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# Promoting fairer consumer contracts: Lessons from the United Kingdom and Victoria

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*As jurisdictions around Australia move towards implementing a uniform legislative framework for dealing with unfair terms in consumer contracts, the United Kingdom and Victoria have not only implemented such a framework, but consumers in those jurisdictions are already benefiting from its operation. Significantly, it is the involvement of the relevant regulatory agency in those jurisdictions that has maximised the benefits for consumers. In contrast to the existing concepts of unconscionability where the impact of any successful litigation is essentially restricted to individual consumers or contractual arrangements affected by the conduct, the United Kingdom and Victorian frameworks dealing with unfair terms in consumer contracts allow the relevant regulatory agency in the jurisdiction to secure fairer consumer contracts across a whole industry. Indeed, where a term is considered to be unfair under such frameworks, the regulatory agency can seek to prevent the term's continued use across all consumer contracts in which the term is found. In this regard, these frameworks operate quite effectively to prevent the industry-wide use of an unfair term without the need for each and every consumer to individually challenge each use of the particular term. Within this context, this article will assess the experiences of the United Kingdom and Victoria with their frameworks for dealing with unfair contract terms, and identify the key factors contributing to the effectiveness of those frameworks.*

## INTRODUCTION

The proposed introduction of a uniform Australian legislative framework dealing with unfair terms in consumer contracts has put the spotlight on not only the value to consumers of having such a legislative framework in place, but more importantly on the need to move quickly to implement a uniform framework for the benefit of both consumers and businesses.<sup>1</sup> Indeed, with a legislative framework for dealing with unfair terms in consumer contracts already in place in the United Kingdom<sup>2</sup> and Victoria,<sup>3</sup> the implementation of a uniform Australia-wide framework is long overdue. Significantly, the experience with such a legislative framework in both the United Kingdom and Victoria provides ample evidence of the value of such legislation to consumers.<sup>4</sup> There can be no doubt that, in both jurisdictions, the legislation has led to many consumer contracts being written in clearer language, with a fairer balancing of contractual rights and obligations between businesses and consumers. Thus, where contracts in the United Kingdom and Victoria have been considered to disproportionately or unreasonably shift contractual obligations or risks onto consumers, the regulatory agencies in those jurisdictions have, almost entirely through consultation with the businesses involved, been able to have allegedly unfair terms either removed or rewritten in a fairer manner. From an Australian perspective, the Victorian experience provides a local example of the immediate benefits to consumers from having a legislative framework dealing with unfair contract terms. Such benefits have long been enjoyed by consumers in the United Kingdom. Within this

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<sup>1</sup> Consumer Protection in Australian and New Zealand, *Strategic Agenda of the Ministerial Council on Consumer Affairs* (2005), [http://www.consumer.gov.au/html/mcca\\_projects.htm](http://www.consumer.gov.au/html/mcca_projects.htm) viewed 4 May 2007.

<sup>2</sup> See *The Unfair Terms in Consumer Contracts Regulations 1999* (UK).

<sup>3</sup> See Pt 2B of the *Fair Trading Act 1999* (Vic).

<sup>4</sup> For a discussion of the Victorian and United Kingdom legislative frameworks, see Zumbo F, "Dealing with Unfair Terms in Consumer Contracts: The Search for a New Regulatory Model" (2005) 13 TPLJ 194.

context, this article will review the United Kingdom and Victorian experiences to date, and discuss the lessons that can be drawn from these experiences, with a view to demonstrating how a uniform Australian legislative framework dealing with unfair contract terms could promote fairer consumer contracts.

### TARGETING UNFAIR CONTRACT TERMS

From the outset, it is important to understand that both the United Kingdom and Victoria have sought to promote fairer consumer contracts by implementing a framework that directly targets unfair contract terms. In doing so, the United Kingdom and Victoria have recognised the extremely limited ability of consumers to challenge allegedly unfair contract terms under existing judicial or statutory concepts of unconscionability.<sup>5</sup> Indeed, judicial and statutory concepts of unconscionability have essentially been concerned with whether or not there has been procedural unconscionability in the making of the contract or during the course of the contract. Absent such procedural unconscionability, it has been almost impossible to have any allegation regarding the unfairness of a contract term (or substantive unconscionability) considered in its own right. Clearly, the threshold for using the existing judicial or statutory concepts of unconscionability is extremely high, and this goes a long way to explain why, historically, few cases have been taken under such existing concepts. Even where a case is brought under the existing judicial or statutory concepts of unconscionability, the procedural unconscionability bias of the courts in those cases means that any successful outcome is of very limited precedent value because the finding will generally be quite fact specific. There can be little, if any, doubt that the very high threshold that needs to be satisfied under existing concepts of unconscionability acts to discourage consumers from bringing action under these concepts. This is especially the case where the value of the goods or services involved is very small. Similarly, the fact-specific nature of any favourable judicial finding under the existing concepts of unconscionability, together with the time and expense of bringing such cases, would certainly discourage regulatory agencies on tight budgets and with national or State-wide enforcement priorities.

In such circumstances, with allegedly unfair contract terms going unchallenged under the existing concepts of unconscionability, consumers are effectively being denied recourse to the courts to have them judicially tested, and are left to place their faith on businesses exercising self-restraint when drafting contract terms. While this faith may or may not be justified, depending on the particular business involved, there always remains the issue of what differentiates a “fair” term from an “unfair” term. This is a critical issue and, in many ways, is central to explaining why the United Kingdom and Victorian legislative frameworks for dealing with unfair contract terms are superior to the existing concepts of unconscionability in dealing with contractual “unfairness”. Indeed, while the existing concepts of unconscionability are typically dependent on a detailed assessment of the factual circumstances surrounding the conduct and interaction of the parties to the contractual relationship, the United Kingdom and Victorian frameworks focus on the wording of a contract term and do so in an objective manner by reference to an established and universally applicable standard of “unfairness”. Thus, while the application of existing concepts of unconscionability very much depends on the inevitably unique circumstances of each individual case, the United Kingdom and Victorian frameworks for dealing with unfair contract terms set a benchmark of unfairness that can be applied universally and consistently across consumer contracts. Under both frameworks, either a contract term is unfair or it is not unfair according to the benchmark of unfairness set in the particular framework.

In short, under the United Kingdom and Victorian frameworks it is known in advance, or is capable of being known in advance, whether or not a contract term is “unfair”. This is generally not the case in relation to the application of existing concepts of unconscionability because these concepts typically require a detailed retrospective assessment of the factual circumstances of the individual contractual relationship. In other words, the United Kingdom and Victorian frameworks draw a line between terms that are unfair and those terms that can continue to bind the parties if capable of doing so. Importantly, this line is known from the outset and, as a result, offers an established point of

<sup>5</sup> For a discussion regarding the operation of the existing judicial and statutory concepts of unconscionability, see Zumbo F, “Dealing with Unfair Terms in Consumer Contracts: Is Australia Falling Behind?” (2005) 13 TPLJ 70.

reference for businesses, consumers and the relevant regulatory agency when assessing the fairness or otherwise of a contract term. It is the drawing of a line between fair and unfair terms that is a key element contributing to the effectiveness of the United Kingdom and Victorian frameworks. Significantly, such a line has been drawn in the frameworks themselves rather than being left to the courts, as is generally the case under the existing concepts of unconscionability. Accordingly, the line under the United Kingdom and Victorian frameworks is known in advance and provides an objective measure of unfairness that can be applied consistently to all contract terms and across all types of consumer contracts. Also, given that this measure of unfairness can be applied to a contract term as and when the need arises, it provides businesses and consumers with a much higher level of certainty regarding its potential application than is generally possible under the existing concepts of unconscionability.

Clearly, this established and objective measure of unfairness allows the United Kingdom and Victorian frameworks to operate in a preventative and pro-active manner. Unlike the existing concepts of unconscionability, which only ever tend to be applied after the event, and even then with a heavy procedural unconscionability bias, the measure of unfairness in the United Kingdom and Victorian frameworks provides a benchmark that can be applied in advance and in a pro-active manner. Thus, contractual terms can be tested in advance against the measure of unfairness and suspect terms identified. This process can be undertaken by businesses well in advance, and allows them to review all contract terms with a view to redrafting suspect terms in a clearer or more balanced manner. This refining or fine-tuning of contract terms by reference to an objective and universally applicable measure of unfairness can assist businesses in minimising consumer disputes by drafting contracts that consumers can understand and be comfortable with. Likewise, the regulatory agency can assess contract terms against the measure and approach businesses to discuss suspect terms. This is particularly helpful in relation to terms used in industry-wide, standard form consumer contracts and allows the regulatory agency and the business or businesses using the contract term to have a constructive dialogue about a suspect term by reference to the measure of unfairness. In this way, suspect terms can be targeted under the United Kingdom and Victorian frameworks in a preventative and pro-active manner which seeks to prevent consumer detriment from arising in the first place, and without in any way detracting from the ability of businesses to reasonably protect their legitimate commercial interests.

### **DEFINING “UNFAIRNESS” – A KEY FACTOR UNDERPINNING THE EFFECTIVENESS OF THE UNITED KINGDOM AND VICTORIAN FRAMEWORKS**

The inclusion of an objective measure of unfairness within the United Kingdom and Victorian frameworks is undoubtedly a key factor contributing to the effectiveness of those frameworks in dealing with unfair contract terms. This measure of unfairness not only acts as a single point of reference for consumers, businesses and regulatory agencies, but its inclusion means that the measure is known from the start and can be applied immediately. Thus, unlike the existing concepts of unconscionability, the inclusion of a measure of unfairness in the United Kingdom and Victorian frameworks means that it does not need to be developed judicially over a period of time, a process that may be ongoing and take considerable time and effort. Indeed, as can be seen with the more recent statutory concepts of unconscionability,<sup>6</sup> leaving the formulation or development of the concepts to the courts may involve a protracted process where the judicial pronouncements may ultimately be so dependent on the factual circumstances of the particular cases that this prevents their general application. Of course, the measure of unfairness under the United Kingdom and Victorian frameworks may, like any legislative provision, be subject to judicial consideration at anytime but, in

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<sup>6</sup> See, eg *Trade Practices Act 1974* (Cth), ss 51AB-51AC.

this regard, it is noteworthy that the measure of unfairness under the frameworks has only been judicially reviewed on rare occasions and even then has been duly applied with little, if any, controversy.<sup>7</sup>

This high degree of certainty and absence of controversy in the application of the measures of unfairness comes as little surprise because the objective nature of the measures adopted within the frameworks allows the measures to be applied as consistently and as universally as possible. The objective nature of the measures of unfairness adopted by the United Kingdom and Victorian frameworks can be seen from the definitions of “unfair term” used in the frameworks. For example, within the Victorian context, an “unfair” term is defined in the following way:

32W What is an unfair term?

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

Similarly, the United Kingdom framework uses the following definition:

Unfair Terms

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

By identifying upfront the type of contract term that may be suspect under each framework, these definitions become the focal point of the frameworks. While there is a slight nuance between the two definitions, with the Victorian definition applying generally to contract terms and the United Kingdom definition applying to terms not individually negotiated, both definitions clearly place the spotlight on contract terms where there is a significant imbalance in the rights and obligations of the parties. In doing so, the identification of terms where there may be “significant imbalance” in the contractual rights and obligations of the parties becomes a useful and efficient way for consumers, businesses, and the regulatory agency to more readily differentiate between terms that may be suspect under the frameworks and those that do not raise any immediate concern.

Of course, there needs to be as much clarity and guidance as possible to determine what may be considered to be a “insignificant imbalance” and, in this regard, each definition of an unfair term is supported by the inclusion of an extensive, detailed and non-exhaustive list of examples of contract terms that may be regarded as unfair under the framework. For example, the Victorian framework identifies terms that have the following intention or effect:<sup>8</sup>

- (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.

<sup>7</sup> See, eg *Director General of Fair Trading v First National Bank plc* [2001] UKHL 52; *Director of Consumer Affairs v AAPT Ltd* [2006] VCAT 1493.

<sup>8</sup> See ss 32X of the *Fair Trading Act 1999* (Vic).

Significantly, the United Kingdom framework includes a more extensive list of indicative and non-exhaustive list of terms that may be regarded as unfair:<sup>9</sup>

1. Terms which have the object or effect of:

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

2. Scope of paragraphs 1(g), (j) and (l)

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<sup>9</sup> See *The Unfair Terms in Consumer Contracts Regulations 1999* (UK), Sch 2.

- (a) Paragraph 1(g) is without hindrance to terms by which a supplier of financial services reserves the right to terminate unilaterally a contract of indeterminate duration without notice where there is a valid reason, provided that the supplier is required to inform the other contracting party or parties thereof immediately.
- (b) Paragraph 1(j) is without hindrance to terms under which a supplier of financial services reserves the right to alter the rate of interest payable by the consumer or due to the latter, or the amount of other charges for financial services without notice where there is a valid reason, provided that the supplier is required to inform the other contracting party or parties thereof at the earliest opportunity and that the latter are free to dissolve the contract immediately.
- Paragraph 1(j) is also without hindrance to terms under which a seller or supplier reserves the right to alter unilaterally the conditions of a contract of indeterminate duration, provided that he is required to inform the consumer with reasonable notice and that the consumer is free to dissolve the contract.
- (c) Paragraphs 1(g), (j) and (l) do not apply to:
- transactions in transferable securities, financial instruments and other products or services where the price is linked to fluctuations in a stock exchange quotation or index or a financial market rate that the seller or supplier does not control;
  - contracts for the purchase or sale of foreign currency, traveller's cheques or international money orders denominated in foreign currency;
- (d) Paragraph 1(l) is without hindrance to price indexation clauses, where lawful, provided that the method by which prices vary is explicitly described.

It is readily apparent that such lists provide valuable guidance as to the intended scope of the measure of unfairness used under the frameworks. Indeed, each type of term included in the lists represents a separate example of a potentially unfair term that may be subject to scrutiny under the frameworks. When taken together, these examples are extremely useful in providing a detailed description of what constitutes an unfair contract term under the framework.

Finally, it should be noted that only terms considered to be unfair under the relevant measure of unfairness are made void by the particular framework, with the remainder of the contract continuing to bind parties if capable of doing so.<sup>10</sup> In contrast, under the existing concepts of unconscionability, the heavy emphasis on the existence of procedural unconscionability means that the conduct held to be unconscionable is likely to be so pervasive as to taint or threaten the entire contract. With only unfair terms being targeted under the United Kingdom and Victorian frameworks, the definition of an unfair term and the non-exhaustive list of terms that may be regarded as unfair represent key factors contributing to the effectiveness of the frameworks.

## **THE ROLE OF EDUCATION IN RAISING AWARENESS OF POTENTIALLY UNFAIR CONTRACT TERMS**

Once the measure of unfairness is set under the framework, an understanding of that measure among consumers and businesses becomes a critical element in the success of the framework. In relation to both the United Kingdom and Victorian frameworks, this has involved the relevant regulatory agency developing and maintaining an educational program that helps promote awareness of the framework and its operation. This program has a number of facets ranging from short explanatory leaflets through to more detailed publications and consultations with particular businesses and industries. A brief review of the educational initiatives of the United Kingdom and Victorian regulatory agencies reveals the considerable guidance available to consumers and businesses in those jurisdictions. Not surprisingly, these educational initiatives have been instrumental in not only promoting awareness of the measure of unfairness used under the United Kingdom and Victorian frameworks, but also ensuring that as much guidance as possible is provided to consumers and businesses about that measure of unfairness.

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<sup>10</sup> See *The Unfair Terms in Consumer Contracts Regulations 1999* (UK), reg 8; *Fair Trading Act 1999* (Vic), s 32Y.

### **United Kingdom Office of Fair Trading – educational initiatives**

The United Kingdom Office of Fair Trading (UK OFT) has an extensive range of publications which are available through the “unfair terms in consumer contracts” home page it has created on its website.<sup>11</sup> This home page provides the entry point to other pages on the website dealing with the following:

- What is an unfair term?
- Who enforces the *Unfair Terms in Consumer Contracts Regulations*, and how?
- Guidance
- Legal powers
- Advice on drafting contracts
- Contacts
- Publications
- Bulletins
- List of concluded unfair terms cases

Each of these pages includes useful information about the United Kingdom framework and links to other relevant pages on the UK OFT website. For present purposes, the “publications” page is particularly relevant as this provides links to consumer information leaflets, guides for consumer advisers, and reports detailing cases where terms have been revised or deleted. These include varying degrees of information about the United Kingdom framework. For example, the UK OFT has developed the following introductory consumer information leaflets:

- *Unfair tenancy terms*
- *Are they fit to join? A guide to health club membership terms*
- *Buying tickets for a show? Hiring a clown for a party? Going scuba diving? Unfair terms in consumer entertainment contracts*
- *Fair terms for care – guide to unfair terms in privately funded care home contracts*
- *A fair pitch for your holiday caravan – guide to unfair terms in agreements for static holiday caravans*

Finally, the UK OFT has published regular Bulletins on all concluded cases, including undertakings, under the United Kingdom framework. These Bulletins can be accessed directly on the website or through the *Unfair terms in consumer contracts* home page. They are particularly useful because they provide real examples of terms that have been redrafted or removed from consumer contracts. Recently, the UK OFT has started to publish a *List of concluded unfair terms cases with undertakings* which can also be accessed directly on the website. While these lists of concluded cases are now published in place of the Bulletins, a total of 29 published Bulletins remain accessible and continue to provide useful guidance.

### **Consumer Affairs Victoria – educational initiatives**

Consumer Affairs Victoria has also produced a variety of publications, including:<sup>12</sup>

- a “Contracts” fact sheet aimed at providing consumers with a basic overview of the Victorian framework;
- *Preventing unfair terms in consumer contracts – Preliminary guidelines for suppliers* (November 2003);
- *Unfair terms in vehicle rental agreements for cars, 4WDs, motor homes and vans* (May 2005).

The latter two publications provide detailed guidance on the types of terms that may be considered unfair under the Victorian framework. Both publications include numerous examples of potentially unfair contract terms along with an explanation of why the terms could be seen as unfair and how the unfairness could be avoided.

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<sup>11</sup> See Office of Fair Trading (UK), *Unfair Terms in Consumer Contracts*, Consumer regulations website, viewed 4 May 2007.

<sup>12</sup> These publications can be accessed through the Consumer Affairs Victoria website, <http://www.consumer.vic.gov.au> viewed 4 May 2007.

When taken together, these United Kingdom and Victorian educational initiatives provide useful insights into the nature of unfairness targeted by the two frameworks and how those frameworks operate in practice. These educational initiatives have undoubtedly been a key factor contributing to the effectiveness of the United Kingdom and Victorian frameworks. Significantly, while these publications are generally tailored to the particular jurisdiction, there is no doubt that such guidance could usefully be drawn upon in other jurisdictions using the same measure of unfairness as the United Kingdom and Victorian frameworks.

### **THE ROLE OF THE REGULATORY AGENCY**

While educating consumers and businesses as to the nature of unfair contract terms dealt with under the United Kingdom and Victorian frameworks is integral to the success of such frameworks, such education needs to be backed up by cost-effective enforcement strategies. In the case of both the United Kingdom and Victorian frameworks, this has meant a very high level of reliance on consultation with businesses where suspect terms have been identified. Such consultation has allowed for the direct targeting of such terms in an efficient and cost-effective manner with only very rare recourse to the courts. Indeed, the considerable efficiency with which matters are dealt with under the frameworks arises because those frameworks empower a regulatory agency to undertake negotiations directly with the businesses regarding the redrafting or removal of allegedly unfair contract terms without the need for every consumer to do so in relation to each use of the term. Not only do consumers usually lack the time, resources or bargaining power to seek the rewriting or removal of an allegedly unfair term, especially in relation to low-cost goods or services, but consumers faced with an unwilling business are left with the bleak choice between: (a) not having the goods or services at all because the terms may be standard within the industry; or (b) pursuing expensive, time-consuming legal action.

Thus, the United Kingdom and Victorian frameworks provide a means through which a suspect contract term within an industry can be efficiently dealt with in one go through the involvement of the regulatory agency, rather than having the suspect term simply go unchallenged or requiring expensive legal action which, even if successful, would have very limited impact on the term's use beyond the facts of the individual successful case. Importantly, because a suspect term may typically be found within standard form contracts used not only by a particular business, but also across the particular industry, any redrafting or removal of an unfair term brought about by the regulatory agency under the United Kingdom or Victorian frameworks benefits all consumers affected by the relevant standard form contracts.

In short, the involvement of the regulatory agency facilitates the review of suspect terms across different contracts and industries. Unlike consumers who may only ever be aware of a suspect term that has been included in their proposed individual contracts with a business, a regulatory agency is able to identify the extent to which a suspect term is used in consumer contracts across an industry. Indeed, the regulatory agency can have a level of awareness about suspect terms that is simply unavailable to individual consumers. Even where consumers are aware of a suspect term, they face the near impossible task of seeking to have the suspect term not only redrafted or withdrawn from their own individual contract, but also from any industry-wide standard form contract.

While a consumer may have little or no ability to question the use of the suspect term, particularly where the cost to the consumer of doing so outweighs the value of the goods or services involved, the regulatory agency has the resources and expertise to do so and, more importantly, is unlikely to be as readily dismissed by a business as would an individual consumer if they sought to question the suspect term. Accordingly, the regulatory agency's involvement under the United Kingdom and Victorian frameworks allows for suspect contract terms to receive a level of scrutiny far exceeding what would be possible if the task was left up to individual consumers or the courts under the existing concepts of unconscionability.

The critical role played by the regulatory agency under the United Kingdom and Victorian frameworks can readily be seen from the extensive and continually growing list of suspect contract terms that have redrafted or withdrawn by businesses in a co-operative manner following discussions between the business and the regulatory agency. Indeed, the willingness of businesses to redraft or



remove suspect terms can readily be seen from lists of such terms that are published either as separate publications or media releases on the regulatory agency's website. For example, in the United Kingdom, the UK OFT publishes regular lists of these redrafted or withdrawn terms. As discussed above, the UK OFT has published 29 Bulletins outlining all concluded cases, including undertakings under the United Kingdom framework,<sup>13</sup> and more recently has started to publish a list of concluded unfair terms cases with undertakings in place of the Bulletins. Likewise, the successful outcomes achieved by Consumer Affairs Victoria can be seen through a growing number of media releases on unfair contract terms available through their website. These media releases reveal that suspect contract terms have already been identified and redrafted in the following areas: gift vouchers and loyalty programs;<sup>15</sup> pay television subscription contracts;<sup>16</sup> car hire contracts;<sup>17</sup> and mobile phone contracts.<sup>18</sup>

Significantly, mobile phone contracts have attracted considerable attention from Consumer Affairs Victoria and have resulted in the first case to proceed to the Victorian Civil and Administrative Tribunal (VCAT), the quasi judicial body given jurisdiction to hear cases under the Victorian framework. In this regard, the review undertaken of mobile phone contracts under the Victorian framework provides a very useful case study of how that framework has brought about fairer consumer contracts in a pro-active and efficient manner that far exceeds what could have been achieved by individual consumers or through the existing concepts of unconscionability.

## A VICTORIAN CASE STUDY

While there are numerous examples of cases both in the United Kingdom and Victoria that could be used to illustrate the effectiveness of their respective frameworks for dealing with unfair contract terms, one Victorian example provides a convenient case study of how such frameworks can operate to raise awareness of potentially unfair contract terms and, in doing so, promote a review or redrafting of such terms to the benefit of both consumers and businesses. Interestingly, the case study also shows how the regulatory agency can play a vital role in reviewing industry-wide consumer contracts with a view to not only identifying potentially unfair terms, but, more importantly, consulting with businesses about the alleged unfairness of those terms and how they could be redrafted in a clearer or more balanced manner.

Such an industry-wide review of contracts was undertaken by Consumer Affairs Victoria in relation to mobile phones during the course of 2004. This review was well publicised and led to considerable discussion between Consumers Affairs Victoria and mobile phone companies about the allegedly unfair nature of particular terms being used in mobile phone contracts.<sup>19</sup> In all but one case, those discussions were resolved in a co-operative manner without recourse to VCAT. The success of these discussions was highlighted in a media release quoting Mr Lenders, the Victorian Minister for Consumer Affairs, that had been issued to announce that action would be taken against one mobile phone company – AAPT:

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<sup>13</sup> Office of Fair Trading (UK), *Unfair terms in consumer contracts: Bulletins*, <http://www.crw.gov.uk/Other+legislation/Unfair+contract+terms/unfair+contract+terms+%2D+bulletins.htm> viewed 4 May 2007.

<sup>14</sup> Office of Fair Trading (UK), *Unfair terms in consumer contracts: List of concluded unfair terms cases with undertakings*, <http://www.crw.gov.uk/Other+legislation/Unfair+contract+terms/list%5Fof%5Fconcluded%5Funfair%5Fterms%5Fcases.htm> viewed 4 May 2007.

<sup>15</sup> Consumer Affairs Victoria, *Victorian consumers protected on loyalty contracts*, Media Release (4 October 2006).

<sup>16</sup> Consumer Affairs Victoria, *FOXTEL revises digital pay TV contracts*, Media Release (4 May 2006). See also Consumer Affairs Victoria, *FOXTEL plays fair as footy channel winds up*, Media Release (29 September 2006).

<sup>17</sup> Consumer Affairs Victoria, *Victoria drives hire car contract reform*, Media Release (22 April 2005). See also Consumer Affairs Victoria, *Victoria continues charge for fairer contracts*, Media Release (16 August 2005).

<sup>18</sup> Consumer Affairs Victoria, *VCAT disconnects unfair mobile phone contracts*, Media Release (2 August 2006).

<sup>19</sup> Consumer Affairs Victoria, *Bracks Government puts mobile phone companies on notice to comply with Victorian Fair Trading Law*, Media release (8 August 2004). See also Consumer Affairs Victoria, *Telcos warned again over unfair contract terms*, Media release (18 October 2004).

Mr Lenders said Consumer Affairs Victoria had initiated proceedings against AAPT in the Victorian Civil and Administrative Tribunal ... alleging AAPT's mobile phone and pre-paid mobile phone contracts contained unfair terms inconsistent with Victoria's *Fair Trading Act*.

...

Mr Lenders said the telecommunications industry had been put on notice back in August [2004] to comply with Victoria's *Fair Trading Act* and remove unfair terms from mobile phone contracts that disadvantaged consumers or face court action.

"Consumer Affairs Victoria wrote to AAPT, Telstra, Optus, Vodafone, '3', Orange, Virgin and SIM PLUS to request they remove unfair terms from mobile phone contracts," Mr Lenders said. "All agreed to review their mobile phone contract terms or discuss the issue further except AAPT".<sup>20</sup>

Even in the case of AAPT, the company did redraft its mobile phone contracts by the time the matter was heard by VCAT. Such redrafting was commented upon by VCAT and provides additional evidence of the positive impact that the Victorian framework has had on the redrafting of mobile phone contracts not only for the benefit of Victorian consumers, but also consumers across Australia since AAPT had, like other mobile phone businesses, reviewed and redrafted all of its mobile phone contracts. The Tribunal stated:

The Director [of Consumer Affairs Victoria] brought the present proceeding on 13 December 2004. AAPT had in fact commenced to review the terms and conditions of its mobile phone contracts several months earlier. As part of the review process several meetings were held with the Director and his staff in the period December 2004 to March 2005. Further, AAPT prepared a series of new terms and conditions, which came into force on 1 May 2005. The new terms and conditions were no doubt intended to address the concerns held by the Director. All contracts entered into since 1 May 2005 – in relation to both the consumer and small business customers of AAPT – have been pursuant to the new terms and conditions. Further, the new terms and conditions wholly replace the terms and conditions previously in place between AAPT and customers (which I take to be both consumer and small business customers) where the contract had been entered into before 1 May 2005. These customers have been advised that if they can identify a situation or event that occurred prior to May 2005 in which they would have received a more favourable outcome had the new terms and conditions applied to that situation or event, then, as long as it is practicable, the new terms and conditions will apply to that situation or event.<sup>21</sup>

Clearly, the dialogue between Consumer Affairs Victoria and the mobile phone companies using allegedly unfair consumer terms was quite constructive and the success of that dialogue in securing the redrafting of suspect terms demonstrates how fairer consumer contracts can be secured under the United Kingdom and Victorian frameworks through a co-operative approach, with litigation to be used only as a last resort.

Thus, while the willingness on the part of mobile phone companies to co-operate with Consumer Affairs Victoria certainly played its part in producing a successful outcome for consumers, it was the measure of unfairness under the Victorian framework that provided not only the catalyst for the review of mobile phone contracts, but also the basis for a constructive dialogue between Consumer Affairs Victoria and the businesses involved. Indeed, it was this measure of unfairness that ultimately enabled the parties to reach, through negotiations, a common view of how suspect terms could be redrafted to the satisfaction of all concerned.

## KEY LESSONS FROM THE UNITED KINGDOM AND VICTORIA

With the many years of experience now accumulated under both the United Kingdom and Victorian frameworks and, in particular, given the numerous examples of successful outcomes achieved for consumers through a co-operative rather than a litigious process, it is readily apparent that these frameworks have been very effective in dealing with unfair contract terms. Clearly, a number of key lessons emerge from the United Kingdom and Victorian experience. These can be summarised as follows:

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<sup>20</sup> Consumer Affairs Victoria, *AAPT taken to court on mobile phone contracts*, Media release (14 December 2004).

<sup>21</sup> See *Director of Consumer Affairs v AAPT Ltd* [2006] VCAT 1493 at [8].

- A clear and workable definition of an unfair contract term under the framework is essential to identifying as precisely as possible the line between fair and potentially unfair terms. Such a definition provides an objective and generally applicable measure of unfairness that can be understood by both consumers and businesses.
- A definition of an unfair contract term then needs to be supported by a detailed list of examples of terms that may potentially be unfair under the framework. In this regard, the more comprehensive the list of examples and the more detailed the description of what may constitute an unfair contract term, the more readily these terms can be identified and dealt with in a pro-active and timely manner. Together, the definition of an unfair contract term and the list of potentially unfair terms represent the cornerstone of an effective framework for dealing with unfair contract terms.
- Once the framework is in place, it is essential that an educational program be implemented and augmented over time not only to publicise actual examples of suspect terms that have been redrafted or removed from consumer contracts, but by also providing industry specific guidance as to the potential application of the framework to particular consumer contracts.
- A well-resourced regulatory agency is critical to any effective framework for dealing with unfair contract terms. A regulatory agency is well placed to implement and maintain an educational program regarding the framework, and is able, through its well-established inquiry/complaint handling systems and other information gathering processes, to identify problem areas within particular consumer contracts. This enables the regulatory agency to step up its educational program or take other preventative action in the case of emerging problem areas or to move quickly where existing problems areas are identified. In any event, the regulatory agency is able to approach the particular business or industry to raise awareness of the problem areas. This promotes a consultative approach to dealing with unfair contract terms and allows suspect terms to be redrafted or removed in a co-operative manner to the benefit of both consumers and business without recourse to the courts or tribunals. Indeed, the experience under the United Kingdom and Victorian frameworks has shown that recourse to courts or tribunals is extremely rare under the frameworks, and this alone provides ample evidence of how these frameworks have enabled suspect contract terms to be dealt with in a timely and cost-effective manner to the benefit of consumers and businesses.
- An emphasis on the plain language drafting of consumer contracts under the United Kingdom<sup>22</sup> and Victorian<sup>23</sup> frameworks has also played its part in their success. Such emphasis helps promote the drafting of contracts in a more user-friendly and transparent manner where consumers can actually have a reasonable chance of understanding all contract terms without the need for legal advice. All too often, consumer contracts are drafted in dense language; and in such circumstances, an emphasis on plain language drafting is very useful in promoting greater use of such drafting for the benefit of both consumers and businesses.
- With the United Kingdom and Victorian frameworks being generally applicable to all consumer contracts, their implementation reduces or even eliminates the need for industry-specific laws or regulations that may proliferate over time to the detriment of both consumers and businesses. Thus, under the United Kingdom and Victorian frameworks, consumers get the benefit of a mechanism for promoting fairer consumer contracts across the board and, along with businesses, are spared the inconsistencies and costs associated with a patchwork of industry-specific laws or regulations dealing with unfair contract terms.

The United Kingdom and Victorian frameworks for dealing with unfair contract terms are at the forefront of consumer protection laws. They represent an innovative and clear-cut response to the longstanding problem of contract terms that seek to shift the contractual risks or obligations disproportionately onto consumers who have very little, if any, choice but to sign such contracts. Through a targeted and co-operative approach, the United Kingdom and Victorian frameworks have become very successful models for dealing with unfair contract terms in an efficient and timely manner.

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<sup>22</sup> See *The Unfair Terms in Consumer Contracts Regulations 1999* (UK), reg 7.

<sup>23</sup> See *Fair Trading Act 1999* (Vic), s 163.

These benefits are not only being enjoyed by consumers in those jurisdictions, but, in the case of the Victorian framework, are likely to be enjoyed by consumers around Australia as more businesses operating nationally review or redraft their contracts having regard to that framework. Such Australia-wide benefits can already be seen from the redrafting of mobile phone contracts following the review of such contracts by Consumer Affairs Victoria. Thus, given that it would make little or no business sense to have one version of a consumer contract for doing business in Victoria and another for doing business in the rest of Australia, the Victorian framework is, in practice, currently operating as the de facto national framework for Australia-wide businesses – at least in this instance. Once these national businesses have prepared or redrafted consumer contracts that they believe to be in keeping with the Victorian framework, there would be little or no additional cost in using those contracts Australia-wide. Nevertheless, these benefits should be made available to all consumers and this can easily be achieved through the timely introduction of a uniform national framework for dealing with unfair terms in consumer contracts.

## **CONCLUSION**

With the United Kingdom and Victorian frameworks now well established, it is readily apparent that they provide a very efficient and cost-effective mechanism for dealing with unfair contract terms without undermining contractual certainty, or in any way detracting from the ability of businesses to draft contract terms to reasonably protect their legitimate commercial interests. Indeed, by providing an objective measure of the unfairness being targeted, these frameworks provide consumers, businesses and regulatory agencies with a readily available benchmark for identifying and assessing suspect contract terms without requiring a detailed assessment of the factual circumstances of the contractual relationship or casting a shadow over the entire contract, as may be the case under the existing concepts of unconscionability. Thus, the United Kingdom and Victorian frameworks are concerned with promoting fairer consumer contracts through a combination of (a) setting out a generally applicable objective measure of unfairness; (b) educating consumers and business about that measure of unfairness; and (c) providing for a regulatory agency to work with businesses where suspect terms persist in their consumer contracts. Such a combination has proven to be very effective in not only raising awareness of unfair contract terms as a real and ongoing issue within consumer contracts, but in having suspect contract terms redrafted through a consultative rather than litigious process between the businesses involved and the regulatory agency. Through this educative and consultative process, consumers get clearer and more balanced contract terms at relatively little or no additional cost to businesses, while businesses can be confident that, if they are mindful of the measure of unfairness outlined in the framework when drafting contract terms, such terms are less likely to meet consumer resistance or come under scrutiny from the regulatory agency. In this way, the United Kingdom and Victorian frameworks provide valuable lessons and insights on how unfair contract terms can be effectively dealt with in a pro-active and co-operative manner to the benefit of both consumers and businesses.