Are Australia's consumer laws fit for purpose?

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After decades of experience with the consumer protection provisions of the Trade Practices Act 1974 (Cth) and the State and Territory Fair Trading Acts, it is timely to consider whether such laws remain fit for purpose. In doing so, this article will consider whether existing consumer laws have become repetitive and unnecessarily complex to a point where both consumers and businesses struggle to fully appreciate the impact of such laws. In turn, questions arise as to whether consumer laws could be streamlined or made more user friendly and, if so, how this could be achieved in an efficient and cost-effective manner. In this regard, the article explores a number of themes such as the use of plain language drafting; the removal of redundant legislative provisions; mechanisms for promoting fairer consumer contracts, and facilitating greater access to justice.

With the consumer protection provisions of the *Trade Practices Act 1974* (Cth) having been added to in a piecemeal manner during the past three decades, it is timely to put those provisions under the spotlight to assess how well they are promoting consumer welfare. Such an assessment is long overdue and provides an opportunity to explore possible new directions in Australian consumer law. Indeed, while there has been a proliferation of consumer laws over those three decades, it remains unclear as to whether those additional laws have delivered the best possible policy outcomes for consumers. In particular, the question arises as to whether consumers are really benefiting, especially since many of the additional laws are simply repetitive or deal with problem areas in an ad hoc manner. Clearly, it is important that consumer laws not only target identified problem areas in a timely manner, but do so in a cost-effective and efficient way.

In short, consumer laws should be designed to minimise compliance costs and maximise consumer and business understanding of such laws. With this in mind, it is opportune to consider a number of key areas of Australian consumer law to not only assess whether those laws could be streamlined, but to also explore possible new approaches that could deliver consumer policy outcomes more effectively. In doing so, the article will explore the following themes:

- the importance of having clear laws and contracts;
- the importance of plain language drafting;
- the value in removing redundant or repetitive legislative provisions;
- the need to promote fairer consumer contracts;
- regulatory agencies and "class compensation orders"; and
- additional mechanisms for directly empowering consumers.

THE IMPORTANCE OF CLEAR LAWS AND CONTRACTS

There can be no doubt that the effectiveness of Australia's consumer laws very much depends on the clarity of language used in such laws. Similarly, clarity of language is essential to a consumer's ability to understand contracts that it may enter into with suppliers. Too often, however, consumer laws and contracts are written in dense legalese, a trend that has undoubtedly been accelerated by the ever-growing reliance on standard form contracts. Indeed, at times there appears to be a contest to see which supplier can draft the longest, most impenetrable consumer contract. With some consumer contracts running to dozens of pages of repetitive and incomprehensible language, there can be little doubt that such density of language adds unnecessary cost and complexity to consumer dealings. In turn, the density of language acts as a strong disincentive to any consumer wishing to understand the terms of the contract, with the consumer simply told by a salesperson "just sign on the dotted line, it's all standard!"

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With little or no opportunity to read, let alone comprehend, the terms of densely worded consumer laws or contracts, consumers have little scope to challenge unscrupulous suppliers or to self-enforce their legal rights. Clearly, therefore, an understanding of relevant consumer laws and consumer contracts is a necessary prerequisite to consumers being able to act in their own best interests. In this way, plain language drafting of consumer laws and contracts represents a vital element in the empowerment of consumers without the need for expensive legal advice.

It also benefits suppliers by allowing suppliers and their staff to better understand the operation and impact of consumer laws and contracts, therefore reducing need for legal advice and the likelihood of misunderstandings and disputes between consumers and suppliers. This in turn reduces compliance costs and boosts compliance rates. Ultimately, plain language drafting represents best practice in that a law or contract should be capable of being expressed in plain and intelligible language. To use dense legalese is to risk either the intended meaning of the particular law or contract term being lost in a sea of legal jargon, or the law or contract term going beyond what is necessary or appropriate in the circumstances, bringing with it a real danger that it may need some judicial interpretation in the future.

Given these obvious benefits, it is surprising that plain language has not been adopted more universally in, eg the drafting of contracts. On the positive side, it is noteworthy that some industry sectors have expressly promoted the use of plain language drafting. For example, cl 7.1 of the Australian Communications Industry Forum: *Industry Code ACIF C620:2005 Consumer Contracts*[1] provides that telecommunication contracts are to be written in plain language:

> 7.1 **Plain Language**
>
> 7.1.1 A Supplier must ensure that the terms of a Contract:
>
> (a) are clearly expressed by using words in their plain and ordinary meaning;
>
> (b) are consistent in the use of definitions and other terminology; and
>
> (c) that may have multiple valid interpretations are completely defined and used consistently.
>
> …
>
> 7.1.2 A Supplier must avoid the use of complex definitions or technical terms as far as is reasonably practicable having regard to the subject matter of the Contract.

Significantly, cl 7.2 of the Code provides additional guidance regarding the format and structure of telecommunication contracts so as facilitate a better understanding of such contracts by consumers:

> 7.2 **Format and Structure**
>
> 7.2.1 A Supplier must ensure that the terms of a Contract are available in writing and are legible having regard to the medium and format used.
>
> 7.2.2 A Supplier must take reasonable steps to ensure that any document which contains the material terms of the Contract:
>
> (a) is available in hard copy in a minimum 10 point font by reference to the font size of Times New Roman or equivalent size in any other font or, if also available in electronic format, is capable of being printed in that font size;
>
> …
>
> (b) avoids clauses or paragraphs which are excessive in length;
>
> (c) groups the terms by subject matter or otherwise in a clear and logical order with subheadings;
>
> (d) includes an index or table of contents for the terms where necessary for ease of reference;
>
> (e) avoids excessive cross-referencing and the incorporation of terms from other documents which are not available or accessible to the Consumer at the same time as the document;
>
> (f) ensures the text of the document appears in a colour that contrasts sufficiently with its background; and
>
> …
>
> (g) brings important terms to the attention of Consumers in a manner that is reasonable having regard to the length of the document and subject matter of the Contract.

[1] Australian Communications Industry Forum, *Industry Code ACIF C620:2005 Consumer Contracts*, http://www.acma.gov.au/webwr/telcomm/industry_codes/codes/c620(1).pdf viewed November 2007.

While there are some positive steps being taken towards the adoption of plain language drafting, it is disappointing to find that so many consumer contracts are still being drafted in dense legalese. Such an unwillingness to adopt plain language is unfortunate and appears to reflect a failure of the generally self-regulatory approach in this area. Indeed, while there has been a growing awareness of the value of plain language drafting, legislatures have typically left it to suppliers to decide whether or not to use it in the preparation of consumer contracts. More recently, however, legislatures have required that contracts be written in plain language. For example, reg 7(1) of the *Unfair Terms in Consumer Contract Regulations 1999* (UK) requires that any written term of a contract be expressed in "plain, intelligible language". Interestingly, reg 7(2) provides that, subject to specified exceptions, if there is doubt about the meaning of a written term, then the interpretation which is most favourable to the consumer shall prevail.

Similarly, s 163 of the *Fair Trading Act 1999* (Vic) requires consumer documents to be "clear" and provides an enforcement mechanism to secure compliance:

> 163. Consumer documents to be clear
>
> (1) In this section "consumer document" means:
>
> (a) a consumer contract; or
>
> (b) a statement, notice or other document required by this Act to comply with this section.
>
> (2) …
>
> (3) A consumer document:
>
> (a) must be easily legible; and
>
> (b) to the extent that it is printed or typed, must use a minimum 10 point font; and
>
> (c) must be clearly expressed.
>
> (4) If the Tribunal is satisfied, on application by the Director, that any provision of a consumer contract does not comply with the requirements of this section, the Tribunal may by order prohibit a supplier from using the provision in the same or similar terms in consumer contracts.
>
> (5) A supplier must comply with an order under this section.
>
> 60 penalty units, in the case of a natural person.
>
> 120 penalty units, in the case of a body corporate.

Importantly, both the United Kingdom and Victorian approaches to plain language drafting are seen as integral to promoting fairer consumer contracts. This is particularly obvious in the case of the United Kingdom where the plain language requirement is actually part of the regulatory framework for dealing with unfair terms in consumer contracts. Thus, clarity of language in the drafting of consumer contracts is viewed as important to promoting transparency in contractual dealings whereby consumers are able to read their contracts and fully appreciate the contractual risks that they are being required to accept. In short, unless consumers can read and understand the contract for themselves, they are left entirely at the mercy of an unscrupulous supplier.

REDUNDANT OR REPETITIVE PROVISIONS IN LAWS AND CONTRACTS NEED TO BE REMOVED

The removal of redundant or repetitive provisions in consumer laws and contracts would also greatly assist consumers in understanding and making sense of those laws or contracts. Such provisions undoubtedly add complexity and compliance costs, especially as they make it difficult for consumers and suppliers, and their advisers, to read and comprehend the operation and impact of the laws or contracts. Indeed, any benefits from plain language drafting can easily be reduced or even lost where laws or contracts contain redundant or repetitive provisions. Such provisions can act to discourage consumers, and even suppliers, from reading through the laws or contracts in much the same manner as the use of dense legalese in consumer laws and contracts, and ultimately detract from consumers' ability to act in their own best interests.

In short, a review of consumer laws and contracts to remove redundant or repetitive provisions, along with a requirement to draft consumer laws and contracts in plain language, would go a long way towards making those laws more user-friendly and ensuring that consumers understand the nature of laws and contracts that impact on them on a daily basis. In this regard, the implementation of uniform

consumer laws around Australia, as well as dealing with the repetition found in relation to the unconscionable conduct and false representation provisions of the *Trade Practices Act*, would be a useful start.

UNIFORM CONSUMER LAWS

While for many years constitutional issues meant that State and Territory Fair Trading Acts to complement Pt V of the *Trade Practices Act* were enacted to facilitate a national application of consumer laws, it is clear that those laws have diverged in places over the years. As such inconsistencies add unnecessary complexity and cost for both consumers and businesses, it is timely to explore the possibility of developing a Model Fair Trading Law or Code that individual jurisdictions can adopt or apply. This would ensure that there was one set of consumer laws applicable to all consumers and businesses across Australia. Indeed, a Model Law or Code would remove the repetition arising from a multitude of federal, State and Territory laws, which, while similar to a substantial degree, do differ in parts. Importantly, such a Model Fair Trading Law or Code should be written in plain language and would provide a single point of reference for consumers, businesses and their advisers.

Such a Code must also be drafted in a manner that reflects "best practice" in relation to the consumer protection provisions. Indeed, it should not reflect a "lowest common denominator" approach where protections are watered down to a point where consumers in some jurisdictions receive less protection than is currently the case, to accommodate those jurisdictions that have in some respects lagged behind their counterparts on the consumer protection front. A "best practice" approach requires that Australian consumer laws be modernised to reflect consumer protection initiatives from within Australia and other jurisdictions around the world that have delivered real benefits to consumers. One such highly successful initiative relates to a new legislative framework for dealing with unfair terms in consumer contracts adopted both in the United Kingdom and Victoria.[2] A proposal to incorporate such a new legislative framework within an Australian Model Fair Trading Law or Code is discussed below.

An Australian Model Law or Code could also be made readily available through a well publicised website, which could then be used to provide guidelines and other useful information to consumers and businesses about the Model Law or Code.[3] Such a website could provide a one-stop shop for consumers and businesses and could even be developed to allow a single portal for consumer inquiries and for the lodging of complaints which could then automatically be directed to the relevant consumer agency or agencies. While such an approach could initially operate concurrently with existing websites and more traditional methods of communicating with consumers such as telephones and paper-based materials, it is apparent that as internet usage becomes ever greater, a single, well-known website would provide consumers with a readily accessible and user friendly vehicle for meeting their particular needs. A single Australian Model Fair Trading Law or Code drafted in plain language would, when combined with a single, well-known website, remove repetition in consumer laws and facilitate a better understanding of relevant laws by both consumers and businesses.

DO WE NEED A VARIETY OF PROVISIONS DEALING WITH FALSE OR MISLEADING REPRESENTATIONS OR CONDUCT IN CIVIL PROCEEDINGS?

With the enactment of Pt VC to separately provide for criminal offences relating to false or misleading representations or conduct, the provisions of Div 1 of Pt V of the *Trade Practices Act* dealing with specific false or misleading representations or conduct have been duplicated. While it may be appropriate to set out separately particular types of conduct giving rise to a criminal offence, the question arises as to why the civil equivalents found in Div 1 of Pt V should remain, given that those

[2] See Zumbo F, "Dealing with Unfair Terms in Consumer Contracts: Is Australia Falling Behind?" (2005) 13 TPLJ 70; Zumbo F, "Dealing with Unfair Terms in Consumer Contracts: The Search for a New Regulatory Model" (2005) 13 TPLJ 194; Zumbo F, "Promoting Fairer Consumer Contracts: Lessons from the United Kingdom and Victoria" (2007) 15 TPLJ 84.

[3] One such website already exists and could easily be used to provide ready access to an Australian Model Fair Trading Law or Code and related material: See Consumers Online, http://www.consumersonline.gov.au viewed November 2007.

specific false representations would ordinarily be caught under the generally applicable s 52. For example, in relation to civil proceedings there is a clear overlap between s 52 and s 53, which deals with particular false representations. Given such an overlap and the fact that the false representations covered under s 53 are made criminal offences under Pt VC, there is little, if any, justification to retain s 53 and the other provisions replicated in Pt VC.

In practice, a party alleging misleading representations in a civil action is likely to confine its application to s 52 for the sake of simplicity and seeking to save time and legal costs. In this regard, s 52 would be more than sufficient to pursue allegations of misleading or false representations, which in turn makes the remaining provisions in Div 1 of Pt V somewhat superfluous now that Pt VC is in place for the ACCC to pursue specific false representations as a criminal offence. The removal of these superfluous provisions would streamline the *Trade Practices Act* and ensure that a future Model Fair Trading Law or Code does not contain any repetitive or redundant provisions.

DO WE NEED MORE THAN ONE UNCONSCIONABLE CONDUCT PROVISION IN THE TRADE PRACTICES ACT?

During the past 15 years, there has been a proliferation of provisions dealing with unconscionable conduct. With unconscionable conduct being dealt with at the federal level by ss 51AA-51AC of the *Trade Practices Act*, and ss 12CA-12CC of *Australian Securities and Investments Commission Act 2001* (Cth) (ASIC Act), questions arise as to whether it is possible to have only one provision dealing with unconscionable conduct. In this regard, a number of points can be made. First, in relation to dividing the prohibition against unconscionable conduct between the *Trade Practices Act* and the ASIC Act, it is readily apparent that the split is an artificial one which not only has the potential to generate demarcation issues or disputes, but is quite unnecessary because it would make considerable sense from a consistency point of view that a sole enforcement agency such as the Australian Competition and Consumer Commission (ACCC) enforce a single prohibition against unconscionable conduct.

Second, there is an unnecessary and potentially very confusing distinction between those provisions such as s 51AA of the *Trade Practices Act* and s 12CA of the ASIC Act which seek to prohibit conduct that is "unconscionable" under "unwritten law", and the other provisions that seek to prohibit conduct that is "in all the circumstances, unconscionable". While, at its simplest, the different use of the word "unconscionable" in each of these sections reflects a distinction between the traditionally very narrow equitable doctrine of unconscionability and the more recent statutory doctrine of unconscionability, such a distinction cannot be readily justified. Not only should there be a single, unified statutory definition of the concept of "unconscionable" in the *Trade Practices Act* or a Model Fair Trading Law or Code, but such a definition could be drafted as a non-exhaustive definition that defines the parameters of the statutory concept while allowing scope for the courts to draw on any useful developments within the equitable doctrine.

Finally, an additional complicating dimension arises from the present distinction between consumer and business transactions. While, originally, the unconscionable conduct provisions of the *Trade Practices Act* were limited to consumer transactions, there was a growing recognition that the unethical practices that led to a statutory concept of unconscionability being enacted for consumers were also prevalent within business-to-business transactions involving small businesses.[4] Indeed, the vulnerability experienced by consumers in dealings with suppliers was sometimes comparable to that experienced by small businesses in their dealings with larger businesses. While initially this led to the enactment of s 51AA of the *Trade Practices Act*, it was soon recognised that the adoption of the concept of "unconscionable" under the "unwritten law" gave no more assistance to small businesses faced with allegedly unethical practices by larger businesses than did the equitable doctrine of unconscionability. This realisation led to s 51AC being enacted, although no attempt was made at the time to rationalise the growing number of unconscionability provisions. Given that s 51AA is now

[4] See Zumbo F, "Unconscionability and Commercial Transactions: Exploring the Need for Further Reform under the Trade Practices Act" (1994) 22 ABLR 323; Zumbo F, "Unconscionability within a Commercial Setting: An Australian Perspective" (1995) 3 TPLJ 183.

arguably redundant in view of s 51AC and, given the parallels between consumers and small business, a compelling case now can be made for rationalising the unconscionable conduct provisions of the *Trade Practices Act* into a single section of general application and doing away with the unconscionable provisions of the ASIC Act.

With these various points in mind, the following provision would be proposed to deal with unconscionable conduct within an Australian Model Fair Trading Law or Code:

> (1) A corporation must not, in trade or commerce, engage in conduct that is, in all the circumstances, unconscionable.
>
> (2) For the purposes of this section, "unconscionable conduct" includes any action in relation to a contract or to the terms of a contract that is unfair, unreasonable, harsh or oppressive, or is contrary to the concepts of fair dealing, fair-trading, fair play, good faith and good conscience.

This proposed provision has a number of noteworthy features. First, the proposed provision prohibits unconscionable conduct in trade or commerce generally. This removes the current reference to the supply of goods or services in both ss 51AB and 51AC, but is in keeping with the current s 51AA. The current reference to the supply of goods or services in ss 51AB and 51AC is superfluous and its removal would simplify significantly the proposed provision. Importantly, prohibiting unconscionable conduct in trade or commerce generally is intended to create a new ethical norm of conduct in the same way that s 52 has established a norm of conduct within trade or commerce.

Second, the proposed provision incorporates a non-exhaustive definition of unconscionable conduct. This is intended to overcome the restrictive view that the courts are currently taking towards the notion of "unconscionable conduct" under ss 51AB and 51AC. Indeed, in applying the concept of "unconscionable conduct" under ss 51AB and 51AC, the courts are focusing increasingly on procedural unconscionability. In doing so, the courts continue to be influenced by the narrow equitable doctrine of unconscionability. While perhaps not surprising, given that the concept of "unconscionable conduct" has been previously used under the equitable doctrine of unconscionability, this procedural unconscionability focus unfortunately raises considerably the threshold for succeeding under ss 51AB and 51AC. Thus, to ensure that the concept of "unconscionable conduct" in the proposed provision is given a wider application than is currently the case, a legislative definition of the concept of "unconscionable conduct" is proposed. Such a definition defines "unconscionable conduct" by reference to a variety of other known concepts that make it clear that the term "unconscionable" as used under the proposed provision is one concerned with dealing with unethical conduct within trade or commerce generally.

Finally, the proposed provision does not have a monetary cap on the value of transactions covered by the proposed provision. The lack of a monetary cap can readily be supported on the basis that: (a) a monetary cap will exclude some parties from the proposed provision; (b) definitional problems regarding the application of the monetary cap are avoided; and (c) a monetary cap can be very artificial and ultimately detracts from what should be the only issue in cases under the proposed provision; namely, whether or not the conduct is "unconscionable".

THE NEED TO PROMOTE FAIRER CONSUMER CONTRACTS

While more streamlined consumer laws and contracts drafted in plain language would be a major step forward for Australian consumers, they would be insufficient to deal effectively with the ongoing concerns regarding the issue of substantive unconscionability and, in particular, the alleged use of unfair contract terms. Why does this issue arise? Quite simply because of the emergence of pre-prepared or standard form contracts typically offered on a "take it or leave it" basis. The problem is not with standard form contracts in themselves, since they can represent an efficient way of doing business. Rather, it is the way that standard form contracts may be used to shift the risks onto the consumer. Indeed, the greater the inequality of bargaining power between the supplier and the consumer, the greater the temptation of the supplier to use pre-prepared or standard form contracts in a manner that shifts the contractual risks and obligations disproportionately onto the consumer. Thus, suppliers may be tempted to use contract terms that go beyond what is reasonably necessary to protect their legitimate business interests and to do so in a way that gives rise to a significant imbalance between the rights and obligations of the supplier and consumer.

While some may seek to argue that consumers can simply try to renegotiate or walk away from such contracts, such contentions do not reflect the harsh reality that standard form contracts do not easily lend themselves to renegotiation. Not surprisingly, suppliers generally do not provide a ready mechanism for such renegotiation, and the cost of doing so for the supplier and the consumer may outweigh the value of the goods or services involved. Similarly, if consumers walk away, they are likely to find other suppliers relying on similar standard form contracts. In this "take it or leave it" environment, consumers are exposed to the possibility of excessively one-sided contracts in which they may be forced to carry risks over which they have little or no control, or where their rights are severely limited to their detriment. They may also, over the course of the contract, be exposed to a disadvantageous realignment of the contractual risks or obligations as a result of the business' ability to unilaterally vary the contract.

In view of the growing use of standard form contracts offered on a "take it or leave it" basis, it is not surprising that some legislatures have moved to facilitate greater judicial scrutiny of unfair contract terms or "substantive unconscionability". As mentioned above, the United Kingdom[5] and Victoria[6] have enacted legislation for dealing directly with unfair terms in consumer contracts. Both frameworks focus solely on making void or unenforceable unfair terms in consumer contracts and do so by defining unfair terms primarily by reference to the concept of good faith, and a significant imbalance in the contractual rights and obligations of the parties to the detriment of the consumer.[7] Where a term is found to be unfair, both frameworks provide that the term will be unenforceable against the supplier, with the remainder of the contract continuing to bind the parties where it is capable of existing without the unfair term. Significantly, these frameworks provide a more targeted and effective mechanism for dealing directly with unfair terms in consumer contracts than do the equitable doctrine of unconscionability and the existing statutory prohibitions against unconscionable conduct.

While the United Kingdom and Victoria frameworks reflect a recognition by those legislatures that a significant imbalance of bargaining power between consumers and suppliers may be exploited by the supplier in the drafting of contracts, it is readily apparent that this recognition has also prompted debate as to whether a growing imbalance of bargaining power between small businesses and larger businesses may also lead to the larger businesses drafting contracts to include allegedly unfair terms. This debate has emerged from discussion papers prepared by law reform bodies in Australia and the United Kingdom. In January 2004, the Australian Standing Committee of Officials of Consumer Affairs released a national discussion paper on the issue of unfair contract terms in which it called for comment on the possible inclusion of business-to-business contracts in any legislation dealing with unfair contract terms.[8] Similarly, in 2002, the English Law Commission issued a consultation paper on unfair terms in contracts in which it considered extending the protection against unfair terms to businesses.[9]

Both papers include a number of arguments both for and against including business-to-business contracts involving small businesses within a legislative framework for dealing with unfair contract terms. In doing so, both papers have identified allegedly unfair terms in such contracts as an issue needing to be addressed. Indeed, while both papers acknowledged the commercial character of business-to-business contracts and the possible greater sophistication of small businesses as compared

[5] See the *Unfair Terms in Consumer Contracts Regulations 1999* (UK).

[6] The Victorian legislation is found in Pt 2B of the *Fair Trading Act 1999* (Vic).

[7] See *Unfair Terms in Consumer Contracts Regulations 1999* (UK), reg 5; *Fair Trading Act 1999* (Vic), s 32W.

[8] Australian Standing Committee of Officials of Consumer Affairs (SCOCA), *Unfair Contract Terms Discussion Paper* (2004), http://www.fairtrading.qld.gov.au/oft/oftweb.nsf/web+pages/CD456F7C38F523684A256E240014EF7C?OpenDocument&L1=Publications viewed November 2007.

[9] The Law Commission (UK), *Unfair terms in contracts: A joint consultation paper*, Consultation Paper No 166 (2002), http://www.lawcom.gov.uk/docs/cp166.pdf viewed November 2007.

to consumers,[10] concern was expressed in them that small businesses in many cases faced comparable imbalances in bargaining power when dealing with larger businesses as those faced by consumers when dealing with suppliers.[11]

Similarly, the authors of both papers also formed the view that the use of standard form contracts offered on a "take it or leave it" basis within a business-to-business context could, as in the case of consumer contracts, possibly lead to the inclusion of potentially unfair terms in contracts between small businesses and larger businesses.[12] For example, the English Law Commission identified that the following contractual terms as potentially going beyond what was reasonably necessary to protect the legitimate interests of the stronger party:

- deposits and forfeiture of money paid clauses;
- high default rates of interest (unless these can be shown to be penalties);
- clauses allowing unilateral variation in price;
- termination clauses allowing one party to terminate in a wider set of circumstances than allowed for the other party;
- unequal notice periods; and
- arbitration and jurisdictional clauses which seek to severely restrict the rights of a party to choose the forum for dispute resolution.[13]

In short, it was recognised in both papers that the potential problems with allegedly unfair terms could, when compared to consumer contracts, be less severe in business-to-business contracts involving small business, such problems could arise and therefore needed to be considered.[14]

In doing so, it must be remembered that consideration of allegedly unfair terms in either consumer contracts or business-to-business contracts involving small businesses is only concerned with the question of whether or not the supplier or larger business has included terms that are not reasonably necessary for the protection of the supplier's or larger business' legitimate interests. Clearly, a supplier or larger business is perfectly entitled to rely on contract terms that are reasonably necessary to protect its legitimate interests. Indeed, both contracting parties should be entitled to include contract terms that are reasonably necessary to protect their respective legitimate interests. Therefore, the issue of fairness involves an objective assessment of particular contract terms. Specifically, fairness is to be tested by an objective standard of whether or not a contract term that places the consumer or small business at a disadvantage is reasonably necessary for the protection of the legitimate interests of the supplier or larger business. In this way, seeking to deal with unfair terms in consumer or small business contracts would in no way detract from, or undermine the ability of a supplier or larger business to include contract terms that are reasonably necessary to protect its legitimate interests.

Overall, therefore, it is readily apparent that there is considerable commonality in the debate surrounding the need to deal with allegedly unfair terms in consumer contracts and the need to do likewise in business-to-business contracts involving small businesses. Indeed, there are growing parallels between consumers and small businesses in their respective relationships with suppliers or large businesses. Such parallels are undoubtedly being accelerated through the increasing use of standard form contracts offered on a "take it or leave it" basis to both consumers and small businesses. In view of such parallels, arguably it would be more efficient to have a single legislative framework for dealing with allegedly unfair terms in contracts involving a significant imbalance in the contractual rights and obligations of the parties. This would avoid repetition and ensure a streamlined approach to unfair contract terms. The following provision would be proposed to deal with unfair contract terms within an Australian Model Fair Trading Law or Code:

[10] See Law Commission, n 9, p 131. See also SCOCA, n 8, p 54.

[11] See Law Commission, n 9, p 131; SCOCA, n 8, p 50.

[12] See Law Commission, n 9, p 130; SCOCA, n 8, p 50.

[13] See Law Commission, n 9, p 126; SCOCA, n 8, p 51.

[14] See Law Commission, n 9, p 131; SCOCA, n 8, p 50.

(1) A corporation must not, in trade or commerce, include in a contract, arrangement or understanding; or proposed contract, arrangement or understanding, an unfair term.
(2) A term is to be regarded as unfair for the purposes of subs (1) 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, arrangement, or understanding; or the proposed contract, arrangement or understanding to the detriment of the consumer or small business.
(3) An unfair term is void.
(4) A prescribed unfair term is void.
(5) The contract will continue to bind the parties if it is capable of existing without the unfair term or a prescribed unfair term.
(6) For the purposes of this section a "prescribed unfair term" means a term that is prescribed by the regulations to be an unfair term.
(7) This section only applies to a contract, arrangement or understanding; or proposed contract, arrangement or understanding entered, or proposed to be entered into on or after the commencement of this section.
(8) This section does not apply to contract terms that are required or expressly permitted by law, including a prescribed industry code or prescribed industry contract, but only to the extent required or permitted.

This proposed provision is intended to promote judicial scrutiny of unfair contract terms themselves. In doing so, the proposed provision targets a contract term that is "unfair" and, in this regard, the term is defined in the proposed provision in a manner consistent with that term's use in the United Kingdom and Victorian frameworks. Importantly, the concept of "unfair" in relation to contract terms has been judicially considered under both the United Kingdom and Victorian frameworks and, on each occasion, the term has been interpreted appropriately to target terms containing a significant imbalance in the parties' rights and obligations under the contract, and without in any way undermining contractual certainty.[15]

The proposed provision would operate to make the unfair term void, with the remainder of the contract continuing to bind the parties where capable of doing so without the unfair term. Significantly, the proposed provision allows for specific contract terms to be prescribed as unfair, thereby preventing their use in advance, where there is a compelling case that the term causes a significant imbalance in the parties' contractual rights and obligations to the detriment of the weaker party and without any offsetting benefit. Indeed, in assessing whether or not a term is either unfair or should be prescribed as unfair, it is essential that the term in question be assessed by reference to the contract as a whole and having regard to whether any detriment flowing from the particular term is offset in some way by a recognisable and reasonably proportionate benefit in another part of the contract. Thus, the elements in the definition of "unfair" relating to the "requirements of good faith and in all the circumstances" point to a need to make an overall assessment of the contract to determine whether or not the terms of the contract go beyond what is reasonably necessary to protect the legitimate interests of the stronger party.

Significantly, a contract term required or expressly permitted by law, including a prescribed industry code or contract, is excluded from the operation of the proposed provision. This provides sufficient scope for an industry and those involved in, or affected by, the particular industry to work towards the development of an industry code or contract that sets out "fair" contract term(s) vetted and approved by the relevant Minister on the advice of the regulatory agency administering the Model Fair Trading Law or Code.

Finally, the question arises as to who may enforce the proposed unfair contract term provision. In this regard, there are a number of possibilities, including allowing only the regulatory agency to enforce the regime, extending the ability to enforce the regime to prescribed consumer and other representative groups, or providing for a private right of action. In the interests of maximising access to justice and facilitating self-help, it would be appropriate to provide for all these possibilities in

[15] See *Director General of Fair Trading v First National Bank* [2001] UKHL 52; *Director of Consumer Affairs v AAPT Ltd* [2006] VCAT 1493.

relation to the proposed provision. A private right of action is available under the Victorian framework and this has allowed affected consumers access to justice without in any way opening the floodgates or undermining contractual certainty.

REGULATORY AGENCIES AND "CLASS COMPENSATION" ORDERS

While the drafting of laws in plain language and the streamlining of laws would promote a greater understanding of those laws, their effectiveness can be undermined if it is time-consuming or expensive to recover losses from breaches of the Model Law or Code. All too often, the ACCC can successfully prosecute breaches of the *Trade Practices Act*, but those affected by the conduct find it difficult to cost-effectively recover their losses. Within this context, it is appropriate to consider a new approach to efficiently and effectively facilitating the recovery of losses from breaches of the *Trade Practices Act* or a future Model Fair Trading Law or Code. Such an approach could involve giving a court the power to make a "class compensation" order, whereby the court would, following a finding that there has been a breach of the *Trade Practices Act* or Model Law or Code, order the contravening party or parties to compensate all affected parties who notify a court-appointed assessor of their loss or other claim within a specified period of time.

Under a class compensation order, a court would have the power to compensate affected parties without the need for those parties to bring their own actions or recovery proceedings. In particular, a class compensation order would, once a breach has been found in an action brought by the regulatory agency, allow the court itself to set up a framework:

(a) to ensure that affected parties are notified within a reasonable period of time that they are able to make a claim to the particular court in relation to the contravening conduct;
(b) allowing a reasonable period of time for affected parties to lodge their claims;
(c) appointing an assessor, answerable to the court, to review all claims lodged by affected parties within the specified time; and
(d) for the court to finally approve any claim recommended by the assessor.

This process would be funded by the contravening party or parties, and would provide a streamlined process for dealing with individual claims arising from a proven breach. While there would be judicial oversight of the process, the court itself would not be tied down by having to consider the factual background of each affected party. Indeed, any factual assessment of individual claims could easily be undertaken by an assessor or assessors, who could conduct such assessments in a very efficient and cost-effective manner without the need to take up valuable court time.

Thus, a class compensation order would not only enable parties affected by the contravening conduct to recover their losses in a streamlined manner, but such an order would be an excellent way to avoid courts being clogged up by a proliferation of individual recovery actions which may occur at present. Importantly, a class compensation order would allow the courts to respond flexibly and effectively to cases where a large number of parties is affected by the contravening conduct and, in this regard, the availability of a class compensation order would enable the regulatory agency to play a leadership role in targeting conduct that has a wide-ranging detrimental impact on consumers and other similarly affected parties.

EXPLORING ADDITIONAL MECHANISMS FOR BETTER DIRECTLY EMPOWERING CONSUMERS

While, clearly, regulatory agencies have a critical leadership role to play in enforcing a Model Fair Trading Law or Code and in helping affected parties to recover losses in an efficient and cost-effective manner, it is clear that regulatory agencies simply would not have the resources to pursue all breaches of the *Trade Practices Act* or future Model Law or Code. In such circumstances, it is essential that consumers and similarly affected parties are allowed access to low-cost and user-friendly binding dispute resolution processes. This could include (a) the establishment of industry ombudsman schemes under which binding determinations could be made following the failure of mediation or other non-binding processes, and (b) providing greater access to the Federal Magistrates Court.

Providing access to the Federal Magistrates Court in relation to breaches of Pt IV of the Trade Practices Act

While consumers and other affected private parties currently are able to bring their own legal proceedings in the Federal Court in relation to breaches of Pt IV of the *Trade Practices Act* or to recover any loss or damage from such breaches, these Federal Court actions can be very expensive to run. In this regard, consumers and other affected parties could be allowed to: (a) bring their own proceedings for breaches of Pt IV in the Federal Magistrate Court, and (b) rely on s 83 findings of fact from a successful ACCC prosecution to commence actions in the Federal Magistrates Court to recover any losses arising from breaches of Pt IV. This would be consistent with what already occurs in relation to other breaches of the *Trade Practices Act*.

Allowing such access to the Federal Magistrates Court in relation to breaches of Pt IV would empower these parties to recover those losses in a timely and cost-effective manner, in contrast to applying to the Federal Court or relying on the ACCC to bring representative actions. This would be consistent with consumers and other affected parties already having access to the Federal Magistrates Court in relation to other parts of the *Trade Practices Act*. It would promote self-help and self-empowerment in a cost-effective manner, and is ultimately preferable to a situation where parties are left to run expensive litigation in the Federal Court or rely on a public agency like the ACCC with scarce public funds to try and recover private losses. Importantly, allowing access to the Federal Magistrates Court to consumers and affected parties for breaches of Pt IV would require only that reference to "Pt IV" be inserted in s 86(1A) of the *Trade Practices Act*.

CONCLUSION

In reviewing key areas of Australia's consumer protection laws, it has become readily apparent that a number of initiatives could easily be implemented to improve the efficiency and effectiveness of such laws. Such initiatives range from drafting consumer laws and contracts in plain language through to facilitating greater access to justice and providing for mechanisms to allow classes of affected parties to recover losses in a timely and cost-efficient manner. Implicit in any consideration of these initiatives is a realisation that there are growing parallels between consumers and other parties such as small businesses in terms of how they are allegedly dealt with by larger parties. Indeed, in relation to both procedural and substantive unconscionability, consumers and small businesses face the same types of allegedly unethical conduct by larger parties and, accordingly, they both need access to the same legislative provisions allowing for judicial scrutiny of any alleged unconscionability. Importantly, recognising the parallels between consumers and other similarly affected groups such as small businesses can assist in streamlining legislative provisions by having one set of laws of general application rather than a confusing proliferation of legislative provisions as is currently the case, with the various provisions dealing with unconscionable conduct. Importantly, a streamlining of legislative provisions to remove repetition or redundant sections would greatly assist consumers and other similarly affected parties by facilitating a better understanding of such laws and, in turn, promoting a greater level of compliance with the laws. Such benefits could then quite easily be maximised through the development and implementation of a "best practice" Australian Model Fair Trading Law or Code to replace the current multitude of, at times, inconsistent and repetitive consumer protection laws.

