EXTENSION OF THE AUSTRALIAN CONSUMER LAW UNFAIR TERMS PROVISIONS TO SMALL BUSINESS AND THE IMPACT UPON GOVERNMENT CONTRACTING

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Introduction

In the Senate Parliamentary debates which precipitated the passage of the original *Trade Practices Act* 1974, Lionel Murphy remarked, in relation to the potential for unfair terms in many a business transaction, that "[t]he untrained consumer is no match for the businessman who attempts to persuade the consumer to buy goods or services on terms and conditions suitable to the vendor".[1] It seems that more than four decades later that small business is finally recognised as potentially suffering detriment under similarly invidious terms.

The passage of the *Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Act* 2015 was precipitated and motivated by the crystallisation of the notion that small business, insofar as the entering into contracts on reasonable terms, was subject to the same frailties and deficiencies in legal knowledge as individual consumers[2] whom presently enjoyed the umbrella of protection provided under the *Australian Consumer Law*[3] ('ACL') and equivalent provisions of the *Australian Securities and Investments Commission Act* 2001 (Cth) ('ASIC Act').

The amending legislation has consequently sought to restore balance to the protective elements of the respective laws in recognition of this, specifically as regards the protections relating to the occurrence of 'unfair terms' utilised within standard form contracts. The proliferation of the so called "standard form contracts" in use commercially and in governmental contracting[4] indicates prima facie a breadth of application of these amendments which must carry with it equally expansive outcomes. In particular, as the name indicates, the hallmarks of the "standard" nature of such contracts are the utter absence of negotiation, and the implantation of repetitively utilised terms typically presented on a "take it or leave it basis".

As with any balancing exercise, the movement of application of force in one direction leads inexorably to an equal and opposite reaction in other quarters, and in this case is characterised by claims of the further diminution of the sacrosanct (although less so with the passage of each decade) doctrine of freedom of contract, coupled with what some may perceive to be the arbitrary application of amendments as currently drafted, particularly in relation to what defines a "small business" for the purposes of the Act. The extensive use of such standard form contracts in the context of government procurement at the federal, state and local levels[5] indicates the pervasive ramifications of any legislative changes to their valid and legal formation, including the resultant exponential commercial and fiscal effects which may follow. These may include the increased cost of formation and management, increased commitment of time and resources including and beyond the adaptation phase, and the renewed uncertainty associated with untested legislation. In light of these legislative changes, the status

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[1] *Trade Practices Bill (No. 2)*, 2nd Reading Speech, Senate Official Hansard, Parliamentary Debates, 15 November, 1973, p.1872.

[2] *Treasury Legislation Amendment (Small Business And Unfair Contract Terms) Bill* 2015 Explanatory Material, pp. 3-4 & 9-10.

[3] Schedule 2, *Competition and Consumer Act* 2010.

[4] See for example "Decision Regulation Impact Statement - Extending Unfair Contract Term Protections to Small Businesses", Consumer Affairs Australia and New Zealand, Australian Government Treasury, 2015.

[5] Ibid.

at law of the "standard terms and conditions" of such contracts at this juncture warrant review, particularly as they occur in governmental procurement transactions. The changes themselves have recently been enacted. However in the fullness of time, the commercial relationships which are centred around these types of contract may indeed be so altered such that the greater paradigm, that standard contracts are utilised in the name of efficiency and cost-saving, may be directly and substantially altered to the point that their very utility may be extinguished. In the meantime, as regards the effect upon government contracting in procurements particularly, the breadth and pervasiveness of application of the revised legislation is anticipated to be profound.

Impetus for Change

The impetus for the introduction of the amendment bill is rooted not in the reasons for the implementation of unfair terms legislation generally, as the substantive effect of those provisions remains unchanged, but rather the necessity to expand the provisions' application to include "Small Business" under the protective shield it offers in respect of unfair contract terms in standard for contracts.

Statistics indicate that in 2016 there were approximately 2.1 million business enterprises in Australia employing less than 20 full time people[6] and that on average, small business were offered to become a party to an average of almost 7.6 standard contracts per annum in the course of typical business transactions[7], either as supplier or purchaser of goods and services (it is worth noting the inversion of protected contracting party with the small business entity realising protection under the amendments on *either side* of the contractual equation as opposed to the consumer protection which operates as buyer only in protection of "an individual [engaged in the] *acquisition of the goods, services or interest*"[8]). Other behavioural and situational statistics of note regarding the disproportionate influence of standard form contracting upon small business and the contingent issues relating to fairness include the following:

1. Small business respondents are less likely to have in-house legal expertise, seek legal advice on contracts or be able to afford legal or financial advice;[9]
2. 80% offered standard form contracts in last 12 months;[10]
3. Average 7.6 per annum;[11]
4. 30% spend less than 10 minutes reading;[12]
5. 60% of small business standard form contracts were under $250,000;[13]
6. Small business respondents, however, were more likely to not thoroughly review the contract if it is too complicated and they lack legal expertise (this was the polar opposite for large business whose propensity to review increased proportionately to the complexity of the proposed contract);[14]
7. Of those who reported being offered standard form contracts, 60 % of small businesses claimed to have experienced unfairness in terms and conditions;[15]and

[6] Australian Bureau of Statistics, "8165.0 - Counts of Australian Businesses, including Entries and Exits", Jun 2012 to Jun 2016, < http://www.abs.gov.au/ausstats/abs@.nsf/mf/8165.0> , accessed on 2 March, 2017.
[7] *Decision Regulation Impact Statement - Extending Unfair Contract Term Protections to Small Businesses*, Consumer Affairs Australia and New Zealand, Australian Government Treasury, 2015, p. 47.
[8] *Australian Consumer Law*, s 23(3).
[9] *Decision Regulation Impact Statement - Extending Unfair Contract Term Protections to Small Businesses*, Consumer Affairs Australia and New Zealand, Australian Government Treasury, 2015, p. 45.
[10] Ibid at p. 47.
[11] Ibid.
[12] Ibid at p. 48.
[13] Ibid.
[14] Ibid.
[15] Ibid at p. 50.

8. 50% of small businesses did not seek professional legal advice, and among those who did, more than half only obtained that advice for less than 20% of contracts.

The extant proliferation of standard form contract use with small business as the counter-party combined with shortfalls in contractual understanding and review by small business similar to individual consumers conceivably make the extension of unfair terms legislation to protect small business an obvious and logical step.[16] As stated the substantive measures of the provisions remain the same – there is only a broadening of application. Although made in the context of the introduction of the original substantive law of unfair terms for consumers, the comments by Gray remain equally applicable to the broadening application to small business for entirely the same reason. Appropriately, he stated at the time that:

> "the fact that the Commonwealth government now sees fit to introduce a national consumer law dealing with unfair contracts might reflect its assessment that the non-statutory doctrine of unconscionability, as interpreted and together with other non-statutory doctrines dealing with contractual aspects under the broad umbrella of 'unfairness', has not sufficiently protected consumers from take it or leave it standard contracts written by powerful businesses. *The very purpose of the reforms is to remedy a perceived problem caused by contracts between parties of unequal bargaining power, in contrast to non-statutory law which refuses to intervene for this reason alone."*[17]

He went on to acknowledge the key components of standard form contracts which make them particularly susceptible to unfair terms, stating that "[unfair terms legislation] recognis[es] the reality that in many cases contracts have not been the subject of any real negotiation, and that power imbalances do exist and affect the terms on which the parties engage."[18]

The Productivity Commission considered such regulation to be rooted in ethics stating that "'[t]he strongest argument for [regulation of unfair contracts] is ethically based — and is merely the extension of existing ethical principles about fairness in contracts, to cover substantive terms that appear to be manifestly unfair in most circumstances".[19] More directly, Consumer Affairs Australia and New Zealand provided a laundry list of direct objectives to be solved by the extension of the legislation to cover small business. These stated that:

> "To achieve the purpose of extending the unfair contract term provisions for standard form contracts to small business, the following elucidates the gaps in Australian law at present:
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> 1. do not cover goods and services purchased for other than personal consumption
>
> 2. only apply when goods or services are acquired by a consumer;
>
> 3. do not cover standard form contracts between small businesses that both purchase and supply
>
> goods and services;
>
> 4. are substantively duplicated between both the Australian Securities and Investments Commission Act 2001 and the ACL;
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> 5. do not enforce regulatory disclosure; yet the food nutrition and home loan sectors have embraced disclosure in terms of a customer context; and

[16] Australian Competition and Consumer Commission (ACCC), *Unfair Contract Terms, Industry Review Outcomes*, March, 2013.
[17] Gray, A., "Unfair Contracts And The Consumer Law Bill", *QUT Law Journal*, Vol 9 No 2 (2009) 155, 160.
[18] Ibid at 167.
[19] Productivity Commission, *Review of Australia's Consumer Policy Framework* (Inquiry Report No. 45, 30 April 2008), p.151.

6. if extended, could potentially impinge heavily on the doctrine of freedom of contract."[20]

A particular key mischaracterisation has led however to the delays in expansion of the law in this area to small business and that is the dual approach of considering all consumers lacking in the requisite skill and diligence and therefore requiring protection, notwithstanding the existence of many "skilled" consumers, and conversely the universal acceptance of all business as possessing this requisite knowledge notwithstanding the lack thereof in many smaller entities as demonstrated above. Freilich and Webb have correctly acknowledged this concept, stating:

> "Consumers benefit from special protections whatever their knowledge and experience; even experienced, 'savvy' consumers can take advantage of common law and statutory safeguards. In comparison, businesses tend to be perceived as well-resourced and advised commercial entities. Their common commercial character binds them, regardless of the business's size or the education and experience of the proprietors".[21]

This undeserved "plight" of small business' lack of protection is further juxtaposed in the comment that "[t]he cosseted position of consumers, protected by an armoury of legislative provisions, is to be contrasted with the plight of small business in their contracts with other commercial entities".[22]

It may be said that the failure of the common law to recognise the potential for unconscionability as arising in the context of business to business dealings[23] may have been in some measure responsible for the delay based upon mischaracterisation of business contracting skill.

As an aside, the consideration of the imposition of cost as a clog to commercial dealings is always present, and legislation requiring substantial re-writing of many standard form contracts rates highly in this regard. The Productivity Commission correctly anticipated that unfair terms legislation would lead to increases in costs for such entities required to re-draft the offending portions of the standard form contracts.[24] This would no doubt apply to Government in the reconfiguration of contracts which are perceived to possess the risk of being deemed to contain unfair terms. Unlike commercial entities however, Government may be required to absorb these additional administrative costs as opposed to passing them on to "the consumer". Notwithstanding this the ACCC found that implementation of the requirements of the ACL legislation in 2010 into actual contract provisions was readily and adequately undertaken.[25]

The Amending Legislation

The stated purpose of the amending legislation is to "amend legislation to extend unfair contract protections to small business contracts, and for other purposes".[26]

The substantive operation of the Unfair Terms provisions contained within the ACL remain unchanged as a result of the emending legislation, specifically the *Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Act* 2015. The amendment effect is two-fold in addressing the equivalent provisions in two distinct pieces of legislation being:

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[20] Van Esch, P.,"Extending Unfair Contract Term Provisions For Standard Form Contracts To Small Businesses" *Alt. Law Journal*, Vol 40:2 (2015) 93, 95 *citing* Consumer Affairs Australia and New Zealand (CAANZ), Treasury, *Extending Unfair Contract Term Protections to Small Businesses* (2014).
[21] Freilich, A. & Webb, E., "Small Business - Forgotten and in need of protection from unfairness?", *University of Western Australia Law Review*, 134 (2013-4), 114-5.
[22] Ibid at 116.
[23] See for example *Australian Competition and Consumer Commission v C G Berbatis (Holdings) Pty Ltd* (2003) 214 CLR 51.
[24] Productivity Commission, *Review of Australia's Consumer Policy Framework* (Inquiry Report No. 45, 30 April 2008), p.155.
[25] Australian Competition and Consumer Commission (ACCC), *Unfair Contract Terms, Industry Review Outcomes*, March, 2013.
[26] Legislation Title, *Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Act* 2015.

1. Amendments to extend the consumer unfair contract term provisions in *the* ***Australian Securities and Investment Commission Act*** **2001 (Cth) (ASIC Act)** to small businesses agreeing to standard form contracts valued less than a prescribed threshold; and

2. Amendments to extend the consumer unfair contract term provisions in the **Australian Consumer Law (ACL) of the *Competition and Consumer Act 2010*** **(Cth) (CC Act)** to small businesses agreeing to standard form contracts valued less than a prescribed threshold.

The Act was assented to on 12 November 2015. The changes came into effect on 12 November, 2016 and applies to contracts signed after this date.

Effective Changes to Unfair Terms Provisions

As stated the substantive provisions of the unfair terms legislation remain unchanged.

The scope of application in both the *ACL* and *ASIC Acts* relating to unfair terms have expanded to incorporate a "small business contract"[27] in addition to the extant application to "consumer contracts".[28] As the import of the *ASIC Act* extends only to the provision of financial services and advice,[29] the focus of this paper will remain upon the ACL as applicable to the typical procurement activities of government.

The legislation only requires that either party to the contract be a "small business".[30] A small business is defined as "a business that employs fewer than 20 persons",[31] which excludes casual employees unless "he or she is employed by the business on a regular and systematic basis".[32] This is the equivalent method adopted in the *Fair Work Act* 2009 (Cth). Of relevant note is the fact that once the establishment of the contract type, *inter alia*, is established, the legislation may then work to operate in protection of *either party* to the contract regardless of size, resources or sophistication.

The relevant section defines the small business contract as follows:

> "(4) A contract is a small business contract if:
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> (a) the contract is for a *supply of goods or services, or a sale or grant of an interest in land*; and
>
> (b) at the time the contract is entered into, at least one party to the contract is a business that employs fewer than 20 persons; and
>
> (c) either of the following applies:
>
> (i) the upfront price payable under the contract does not exceed $300,000;
>
> (ii) the contract has a duration of more than 12 months and the upfront price payable under the contract does not exceed $1,000,000."[33]

The "upfront" amount is defined in the Act as follows:

> "(2) The upfront price payable under a contract is the consideration that:

[27] See ACL s.23 *and* ASIC Act s.12BF.
[28] *Australian Consumer Law*, s.23 & *ASIC Act*, s.12BF.
[29] *Australian Securities And Investments Commission Act* 2001, Division 2.
[30] ACL, s. 23(4)(b).
[31] ACL, s. 23(4)(b).
[32] ACL, s.23(5).
[33] ACL, s. 23(4).

(a) is provided, or is to be provided, for the supply, sale or grant under the contract; and

(b) is disclosed at or before the time the contract is entered into;

but does not include any other consideration that is contingent on the occurrence or non-occurrence of a particular event."[34]

The amounts are arbitrary and are thought to define the reasonable section of the space within which small business operates and in fact represents a substantial section of small business activity, including government procurement as described above. It is interesting to note that the original intention was to set the single year and multi-year amounts at $100,000 and $250,000 respectively,[35] which was ultimately substantially expanded, and consequently as was the level of protection, in the passage of the finally drafted bill.

This dissection of the elements of business worthy of protection in this area has been found to be capricious in application by some scholars. It has been stated that:

> "The adoption of a status driven dichotomy" that cuts an arbitrary legal line between consumers and business" distorts the perspective from which the legislature and the courts proceed….. If conduct is inappropriate - and a term of a contract is unfair - it should not matter to whom it is directed".[36]

The "gateway" provision found in section 23(1) requires that the operation of the legislation in addressing an unfair term, requires that the contract itself is a standard form contract.[37] The indicia of a standard form contract are contained within the Act,[38] and are discussed below. As mentioned above, it is not atypical in government tendering for the supply of goods and services to government that such tender would include a pro forma contract which, without further negotiation, is to be executed upon successful tendering for the supply by the private entity.

Remedies

Upon application by a party to the contract, or the Regulator, the Court may declare a contract term to be unfair.[39] Upon such a declaration, and in the context or a standard form contract, the term becomes void.[40] The residual contract remains binding upon the parties "if it is capable of operating without the unfair term".[41]

The Court has broad powers to issue injunctions in relation to contravention of the unfair terms legislation, including prospectively, and against the direct or related parties in engaging in the conduct.[42] Any person or the Regulator is empowered to make the application.

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[34] ACL, s.26(2).
[35] "Exposure Draft Treasury Legislation Amendment (Small Business And Unfair Contract Terms) Bill 2015" *Explanatory Material*, section 1.12.
[36] Freilich, A., & Webb, E., "Small Business - Forgotten and in need of protection from unfairness?", 37 *University of Western Australia Law Review*, 134 2013-2014 p. 116 ,155.
[37] ACL, s.23(1)(b).
[38] ACL, s.27.
[39] ACL, s.250.
[40] ACL, s.23(1).
[41] ACL, s.23(2).
[42] ACL, s.232.

The aggrieved party suffering losses as a result of the unfair terms may recover such losses against the responsible party and any other "involved" party.[43] The limitation period is 6 years from the conduct which gives rise to the cause of action.[44]

A compensation order may be sought by the injured party or the Regulator in the event of actual, or the likelihood of loss as a result of the impugned conduct[45] and/or "constitutes applying or relying on, or purporting to apply or rely on, a term of a contract that has been declared under section 250 to be an unfair term".[46]

The Applicability of the ACL to Government Generally

It is worthy of note in the first instance that a significant (and still significant notwithstanding the recent changes to the unfair terms law) operation of the ACL may not be applicable to the procurement activities of government.

The four words "carries on a business" are pivotal in the capture or otherwise of governmental purchasing activity in the net of the ACL and equivalent state based legislation regulating the procedural and substantive contracting of these entities.

Application of the *Competition and Consumer Act* 2010 ('CCA') and thence the Australian Consumer Law to government dealings at a federal level is sounded in at section 2A(1) of the Act:

"…this Act binds the Crown in right of the Commonwealth in so far as the Crown in right of the Commonwealth **carries on a business**, either directly or by an authority of the Commonwealth".[47]

"Authority of the Commonwealth" means a:

- statutory corporation or
- corporation under the Corporations Act in which a statutory corporation has a controlling interest.[48]

Statutory corporations are corporations created by Acts of parliament and include for example

The CCA does not bind the States, however these are captured in the equivalent state-based legislation. In Queensland, for example, the following sections of the Fair Trading Act bind the State to the ACL of the state and other state-based ACL legislation[49]:

- s.24 - binds Qld Crown and other State and Territory Crowns so far as they "**carry on a business";** and
- s.25 - Crown bound by ACLs of other States and Territories so far as it "**carries on a business".**[50]

Similar provisions reside in the other equivalent state legislations.[51] As a side note, the Commonwealth is similarly only bound to the degree that it "carries on a business" under the equivalent provisions in the *ASIC Act*.[52]

[43] ACL, s.236(1).
[44] ACL, s.236(2).
[45] ACL s.237(1).
[46] ACL, s.238(1)(b).
[47] ACL, s.2A(1).
[48] ACL, s. 4 Interpretation.
[49] For example *Fair Trading Act* 1987 (NSW) and *Australian Consumer Law and Fair Trading Act* 2012 (Vic).
[50] *Fair Trading Act* 1989 (Qld).
[51] For Example section 36 of the *Fair Trading Act* 1987 (NSW) and section 16 of the *Australian Consumer Law and Fair Trading Act* 2012 (Vic).
[52] *ASIC Act*, s. 12AD.

The requirement that business *be carried on* remains the narrow gate to application of the ACL at the State and Federal Levels. The development of the law in this area outwardly appears to exclude the activities of government purchasing generally from the paradigm of "carrying on a business"[53] however this is subject to the individual nature of the circumstances of the purchase.

The question as to whether the government activity in the context of tendering for supply of goods and services was succinctly posited by the Federal Court in *J.S. McMillan Pty Ltd v Commonwealth of Australia.*[54] Notwithstanding the factual matrix of the case involving a tender for procurement, it can be argued equally that the mere act of purchasing in the procurement setting on a direct or informal basis is subject to the characterisations extrapolated therein. Of prime consideration was the distinction of carrying on a business from the "functions of Government". The Federal Court stated that:

> "The….AGPS [a business unit within the Commonwealth Government Department] was undertaking functions which are inherently functions of Government such that they cannot be considered a trading activity, much less the carrying on of a business. Clearly, there is a distinction between those functions of a Government which are purely governmental or regulatory and those functions which entail the carrying on of business".[55]

Further, the presence of additional elements which may be considered in the ordinary sense to be the indicia of "business" are not determinative, and certainly do not abrogate the prohibition on the characterisation of government functions as business. Accordingly, the Federal Court declared that:

> "…mere repetitiveness is not sufficient to constitute carrying on of a business. System and regularity are involved in the carrying on of the business but it does not necessarily follow that one who has transactions of the same kind systematically or regularly is carrying on a business in those transactions. The example of regular deposits to a bank account is sufficient to explain that proposition. Absence of a system and regularity might deny that a business is being carried on but the presence does not necessarily establish that it is".[56]

The question was more recently considered in the Supreme Court of Victoria in *Murphy v State of Victoria & Anor (No 2)* [2014].[57] In that case, the plaintiff sought the application of the misleading and deceptive conduct provisions of the ACL[58] to the State. The misrepresentations were allegedly made by the State Government authority responsible for stakeholder engagement in relation to the construction by the State of the Melbourne East West Link Project. The Court extrapolated upon three limitations "inherent" in section 16 of the Victorian ACL potentially preventing the flow of liability to the State, the first and third of which are most apposite to the question of unfair terms and government activities generally.

In the first limitation, the Court restated with approval the requirements for carrying on business as sounding in applicability of the legislation to the State as laid down in *J.S. McMillan*, including those indicia of the carrying on of business by the State. In doing so, the Court surmised that "it is not sufficient that the making of the Representations may be said merely to be connected in some way with a business conducted by the State".[59]

The third limitation went to the heart of defining the concept of "carry on a business" and expressed the following points:

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[53] See for example *J.S. McMillan Pty Ltd v Commonwealth of Australia* [1997] FCA 619; 77 FCR 337; 147 ALR 419.
[54] [1997] FCA 619; 77 FCR 337; 147 ALR 419.
[55] *J S McMillan Pty Ltd & Ors v Commonwealth of Australia* [1997] FCA 619; 77 FCR 337, 355.
[56] *J S McMillan Pty Ltd & Ors v Commonwealth of Australia* [1997] FCA 619; 77 FCR 337, 354.
[57] VSC 404; 289 FLR 245.
[58] ACL, s.18.
[59] *Murphy v State of Victoria & Anor (No 2)* [2014] VSC 404; 289 FLR 245, [44].

1. "[T]he activities must be undertaken in a commercial enterprise or as a going concern. The activities must constitute trade, or commercial transactions or engagements.";
2. "[Carrying on a business] signifies a course of conduct involving the performance of a succession of acts with system and regularity, not the effecting of a solitary transaction. *The less commercial the character and objectives of an organisation, the greater the degree of system and regularity required to establish that it carries on a business*";
3. "It does not necessarily follow that one who engages in transactions of the same kind systematically or regularly is carrying on a business in those transactions"; and
4. "There must be present some element of commerce or trade such as a private citizen or trader might undertake".[60]

These pronouncements yield the following conclusions as regards the application of the ACL to the activities of government generally:

> 1. There has been a solidification of the requirement that a finding of "business" in government transactions must align with that of a private entity or individual, thus raising the bar in terms of a finding of business in government procurement. This retains the connotation of a profit motive and a purely business context in applying the ACL to government;
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> 2. The position of government as a non-business entity first and foremost raises the bar even higher from the outset in the requirement that specific actions of government may constitute actions as "business", due to its low "commercial character and objectives";
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> 3. That the overall transactions of government characterised as *government functions* are excluded from the application of the legislation, and thus the potential exists to "extract" otherwise business-based transactions from the ambit of the Act if these might indeed be termed government functions; and
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> 4. That many indicia which may ordinarily lead to a conclusion that business is being conducted, are insufficient as regards the application of the ACL through the portal of "carrying on a business".

The somewhat incongruous nature of the separation of the application of the ACL and equivalent legislation from application to the massive volume of commercial transactions coupled with governments' special requirements of fairness (see below) has not gone unnoticed. Finn J of the Federal Court noted in *GEC Marconi Systems Pty Limited v BHP Information Technology Pty Limited*[61] that:

> "I would merely add that it is not now open to me to countenance the suggestion that s 2A should be construed expansively in favour of those dealing with the Commonwealth, so limiting the immunity that would otherwise be enjoyed by the Commonwealth. It is appropriate, though, to note again the obvious anomaly of the s 2A requirement. Government contracting (in procurement and otherwise) is of major significance in the economic life of this country, as it is in most countries. It is somewhat surprising, that when the State enters the market place to acquire goods or services, it should exempt itself from those norms of conduct considered appropriate to the conduct of trade and commerce that it has imposed upon the private sector as of course – the more so given the "business-like" manner in which the Executive government commonly professes it conducts its affairs both internally and in its dealings with the community".[62]

[60] *Murphy v State of Victoria & Anor (No 2)* [2014] VSC 404; 289 FLR 245, [51].
[61] [2003] FCA 50; 128 FCR 1.
[62] *GEC Marconi Systems Pty Limited v BHP Information Technology Pty Limited* [2003] FCA 50; 128 FCR 1, [1375].

A finding of substantive interest on the basis of public interest has been found to "represent the upper limit of a finding of substantive fairness under the [consumer law]".[63]

The unfair terms provisions of the ACL are indeed substantive, as contrasted for example with the procedural elements of unconscionability.[64] It may feasibly be postulated that the very construction of the unfair terms legislation indeed exclude the necessity for the Act to "bind the Crown" in any case as regards a finding of unfair terms. Upon a finding of a "small business contract" triggered by the commitment of a small business party and the standard form nature of the agreement, the gateway to the application of the unfair terms provisions has been opened, and the focus becomes the substantive terms of the impugned contract. The inapplicability of the Act to a government entity as counter-party may not necessarily become a bar to a finding of an unfair term, and its striking out.[65] In such an instance, the intent of the legislation would be fulfilled (i.e. the protection of small business from unfair contractual terms) notwithstanding a finding that the counter –party is not bound by the provisions of the Act. The application of the gamut of remedies including actions for damages[66] and compensation orders[67] may indeed be barred however if the government is held not to be carrying on business in the context of the transaction.

The High Court in *Bradken Consolidated Ltd v Broken Hill Proprietary Co Ltd* [68] declared this proposition invalid, in considering the question of derivative immunity in that case – the question as to whether the private entity counter-party to a contract with an immune (under the consumer legislation) government entity would receive the same immunity by virtue of the contractual connection. In deciding that the counter-party would be immune the Court went so far as to bar the application of the Act from jointly made contracts so as to shield the government from any prejudice which might flow therefrom. Accordingly, the High Court held that:

> "the absence of an intention to bind the Crown in right of Queensland will not only exonerate it from the direct application of the statutory provisions but will also *exonerate from the application of those provisions the contracts arrangements or understandings made by that Crown and the other parties thereto as well*".[69] [italics added]

The proposition *against the* "derivative immunity" - the seemingly disparate application of the ACL and its provisions to a party notwithstanding the inapplicability of the legislation to the Government as procurer and counter-party – has also been held more recently in the High Court decision in *Australian Competition and Consumer Commission v Baxter Healthcare Pty Ltd*.[70] Consequently the Court allowed the application of the *Trade Practices Act* 1974 upon the private entity supplier notwithstanding the immunity of the State Governments as counter-parties. Whilst this decision has no influence upon the general lack of applicability of the ACL where the government, particularly in procurement, is found not to be "carrying on business", it indicates the potential for government entities to have available to them the potential for recourse against unfair terms under the ACL whereby the standard form contract was provided *by the private supplier as the basis for the procurement transaction*. This is theoretically possible despite the intention of the ACL as affording protection to the disadvantaged party.

In toto, the binding of government to the provisions of the ACL as regards the unfair terms provisions faces a challenge in traversing the requirement of carrying on a business, particularly as relates to the

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[63] Santucci, P., "Substantive Fairness in Australian Standard Form Consumer Contracts: Lessons from the UK Experience", *Oxford University Commonwealth Law Journal* (2011) 11:2, 183.
[64] ACL, s. 20 & s.21.
[65] ACL, s.250.
[66] ACL, s.236.
[67] ACL, s.237.
[68] [1979] HCA 15; 145 CLR 107.
[69] *Bradken Consolidated Ltd v Broken Hill Proprietary Co Ltd* [1979] HCA 15; 145 CLR 107, 138 per Mason & Jacobs, JJ.
[70] [2007] HCA 38; 232 CLR 1; 81 ALJR 1622; 237 ALR 512.

vast bulk of government business sought to be caught by the provisions, namely the smaller procurement based transactions with small business as the counter-party, and low volume contracts forming the relationship.

Government Tendering In Procurement and Duties of Fair Dealing

The decision in *Marconi* provides a refreshing counterpoint to judicial determinations that government may generally escape the provisions of the ACL on the basis of not transcending the "carrying on a business" benchmark, principally due to the non-commercial nature of government overall, and the general classification of much of similar activity as being the function of government. The expectations expressed in *Marconi* of a higher degree of exemplary conduct by government based on the Executive's self-professed "business-like manner" is not solely policy based, but indeed has a basis on law, particularly as regards the conduct of procurements in tender and similar.

Government is indeed a prolific procurer of goods and services from private enterprise, with the Federal Government alone procuring $5.5 billion in goods and services from small enterprises in the last fiscal year.[71] The legislation has now, as seen above, shifted the focus of the "protected party" from that of strictly a consumer to that of either party to the contract.[72] This is based upon the focus upon the contract itself as having a "small business" party (regardless of which side of the equation) as defined by the legislation, at which time the agreements terms become subject to unfair terms oversight as laid down in the provisions of the applicable Act, be it the ACL or ASIC Act. The effect of this is profound, in that, under the purely consumer paradigm, the Government entity would represent the powerful player in the equation, and would with all of its resources and expertise be the party from whom the lesser party might be protected. In the typical procurement scenario, it is these small businesses which would typically be the supplier to the Government body, and the consequent agreement would be subject to having unfair terms struck out, and indeed the entire agreement if it failed to subsist following the removal of the offending term(s). Further, the host of remedies would now come into play over and above the removal of the unfair term including, as stated:

- A declaration that term is unfair: s. 250
- An Injunction to prevent the operation of the agreement: s. 232
- An action for Damages arising out of the agreement as a result of the unfair term: s. 236
- A compensation claim on behalf of party suffering loss: s. 237
- An order to redress loss or damage to a non-party consumer if applicable: s. 239

Standard form contracts themselves are a typical aspect of government procurement. Indeed, the contract itself (save for the details of the counter-party) are typically provided and included in the tender documentation to be executed upon successful bid by the Offeror. These pro-forma contracts are standard form in the purest sense in that no negotiation as to terms is entered into by the parties, and by submission of a tender offer, the party has indeed already indicated a willingness to enter into the contract, having undertaken to do so pursuant to the terms of the tender itself. This has occurred pursuant to the formation of a "process contract" which has arisen as a result of the Governments invitation to tender, and the supply by the private entity of a fully conforming bid. Accordingly, the Federal Court held in Hughes that, in relation to an accepted tender Invitation that:

> "Objectively viewed the circumstances were redolent of a contractual intent on the part of the parties concerned. I cannot accept that a mere invitation to treat was being proffered by the [inviting government entity]. It was taking positive steps to procure the participation of the

[71] Australian Government Department of Finance - *Statistics on Australian Government Procurement Contracts 2015-2016*, Source - https://www.finance.gov.au/procurement/statistics-on-commonwealth-purchasing-contracts/, accessed on 2 March, 2017.

[72] Per the ACL, contrast section 23(3) where the individual is strictly and "acquirer" of goods and services with section 23(4)(b) whereby either party ("at least one party") needs to be a small business.

> tenderers in a competitive [tender]. Integral to that was the prescription of a tender process acceptable to them. While I need not necessarily go so far as to suggest of tender procedures generally that "the integrity of the bidding system must be protected where under the law of contract it is possible so to do"….the circumstances here were ones in which it properly can be said the parties, by agreement, had used contract to protect "the integrity of the bidding system",[73]

and further, reconfirming the process contract and implying a term of "fair dealing" into the process contract principally on the basis that the entity inviting tender was a government body…..

> "I have found that the processes leading to the award of the [tendered] contract were governed by a process contract, the principal terms of which were contained in the [tender request]. I also have found it to be an implied term of that contract that (inter alia) the [the inviting government entity] would conduct its tender evaluation fairly. I have determined as well that a term should be implied as a matter of law into a tender process contract with a public body (such as this was) that that body will deal fairly with a tenderer in the performance of its contract. Accordingly I have made such an implication into the [tender request]".[74]

And further as regards the implied term of fair dealing….

> "[the tender] is one in which I am prepared to find that, as a matter of law, a duty to deal fairly in the performance on the contracts I have found should be implied into those contracts. Irrespective of what should be taken to have been the intentions of the parties, both the type (or class) of contract and the relationship of the parties were such as gave the tenderers the right to expect, and the CAA the obligation to exhibit, fair dealing in the performance of the contract".[75]

Such was the implication of fairness that the Court described this as the guiding paradigm of the conduct within the context of the contract stating that "fairness in process and dealing was the *a priori* of this business relationship".[76] His Honour, in delivering the judgement extrapolated upon the "special" place occupied by the Government in its dealings with private enterprise. To wit, his Honour stated that:

> "In differing ways these instances reflect policies in the law, albeit in specific contexts, (a) of protecting the reasonable expectations of those dealing with public bodies; (b) of ensuring that the powers possessed by a public body, "whether conferred by statute or by contract", are exercised "for the public good" and (c) of *requiring such bodies to act as 'moral exemplars': government and its agencies should lead by example*….These policies I consider to be important in the present matter."[77]

Indeed the "special overlay" of Government behaving as the "moral exemplar" in contractual relations is well established and derives from the governments unique position based upon democratic appointment, and subsistence upon public monies.

Hughes was cited with authority in the subsequent Supreme Court of NSW case of *Cubic Transportation Systems Inc & Anor v State of New South Wales & 2 ors*.[78] The Court upheld the existence (and therefore binding requirements) of a process contract in that case, and the and the principle of the implication of fair dealing by the government in tendering notwithstanding attempts in the tender documentation to "draft out" these requirements.

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[73] *Hughes Aircraft Systems International v Airservices Australia* [1997] FCA 558; 76 FCR 151 at 184 per Finn, J.
[74] *Hughes Aircraft Systems International v Airservices Australia* [1997] FCA 558; 76 FCR 151 at 277.
[75] Ibid at 193.
[76] *Hughes Aircraft Systems International v Airservices Australia* [1997] FCA 558; 76 FCR 151 at 190.
[77] Ibid at 197.
[78] [2002] NSWSC 656.

The implication at common law of a requirement of fair dealing on the part of the Government is particularly instructive in the current discussion, as it connotes the "overlay" upon the government as the keeper of the public purse, an implied procedural requirement in dealing with private suppliers. Notwithstanding the procedural nature of this requirement, it can be said to be a logical extension of this that the terms of agreements emanating from such arrangement may validly be bound to be drafted and made in accordance with common law notions of fair dealing. Although beyond the ambit of this discussion, this general requirement of Government dealing as a "moral exemplar" may act to bind the Government in a pervasive requirement traversing government contracting in both procedural and substantive components.

Accordingly, government in all standard form contracts should seek to revisit and review potentially unfair terms within standard form contracts.

Standard Form Contracts

> *"....standard form contracts appear to offer little potential for genuine consent on the part of the consumers to whom such contracts are presented. The whole point of standard form contracts is that there will be no negotiation over, or variation of, the terms of the contract. They are presented on a '[t]ake it or leave it' basis. The opportunities for consumers to read, comprehend or take advice on the terms of the contracts are typically limited".*[79]

Standard forms yield for the drafter, including and especially government, a multitude of benefits including, but not limited to the following:

- Reduced Cost;
- Reduced Time ;
- Certainty of outcome;
- Uniformity of approach to counter-parties; and
- Eradication of negotiation.

The efficiencies for the drafter are undeniable and palpable. Santucci states that:

> "standard form contracts generate efficiencies for suppliers by standardising contractual risk and streamlining internal administration processes. Legal advice is obtained in relation to one standard contract which is promulgated throughout an enterprise for uniform use, enabling any member of staff to deal directly with the consumer. The efficiencies generated by standard form contracts reduce costs and provide greater supply and variety for consumers".[80]

The above statement fails to take into account the prolific use of the purchaser in the case of a significant volume of government procurement. Further, the statement as to variety is only relevant (potentially) insofar as a variety of product offerings, as standard form contracts are by their very nature devoid of variation. He rightly continues on to state that accordingly:

> "In the case of standard form contracts, however, regulation of the substantive fairness of the rights that a consumer forfeits or the obligations they assume is justified even where a contract is entered into voluntarily".[81]

The proliferation of the use of standard form contracts amongst small businesses is indicated above in the statistical markers of their use. Anecdotal and empirical research into the behaviours surrounding

[79] Paterson J., "The Australian Unfair Contract Terms Law: The Rise Of Substantive Unfairness As A Ground For Review Of Standard Form Consumer Contracts" Vol. 33 *Melbourne University Law Review* (2009) 934, 940.
[80] Santucci, P., "Substantive Fairness in Australian Standard Form Consumer Contracts: Lessons from the UK Experience"(2011) *Oxford University Commonwealth Law Journal*, 11:2, 171-195, 172.
[81] Santucci, P., "Substantive Fairness in Australian Standard Form Consumer Contracts: Lessons from the UK Experience"(2011) *Oxford University Commonwealth Law Journal*, 11:2, 171-195, 174.

the use of these by consumers and small businesses alike is informative to the drafter both in terms of the impetus and need for protection for the user, but also the means by which appropriate drafting may assist in circumventing the issues which the legislation and common law seek to vanquish.

Section 27 of the ACL defines the indicia of a standard form contract. All relevant matters may be considered by the Court in determining that a contract is indeed standard form, however the following are mandatory considerations in this regard:

> "(a) whether one of the parties has all or most of the bargaining power relating to the transaction;
>
> (b) whether the contract was prepared by one party before any discussion relating to the transaction occurred between the parties;
>
> (c) whether another party was, in effect, required either to accept or reject the terms of the contract (other than the terms referred to in section 26(1)) in the form in which they were presented;
>
> (d) whether another party was given an effective opportunity to negotiate the terms of the contract that were not the terms referred to in section 26(1); and
>
> (e) whether the terms of the contract (other than the terms referred to in section 26(1)) take into account the specific characteristics of another party or the particular transaction".[82]

It is of note the indicia appear to vacillate between procedural and substantive matters in defining a standard form contract, which is essentially a declaration that is substantive in nature, notwithstanding the means by which the contract came about, other than the absence of negotiation. The lack of negotiation however still points substantively to the notion of "standard" as a logical consequence of negotiation (typically) are changes to an agreement making it no longer "standard". The standard nature of such a contract connotes certain contingent behaviours which are validly the subject of unfair terms oversight, the least of which is not the lack of negotiation associated with their formation. The general understanding of the approach to these from the perspective of counter-party behaviour makes the reasoning for addressing unfair terms in their use apparent, and this relates directly to the twin issues of notice of the terms, and the ability to adequately assess the impacts of the terms themselves in the typical users. Paterson has observed that:

> "[I]n many standard form contracts, the opportunities for genuine, in the sense of free and informed, consent by consumers to the terms of that contract are limited. This is because consumers may have considerable limitations on their ability to assess the merits of, or the risks inherent in, the terms of a contract."[83]

The risk is such that the very concept of "standard form contract" itself is seen as an abrogation of the basic contractual requirement of *consensus ad idem*:

> "Suffice to say, the 'meeting of the minds' required in the classical model is artificial where standard form contracts are the norm and there is little to no opportunity to negotiate terms".[84]

The lack of appropriate review and understanding of the terms of such contracts are further compounded by a perceived impetus upon suppliers, particularly in regards to those wishing to maintain substantially large ongoing contracts with government entities, and thereby "forego" the notion of negotiation, even where it may be available to them. Such action contributes to the accepted notion of the absence of

[82] ACL, s.27(2)(a)-(e).
[83] Paterson, J.M., "The elements of a prohibition on unfair terms in consumer contracts" (2009) 37 *ABLR* 184, 190.
[84] Freilich, A. & Webb, E., "Small Business - Forgotten and in need of protection from unfairness?" 37 *University of Western Australasia Law Review* 134 (2013), 140.

rationality on the part of the consumer and small business contractor, and thereby strengthens the need for unfair terms oversight. Whilst Radin declares that "boilerplate alternative legal universes simply do not assimilate to freedom of contract"[85] the answer remains that they were not meant to – however this does not abrogate the need and legal compulsion to draft such agreements accordingly.

Insofar as such agreements are rarely read or understood by the class of contractors known as small business,[86] the unfair terms legislation has properly sought to redress this scenario whereby in large volumes, small businesses become a party to contracts upon terms which they do not know or understand. Such defects indeed also contribute to a disruption of market forces at the macro level, as fully informed consent is not occurring. This is in avoidance of the implied requirement of fair dealing incumbent upon government in dealings with private entities. The abrogation of fair dealing in not taking proper account of the counter party's disparity of understanding and position are eloquently captured by Lord Bingham in *Director General of Fair Trading v First National Bank Plc*, whereby his Lordship stated that:

> "[f]air dealing requires that a supplier should not, whether deliberately or unconsciously, take advantage of the consumer's necessity, indigence, lack of experience, unfamiliarity with the subject matter of the contract, weak bargaining position or any other factor listed in or analogous to those listed in Schedule 2 of the regulations".[87]

At the pragmatic level, the evident nexus of behavioural science, economics and law is best encapsulated in the following as regards standard form contracts, unfair terms and the need for redress:

> "The importance of questioning consumers' rationality in the context of SFC terms cannot be overstated. Cognitive errors impede the idea that open market forces can achieve an efficient and just equilibrium. Behavioural insights put forward a variety of phenomena that make it easier on sellers to manipulate consumers. Any general theory of and practical approach to consumer contracts must take cognitive biases and actual behavioural patterns into account. To do otherwise would be unconscionable".[88]

Transparency

Transparency of a term is a stipulated element in determining if a term is unfair under the ACL.[89] The Act details the indicia of "transparency" of a term as:

> "(a) expressed in reasonably plain language; and
>
> (b) legible; and
>
> (c) presented clearly; and
>
> (d) readily available to any party affected by the term."[90]

The first element relates to the understandability of the term, particularly as being expressed in such a fashion as to achieve the greatest breadth of understanding to a reader. The following three indicia might be characterised as elements relating to notice. The preponderance of elements relating to the visibility of a term to a counter-party may indeed be indicative of the importance of the question of notice in

[85] Radin, M., "Boilerplate: The Fine Print, Vanishing Rights, And The Rule Of Law", *Princeton University Press* 2013, p. 98.
[86] Santucci, P., "Substantive Fairness in Australian Standard Form Consumer Contracts: Lessons from the UK Experience"(2011) *Oxford University Commonwealth Law Journal*, 11:2, 171-195, 173.
[87] *Director General of Fair Trading v First National Bank Plc* [2001] UKHL 52 [2002] AC 481, at [17] per Lord Bingham.
[88] Becher, S., "Behavioural Science and Consumer Standard Form Contracts" 68 *La. L. Rev.* 117 (2007-2008) 179.
[89] ACL, s.24(2)(a).
[90] ACL, s.24(3).

finding an unfair term. Indeed, Justice Harbison considered the element of notice to be absolute such that where clearly given, may overturn an otherwise unfair term.[91] His Honour stated that, a term which failed in respect of notice was:

> "[A] term which in my view would surprise consumers. It is one which they would not expect. However, I can envisage that such a term might be perfectly fair if it was brought to a consumer's attention prior to signing of a contract".[92]

This expresses a counterpoint to the apparent intentions of the drafters of the legislation, who stated that:

> "Transparency, on its own account, cannot overcome underlying unfairness in a contract term. Furthermore, the extent to which a term is not transparent is not, of itself, determinative of the unfairness of a term in a consumer contract and the nature and effect of the term will continue to be relevant".[93]

This intention was upheld in *Jetstar Airways Pty Ltd v Free*[94] whereby Justice Cavanough held that notice was not a bar to unfairness and consequently that:

> "I think that…a term….depending on all the circumstances, [may] be found to be an unfair term notwithstanding full prior knowledge on the part of the consumer, especially in a standard form contract".[95]

Clearly a tendency of any term to be expressed clearly and with an intention for the term to be seen (alternatively and preferably additional clear notice of particularly onerous terms) will encounter a proportionately lower propensity to be deemed unfair. An element of reasonableness will no doubt prevail, however the drafter of such notice would be mindful of the benefits to be gained by erring on the side of caution, in the form of disclosure. This would obviate the wrath of the relevant provisions of the ACL.

Specific Elements of Unfair Terms

1. Significant Imbalance in the Parties' Rights

A significant imbalance in the rights of parties resulting from the prolific use of standard form contracts is the quintessential pathway to unfair detriment to the affected party. It is fair to say that such imbalances may be the most readily observable outcome of an unfair contract terms. Such unfair terms, for reasons outlined in this paper, have flourished under the confluence of contrived contract design and counter-party deficiencies of diligence and legal expertise. In observance of this, it has been stated that:

> "consumers do not fit the model of the competent and rational contracting party presumed by classical contract theory. Decisions to accept onerous or unbalanced contract terms are not necessarily a calculated risk assumed by consumers in return for a concession in price. Rather…there are significant limitations on the decision-making processes of consumers relating to 'rational, social, and cognitive factors', which are not necessarily improved by consumers being provided with more information about the incidental terms of their contracts".[96]

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[91] *Director of Consumer Affairs Victoria v Trainstation Health Clubs Pty Ltd* (Civil Claims) [2008] VCAT 2092, [145].
[92] *Director of Consumer Affairs Victoria v Trainstation Health Clubs Pty Ltd* (Civil Claims) [2008] VCAT 2092, [145].
[93] Parliament Of The Commonwealth Of Australia, House Of Representatives, Trade Practices Amendment (Australian Consumer Law) Bill (NO.2) 2010 *Explanatory Memorandum*, para. 5.39.
[94] [2008] VSC 539.
[95] *Jetstar Airways Pty Ltd v Free* [2008] VSC 539, [115] per Cavanough, J.
[96] Paterson J., "The Australian Unfair Contract Terms Law: The Rise Of Substantive Unfairness As A Ground For Review Of Standard Form Consumer Contracts" Vol. 33 *Melbourne University Law Review* (2009) 934, 956.

The ACL in defining 'unfair', stipulates that one of the elements constituting an unfair terms is one which "would cause a significant imbalance in the parties' rights and obligations arising under the contract".[97] Of instant note is the prospective nature of the requirement, obviating the requirement that such an imbalance became crystallised, but rather that the nature of the term would indeed result in such an imbalance. The onus of proof lies upon the Applicant. The notion of an imbalance in the respective rights of the parties connotes a review of the respective bundle of rights of each in total. A consideration of balance is required, as evident in the House of Lord's defining of the requirement that:

> "[t]he requirement of 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".[98]

The word "significant" has indeed been held to be quantitative,[99] and means "'significant in magnitude', or 'sufficiently large to be important', being a meaning not too distant from 'substantial'".[100] It has been held to possess as low a benchmark as simply "important" or "of consequence".[101] It has also been defined as "large, weighty, considerable, solid or big imbalance".[102]

To some extent, respectfully, the definition laid down in *First National Bank* is circular, and lacks, without more, a definitive pathway to ascertaining the presence of a significant imbalance in the rights of the parties. A question of balance requires quantum, and in this regard the rubric of assessment is pivotal. The standards of "good faith" and "fairness" have come to the fore in the courts as this rubric. The Victorian Supreme Court has held that:

> "…it is impossible to avoid the notion of fairness in determining whether a term causes a significant imbalance in the parties' rights and obligations. However, if the balance of the parties' rights and obligations is thought to be contrary to the requirements of good faith this would be indicative of a significant imbalance. There is no separate requirement of "good faith" in consumer contracts; rather "good faith" is a touchstone which might be employed in determining whether a term in a consumer contract is an unfair term".[103]

In referring to the parallel section of the Victorian Act,[104] His Honour continued as to the "overlap" between an imbalance in rights and the abrogation of good faith, stating that:

> "The section seems to speak of the causing of the significant imbalance being contrary to the requirements of good faith, not of contrariety to the requirements of good faith being a cause of or contributing to a significant imbalance. A "significant imbalance" must have been caused, and the causing of it must be able to be characterised as "contrary to the requirements of good faith". Those two elements thus overlap, and the self-same facts may be relevant to both, but they are separately identifiable elements nonetheless".[105]

This "overlap" was also recognised by the House of Lords".[106]

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[97] ACL s.24(1)(a).
[98] *Director General of Fair Trading v First National Bank Plc* [2001] UKHL 52; [2002] 1 AC 481, [17].
[99] *Jetstar Airways Pty Ltd v Free* [2008] VSC 539, [104] per Cavanough J.
[100] Ibid at [105] per Cavanough J.
[101] *Director of Consumer Affairs v AAPT Ltd* [2006] VCAT 1493 at [33].
[102] *OPR WA Pty Ltd v Marron* [2016] WASC 395, [48].
[103] *Jetstar Airways Pty Ltd v Free* [2008] VSC 539, [44] per Cavanough J.
[104] Section 32W, *Fair Trading Act* 1999 (Vic).
[105] *Jetstar Airways Pty Ltd v Free* [2008] VSC 539, [102] per Cavanough J.
[106] *Director General of Fair Trading v First National Bank Plc* [2001] UKHL 52; [2002] 1 AC 481, [37].

Notwithstanding the focus upon an individual term in a finding of unfairness based upon, inter alia, a significant imbalance in the rights of the parties, the term must still be considered "in the context of the [c]ontract as a whole".[107]

The legislators contemplated that a lack of transparency is indicative of such imbalances describing the absence of transparency as "a strong indication of the existence of a significant imbalance in the rights and obligations of the parties under the contract".[108] The Federal Court has concurred stating that "[w]hether that imbalance is significant in the context of the whole of the contract might depend upon an assessment of the extent to which the term is transparent".[109]

In the drafting of terms, regard must be had to the application of this "balancing act" in the context of the entire contract, and the *cumulative* bundle of rights as opposed to the counter-party. The lack of transparency apparently exacerbates the weight of imbalance, however, as with any balancing exercise, a counterbalance may be introduced within the four corners of the document in mitigation. Accordingly, it has been stated by scholars that:

> "the question which the court must address is whether or not the exclusions, qualifications, and limitations on the trader's obligations are balanced in the contract by either similar limitations favouring the consumer or a commensurate reduction in the price".[110]

As to what presents an appropriate balance remains at the discretion of the drafter and the parties.

2. Reasonable necessity to protect a party's legitimate interests

The meaning of "unfair" for the ACL considers that one of the 3 indicia of unfair is that a term "is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term".[111] As it stands, there is a rebuttable presumption that a term is not reasonably necessary for that reason and that the "onus is upon the applicant to prove the matters…in relation to s 24(1)(b)".[112] The occurrence of the requirement of reasonableness has, as ever, presented the Courts with the opportunity to divine the true and intended effect and scope of the legislation. The law has determined that in the case of unfair terms, what is reasonable is a measure of a proportionate response by the drafter of the contract to the inherent risks – i.e. a term can be fair ""only where the term represents a proportionate response to the risk it addresses".[113] In referring to the reasoning in *Esanda Finance Corporation Ltd v Tong*[114], the role of proportion in determining reasonable necessity " demonstrates the focus on the substantive fairness of the term as a disproportionate response to the supplier's legitimate interest."[115] Accordingly, in drafting compliant standard form contracts, the drafter ,must remain mindful of the necessity of the term and the extent of its reach as being minimally sufficient to address the parallel risk to which it is addressed, or the "interest being protected".[116] This paradigm is aptly described in the following terms:

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[107] *OPR WA Pty Ltd v Marron* [2016] WASC 395, [47].
[108] Parliament Of The Commonwealth Of Australia, House Of Representatives, Trade Practices Amendment (Australian Consumer Law) Bill (NO.2) 2010 *Explanatory Memorandum*, para. 5.38.
[109] *Australian Competition and Consumer Commission v Chrisco Hampers Australia Limited* [2015] FCA 1204, [74].
[110] Collins, H.,"Good Faith in European Contract Law," (1994), 14 *Oxford Journal of Legal Studies* 229, 249 cited in *Director General of Fair Trading Ltd v First National Bank* [2001] UKHL 52, [2002] 1 AC 481 at [37].
[111] ACL, s.24(1)(b).
[112] *Australian Competition and Consumer Commission v Chrisco Hampers Australia Limited* [2015] FCA 1204; 239 FCR 33 at [43].
[113] Paterson J., "The Australian Unfair Contract Terms Law: The Rise Of Substantive Unfairness As A Ground For Review Of Standard Form Consumer Contracts" Vol. 33 *Melbourne University Law Review* (2009) 934, 945.
[114] (1997) 41 NSWLR 482.
[115] Santucci, P., "Substantive Fairness in Australian Standard Form Consumer Contracts: Lessons from the UK Experience", *Oxford University Commonwealth Law Journal* (2011) 11:2, 183.
[116] Sims, A., 'Unfair Contract Terms: A New Dawn In Australia And New Zealand?' *Monash University Law Review*, Vol 39, No 3, 739, 768.

> "Traders will argue that a clause is reasonably necessary to protect their legitimate interests where, without it, they will be required to 'bear a disproportionate higher level of contractual risk or obligation than the consumer'. If this argument is accepted, which on its face it must be, the converse is that equally the contractual terms cannot impose upon the consumer a higher level of contractual risk than the trader. Thus, if the effect of the clause in question makes the risk fall more heavily upon the consumer, by definition it cannot be reasonably necessary".[117]

In this sense the benchmark is an objective one when viewed in the light of the multitude of considerations as to risk or interests and the sufficiency of an drafted terms and burdens placed upon the counter-party in addressing them. This objective assessment may extend beyond the immediate considerations of the drafting party, however must remain distinct from the subjective interests of that party. This methodology of application was held in the Victorian Supreme Court in *Jetstar Airways Pty Ltd v Free*[118], whereby Justice Cavanough declared, in relation to the equivalent provision in the *Fair Trading Act* 1999 (Vic), that the:

> "[legitimate Interests requirement] may call for an inquiry into each individual consumer's undefined 'legitimate interests' and each individual supplier's undefined "legitimate interests" (including, perhaps, the detailed financial circumstances of each particular consumer and of each particular supplier.). I can see no sufficient warrant for this in the language or history of the relevant provisions.[113] In my view, s 32W is centrally concerned with the fairness of the terms of contracts in themselves, in the light of broad business practices in the relevant industry, and in the light of the circumstances in which each relevant contract was made, and not so much with the multifarious personal interests of individual parties to which their contracts might directly or indirectly relate".[119]

Of particular note is that His Honour also determined that an unfair term on this basis may be internally counterbalanced within the contract by a revised price to appropriately reflect the breadth of the impugned term.[120] This is significant, as it allows a true balancing of the entire agreement as opposed to a pure focus upon a single term absent the context of the bundle of rights and obligations provided in the agreement. Further, this aligns with the holistic considerations of assessment stipulated in section 24(2)(b) of the ACL, and the necessity to consider the contract *in toto*.

The "balancing act" required under this provision requires genuine and considered drafting based upon objective assessments. The key point sought to be combatted by this provision is the extraction of wilful "gouging" or utilisation of a superior bargaining position in the contract terms. The import and intent of the legislation is to legitimately foster "an attempt by that 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".[121]

3. Detriment

The unfair terms legislation would not require the actual occurrence of detriment to a party to the contract in order to trigger the effect, but rather the potential to cause detriment. The prospective and anticipatory nature of this is evident in the operative provisions relating to the meaning of unfair:

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[117] Sims, A., 'Unfair Contract Terms: A New Dawn In Australia And New Zealand?' *Monash University Law Review*, Vol 39, No 3, 739, 769.
[118] [2008] VSC 539.
[119] *Jetstar Airways Pty Ltd v Free* [2008] VSC 539 per Cavanough J at [119].
[120] Ibid at [129].
[121] Paterson, J., "The elements of a prohibition on unfair terms in consumer contracts" (2009) 37 *Australian Business Law Review* 184, 193.

> "(c) it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on".[122]

Notwithstanding this, the intention of the legislature in drafting the unfair terms provisions were that the issue of detriment was not to be trifling or illusory but fully expected to result in detriment - "more than a hypothetical case to be made out by the claimant".[123] The explanatory memorandum explains:

> "By requiring evidence of whether detriment has existed or would exist in the future, the provision requires more than a hypothetical case to be made out by the claimant. In this context, a claimant does not need to have proof of having suffered actual detriment, but that detriment would exist in the future as a result of the application of or reliance on the term".[124]

Despite the prospective nature of detriment per the ACL, this may not be avoided by a right to terminate and should be borne on mind in drafting of the contract terms. This is principally due to the accumulation of detriment by the mere entering into the contract and contingent detriment including loss of opportunity. In this regard, Paterson writes:

> "The consumer's right to terminate is not an adequate protection. Consumers who terminate may have sunk costs that they may be unable to recoup. Consumers may have incurred an 'opportunity cost' in choosing to contract with one provider as opposed to some other provider who, at the time of contracting, might have had competitive offers that are no longer available. Moreover, studies in consumer behaviour have highlighted the 'inertia' factor, which shows that consumers, once committed to an arrangement, tend not to opt out of that arrangement".[125]

Conclusion

The recent amendments to the unfair terms legislation in recognisance of the vulnerability of small business on an equal footing with consumers is merely a reflection of commercial realities. Government at all levels represents, as the purchaser, a significant consumer of the goods and services of these entities in the contract amounts which sound in the legislation. Notwithstanding the hesitancy in the past of the Courts to characterise the purchasing activities of government as constituting transactions "in business", the potential remains on a case by case basis for the import of the legislation to be brought to bear upon these myriad of standard form agreements as they occur in the procurement context. History has made evident the fraught nature of such instruments, and in confluence with the deficiencies in small business legal and commercial acumen, a perfect storm of elements has allowed a potential torrent of unfair impositions to be placed upon those entities, often accompanied by the added distraction of the desire to expand contract volume with government. Law and ethical considerations place upon all levels of government the obligation to act as an moral exemplar in such dealings, and the recent legislative changes signify an effort to manage these contracts in particular, and as such, government procurers should respond accordingly.

[122] ACL, s.24(1)(c).
[123] Parliament Of The Commonwealth Of Australia, House Of Representatives, Trade Practices Amendment (Australian Consumer Law) Bill (NO.2) 2010 *Explanatory Memorandum*, para. 5.31.
[124] Ibid.
[125] Paterson, J.M., "Looking At The Fine Print: Standard Form Contracts For Telecommunications Products And Consumer Protection Law In Australia" 37 *University of Western Australia Law Review* 45 (2013-2014), 54.