regarded as 'a standard form contract'.[11] In this respect, it is instructive to note that the focus of s. 27(2) is on the negotiation of the contract as a whole, rather than on the negotiation of any particular term.

(c) The rational for the requirement's existence is erroneous

The 'standard form contract' requirement adopts a recommendation of the Productivity Commission.[12] The Commission argued that negotiated contracts would 'eliminate any terms seen as unfair' and that the parties to negotiated contracts 'are usually sufficiently sophisticated to ensure acceptable contract outcomes and can reasonably be expected to have their "eyes wide open"'.[13] In reaching this conclusion, the Commission appears to have also been influenced by the fact that the UK provisions at the time also excluded negotiated terms and to have been unaware that the Law Commissions' had recommended, based on experience with those provisions, that this exclusion be removed. More importantly, as decisions such as *ACCC v Coles Supermarkets Australia Pty Ltd*[14] demonstrate, the fact that some negotiation occurs does not necessarily mean that the outcome will be fair. Furthermore, excluding a contract because it was (for example) not pre-prepared, or because there was 'an effective opportunity to negotiate' is inconsistent with one of the principal objections to unfair terms, namely, that they are 'offered on a "take it or leave it" basis by a party with greater bargaining power', as that power can be exercised in relation to negotiated terms just as well as it can with those that are not. Far better to cover all contracts and (as suggested above) leave the issue of negotiation to be a factor to be considered when the court determines whether the term is unfair.

Issue two: whether the protections should extend to a contract that is unfair as a whole

3. Yes; but changing Part 2-3 to achieve this appears to be unnecessary.

If it is accepted (as I do) that unfair terms (as defined in Part 2-3) should be void, it follows that the same should be the case for *contracts* that are unfair. With one qualification, what is less obvious is how a contract can be unfair if its individual terms are not – at least given the definition of 'unfair' in s. 24 and the matters a court must take into account when applying that definition.

The question posed appears to envisage a situation in which the individual terms of a contract are not unfair but the manner in which they are combined into a contract makes the contract as a whole of this nature. However, it is suggested that if such a conclusion could be reached, one or more of the individual terms *would* be unfair because the courts is required, when looking at an individual term, to consider the contract as a whole and the transparency of the term. This is especially so,

[11] It is noted that *in St Albans City Council v International Computers* [1996] EWCA Civ 1296, the Court of Appeal held that the mere discussion of a term is not sufficient to make it a negotiated term.
[12] Productivity Commission, *Review of Australia's Consumer Policy Framework*, (2008) Report Vol 2, p. 161
[13] Id. The Commission also reasoned that 'egregious terms' in a negotiated contract could be addressed by the law relating to unconscionable conduct; in particular by what is now Part 2-2 of the CCA. Its conclusion was that 'the inclusion of negotiated contracts would involve risks that exceed the likely benefits.'
[14] [2014] FCA 1405.

bearing in mind that the concepts involved are ones that 'naturally and indeed necessarily attract a more purposive and less minutely textual mode of construction.'[15] Thus, for example:

- just as an apparently unfair term may be rendered 'fair' when considered in the context of the contract as a whole,[16] an apparently 'fair' term may be found to be unfair when it is considered likewise.
- a term that might be fair if brought to a consumers attention might found to be unfair through lack of transparency if the contract is constructed in such a way as to conceal its existence or significance.[17]
- a term that was not hidden and was located where it might be noticed might still have its transparency reduced by the language in which it is expressed and the manner in which it was presented.[18]

The qualification alluded to above concerns a price term. It may be possible to conclude that the price (charged or to be paid) is so unreasonable that the contract as a whole is unfair but is nevertheless incapable of being challenged under Part 2-3 because the 'upfront price' exclusion in s. 26 means that the price term cannot be rendered void under s. 23. However, allowing the contract as a whole to be avoided in such a situation would nullify the upfront price exclusion. Whilst (in my opinion) there would be great merit in this outcome it is noted that this possibility has not been raised in the Issues Paper.

Issues three: whether standard form contracts covered by the *Insurance Contracts Act 1984* should be subject to unfair terms protection

Issue eight: whether insurance contracts should be treated in the same way as other standard for contracts

4. No; the requirement of utmost good faith has, in practice, the same (but more potent) effect and a case for change is not made out

As a general rule, exclusions from Part 2-3 of the ACL, or the ASIC Act equivalent, are undesirable. However, the exclusion of contracts covered by the *Insurance Contracts Act 1984* is already in place and because of the operation of the Act's requirement that the parties to an insurance contract exercise the utmost good faith, does not appear to be causing consumers harm. For this reason, change is not warranted; indeed, to do so may undesirably complicate insurance law as it would would then have to reconcile the unfair contract terms provisions of the ASIC Act and Part II of the *Insurance Contracts Act 1984*. This conclusion does not overlook that there is not a similar exclusion in the CRA; however, this may be the result of UK insurance law not containing similar provisions to those in Part II of the *Insurance Contracts Act 1984*.

Part II of the *Insurance Contracts Act 1984* imposes on the parties to an insurance contract a requirement 'to act towards the other party, in respect of any matter arising under or in relation to it, with the utmost good faith'.[19] Although the principal obligation this imposes is to disclose relevant

[15] M Leeming, 'Equity Ageless in the Age of Statutes' (2015) 9 *Journal of Equity* 108 at 116 – quoted with approval in relation to s. 24 in *ACCC v Chrisco Hampers* [2015] FCA 1204.
[16] The *Jetstar Airways Pty Ltd v Free* [2008] VSC 539 situation.
[17] For a possible example of how this might happen see *ACCC v CAN 117 372 915 Pty Ltd* [2015] FCA 368 at 953.
[18] See *ACCC v Chrisco Hampers* [2015] FCA 1204.
[19] See s. 13(1).

matters to the other party, it is a distinct requirement from disclosure (which is dealt with in Part IV) and covers other matters. A failure to comply with that provision is a breach of the Act. Furthermore:

- section 14(1) provides that if relying on the terms of a contract 'would be to fail to act with the utmost good faith' the party may not do so; and
- section 37 provides that an insurer may not rely on a term in a contract of insurance if it is unusual for insurance cover of the kind in question *unless* the insured was 'clearly informed' in writing of the effect of the term before the contract was entered into.

In *CGU Insurance Ltd v AMP Financial Planning Pty Ltd* [2007] HCA 36 at [15] Gleeson CJ and Crennan J said that the requirement of utmost good faith was not limited to dishonesty but

> 'may require an insurer to act with due regard to the legitimate interests of an insured, as well as to its own interests. [and that] an insurer's statutory obligation to act with utmost good faith may require an insurer to act, consistently with commercial standards of decency and fairness, with due regard to the interests of the insured'

In view of the reach of Part II of the Act and judicial statements such as this, it is hard to envisage many (if any) terms that would clearly be 'unfair' under s. 12BG of the ASIC Act but would not also involve a breach of the utmost good faith requirement. It is also worth noting that the consequences of breaching this requirement are far more severe than a contract term being unfair. Whereas such a term is made void by s. 12 BF of the ASIC Act, breach of the duty of utmost good faith, as well as making the term unenforceable, exposes the guilty party to liability for breach of contract[20] and for breach of the *Insurance Contracts Act*.

Issue four: whether regulators should have the power to seek monetary penalties

5. Yes! Where terms have previously been declared to be unfair, those responsible should be liable to a monetary penalty

The ACL does not prohibit incorporating an unfair term into a contract, or seeking to rely upon such a term, or purporting to do so ('using an unfair term'). This is made clear by s. 15(a). Similarly, the ACL does not contain mirror offences that make such conduct an offence in the manner achieved by Chapter 4 in relation to many (but not all) of the forms of conduct prohibited in Chapter 3. As a result, a pecuniary penalty cannot be imposed under s. 224 for using an unfair term, nor is using an unfair term an offence with a penalty attached. The only situation in which a penalty could be imposed is where a party has continued using an unfair term after an injunction against doing so had been obtained and the penalty was imposed for contempt of court.[21]

The ACCC's 2013 report, *Unfair Contract Terms – Review of Industry Outcomes*, indicates that many firms have responded positively to Part 2-3 and have worked with the ACCC (and no doubt their lawyers) to remove unfair terms from their contracts. This was also the experience in Victoria under the *Fair Trading Act 1999.* However, the ACCC's Report also indicates that not all firms have exhibited a willingness to do this. As a result, an effective and efficient way of dealing with recalcitrant firms is required.

[20] As including an unfair term in a contract is not a contravention of the ACL or ASIC Act, unless a declaration is obtained under s. 250 of the ACL, or s. 12 GND of the ASIC Act, damages cannot be recovered.
[21] *ACCC v Contact Plus Group Pty Ltd* (2006) ATPR 42-116 at 44,998-44,999.

Clearly, in practice at least, consumers and small businesses cannot be relied upon to take general enforcement proceedings. They may be able to avoid being bound by unfair terms in their own contracts; that is all. Therefore, it falls to the ACCC (and ASIC in relation to the ASIC Act equivalent) to police and seek to realise Part 2-3's policy objectives. As well as protecting consumers, these include avoiding the economic costs to the community in general of unfair contract terms, identified by the Productivity Commission.[22]

It is submitted that the most efficient and effective means of policing Part 2-3 is through ACCC enforcement and that their ability to fulfil this responsibility would be enhanced by them having the power to seek the imposition of pecuniary penalties. This should be possible, however, only in the case of the egregious use of unfair terms – understood in this context to mean the use of a term after it has been determined to be unfair. This approach could be achieved by:

- including in Part 2-3, or perhaps as a new sub-section of s. 250, a provision to the effect that a 'person should not apply or rely on, or purport to apply or rely on a term (or a term to the like effect[23]) once that term has been declared under s. 250 to be an unfair term'
- amending s. 224(1) so that it applies to the contravention of that new prohibition
- making equivalent amendments to the ASIC Act.

Such amendments would enable the ACCC/ASIC to seek the imposition of a pecuniary penalty where a firm has had a term declared to be unfair under s. 250 but has continued to use the term, or a term to the like effect. In other words, it would visit the imposition of a pecuniary penalty upon a firm only after it has been warned that the term was unfair and has ignored the warning. In such a case, the continued use of the term warrants the imposition of a pecuniary penalty. Also, using s. 224 would extend liability to attempting to use the term and to all those persons covered by s. 224(1)(c)-(f). To the extent that the threat of receiving a pecuniary penalty can have a positive effect on behaviour, this would be a more efficient and effective means of ensuring compliance than seeking and then enforcing an injunction.

As you will be aware, s. 32Z of the *Victorian Fair Trading Act* made it an offence to 'use in relation to a consumer a standard form contract containing a prescribed unfair term', or to attempt to enforce such a term. A 'prescribed unfair term' was defined as one that was prescribed by the regulations to be an unfair term or a term to like effect. That approach has been described as creating a 'black list' of terms, the effect of which was to make a single and initial use of a term on the list instantly a criminal offence. It is suggested that such an approach is too draconian for contractual conduct. Furthermore, adopting a pecuniary penalty approach only has the advantages that the criminal standard of proof would be avoided and that it would make the new prohibition of the use of unfair terms consistent with the existing prohibition of unconscionable conduct – the form of conduct proscribed by the ACL that most resembles using unfair terms.

[22] Productivity Commission, *Review of Australia's Consumer Policy Framework*, (2008) Report Vol 2, p. 415
[23] Included to prevent the prohibition being avoided by redrafting the clause but without altering its effect.

Issue five: whether regulators should be able to take action against systemic unfair contract terms

6. Yes! But it would appear to have this power already

The ACCC can obtain a declaration under s. 250 that a term of a contract is unfair. Having obtained such a declaration, it can obtain:

- *an injunction under s. 232*; this can be obtained 'in such terms as the court considers appropriate' where the court is satisfied that a person is 'applying or relying on, or purporting to apply or rely on' a term that has been declared to be unfair
- *a compensation order under s*. 237; such an order can be obtained on behalf of one or more persons who have 'suffered, or is likely to suffer, loss or damage' as a result of another person 'applying or relying on, or purporting to apply or rely on' a term that has been declared to be unfair. A compensation orders can be used to compensate loss that has already occurred and to prevent or reduce loss or damage that is likely to be suffered in the future
- *an order under s. 239 redressing the loss or damage suffered by non-party consumers*; such an order can be obtained against a contracting party who is advantaged by a term that has been declared to be unfair where (i) the term has caused, or is likely to cause, a class of persons loss or damage and (ii) that class includes persons who are not party to the term. The order can be in any terms the court thinks appropriate (other than an award of damages) to redress the loss or damage suffered by the non-party, or to prevent or reduce the loss or damages they have suffered or are likely to suffer as a result of the term.

Section 243 provides that the types of order that can be made under ss. 237 and 239 include:

- declaring the whole or part of a contract void
- refusing to enforce any or all of the terms of a contract
- directing the refund of money or the return of property
- except in the case pf s. 239(1) directing the respondent to pay damages.

These provisions appear to already give the ACCC wide powers to address systemic unfair contract terms, including through bringing representative actions. This is because one or other of them:

- is available in respect of proposed conduct, as well as conduct that has already occurred
- is available whether or not the unfair term has caused loss or damage
- is available in respect of loss or damage that is likely to be suffered, as well as that which has actually been suffered
- can be brought on behalf of consumers whether or not they are party to the proceedings (although the constitutional validity of orders in respect of non-parties has been questioned[24]).

[24] See *Medibank Private Ltd v Cassidy* (2002) ATPR 41-895 at 45,317 and 45-319.

Issue six: whether there are issues with contracts in general that the ACL should address, for example through improving contractual transparency and clarity

7. Part 2-3 of the ACL should give great attention to transparency.

This section deals only with improving contractual transparency. For this purpose, 'transparent' has the meaning given to it in s. 24(3) of the ACL and thus involves language, legibility, presentation and availability. It is submitted that Part 2-3 would be enhanced by:

- including a new requirement that written *contracts* and contractual *terms* be transparent
- including a statutory *contra proferentum* provision
- providing that the s. 26 exclusions of terms defining the main subject matter or setting the upfront price will only operate if those terms are transparent and prominent
- limiting the upfront price exclusion to money.

(a) *Requiring contracts and contractual terms to be transparent*

The transparency of a term is already a matter that a court must take into account when determining whether the term is unfair under s. 24(1). It is submitted that Part 2-3 should go further and separately require that written consumer and small business contracts should be transparent as should their terms. This is desirable because such transparency would:

- enhance the ability of consumers and small businesses to understand the contracts they are proposing to make. This would increase their ability to negotiate away unfair terms, or to avoid such terms by not contracting with the firm proffering them, or take precautions (such as insurance) against their use
- improve the competitive process by assisting consumers and small businesses to be better informed about the alternatives open to them and by making the process fairer by reducing the opportunity for firms to conceal what they are offering behind opaque language
- if complied with, make it less likely that a firm's terms would be unfair and hence unenforceable. This would make compliant forms more secure in the use of their contracts.

Whilst the potential for these benefits to be realised in practice should not be exaggerated,[25] they are real and explain why art. 5 of the ECD 93 and s. 68 the CRA require written terms to be transparent. In this regarded it is noted that the above proposal goes beyond the position in ECD 93 and the CRA by applying the transparency requirement to the contract as a whole as well as to individual terms. Whilst, as noted earlier, it is difficult to imagine how a contract as a whole could be unfair (and thus rendered void under s. 23) if none of its individual terms are of that nature, consumers, small businesses and market place competition would still benefit, in the manner outlined above, by having fair terms presented in a transparent contract.

As is the case with s. 68 of the CRA, the sanction for not complying with a requirement that written contracts and terms should be transparent would be the issue of an injunction under s. 232 of the ACL. This would enable a court to respond to the breach by issuing an injunction against the firm on whatever terms were considered to be appropriate.

[25] See the discussion of the economic benefits of unfair contract terms legislation in the Productivity Commission's, *Review of Australia's Consumer Policy Framework*, (2008) Report Vol 2, at 415-422.

(b) *A statutory contra proferentem provision*

It is an established principle of construction that, in cases of ambiguity, contractual terms should be construed against the party who drafted them, or in whose favour they would operate. This principle has been particularly valuable in ensuring that exclusion clauses operate only when they clearly and unambiguously cover the event in question.[26] Despite the existence of this principle in our 'unwritten law' it would be useful to reinforce the requirement that contracts and their terms be transparent by enacting it in Part 2-3. This approach has been taken in art. 5 of the ECD 93 and the CRA, s. 69 of which provides that:

> "If a term in a consumer contract, or consumer notice, could have different meanings, the meaning that is most favourable to the consumer is to prevail.'

(c) The s. 26 exclusions should operate only if those terms are transparent and prominent

Although of the opinion that Part 2-3 should not contain the price and subject matter exclusions contained in s. 26(1)[27] this is not advocated at this stage. However, those exclusions should be made fairer by being made subject to transparency and prominence requirements comparable to those in s. 64(2) of the CRA.

The exclusion of price and subject matter terms are predicated on those terms being expressed in clear and accessible language so that consumers and small businesses are not unfairly surprised by what they provide and are able to make ready comparisons between what they are being offered by those with whom they contract. Terms of this nature protect those to whom they are addressed and promote competition. For these reasons, many argue that they should not be subjected to a fairness assessment. However, because this is the rationale for them, in the CRA the exclusions operate only if the terms are 'transparent and prominent'. This means that they must be

- 'expressed in plain and intelligible language and (in the case of a written term) is legible'; and
- 'brought to the consumer's attention in such a way that an average consumer would be aware of the term'. For this purpose, an 'average consumer' is one who is 'reasonably well-informed, observant and circumspect'.[28]

By contrast, 26(1) of the ACL does not require price and subject matter terms to be 'transparent and prominent' before they are excluded. Whilst such a requirement may be inappropriate in relation to a term covered by para. 26(1)(c), it omission in relation to the subject matter and price exclusions means that they have the potential to operate prejudicially to consumers in a manner not possible in the UK.

Section 26(1)(b) excludes a price term only to the extent that it 'sets the upfront price' and s. 26(2)(b) requires this to be 'disclosed at or before the contract is entered into'. This is designed to make the exclusion apply only to terms that set the price that attracts consumers' attention and which they use when making product comparisons and purchasing choices, and not to those terms relating to price that are obscured from them by being located in the fine print, or which reveal the quantum of the price only after the consumer has become bound.[29] However, the requirement that

[26] See, for example, *Insight Vacations Pty Ltd v Young* (2011) 243 CLR 149.

[27] Briefly, this is because they have the potential to prejudice the interests of consumers and especially (as they may not have the same freedom of choice as consumers) the interests of small businesses.

[28] See CRA, s. 64(2)-(5)

[29] For a brief outline of the rationale for this provision seethe Explanatory Memorandum for the *Trade Practices Amendment (Australian Consumer Law) Bill 2009,* paras 2.67-2.76 which argues (at para. 2.73) that a consideration of whether a payment 'forms the upfront price may be the transparency of the disclosure of such a payment, or the basis upon which such payment may be determined'.

the price be 'disclosed' is significantly weaker than the CRA's requirement that it be 'transparent and prominent', especially having regard to the meaning the CRA gives to those words in s. 64. For example, s. 26(1)(b) would seem to apply to an obscure term contained in a lengthy printed contract, providing that the consumer will not be paid interest on money deposited with a financial institution in exchange for receiving a package of financial products. This is because it has set the upfront price (interest foregone) and this has been 'disclosed' (that is, made known, revealed, exposed to view) in the contract before it was concluded.[30]. On the other hand, under the CRA it would be necessary for this term to also have been expressed in 'plain and intelligible language' and brought to the consumer's attention in such a way that an average consumer would be aware of the term' – neither of which will necessarily have occurred in this example.

(d) *The upfront price should be expressed in money*

Unlike the CRA,[31]the price exclusion, 26(2) of the ACL defines price as 'consideration', rather than a money payment. This broadens the exclusion by giving it the potential to apply to other forms of consideration than money. When combined with the absence of a 'transparent and prominent' requirement, this could result in certain price terms not being subject to a fairness assessment despite not reflecting the rationale for their exclusion. It would exclude from examination, for example, John Batman's 1835 'purchase' of 600,000 acres in Victoria from members of the indigenous population in exchange for 20 pairs of blankets, 30 tomahawks, 100 knives, 50 pairs of scissors, 30 looking glasses, 200 handkerchiefs, one hundred pounds of flour and 6 shirts.[32]

Philip H Clarke
Emeritus Professor of Law
Deakin University
Geelong

[30] It is noted that as the product involved is a financial service, the relevant Australian provisions would actually be ss.12BG and 12 BI of the ASIC Act 2001.

[31] Price is not defined in the CRA. However, the Law Commissions recommended that it should mean 'money consideration' in line with s. 2(1) of the *Sale of Goods Act 1979.*

[32] See the Batman Land Deed, National Museum of Australia. In an early example of setting aside unfair contracts, this agreement was shortly afterwards rendered void by a proclamation issued by the Governor of New South Wales.