

Unfair Contract Terms in Australia

Jeannie Paterson

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Jeannie Paterson's *Unfair Contract Terms in Australia* provides a concise, timely and comprehensive overview of the recently enacted Unfair Contract Terms Law ('UCTL') within both the Australian Consumer Law ('ACL') (contained in the *Competition and Consumer Act 2010* (Cth) ('CCA')) and the *Australian Securities and Investments Commission Act 2001* (Cth) ('ASIC Act'). The replacement of the *Trade Practices Act 1974* (Cth) with the CCA has left a hole in quality texts available for practitioners to consult and understand the resulting changes. In regards to unfair contract terms in Australia, Paterson's text fills this hole through a well structured comparative account of similar legislation in the United Kingdom under the *Unfair Terms in Consumer Contracts Regulations 1999* (UK) ('UTCCR') and the repealed Victorian *Fair Trading Act 1999* (Vic) ('FTA Vic').

The text is divided into twelve chapters beginning with the legislative rationale for the UCTL coupled with a theoretical perspective as to why regulation is important in this area. This inquiry underpins the work and is coupled with a philosophical and behavioural explanation of the interests of consumers and their need for protection, some of which derives from the Productivity Commission's 2008 *Review of Australia's Consumer Policy Framework*.¹ The findings broadly are that consumers' economic behaviour can effectively put them at a bargaining power disadvantage when it comes to negotiating standard form consumer contracts with traders. The traders advantageous position results in terms being dictated to consumers on a 'take it or leave it basis'.

From this grounding the text moves on to the commencement of the legislation and the roles of the regulators enforcing the regime, which helps to contextualize the subsequent explanation of the comparative regimes. Indeed the continual comparative analysis between both the equivalent *UTCCR* and *FTA Vic* with the UCTL is arguably the most important recurring element of the text. Paterson notes that these 'regimes are sufficiently similar to make case law' and does not shy away from the comparative jurisprudence. Notwithstanding that, she does acknowledge that 'significant' and semantic differences do occur between the varying legislation. For example, the critical definition of 'consumer' varies in

¹ Productivity Commission, *Review of Australia's Consumer Policy Framework*, Report No 45 (2008).

each jurisdiction. The use and explanation of key cases in both the UK,² and in Victoria³ will help readers understand how concepts such as ‘fairness’ have been determined under similar provisions to the UCTL and in what circumstances. As the UCTL is largely modelled on these comparable laws the analysis of such cases is of particular importance.

After explaining the regime’s rationale, the text moves onto its application, first describing terms and contracts exempt from review, then moving onto the contracts to which the UCTL applies, namely standard form consumer contracts. From here the text further delves into the substantive law surrounding the interpretation of unfair terms within the UCTL, by looking to common law contract principles in regards to the incorporation and construction of terms. Paterson importantly combines contract at common law and the potential interplay it has with that of the provisions under the UCTL and their potential interpretation in the courts. She provides novel practical examples of the potential application and dilemmas posed with the UCTL. For example, she looks at the powers of regulators, or an individual consumer to challenge a term as unfair, even if it is not at law, incorporated within the contract. Indeed from this a question arises; *how* will ‘unfair’ terms be interpreted and what methods of construction would be used? According to Paterson, such questions could be answered by looking at ‘ordinary’ principles of construction under contract law generally, with such principles complementing the UCTL.

Such complementary application can help construct the ‘fairness’ of a term, depending on who is relying on the term, whether it is a consumer seeking to determine if a term is unfair under a single contract, or a regulator seeking to find a term within the market unfair generally. Paterson explains her analysis of the construction of such terms, through the contract law *contra proferentem* rule in regards to the interpretation of exclusion clauses: that a party relying on such a clause will have any ambiguity within it construed against their interests.⁴ She contends such an approach to determining whether an ambiguous clause is unfair may be followed under the UCTL, which would essentially follow a rule expressly laid out in the *UTCCR* under Regulation 7(2) that an interpretation of a term ‘which is most favourable to the consumer shall prevail.’ The profession will benefit from this original analysis on construction, adding to the efficiency of compiling and preparing advice in this area.

² *Director General of Fair Trading v First National Bank plc* [2002] 1 AC 481; *Office of Fair Trading v Abbey National plc* [2010] 1 AC 696.

³ *Jetstar Airways Pty Ltd v Free* [2008] VSC 539 (3 December 2008).

⁴ *Darlington Futures Ltd v Delco Australia Pty Ltd* (1986) 161 CLR 500, 510.

After this investigation, Paterson looks at the elements of the test to determine an unfair term, then discussing the relevant matters that point to unfairness including transparency, the contract as a whole and notice. Rounding off the application of the UCTL there is an assessment of its effects and remedies and consequences from enforcement. There is also a gauging of the relationship between unfair terms and unconscionable conduct and the UCTL's congruence with the Consumer Guarantees Law under the ACL. The final chapters look in detail at what terms are specifically deemed to be unfair under the UCTL itself and have been found to be unfair through comparative jurisprudence – described as the 'grey list' terms that are not prohibited but can be found to be on construction. This final analysis is particularly impressive, as it offers potential outcomes in the Australian context for a number of clauses including termination clauses and penalties clauses. Arguably this is the most useful single part of the text, as it demonstrates through principled research how the UCTL could be operated in the Australian context and the terms subject to it.

In the UCTL context, a current topical issue in the Australian courts is the need for a 'breach' of a term under a contract for the exceptions on penalties to apply. Australian authority suggests that the penalties doctrine applies where there is a breach of a contract term, which stipulates that the breaching party will pay an agreed amount that acts as a genuine pre-estimate of the loss caused by the breach.⁵ Indeed, a term that may be deemed unfair under the UCTL within the ACL under s 25(1)(c)⁶ is 'a term that penalises, or has the effect of penalising, one party (but not another party) for a breach or termination of the contract.' However, the issue for a consumer arises where courts determine that a breach under a contract, for example over-drawing an account,⁷ is not a breach, but rather an event that on its occurrence allows a bank the discretion to accept the overdrawn amount and thus impose a fee on the new facility. Through such an interpretation the 'overdrawn' fee, for example, is not subject to the penalties doctrine, as there was no 'breach' per se. Whether such an interpretation would be followed under the UCTL is yet to be seen, however comparative jurisprudence would suggest that this approach will remain.⁸ Perhaps such terms could be deemed unfair as it arguably results in a unilateral variation of the contract under s 25(1)(d)⁹ of the UCTL under the ACL? Regardless, it is novel issues like this that Paterson's text will help litigators identify and structure arguments against with her concise yet comprehensive account in *Unfair Contract*

⁵ *Ringrow Pty Ltd v BP Australia Pty Ltd* (2005) 224 CLR 656.

⁶ See also *ASIC Act* s 12BH(1)(c).

⁷ *Andrews v Australian and New Zealand Banking Group Limited* [2011] FCA 1376 (5 December 2011).

⁸ *Office of Fair Trading v Abbey National plc* [2010] 1 AC 696.

⁹ See also *ASIC Act* s 12BH(1)(d).

Terms in Australia. The text is impressive precisely because it underpins the reasons for the legislative changes, and using largely comparative analysis of case law, how such changes will be interpreted on specific points of the legislation.

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