

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).

This is a preview. Not all pages are shown.