

STATUTORY INTERPRETATION IN PRIVATE LAW

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Contents

<i>Preface</i>	v
<i>Contributors</i>	ix
<i>Table of Cases</i>	xi
<i>Table of Statutes</i>	xxi

PART I – Introduction

1	Introduction: Is Statutory Interpretation in Private Law Distinctive? <i>Prue Vines and M Scott Donald</i>	2
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PART II – Current Trends and Debates

2	‘Icecream is Not “Meat”’: Literal Meaning and Purpose in Statutory Interpretation in Private Law <i>The Hon TF Bathurst AC</i>	16
3	Statutory Interpretation as Private Law <i>The Hon Mark Leeming</i>	28
4	Commentary on ‘Statutory Interpretation as Private Law’ <i>The Hon Ashley Black</i>	52
5	Statutory Interpretation and Private Law Obligations <i>Joachim Dietrich</i>	58

PART III – Applications of Statutory Interpretation in Private Law

6	‘Co-production’: Novelty and Path Dependence in Defamation Reform <i>Jenny Steele</i>	78
7	Taking Common Law Concepts Seriously: Extending the Principle of Legality in Private Law <i>Prue Vines</i>	99
8	Statutes in a Web of Law <i>Lyria Bennett Moses and Brendan Edgeworth</i>	115

CONTENTS

9	An Integrated Approach to Statutory Interpretation: Directors' Duties in the UK	135
	<i>Rosemary Teele Langford</i>	
10	Intuitive Synthesis and Fidelity to Purpose? Judicial Interpretation of the Discretionary Power to Award Civil Penalties under the Australian Consumer Law	154
	<i>Jeannie Marie Paterson and Elise Bant</i>	
11	Contractual Fairness: Statutory Innovation and Statutory Interpretation	185
	<i>May Fong Cheong</i>	
12	Lord Cairns' Act and Statutory Interpretation: Give the Court an Inch, They'll Take a Mile	207
	<i>Katy Barnett</i>	
13	Statutes and a Fiduciary Course of Dealing	228
	<i>Simone Degeling</i>	
	<i>Index</i>	245

Chapter 11

Contractual Fairness: Statutory Innovation and Statutory Interpretation

May Fong Cheong

Introduction

In today's trading environment where standard form contracts are the norm for consumer transactions, contractual fairness has received more attention than it had previously. Laissez faire and free market philosophies which set the background for classical contract law had meant that apart from statute or special cases, there was no accepted regime of fairness under the general law.¹ While the courts have developed the general law addressing the unconscionable use of power in taking advantage of a special disability, the lack of a body of principles to deal with consumer and business fairness led to legislative initiatives for consumer legislation in the 1980s and 1990s.²

This chapter considers statutory innovation and statutory interpretation in two pieces of Australian legislation: the unfair contract terms law (UCTL) introduced in the Australian Consumer Law (ACL),³ and the *Contracts Review Act 1980* (NSW) (CRA) which provides for unjust contracts. A comparison of the UCTL's provision for unfair contract terms with the CRA's concern for unjust contracts shows the challenges of interpreting statutes which seek to give content to indeterminate values of fairness and justice. As the UCTL adopts a similar test (albeit with an important change) to the United Kingdom's regime of unfair contract terms legislation, where relevant the position in the United Kingdom⁴ will be referred to for a more complete overview.

While values such as unfairness or unjustness are broad-based and open-ended, statutory innovation and the application of legal concepts to articulate and balance

1 *Biotechnology Australia v Pace* (1988) 15 NSWLR 130, 132-133 (Kirby P): 'I doubt that, statute or special cases apart, [contract law] does or should enforce a regime of fairness upon the multitude of economic transactions governed by the law of contract.'

2 Chief Justice Allsop AO, 'Conscience, Fair-Dealing and Commerce: Parliament and the Courts' (2017) 91 *Australian Law Journal* 820, 837-838.

3 ACL ss 23-28 (Sch 2 to the *Competition and Consumer Act 2010* (Cth)). For the early usage of the terminology 'the UCTL', see JM Paterson, *Unfair Contract Terms in Australia* (Lawbook Co, 2012) 1.

4 In the United Kingdom, the UTCCR was implemented following the European Community Council's Directive 93/13/EEC of 5 April 1993 on *Unfair Terms in Consumer Contracts*. Due to concerns of the overlap of the reasonableness test under the *Unfair Contracts Terms Act 1977* (UK) which applies to indemnity clauses and exclusion clauses, and the unfairness test under the UTCCR, the unfair contract terms regime applicable to consumers is now provided in the *Consumer Rights Act 2015* (UK) Pt 2 (ss 61-76).

the rights of both suppliers and consumers are instrumental in providing a framework for contractual fairness. In a rule of law-based society, the legislative and judicial arms work in tandem, each performing its respective function. While statutes 'declare a new standard and set out guides to its content',⁵ the judicial task is to interpret and apply the content of the statutory standard to the case situations before the courts. Established principles of statutory interpretation apply to the UCTL and the CRA, as to other statutes. However, in view of the fact that both pieces of legislation were enacted for the overall purpose of providing better protection and to grant relief against unfair contract terms and unjust contracts respectively, a more generous interpretation after careful consideration can be justified to address exigencies.

The value of fairness in contract

Classical contract law dictates that signed agreements freely entered bind both parties unless factors exist to vitiate consent.⁶ In the same breath, the requirement of free and informed consent to hold parties to their bargain is testimony that general conceptions of fairness underpin contract law.⁷ However, a tension in contract law remains: while contracts protect the reasonable expectations of honest persons,⁸ it is less clear how the value of fairness should be expressed and what is the content of fairness, more specifically, procedural or substantive fairness.

The courts have been zealous in their role of ensuring procedural fairness through doctrines of misrepresentation, undue influence, duress and unconscionability. By the same token, courts are careful not to lightly intervene in the substance of the bargains struck by the parties.⁹ Increasingly, statutes have taken the role¹⁰ of promoting substantive fairness as seen in the two statutes considered in this chapter.

The push for stronger protection for substantive fairness is a response to the limitations of standard form contracting.¹¹ There is a recognition that there is no genuine consent when one party signs adhesion contracts drafted by the other party having the power to dictate the terms.¹² It has also been propelled by more recent

5 Allsop, above n 2, 838.

6 *Wilton v Farnworth* (1948) 76 CLR 646; *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* [2004] HCA 52; 219 CLR 165.

7 S Waddams, 'Unconscionability in Contracts' (1976) 39 *Modern Law Review* 369; M Chen-Wishart, *Contract Law* (Oxford University Press, 6th ed, 2018) 339.

8 J Steyn, 'Contract Law: Fulfilling the Reasonable Expectations of Honest Men' (1997) 113 *Law Quarterly Review* 433, 433-434; see also Steyn LJ in *First Energy (UK) v Hungarian International Bank Ltd* [1993] 2 Lloyd's Rep 194, 196.

9 See *Woolworths Ltd v Kelly* (1991) 22 NSWLR 189. In *Biotechnology Australia v Pace* (1988) 15 NSWLR 130, 133, Kirby P took cognisance of the 'limited capacity of the courts to substitute their views of what is "fair" for the parties'.

10 The Hon Michael Kirby AC CMG, 'Towards a Grand Theory of Interpretation: The Case of Statutes and Contracts' (2003) 24(2) *Statute Law Review* 95, 97.

11 R Dugan, 'The Application of Substantive Unconscionability to Standardized Contracts – A Systematic Approach' (1982-83) 18 *New England Law Review* 77; LA Kornhauser, 'Unconscionability in Standard Forms' (1976) 64 *California Law Review* 1151.

12 A Robertson, 'The Limits of Voluntariness in Contract Law' (2005) 29(1) *Melbourne University Law Review* 179; MJ Trebilcock, *The Limits of Freedom of Contract* (Harvard University Press, 1997).

studies of behavioural economics debunking traditionally held notions of the ‘rational’ consumer who can make the best choices from information available. Consumers are for the most part ‘irrational’,¹³ or at best, possess ‘bounded rationality’;¹⁴ they decide based on key factors such as price, while in practice, unfairness is seeded into incidental terms. Consumers are also unable or unwilling to spend time to research and compare products and services, thus overestimating their abilities to assess risks before signing on the dotted line. These consumer behaviours demonstrate that the classical model of contracting does not accurately reflect the decision-making process of consumers entering standard form contracts.¹⁵ It also shows the limits of classical contract theory of the binding nature of contracts which assumes informed consent by the act of signing. The result is two conflicting ideas: the ‘fiction of equality’ in respect of adults with sound minds and the ‘reality of inequality’ which colours contractual negotiations.¹⁶ It also questions the ability of the common law and of the courts to promote substantive fairness.¹⁷

Statutory interpretation and contractual fairness

In 2016 Chief Justice Allsop conveyed the idea of law being conceived and derived from values that are expressed in rules, principles, precepts and norms developed by society and by the law.¹⁸ These values ‘lie at the heart of every individual, and at the heart of society – as human values.’¹⁹ These values are the concern of both public and private law;²⁰ the latter to prevent unconscionability and deterrence of behaviour that is antithetical to honest, reasonable and mutually beneficial commercial relations. Fundamental values of fairness, which represent society’s changing underlying expectations of conscience and fair dealing in a bargain derive in part from common law, and particularly from equity.²¹ Conceptions of fairness and justice derived from

13 L Griggs, ‘The [Ir]rational Consumer and Why We Need National Legislation Governing Unfair Contract Terms’ (2005) 13 *Competition and Consumer Law Journal* 1.

14 R Korobkin, ‘Bounded Rationality, Standard Form Contracts, and Unconscionability’ (2003) *University of Chicago Law Review* 1203; J Jacoby, ‘Is it Rational to Assume Consumer Rationality? Some Consumer Psychological Perspectives on Rational Choice Theory’ (2000-2001) 6 *Roger Williams University Law Review* 81; MA Eisenberg, ‘The Limits of Cognition and the Limits of Contract’ (1995) 47 *Stanford Law Review* 211.

15 JM Paterson, ‘The Australian Unfair Contract Terms Law: The Rise of Substantive Unfairness as a Ground for Review of Standard Form Consumer Contracts’ (2009) 33 *Melbourne University Law Review* 934, 953-954.

16 Chen-Wishart, above n 7, 340.

17 See C Thomas, ‘What Role Should Substantive Fairness Have in the English Law of Contract? An Overview of the Law’ [2010] *Cambridge Student Law Review*; M Trebilcock, ‘The Doctrine of Inequality of Bargaining Power: Post-Benthamite Economics in the House of Lords’ (1976) 26 *University of Toronto Law Journal* 359. Cf SA Smith, ‘In Defence of Substantive Fairness’ (1996) 112 *Law Quarterly Review* 138.

18 Chief Justice Allsop AO, ‘Values in Law: How They influence and Shape Rules and Application of Law’ (Speech delivered at the 2016 Hochelaga Lecture, Centre for Comparative and Public Law, Faculty of Law, University of Hong Kong, 20 October 2016) <<http://www.fedcourt.gov.au/digital-law-library/judges-speeches/chief-justice-allsop/allsop-cj-20161020>>.

19 Ibid [2].

20 Ibid [7].

21 Allsop, above n 2, 825.

shared values of the community necessarily uphold freedom of contract. At the same time, this freedom must be restrained to prevent the abuse of contract power through both procedural and substantive means. The values contributing to contractual fairness are embedded in the legal concepts which are provided in the UCTL and the CRA. The criteria for fairness must balance the interests of all parties and reflect shared community values (*precepts and norms*): these are imposed by law and society reflected in the *rules and principles* provided in statutes and as interpreted by the courts. After all, contracting is a 'collective good' to support useful contracting activity.²²

Statutory interpretation is akin to a contractual analysis of construction, fact finding and rule application which involves a process of 'characterisation' where a value judgment is made by reference to the ascribed meaning, found facts, expressed rule and other relevantly organised values that are often hidden, disguised and suppressed.²³ The challenge of statutory interpretation is greater where the apparent legislative purpose is to provide fairness and justice,²⁴ being broad-based values and norms which are not susceptible to definitions.²⁵ In this respect, judicial latitude in statutory interpretation is often determinative of the outcome of cases.²⁶ It is, however, not based on the judge's personal intuitive assertion, but on judicial techniques enabling an evaluation which is reasoned and referenced to 'the values and norms recognised by the text, structure and context of the legislation, and by reference to the legal values of the common law and equity and perceived community values, made against an assessment of all connected circumstances.'²⁷ The next two parts consider the statutory frameworks of the UCTL and the CRA, and the courts' interpretation of their provisions. This is followed by a discussion of the test of unfairness in the UCTL and the test of unjustness in the CRA, followed by a comparison of the two tests and some concluding thoughts.

Unfairness in the UCTL

The statutory framework

The UCTL came into effect on 1 January 2011 and was introduced following an agreement between the Council of Australian Governments for a national law.²⁸ This new legislation was founded on ethical and economic reasons,²⁹ and through its three-prong test of unfairness, it was meant to strike a balance between consumer and supplier interests to ensure the viability and competitiveness for businesses.

22 Chen-Wishart, above n 7, 31.

23 Allsop, above n 18, [23]; see also Chief Justice Allsop AO, 'Characterisation: Its Place in Contractual Analysis and Related Enquiries' (2017) 91 *Australian Law Journal* 471.

24 S Corcoran and S Bottomley, *Interpreting Statutes* (Federation Press, 2005).

25 S Thal, 'The Inequality of Bargaining Power Doctrine: The Problem of Defining Contractual Unfairness' (1988) 8 *Oxford Journal of Legal Studies* 17.

26 J Goldring, J Pratt and DEJ Ryan, 'The Contracts Review Act (NSW)' (1981) *University of New South Wales Law Journal* 1, 14 pessimistic as to whether the judiciary will share the legislature's value judgment for justice and fairness in the CRA. Cf Allsop, above n 2, 838.

27 Allsop, above n 2, 839.

28 The national law was recommended by the Productivity Commission and proposed by the National Council on Consumer Affairs.

29 Productivity Commission, *Review of Australia's Consumer Policy Framework* (2008) 34.

The UCTL applies³⁰ to consumers³¹ and to terms in standard form contracts.³² The key provision is s 24 which provides that a term of a consumer contract is unfair if:

- (a) it would cause a significant imbalance in the parties' rights and obligations arising under the contract; and
- (b) it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and
- (c) it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.

In applying the above test,³³ the court may take account of such matters as it thinks relevant but must take into account the extent to which the term is transparent and the contract as a whole.³⁴ In considering the latter, courts can consider the context in which a claim arises; this is broader than s 24(1) which focuses on the term itself. Sections 24(1) and (2) read together thus allow procedural and substantive concerns to be addressed. Section 25 sets out 14 examples of terms of a consumer contract that may be unfair.³⁵ These examples include exclusion and limitation clauses, penalty clauses and terms (including effectively) permitting unilateral variation and termination.

Interpreting 'new' legislation

Statutory reforms incorporated in the UCTL allow Parliament to set standards of expected community behaviour in commerce. The courts apply principles of statutory interpretation and judicial techniques to identify and evaluate the values and norms embedded in a statute by reference to the text, context and purpose of the legislation.³⁶ Statute is thus not only the source of a particular law, but the source of normative standards.³⁷

In interpreting the UCTL, the courts are cognisant of the evaluative exercise required by the new standards contained in the statute. In *Australian Competition and Consumer Commission v Chrisco Hampers Australia Ltd*,³⁸ Edelman J observed that the legislative technique used in s 24 is less familiar to the common lawyer than to the civilian lawyer. His Honour described s 24 as a 'guided form of open-ended legislation'

30 ACL s 23(1) provides that such unfair terms are void. However, terms that define the main subject matter of the contract are unaffected (s 26), and some contracts are specifically excluded (s 28).

31 A consumer is 'an individual whose acquisition of the goods, services or interest is wholly or predominantly for personal, domestic or household use or consumption' (s 23(3)). With effect from 12 November 2016, the UCTL was extended to small businesses.

32 Contested contracts are statutorily presumed to be standard form contracts; the onus is on the supplier to prove otherwise (s 27(1)).

33 Discussed below.

34 ACL s 24(2).

35 The examples in s 25 'provide statutory guidance on the types of terms which may be regarded as being of concern. They do not prohibit the use of those terms, nor do they create a presumption that those terms are unfair', see Explanatory Memorandum, Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010 (Cth) [5.44].

36 See Chapter 1 in this volume.

37 Allsop, above n 2, 840.

38 [2015] FCA 1204; 239 FCR 33.

elaborated through the three elements of unfairness; this creates broad evaluative criteria to be developed incrementally. Such open-ended statutes would ‘naturally and indeed necessarily attract a more purposive and less minutely textual mode of construction.’³⁹

In seeking to interpret this, the courts have looked to the purpose or object of the statutory provisions.⁴⁰ In *Australian Competition and Consumer Commission v CLA Trading Pty Ltd*,⁴¹ Gilmour J inferred that the objective of regulating such contracts is evident from the definition of a consumer contract and that the elements of potential unfairness as seen from the criteria on standard form contracts show Parliament’s concern to regulate ‘take it or leave it’ consumer contracts. His Honour described s 12BF of the *Australian Securities and Investment Commission Act 2001* (Cth) (ASIC Act) (equivalent of s 23 of the ACL) as a statutory exception to the freedom of contract approach of the common law: the common law will not invalidate contract terms merely because they are unfair.⁴²

With effect from 12 November 2016, the UCTL was extended to small businesses via the *Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Act 2015* (Cth).⁴³ In the first decision involving small business contracts, the Federal Court in *Australian Competition and Consumer Commission v JJ Richards & Sons Pty Ltd*⁴⁴ declared eight clauses of the Waste Management Service Agreement unfair within the meaning of s 24 of the ACL. Moshinsky J affirmed the principles on the unfairness test set out in *Chrisco* and in *CLA Trading*. A new perspective on the test of significant imbalance was also drawn from the High Court’s decision in *Paciocco v Australia & New Zealand Banking Group Ltd*.⁴⁵ The next section discusses this first prong test.

The first prong test of unfairness – significant imbalance

Section 24(1)(a) provides that a term is unfair if it would cause significant imbalance in the parties’ rights and obligations arising under the contract. The meaning of ‘significant imbalance’ was considered in the first United Kingdom decision on the law in the *Unfair Terms in Consumer Contracts Regulations 1999* (UTCCR). In *Director-General of Fair Trading v First National Bank plc*,⁴⁶ Lord Bingham stated:

The requirement for a significant imbalance is met if a term is so weighted in favour of the supplier as to tilt the parties’ rights and obligations under the contract significantly in his favour. This may be by the granting to the supplier of a beneficial option or discretion or power, or by the imposing on the consumer of a disadvantageous burden or risk or duty.

39 Ibid [40], citing Justice Mark Leeming’s article, ‘Equity: Ageless in the “Age of Statutes”’ (2015) 9 *Journal of Equity* 108, 116.

40 *Acts Interpretation Act 1901* (Cth) s 15AA.

41 [2016] FCA 377.

42 Ibid [47]-[49].

43 A small business contract involves at least one party being a business employing fewer than 20 people with limits on the upfront price payable under the contract. See ACL s 23(4).

44 [2017] FCA 1224.

45 Ibid [31]; see [2016] HCA 28; 258 CLR 525, [200]-[201] (Gageler J).

46 [2002] UKHL 52; [2002] 1 AC 481, [494].

Lord Bingham applied a plain and ordinary reading to the term, arguably in a neutral sense which is capable of, and had given rise to differing understandings. In the first decision on the unfair contract terms provisions in the *Fair Trading Act 1999* (Vic) (FTA), *Director of Consumer Affairs Victoria v AAPT*,⁴⁷ President Morris after referring to the passage above stated:

The word 'significant' simply means 'important' or 'of consequence'. It does not mean 'substantial'. It is not a word of fixed connotation and beside being elastic is somewhat indefinite.⁴⁸

It appears that President Morris interpreted this in a qualitative sense, which was not agreed to by Cavanough J in *Jetstar Airways Pty Ltd v Free*.⁴⁹ Cavanough J interpreted 'significant imbalance' in a quantitative sense and concluded:

I recognise the perils of attempting to paraphrase statutory language, but, in my view, the context of the word 'significant' in s 32W shows that it means, principally at least, 'significant in magnitude', or 'sufficiently large to be important', being a meaning not too distant from 'substantial'. If that be right, the interpretation of s 32W adopted in AAPT is all the more unlikely.⁵⁰

The approach in *Jetstar* has been adopted in the UCTL cases.⁵¹ The focus of the test in s 24(1) is on the impugned term itself. In *Ferme v Kimberly Discovery Cruises Pty Ltd*,⁵² the respondent cancelled the cruise due to inclement weather and forfeited sums paid by the applicants for the cruise. The respondent incurred costs repatriating the applicants and argued that its conduct to ensure the passengers' safety demonstrated a significant weighting of the bargain in favour of the applicants. The Court held that the conduct of the respondent is irrelevant: the first prong requires an objective assessment of the rights and obligations arising under the contract. In this case, the term allowing forfeiture results in a significant imbalance since it allows the respondent to cancel at any time before commencement of the cruise and to keep any sums paid.

The first and third prongs were considered in detail in *Chrisco*, one of the first decisions articulating principles of statutory interpretation in this relatively new legislation. Edelman J emphasised the evaluative exercise to consider the impugned term (the HeadStart term) in the context of the contract as a whole to determine if it would cause a significant imbalance.⁵³ After evaluating all the circumstances relevant to the term including its transparency, the Court concluded that it caused a significant imbalance⁵⁴ and significant financial detriment (the third prong) to the consumer.⁵⁵ Counsel for *Chrisco* did not submit on the second prong that the term was reasonably

47 [2006] VCAT 1493.

48 Ibid [95].

49 [2008] VSC 539.

50 Ibid [104], [105].

51 *OPR WA Pty Ltd v Marron* [2016] WASC 395, [48]; *Australian Competition and Consumer Commission v CLA Trading Pty Ltd* [2016] FCA 377, [54](e).

52 [2015] FCCA 2384.

53 *Australian Competition and Consumer Commission v Chrisco Hampers Australia Ltd* [2015] FCA 1204; 239 FCR 33.

54 Ibid [97].

55 Ibid [100]. Section 24(1)(c) requires applicants to show that the impugned clause would cause detriment to them (whether financial or otherwise) if the clause were to be applied or relied on.

necessary in order to protect its legitimate interest, and the term was thus presumed to be not reasonably necessary applying the presumption in s 24(4).

In this case, Chrisco sold and delivered Christmas hampers. The goods were usually priced above retail prices but consumers (as referred to in the decision) paid by way of instalments over a period of one year. There was evidence that consumers of Chrisco were low to middle income earners. Chrisco's catalogues were available in soft copy through their website or in hard copy containing terms and conditions for orders and payments. The contested term was a 'HeadStart term' following a 'HeadStart Plan' that Chrisco introduced in 2014. Under the plan, although consumers had paid off their 2014 orders, Chrisco could continue to deduct from the consumers' bank account or credit towards purchase orders made for 2015. However, consumers did not receive any discount for these purchases. The term applied unless consumers opted out of the plan. Consumers could seek a refund of the moneys but no interest was payable.

As to whether the HeadStart term caused a significant imbalance under s 24(1)(a), Edelman J referred to Lord Bingham's definition in *First National Bank* while noting that the two provisions are not identical.⁵⁶ His Honour proceeded on the basis that in considering significant imbalance of the HeadStart term, the parties' other rights and obligations arising under the contract must also be taken into account applying s 24(2). Thus, the Court may consider 'such matters as it thinks relevant', but must take into account the transparency of the term⁵⁷ and the contract as a whole.

The lack of individual negotiation of the contracts between Chrisco and the consumers was held not relevant. Relevantly the HeadStart term gave Chrisco a right to withdraw money from the consumer's account after the conclusion of an order, 'without any substantial corresponding right to the consumer'. The Court was not persuaded by Chrisco's submissions that the HeadStart term gave the consumer a right to make an order for delivery of a hamper of their choice within the money contributed up to the time of their delivery and retaining the option for a refund if they did not place the order. The argument was that the plan was helping an 'unsophisticated' consumer who did not have the 'discipline' to budget to pay for a chosen item.⁵⁸ The Court noted that this was not a right at all, since the purchase orders could be made with or without the HeadStart term. Further, considering the time value of money, following the HeadStart plan, a consumer would 'pay more, by making payments of the same amount but starting at an earlier point in time'.⁵⁹ More importantly, even if the money were refunded, it was repaid without interest and there was no discount for the consumer who later chose to make an order – these detriments were not balanced by any substantial corresponding right that the consumer obtained against Chrisco.⁶⁰

56 Edelman J cautioned against reference to United Kingdom decisions noting that Parliament departed from the precise terms of the United Kingdom provision removing the requirement of 'good faith'; see *ibid* [42]. Cf *Australian Competition and Consumer Commission v CLA Trading Pty Ltd* [2016] FCA 377, [53]-[54] where Gilmour J, while noting that there are differences, sought assistance from both the United Kingdom and Victorian cases.

57 A term is transparent if the terms is (a) expressed in reasonably plain language; (b) legible; (c) presented clearly; and (d) readily available to any party affected by them (s 24(3)).

58 *Australian Competition and Consumer Commission v Chrisco Hampers Australia Ltd* [2015] FCA 1204; 239 FCR 33, [62].

59 *Ibid* [57].

60 *Ibid* [69].

Another relevant matter was the term that allowed consumers to opt out of the HeadStart term.⁶¹ As part of the evaluative exercise, the Court considered the extent to which this aspect of the HeadStart term was transparent. The Court held that the HeadStart term was not wholly lacking in transparency since the term was not hidden and the option to opt out of the clause was placed in a noticeable place. However, three matters reduced its transparency. First, the language did not clearly identify the amounts that would be debited nor how the sum was arrived at; it was unclear whether Chrisco would write to the consumer to confirm the commencement of the HeadStart plan and Chrisco did not explain to the consumer the procedure for them to cancel the plan and obtain a refund. Secondly, the terms were not very legible. The font size was small (and was in the same size as all the other terms) and was not singled out from other terms contained in the 20 other paragraphs on the same page. Further, the opt-out box to be ticked did not refer to the HeadStart term, and the refund term was not contained in the catalogue but in the opt-out box form which would be sent to Chrisco.

Lastly, the HeadStart term had to be considered in the context of the contract as a whole in order to determine whether it would cause a significant imbalance in the parties' rights and obligations. The Court held that the HeadStart term and contract as a whole provided convenience to the customer; there were no charges for collection of instalment payments, packing, administration or delivery. Further, the HeadStart term did not fall under any of the examples of an unfair term under s 25. However, based on an assessment of 'all the circumstances relevant to the HeadStart term including its transparency and the contract as a whole', the Court held that the term caused a significant imbalance in the parties' rights and obligations under the contract, satisfying s 24(1)(a) and consequently also s 24(1)(c).

The detailed application of s 24(1)(a) and s 24(2) to the facts of the case offers interesting observations on the relationship between procedural and substantive fairness. This distinction was first made in the context of unconscionability by Leff who distinguishes the former as problems in the 'process of contracting' and the latter as a problem in the 'resulting contract'.⁶² Thus, procedural fairness is concerned with the way the contract is entered into, while substantive fairness is concerned with the terms and their effects.⁶³ Transparency is a procedural concern while the first element of unfairness, 'significant imbalance' is a substantive matter. The Court in *Chrisco* in applying s 24(2) and deciding that the HeadStart term caused significant imbalance by reference to its lack of transparency appears to have conflated the test of transparency with the test of significant imbalance. The court referred to the Explanatory Memorandum to the Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010 (Cth) that the lack of transparency may be 'a strong indication of the existence of a significant imbalance in the rights and obligations of the parties under the contract'.⁶⁴ With this approach, there is an implicit assumption that consumers would not have entered into contracts

61 Ibid [52].

62 AA Leff, 'Unconscionability and the Code – The Emperor's New Clause' (1967) 114 *University of Pennsylvania Law Review* 485.

63 See Lord Brightman in *Hart v O'Connor* [1985] UKPC 1; [1985] AC 1000 (Privy Council) and McHugh JA in *West v AGC (Advances) Ltd* (1986) 5 NSWLR 610, 620G.

64 *Australian Competition and Consumer Commission v Chrisco Hampers Australia Ltd* [2015] FCA 1204; 239 FCR 33, [70]; see [5.38] of the Memorandum.

with terms that are so significantly imbalanced if not for the lack of transparency. This may indicate that courts will watch out closely for signs of lack of transparency. This appears to be the case (conversely) in *Paciocco*.⁶⁵ In this case, the Federal Court held that the late payment fees on credit card accounts were not unfair because it was transparent – ‘the provisions were clearly disclosed. In most instances, the fees could be avoided. No trickery took place.’⁶⁶

Second prong test – legitimate interest of supplier

The second prong test of unfairness in s 24 requires suppliers to justify that the impugned clause is reasonably necessary in order to protect their legitimate interests, failing which a presumption arises under s 24(4) that the term is not reasonably necessary for the said purpose. This criterion is not found in the UTCCR which has a good faith requirement instead. Regulation 5(1) provides:

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.

This provision was adopted in Victoria when it enacted its law on unfair contract terms in a 2003 amendment to s 32W of the FTA. However, due to uncertainty concerning ‘good faith’,⁶⁷ the phrase was deleted in 2009.⁶⁸ For the same reason, the UCTL did not adopt the ‘good faith’ requirement⁶⁹ and introduced the second prong test. Through this purposeful legislative manoeuvre, this new requirement as interpreted by the courts, has enabled the UCTL to give stronger protection against substantive unfairness than under the English position.

There are two stages in the application of s 24(1)(b); first, that the term is necessary to protect the supplier from business risks inherent in the transaction and secondly, that this is a reasonable justification. In *Qamaruddin v Kolak Living Pty Ltd*,⁷⁰ Ferguson SM held that ‘reasonably necessary’ is not to be construed narrowly which would mean that the suppliers’ legitimate ends justified an unreasonable, yet necessary, means. This interpretation would defeat the legislative intent to protect consumers against unfair business practices. Thus, the impugned term must be both reasonable and necessary.⁷¹ In this case, a no refund term applied which would deprive the applicant of a \$5000 deposit if the building contract did not proceed. The building company failed in its

65 [2015] FCAFC 50; 236 FCR 199.

66 *Ibid* [358]. This passage was cited by Keane J in the High Court, see [2016] HCA 28; 258 CLR 525, [301].

67 See *Director of Consumer Affairs Victoria v AAPT* [2006] VCAT 1493; *Jetstar Airways Pty Ltd v Free* [2008] VSC 539.

68 Via the *Fair Trading and Other Acts Amendment Act 2009* (Vic). The new s 32W provides that a term will be regarded as unfair ‘if, in all the circumstances, it causes significant imbalance to the parties’ rights and obligations arising under the contract to the detriment of the consumer’. With the introduction of the UCTL in Pt 2-3 of the ACL, this Act was subsequently repealed.

69 On the uncertainty surrounding good faith in the UTCCR and the FTA, see Paterson, above n 15, 33-34 [3.80].

70 [2017] ACAT 45.

71 *Ibid* [75].

argument that the term protected its legitimate economic interests in defraying certain costs of business. Following *Ferme*,⁷² the Court held that the test of reasonableness in this section is objective and not case specific. Thus, the nature and quantum of costs that the respondent generally incurs as a result of parties not proceeding with their contracts are relevant, which evidence was not produced in this case. Further, there was nothing to suggest that the term balanced the interests of the parties as the term penalised the customer regardless of the cause of the failure to proceed with the project.

This second prong which recognises a need to balance the rights and obligations of each of the parties to the contract will likely be the determining test for future cases. Requiring suppliers to justify the need for an impugned clause enables an economic assessment to be made. This evidential process can be seen in both *Qamaruddin* and *Ferme* where the courts required clear and concrete proof.

Whether a clause is reasonably necessary for the legitimate protection of suppliers is also based on the principle of proportionality.⁷³ In *Poole v Australian Pacific Touring Pty Ltd*,⁷⁴ which involved a touring contract, the question arose whether the cancellation term would be reasonably necessary to protect the legitimate interests of the touring company. The Court rejected the evidence that the touring company needed the 100% cancellation fee in order to avoid any loss arising from its downstream supplier contracts. A similar decision was arrived at in *Dharmawardena v Advanced Hair Studio*.⁷⁵ In this case, it was held that there was no legitimate interest to protect where the electricity charge to use the laser machine was minimal and the customer was required to pay 100% of the total fee. The Federal Court in *Australian Competition and Consumer Commission v Get Qualified Australia Pty Ltd (in liq) (No 2)*,⁷⁶ arrived at a similar conclusion that the refund policy concerned was not reasonably necessary to protect Get Qualified Australia's legitimate interest where a refund could be refused where the company had not incurred any significant costs in relation to a specific customer nor would be out of pocket even if a refund was provided. On the other hand, a non-refundable clause for cancellation of a booking of a wedding venue made 12 months before the booked dates was held to be not unfair. In *Lam v Push Projects Pty Ltd*,⁷⁷ the Court accepted that there was a legitimate interest to avoid a financial loss in the likely eventuality of being unable to achieve a fresh booking for the date after a cancellation of a booking for a wedding venue.

Two Victorian cases have applied this second prong test in considering the impugned term in the light of the overall purpose of the contract. In *Director of Consumer Affairs Victoria v Trainstation Health Club*,⁷⁸ a term allowing the club to terminate the gym contract with its members for failure to comply with club rules was

72 *Ferme v Kimberly Discovery Cruises Pty Ltd* [2015] FCCA 2384.

73 Paterson explains proportionality as 'an attempt by the party to respond to risks inherent in the transaction, as opposed to an opportunistic attempt to appropriate gains not contemplated as part of the original bargain', see JM Paterson, 'The Elements of Prohibition on Unfair Terms in Consumer Contracts' (2009) 37 *Australian Business Law Review* 184, 193.

74 [2017] FCA 424.

75 [2016] VCAT 1036, [40].

76 The Court held that the term on the refund policy was an unfair term: see [2017] FCA 709. See also [2017] FCA 1018 on relief including orders on penalties and disqualifications.

77 [2016] VCAT 1642.

78 [2008] VCAT 2092, [174].

held to be not unfair as it was reasonably necessary to provide a 'framework for the efficient and safe running' of the club so as to protect the gym members. In contrast, this requirement was not satisfied in *AAPT's* case as the term allowing AAPT to terminate the mobile phone contract where the consumer breached the contract or changed their addresses or contact details without informing AAPT was found to be one sided and too broadly drawn.⁷⁹

Clauses in airline tickets allowing the cancellation of flights and providing for refunds appear to be reasonably necessary to protect airlines from risks inherent in the airline industry. In *Chanel v Tiger Airways Australia Pty Ltd*,⁸⁰ the customer was unsuccessful in claiming that the cancellation clause was unfair for not providing refunds on fares incurred if customers use other airlines. The Court held that Tiger Airways had a legitimate interest to protect in order to operate efficiently otherwise it would be exposed to unavoidable and unquantifiable risk and consequences. Preventing the use of such terms would ultimately act against consumer interests and in any event, the same conditions apply even if a customer opt to choose other airlines.

The above case provides an apt comparison with *Jetstar* which was decided under the original s 32W of the FTA (adopting the UTCCR model) that did not have this second prong provision. In that case, Ms Free failed in her argument that the clause imposing payment of administrative charges for a change of the passenger's name was unfair. Viewing the contract as a whole, the Court held that the purported unfairness was counterbalanced by the extremely cheap price of the ticket. Cavanough J stated that the statutory injunction to consider 'all the circumstances' requires that the contract be considered as a whole and that one term may counterbalance another. This involves an exercise of judgment against a statutory standard, rather than an exercise of discretion. This thus provides a safeguard that each case will be decided against some measured criteria when the contract is considered as a whole. While a counterbalancing exercise may provide a similar outcome to the second prong test, the latter test requiring suppliers to justify that an impugned clause is reasonably necessary for their legitimate interests is preferable. It shifts the onus to suppliers and allows an economic assessment based on evidential proof.

This second prong in the UCTL is also more supportive of substantive fairness when compared with the UTCCR and the original Victorian s 32W of the FTA which provides for a good faith test. Unlike the legitimate interests test which is capable of proof, many difficulties remain with the concept of good faith; it is unclear whether good faith performs merely an adjectival role or is a separate requirement. In *AAPT*, good faith was not viewed as a separate substantive requirement; it merely performs an adjectival role in determining whether there is a significant imbalance. Conversely, in *Jetstar*, 'good faith' and 'significant imbalance' are considered as distinct elements. Where good faith takes on a substantive meaning, the obligation imposed on one party must thus not be so unusual and one-sided; however, if it is only procedural, it only targets unfair surprises. In *First National Bank*, while Lord Steyn made clear that good faith is not purely procedural, the other Law Lords did not support it; thus a substantively unfair term may not be unfair if it was procedurally fair. Further, as

79 Ibid [53].

80 [2016] VCAT 84.

noted in *Jetstar*, although the United Kingdom regulation derives from the European Community Council Directive, the member states of the European Union have no common concept of fairness or good faith.

The uncertainties of the good faith requirement contributed to the unfairness test adopting the second prong. The UCTL cases demonstrate that the second prong test has positioned Australian law on unfair contract terms to be on a stronger footing compared with the United Kingdom.⁸¹ According to Santucci, the question remains whether Australian judges who value freedom of contract will use the higher level of unfairness before finding a term unfair. This can be determined by both the first and second prongs. However, the cases reviewed show that the first prong has not been as contested as the second prong. The new second prong offers much potential as a criterion to determine substantive fairness. It balances the position of both parties including the supplier. By allowing suppliers to justify that a term is reasonably necessary to protect its business legitimate interests, it sustains business confidence in the regulation of unfair terms. An economic approach also supports evidential proof enabling a coherent development of the test. More importantly, its focus on substantive fairness supplements the first prong on significant imbalance, ultimately providing better protection to consumers.

Unjustness in the CRA

The statutory framework

The CRA, hailed as ‘beneficial legislation which must be interpreted liberally’⁸² is significant being the only State legislation⁸³ granting courts wide powers to review unjust contracts. Its purpose was ‘to confer on the courts a new and wide jurisdiction to determine the existence of harshness in a contract, and thereby develop a doctrine of unconscionability suitable to present and future business and community needs and standards.’⁸⁴ It applies mainly to consumer transactions; s 6(2) precludes relief to contracts entered into for purposes of trade, business or profession other than a farming undertaking. The Crown, a public or local authority or a corporation may not

81 C Willet, ‘Transparency and Fairness in Australian and UK Regulation of Standard Terms’ (2013) 37(1) *University of Western Australia Law Review* 72; P Santucci, ‘Substantive Fairness in Australian Standard Form Consumer Contracts: Lessons from the UK Experience’ (2011) *Oxford University Commonwealth Law Journal* 171.

82 McHugh JA in *West v AGC (Advances) Ltd* (1986) 5 NSWLR 610, 631E.

83 Similar Australian Capital Territory and South Australian legislation failed to be enacted as law. Decisions on s 9 of the CRA are of assistance to cases under s 76 of the *National Credit Code* (Sch 1 to the *National Consumer Credit Protection Act 2009* (Cth)) for reopening of unjust transactions, provided the different legislative context are considered: see *Lauvan Pty Ltd v Bega* [2018] NSWSC 154, [303], [304] (Gleeson JA), citing *Knowles v Victorian Mortgage Investments Ltd* [2011] VSC 611, [65] (Croft J); *Evolution Lifestyles Pty Ltd v Clarke (No 3)* [2016] NSWSC 1237, [82]-[83] (Wilson J).

84 Statement of Professor John Peden quoted by the Minister who introduced the Bill during the second reading speech, New South Wales, *Parliamentary Debates*, 1980. Professor Peden wrote the report, *Harsh and Unconscionable Contracts: Report to the Minister for Consumer Affairs and the Attorney-General for New South Wales* (1976) which formed the basis of the CRA, see JR Peden, *The Law of Unjust Contracts* (Butterworths, Sydney, 1982) 82.

be granted relief.⁸⁵ Unlike the UCTL, the CRA is not limited to standard form contracts and it applies to matters relating to land as well.

Also, unlike the proscribed three-prong test of unfairness in the UCTL, the CRA provides a broader framework to determine whether a contract is unjust. Section 7 provides that where the court finds a contract or provision of a contract to have been unjust in the circumstances relating to the contract at the time it was made, the court may, if it considers it just to do so and for the purpose of avoiding as far as practicable an unjust consequence or result, provide the various forms of relief set out in the section. There is thus a two-stage inquiry:⁸⁶ the first involving the court in a fact-finding role as to whether a contract is unjust, and the second requiring the court to exercise discretion to decide the appropriate relief. Differing judicial views as to the first stage impact on the scope of appellate review of a finding by a trial judge that a contract is or is not unjust. Spigelman CJ in *Perpetual Trustees Co Ltd v Khoshaba*⁸⁷ concluded that notwithstanding the evaluative character at this first stage, it remained a finding of fact⁸⁸ invoking principles of judicial review reflected in *Warren v Coombes*.⁸⁹ His Honour relied on the language of the text of s 7(1) that ‘the Court *finds* a contract to have been unjust’ and the language of fact in s 9(1) and (4) which states that ‘a contract *is* unjust’.⁹⁰ The opposing view treats the first stage as a discretionary process in view of the open-ended and evaluative nature of the statutory criteria; this calls for restraint in appellate review of the decision reached by the trial judge who has evaluated the knowledge and actions of the witnesses.⁹¹ An intermediate view is that of Kirby P in *Beneficial Finance Corp Ltd v Karavas*⁹² that ‘the proper approach for the appellate court is that so long as there is adequate basis for the opinion reached, conscientiously and honestly in a particular case, it should approach with caution the substitution of its own opinion’.⁹³

There is no definition as to what is ‘unjust’: s 4 provides that it includes ‘unconscionable, harsh or oppressive’.⁹⁴ The CRA, however, provides for a broad range of factors to assist this process. Section 9(1) provides that in determining whether a contract is unjust in the circumstances relating to the contract at the time it was made, the court shall have regard to ‘the public interest and to all the circumstances of the case’. Section 9(2) sets out the matters to which the court ‘shall have regard shall, to the extent that they are relevant in the circumstances’ include 12 aspects. One procedural factor which has been raised in many cases is s 9(2)(h) whether and when ‘independent

85 CRA s 6(1).

86 This is the general view; however, there is also a view that it is a three-stage inquiry: the initial stage is to make findings of primary facts as to the circumstances revealed in the evidence, see Handley JA and Basten JA in *Perpetual Trustees Co Ltd v Khoshaba* [2006] NSWCA 41.

87 *Perpetual Trustees Co Ltd v Khoshaba* [2006] NSWCA 41.

88 Ibid [30]-[33]. Spigelman CJ at [37] relying also on the majority judgment in *Singer v Berghouse* [1994] HCA 40; 181 CLR 201, 210-211.

89 [1979] HCA 9; 142 CLR 531.

90 *Perpetual Trustees Co Ltd v Khoshaba* [2006] NSWCA 41, [38] (emphasis added).

91 *Beneficial Finance Corp Ltd v Karavas* (1991) 23 NSWLR 256, 262 where Kirby P cited *Idameneo No 9 Pty Ltd v Bandeski* [1991] ASC ¶56-047. See also the decisions of Mahoney JA in *Antonovic v Volker* (1986) 7 NSWLR 151, 167; *Elders Rural Finance Ltd v Smith* (1996) 41 NSWLR 296, 302.

92 (1991) 23 NSWLR 256.

93 Ibid 262F-263B.

94 CRA s 4(1). See *Elders Rural Finance Ltd v Smith* (1996) 41 NSWLR 296, 298A (Mahoney J).

legal or other expert advice' was obtained by the applicant. Of the substantive concerns, s 9(2)(d) considers whether or not any provisions of the contract impose conditions which are unreasonably difficult to comply with or 'not reasonably necessary for the protection of the legitimate interests of any party to the contract'. Section 9(2)(d) considers the legitimate protection of 'any party' and is one of 12 considerations as to whether a contract is unjust. This may be compared with the mandatory second prong test of unfairness as to the protection of the legitimate interests of the supplier. In any event, the factors in s 9(2) are not fully determinative of the issue; s 9(1) provides that the court shall have regard to 'all the circumstances of the case'. This is also wider than the UCTL: s 24(3) of the ACL provides that in determining unfairness under s 24(1), the court must consider the contract as a whole.

Determining whether a contract is 'unjust' – caution against three disinclinations

The starting reference point of many CRA decisions is McHugh JA's detailed judgment in *West v AGC (Advances) Ltd*.⁹⁵ His Honour described the CRA as 'revolutionary legislation whose evident purpose is to overcome the common law's failure to provide a comprehensive doctrinal framework to deal with 'unjust' contracts'.⁹⁶ While McHugh JA referred to the legislative purpose of the CRA to develop a *doctrine of unconscionability*,⁹⁷ his Honour approached the CRA more broadly, stating that unjustness 'is not limited to the so-called "tautological trinity" (unconscionable, harsh or oppressive).⁹⁸ While the CRA operates within and not outside the domain of contract law,⁹⁹ McHugh JA surmised that the CRA very likely 'signal[s] the end of much classical contract theory in New South Wales', an observation agreed to by Kirby P (in dissent in this case).¹⁰⁰

Expecting the radical disturbance that the CRA provisions would yield on settled contractual concepts, Kirby P cautioned against three possible disinclinations that may arise: first, a natural disinclination to apply the statute as its language would suggest the Parliament to have envisaged; secondly, avoiding the application of the statute altogether and relying on previously settled and more familiar avenues of redress; and thirdly, even if the statute is applied, reading down its provisions out of deference to previously available applicable relief. His Honour stated that 'these inclinations should be recognised so that they may be resisted'.¹⁰¹ The case law shows that the disinclinations have not materialised.

The first concern, whether judges would interpret the statute as its language would suggest, is illustrated in the differing views arrived in *West* concerning s 9(2)(h). McHugh JA (Hope JA agreeing) was satisfied that the advice given to Mrs West by

95 *West v AGC (Advances) Ltd* (1986) 5 NSWLR 610.

96 *Ibid* 621A.

97 *Ibid* 621A (emphasis by His Honour referring to a quote of the statement of Professor John Peden in the second reading debate). See above n 84.

98 *Ibid* 621A.

99 *Ibid* 631E.

100 *Ibid* 611G.

101 *Ibid* 612A, 612B.

her son who was an accountant and her friend was sufficient. Since Mrs West was reasonably able to protect her interest applying s 9(2)(e), the deed of loan executed by Mrs West was not unjust. Kirby P disagreed and read the statute's intention to require independent advice as advice provided by a lawyer or other relevant expert acting in a professional capacity. Thus, the informal advice given by Mrs West's son and by a barrister friend would not satisfy s 9(2)(h). In this regard, his Honour adopted an interpretation to give effect to the language of the text in view of the beneficial purpose of the CRA.

The second concern is the avoidance of new concepts provided in the CRA, applying instead previously settled and more familiar avenues of redress. The courts have been careful to apply the statutory standards set out in the CRA and have not avoided the CRA. The danger of relying on the general law on unconscionability in light of the CRA's purpose to provide for a statutory doctrine was averted in *Spina v Permanent Custodians Ltd*.¹⁰² Young JA (Tobias and Campbell JAA agreeing) stated that unless exceptions apply, 'it is always preferable to deal with the *Contracts Review Act* point first. Not only is the jurisdiction probably wider ... but where ... statute has been enacted to cover the same ground as an equitable principle, the equitable principle is usually put into abeyance.'¹⁰³ A similar approach has been applied to ensure that the nature of a possible duty of financial institutions concerning independent advice to clients is not equated with a common law tortious duty of care.¹⁰⁴ The issue of lenders ensuring that borrowers obtained independent legal advice also arose in *Khoshaba*. In this case, Basten JA stated that it would 'be an error to look for a duty imposed under the general law to ensure such a result'.¹⁰⁵

In relation to the third disinclination, the courts have also not read down the provisions in the CRA and have instead sought to interpret the factors provided in s 9(2) to determine if a contract is unjust by seeking out Parliament's intention. In *Karavas*, Kirby P in considering 'independent legal or other expert advice' in s 9(2)(d) referred to the fact that the lender did not provide 'effective and independent financial advice'¹⁰⁶ to the borrower and that there should be available equal knowledge and means of knowledge to both lender and borrower of the risks faced in the transaction. This raised some concerns in the banking industry.¹⁰⁷ However, as correctly pointed out in a subsequent note,¹⁰⁸ his Honour limited the statements to circumstances where the borrowers or guarantors and mortgagors 'are ill-educated, inexperienced in business' involving family members purchasing businesses with apparent risks.¹⁰⁹ In *Elders Rural Finance Ltd v Smith*,¹¹⁰ Mahoney P emphasised the importance of

102 [2009] NSWCA 206.

103 *Ibid* [74].

104 *Arbest Pty Ltd v State Bank of New South Wales Ltd* (unreported, New South Wales, 9 August 1994, 4 August 1995) 38.

105 *Perpetual Trustees Co Ltd v Khoshaba* [2006] NSWCA 41, [127].

106 *Beneficial Finance Corp Ltd v Karavas* (1991) 23 NSWLR 256, 264D (emphasis added).

107 M Hetherington, 'Business Finance and the Case of *Beneficial Finance v Karavas*' (1991) 2 *Journal of Banking and Finance Law and Practice* 244.

108 A Tyree, 'Independent Financial Advice and the Case of *Beneficial Finance v Karavas*' (1992) 2 *Journal of Banking and Finance Law and Practice* 112, 112.

109 *Beneficial Finance Corp Ltd v Karavas* (1991) 23 NSWLR 256, 268.

110 (1996) 41 NSWLR 296.

applying the CRA 'according to its true intentment as appearing from its terms' and also 'in the context of the Act as a whole and against the background of the mischief with which it was intended to deal'.¹¹¹

Challenges in making an evaluative judgment and public interest

Under s 9(1), the court is required to determine whether a contract is unjust in the circumstances relating to the contract at the time it was made. Toward this, the court shall have regard to the public interest and 'to all the circumstances of the case' aided by the 12 factors set out in s 9(2). The challenges in giving content to open-ended criteria such as unjustness in the CRA have been acknowledged. The first stage of the s 4 inquiry has been described as 'the formation of an evaluative judgment'.¹¹² This process of making findings of primary fact inevitably involves an assessment relevant to the facts and circumstances of each case. It has been said that 'the meaning of injustice lies in the reaction of the individual judge, informed by what has been said [by] those to whom he should pay regard'¹¹³ and that 'what constitutes injustice will vary from one judicial decision-maker to another'.¹¹⁴ Due to the potentially wide array of factual situations where the CRA may be invoked, courts are mindful that they should not be confined by reasoning in decided cases as if they were 'rules'¹¹⁵ or to adopt a mechanistic exercise and apply 'the unjustness calculus'.¹¹⁶ But this does not mean that there are no boundaries or limits to this evaluative exercise or that it is 'given to the predilections of individual judges'.¹¹⁷ In *Karavas*, Kirby P emphasised the need to consider policy issues in working out the test. The question then is: 'what are the consequences of the holding and are such consequences within the apparent purposes of Parliament as expressed in the legislation?'¹¹⁸ This entails the application of established principles of interpretation of the statute.¹¹⁹ In making an evaluative judgment to determine whether a contract is unjust, the court has to consider and give content to the value embodied in the consideration of 'public interest'.

Policy consideration is integral to a finding whether a contract is unjust. Section 9(1) provides that the court shall have regard to the 'public interest' which is a significant legislative technique in the CRA. This mandatory factor was intended to 'direct the courts' attention to the underlying purpose of the Bill, namely to prevent

111 Ibid 298B, C.

112 *Perpetual Trustees Co Ltd v Khoshaba* [2006] NSWCA 41, [41] (Spigelman CJ).

113 *Elders Rural Finance Ltd v Smith* (1996) 41 NSWLR 296, 298 (Maloney P).

114 *Beneficial Finance Corp Ltd v Karavas* (1991) 23 NSWLR 256, 262 (Kirby P). Similarly, the standard of unjustness is 'general, and inherently variable': see *Perpetual Trustees Co Ltd v Khoshaba* [2006] NSWCA 41, [64] (Spigelman CJ).

115 *Perpetual Trustees Co Ltd v Khoshaba* [2006] NSWCA 41, [73] (Spigelman CJ). '[T]he characterisation of a contract as unjust and the sheeting home to the other contracting party of the consequences of unjustness may be a difficult evaluative exercise': see *Provident Capital Ltd v Papa* [2013] NSWCA 36, [7] (Allsop P).

116 *Perpetual Trustees Co Ltd v Khoshaba* [2006] NSWCA 41, [101] (Handley JA).

117 Ibid [110] (Basten JA).

118 *Beneficial Finance Corp Ltd v Karavas* (1991) 23 NSWLR 256, 268F.

119 Kirby, n 10; S Crennan, 'Statutes and the Contemporary Search for Meaning' (Paper presented to Statute Law Society, 1 February 2010).

unjust dealings which offend against community standards of business morality'.¹²⁰ According to Professor Peden, as no further assistance is offered on this provision, courts are to develop the doctrine guided by the spirit of the preamble and the specific criteria in s 9(2) and with regard to the mischief which the law was intended to cure.¹²¹

The 'public interest' factor has been applied by the courts to balance the interests of both contracting parties within the framework of the CRA. The courts are cognisant of the role of contracts to facilitate trade and commerce.¹²² In *Baltic Shipping Co v Dillon (The Mikhail Lermontov)*,¹²³ Gleeson CJ states that the general policy of the law is that contracts should be honoured and that this policy forms part of the idea of what is just. This has been justified on the basis that short of vitiating factors, people do have the opportunity to read documents.¹²⁴ It has been emphasised that this aspect of public interest 'is fundamental, indeed it inheres in the CRA itself'.¹²⁵

At the same time, there is also a public interest in protecting persons who are unable to protect themselves, for example persons who may be tricked or preyed upon by dishonesty.¹²⁶ This protection is seen in the law's insistence that financial institutions follow prudent lending practices and comply with their own guidelines. It has been made clear that the CRA's purpose is not to promote an efficient banking system; rather the policy is to ensure that clear operational guidelines are followed which will avoid or minimise fraud.¹²⁷ Related to this is the public interest in deterring 'pure asset lending', where the financier is prepared to lend knowing that adequate security is available in the event of default, without any regard to the capacity of the borrowers to repay. There is a public interest in protecting borrowers, as lenders suffer no risk of loss. This arises particularly where the security is the sole residence of the borrower and the borrower has shown an inability to reasonably protect his own interest.¹²⁸ In *Khoshaba*, the contract was found to be unjust and justified on the basis that the financier had failed to follow its own lending guidelines.¹²⁹ In *Elkofairi v Permanent Trustee Co Ltd*,¹³⁰ the financier knew that the appellant had no income or other assets. However, the position on this matter has not been settled. Difficulties arise as in some cases the financier may not have the knowledge that the borrower is not aware of the risks.¹³¹ Asset lending is

120 Peden, above n 84, 122.

121 Ibid 123.

122 See Allsop, above n 2, 824, referring to Lord Devlin, 'The Relation between Commercial Law and Commercial Practice' (1951) 14 *Modern Law Review* 249 that law should facilitate and not hinder commerce.

123 (1991) 22 NSWLR 1.

124 As in the case of *CIT Credit Pty Ltd v Blayn Norman Keable* [2006] NSWCA 130, [74]-[76].

125 See *Tonto Home Loans Australia Pty Ltd v Tavares* [2011] NSWCA 389, [269] (Allsop P).

126 Ibid [270].

127 Ibid [271].

128 *Perpetual Trustees Co Ltd v Khoshaba* [2006] NSWCA 41, [128] (Basten JA). See also *Elkofairi v Permanent Trustee Co Ltd* [2002] NSWCA 413.

129 See also *Spina v Permanent Custodians Ltd* [2009] NSWCA 206.

130 [2002] NSWCA 413.

131 See, eg, *Kowalczyk v Accom Finance Pty Ltd* [2008] NSWCA 343 and JM Paterson, 'Knowledge and Neglect in Asset-based Lending: When Is It Unconscionable or Unjust to Lend to a Borrower Who Cannot Repay' (2009) 20 *Journal of Banking and Finance Law and Practice* 18, 35. See also PC Rajapakse, 'Unconscionable or Unfair Dealing in Asset-based Lending in Australia' (2014) 22 *Competition and Consumer Law Journal* 151.

also said to have its advantages: it may facilitate commerce generally and advance the interests of both parties to the transaction. In *Fast Fix Loans Pty Ltd v Samardzic*,¹³² the Court warned against labelling transactions as such, adopting the position that public interest does not necessarily require asset lending to be proscribed or even deterred. Agreeing on this, Allsop P said this issue must be assessed in the context of all the circumstances surrounding the loan; the public interest would be satisfied if a financier is satisfied of the borrower's ability to make an independent decision or has received appropriate advice.¹³³

Related to pure asset lending cases are situations where borrowers often do not understand the risk they have placed upon themselves and have not received financial advice. In *Karavas*, Meagher J held that there was no duty on financiers to provide borrowers of third party guarantors with commercial advice. This absolute position has, however, been doubted on the basis that there can arise a variety of circumstances under the CRA.¹³⁴ It is still unclear whether this aspect is a matter of public interest, as also with the issue of independent legal advice.¹³⁵

Unfairness and unjustness

The above two parts have considered the test of unfairness under the UCTL, and unjustness under the CRA. Both concepts are of indeterminate value with the respective statutes setting out open-ended criteria to give them content. While both statutes may be seen to have broadly similar aims to provide better protection for consumers, the analysis of both tests as statutorily provided and as interpreted by the courts shows they are clearly distinct.

Professor Peden explained that the term 'unfair' was omitted from the definition of 'unjust' in the CRA out of a conscious policy 'not to allow contracts to be reviewed simply on the ground that the contract favours one party unless there has been an abuse of power or unconscionable conduct on his part'.¹³⁶ A similar passage was quoted by McHugh JA who pointed out that a contract will not be unjust unless the contract or one of its terms is the *product of unfair conduct* on his part either in the terms which he has imposed or in the means which he has employed to make the contract.¹³⁷ In contrast, the test of unfairness in the UCTL focuses on the terms of the contract.

Following the Peden report, a list of specific criteria was set out in s 9(2) rather than a broad or general formulation of injustice or unconscionability.¹³⁸ However, the list is not exhaustive and the court is entitled to have regard to all the circumstances of the case and the public interest. The concept of unjustness has become much more fluid than anticipated in the Peden Report. In *West*, McHugh JA was of the view that

132 [2011] NSWCA 260.

133 *Provident Capital Ltd v Papa* [2013] NSWCA 36, 84 NSWLR 231, [113].

134 *Bosnjak v Farrow Mortgage Services Pty Ltd (in liq)* [1993] NSWCA 304 (Kirby P and Priestly JA).

135 See *Gough v Commonwealth Bank of Australia* [1994] ASC ¶56-270, Kirby P (provision of independent legal advice may be considered a public interest).

136 Peden, above n 84, 109.

137 *West v AGC (Advances) Ltd* (1986) 5 NSWLR 610, 622B.

138 Peden, above n 84, 121.

notions of unfairness and unreasonableness will generally be present when a contract is declared unjust, particularly if procedural unfairness is relied on.¹³⁹

The two concepts, unfairness and unjustness are also often equated with the distinct doctrine of unconscionability which requires the establishment of a special disability and exploitation of that disability. In *Paciocco*,¹⁴⁰ Allsop CJ concluded that ‘unjustness and unfairness are of a lower moral or ethical standard than unconscionability’.¹⁴¹ Further, courts have emphasised that the characterisation of unjustness or unfairness is an evaluative task that must be carried out with a close attention to the statutory provisions,¹⁴² and to note the language used to explicate the ascribed standards.

This chapter has shown that the UCTL provides a more defined test of unfairness with its mandatory three-prong test. It provides better protection for substantive fairness through the first prong of ‘significant imbalance’. The innovative introduction in the UCTL of a mandatory second prong test of fairness (that the supplier justifies that an impugned term is reasonably necessary for its business legitimate interests) has provided strong protection for substantive fairness. This has resulted in the UCTL’s better protection in Australia compared with the English position. The UCTL also compares better than the CRA where a similar criterion is provided in s 9(2)(d) but only as one of the factors that the court must consider in determining whether a contract is unjust.

The second prong test in the UCTL also reflects a balanced conception of contract fairness; it takes account of the interest of suppliers and supplements the first prong test of ‘significant imbalance’. The test also allows courts to adopt an economic approach in the kind of evidence that suppliers must bring to justify the use of the impugned term. Thus, conceptions of fairness are not derived from narrow consumer interests alone but is a balance from both consumer and business perspectives. By adopting a more economic approach and as the UCTL’s fairness test becomes more developed, it will provide more consistent outcomes enabling businesses to better anticipate and manage business risks which will result in better consumer choices.

The breadth of the provisions in the CRA has given judges more latitude to determine whether a contract is unjust in considering all the circumstances of the case and the public interest. The cases show the development of the ‘public interest’ element in light of transactional imbalances that arise between financial institutions and their financially inexperienced customers in relation to pure asset lending and the provision of independent legal advice. This has occurred in the context of cases involving mortgages and guarantees provided by wives and elderly parents,¹⁴³ and other common areas of alleged injustice including high interest rates and falsified information

139 *West v AGC (Advances) Ltd* (1986) 5 NSWLR 610, 621C.

140 [2015] FCAFC 50, [363]-[364].

141 *Ibid* [363]. See also *Attorney-General (NSW) v World Best Holdings Ltd* [2005] NSWCA 261; 63 NSWLR 557.

142 *Ibid* [364].

143 T Carlin, ‘The Contracts Review Act 1980 (NSW) – 20 Years On’ (2001) 23 *Sydney Law Review* 125.

where the CRA has provided relief.¹⁴⁴ In the CRA, while the ‘public interest’ factor and the width of its provisions have provided much judicial discretions to arrive at decisions to enable just outcomes, the challenge is to develop a framework to arrive at ‘structured discretions’¹⁴⁵ which can serve as future guides for decisions.

While both the fairness test in the UCTL and the unjustness test in the CRA involve the courts in an evaluative exercise, the courts’ interpretative development of the prescribed three prong tests of unfairness in the UCTL provides more guidance compared with the list of mandatory factors applicable to the CRA’s determination of unjust contracts. On the other hand, the mandatory ‘public interest’ factor in the CRA has provided more ‘leeway for choices’¹⁴⁶ allowing courts to make decisions based on value and policy considerations. It also acts as a backstop to the wide provisions in the CRA.

Conclusion

The CRA was enacted in 1980, and through its history has provided relief for many applicants in varying situations. While the kind of contracts more recently decided under the CRA remain similar to those considered when the CRA first came into force,¹⁴⁷ the courts have recognised the need to apply the unjustness test in the light of current conditions. In *Khoshaba*, Spigelman CJ observed:

West is now 20 years old. When Parliament adopts so general, and inherently variable, a standard as that of ‘justness’, Parliament intends for courts to apply contemporary community standards about what is just. Such standards may vary over time, particularly over a period of two decades. There have been observations in this Court that the standards may have changed from those applied in 1986 in *West*.¹⁴⁸

The UCTL, on the other hand, is relatively new legislation. Within the seven years since its enactment, legal principles following from the courts’ interpretation of the fairness test have begun to emerge, and will be incrementally developed, as by Edelman J in *Chrisco*. The cases have shown the courts facing up to the challenges of interpreting and applying the open-ended criteria of unfairness and unjustness in the UCTL and in the CRA respectively. The decisions seek to articulate the norms and the precepts embodied in both statutes reflecting the values of community and society, as expressed in the

144 M Tibbey, ‘Undoing Unjust Contracts: Developments in Jurisprudence under the Contracts Review Act 1980 (NSW)’ (2009) 32 *Australian Bar Review* 182; see also B Zipser, ‘Unjust Contracts and the Contracts Review Act 1980 (NSW)’ (2001) 17 *Journal of Contract Law* 76 for cases decided under the specific criteria in s 9(2)(a)-(l).

145 Chen-Wishart, above n 7, 17.

146 M Kirby, ‘Statutory Interpretation: The Meaning of Meaning’ (2011) 35(1) *Melbourne University Law Review* 113.

147 S Christensen and WD Duncan, ‘Unfair Terms in Residential Land Contracts – Will the Australian Consumer Law Improve a Buyer’s Bargaining Position?’ (2012) 20 *Competition and Consumer Law Journal* 56, 64 fn 60 noted that their audit of cases since 2001 revealed that the statistics provided in Carlin’s article still accurately reflected the position (see Carlin, above n 143).

148 *Perpetual Trustees Co Ltd v Khoshaba* [2006] NSWCA 41, [64], [65].

extra-judicial writings of Chief Justice Allsop. The continued utility of both statutes will rest, in part, on the consistent applications of principles of statutory interpretation as well as sensitivity to the three disinclinations cautioned by Kirby P in *West*. Finally, the clear mandate in s 15AA of the *Acts Interpretation Act 1901* (Cth) for an interpretation that would best achieve the purpose or object of the Act must surely apply with greater force in view of the specific purpose of both statutes to grant relief against unfairness of contract terms and unjustness of contracts.