Introduction

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Just over a decade ago, Professors Robert Hillman and Jeffrey Rachlinski noted that:

> *Contract law, with its quaint origins in cases involving the delivery of cotton by clipper ship or mill shafts by horsedrawn carriage, seems ill-equipped to respond to contracts made at the speed of light. Can contract law adapt to this fundamental change in the way people make contracts, or is a new legal order required?*[2]

The notion of the 'meeting of minds' which underpinned traditional legal doctrine on the sanctity and freedom of contract is far removed from the contemporary realities of online purchases using standard, lengthy and often un-reviewed contract terms; commonly giving consumers a simple but stark choice – 'take it or leave it'.

A nice example of the changing context of contract law is provided in an article in this collection, Justin Malbon's 'Online Cross-border Consumer Transactions: A Proposal for Developing Fair Standard Form Contract Terms'. Malbon refers to a *Financial Times* report of a 2010 April Fools Day prank. It seems 7,500 customers who purchased an item from a video game retailer on 1 April accepted conditions which included a provision agreeing 'to surrender your immortal soul, and any claim you may have on it, within 5 (five) working days of receiving written notification'.[3]

The common law notion of a contract representing a true consensus, a meeting of the minds of well-informed parties willingly concluding their bargain free of constraint and cognisant of its risks and consequences is far removed from reality in many areas of contemporary commercial activity.

This poses the question addressed in this collection of articles, of whether the common law emphasis upon freedom of contract should be augmented by broader principles of fairness and unconscionability, so as to mitigate the potential harshness of the strict enforcement of contractual provisions.

1 Chief Justice of Western Australia

2 Robert A. Hillman & Jeffrey J. Rachlinski, 'Standard-Form Contracting in the Electronic Age' May, 2002 77 NYUL Rev 429, 430.

3 Justin Malbon's 'Online Cross-border Consumer Transactions: A proposal for Developing Fair Standard Form Contract Terms' UMA Law Review 2013 [to be completed]

Earlier this year the Federal Court of Australia declared a number of clauses in an internet provider's standard form consumer contracts unfair and therefore void. These legal proceedings had been brought by the Australian Competition and Consumer Commission (ACCC) relying exclusively on the new unfair contract terms provisions of the Australian Consumer Law (ACL).[4] The ACL commenced as a law of the Commonwealth and of each State and Territory on 1 January 2011.[5]

One of the key factors prompting the 2008 Productivity Commission's recommendation to introduce a single generic consumer law applying across Australia was the increasingly national nature of Australia's consumer markets.[6] In part this was attributable to the internet. The internet has also fostered the rapid growth of international trade in consumer goods. Even in geographically isolated countries like Australia, transactions between a retailer in one country, and a consumer in another are now commonplace.

Recent developments in the law on unfair contract terms in Australia and elsewhere have gone some way to grappling with these contemporary realities. As consumer transactions increasingly cross national borders we have even more reason to learn about and from consumer protection laws in other jurisdictions.

This special edition of the *University of Western Australia Law Review* is a timely addition to the scholarship on the 'new legal order' of unfair contract terms. It examines just how effective reforms have been to date as well as pointing the way forward in this important and dynamic area of consumer protection, both nationally and internationally.

This collection of articles addresses a number of the pitfalls and opportunities of the electronic commercial environment in which many consumers operate. It also examines international developments which attempt to grapple with the changing nature of the international market economy, as well as warning that the specific socio-economic context of the country of origin is not to be ignored. Closer to home but equally important other articles in this collection identify the gaps in the existing law on unfair contract terms in Australia and the significant opportunities for further reform.

The special edition articles

Dr Christine Riefa's article 'An Empirical Study of Unfair Terms in Online Auction Contracts in the UK: Evidence of the Need for Better Enforcement Mechanisms' is based on the results of an empirical examination of the effectiveness of unfair

4 ACCC (30 July 2013), 'Court declares consumer contract terms unfair' Media Release 174/13, accessed at www.accc.gov.au/media-release/court-declares-consumer-contract-terms-unfair 7 November 2013.

5 Australian Consumer Law 2010, 'Implementation' at http://www.consumerlaw.gov.au/content/Content.aspx?doc=the_acl/implementation.htm (accessed 5 November 2013).

6 Productivity Commission 2008, *Review of Australia's Consumer Policy Framework,* Final Report, Canberra, p 2.

terms legislation using online auction contracts in the UK as the medium of assessment. Riefa concludes that compliance with unfair terms legislation is lower than might be expected considering the legislation has been in place for well over a decade. She examines the limitations of the current enforcement model, noting that reliance on private redress is not best fitted to remedying widely used unfair contract terms, and advocates targeted public enforcement of a preventative nature followed by the development of model industry standards.

Justin Malbon's article, referred to previously, points to the practical difficulties in pursuing the remedies available under the ACL against an overseas supplier. He notes that if European laws apply to the transaction, the consumers' rights may be enhanced, whereas under US laws the terms in standard form consumer contracts are increasingly pro-seller. Malbon proposes ways in which the interests of consumers could be better protected in cross-boarder transactions, following developments in international commercial contracting, and including the development of 'model' laws governing cross-boarder sales and of on-line 'Fair Term' standard form contracts.

In 'Looking at the Fine Print: Standard Form Contracts for Telecommunications Products and Consumer Protection Law in Australia' Dr Jeannie Marie Paterson and Jonathan Gadir report on the results of the 'Fine Print Project' which was set up following concerns about unfairness in the telecommunications industry. The project demonstrated that despite the provisions of the *Telecommunications Consumer Protection Industry Code* and the ACL, there was widespread use of terms in telecommunications contracts that had previously been identified as unfair or potentially unfair. Paterson and Gadir examine the possible reasons for this widespread failure and the implications for the effectiveness of the consumer protection regime more broadly. Significantly they note a lack of respect for the rule of law in this space.

Chris Willett's article 'Transparency and Fairness in Australian and UK Regulation of Standard Terms' contrasts the approach to the regulation of unfair standard contract terms in Australia and the UK, and in particular assesses whether priority is given to unfair substantive outcomes or to transparency (procedural fairness). In the latter case, otherwise unfair terms are excused provided the consumer is in a position to make an 'informed choice', with for example the (unfair) term being readily available, clearly stated and appropriately prominent. Willett concludes that in certain key ways the Australian approach is more concerned with substantive fairness and as such more protective of consumers, attributing this to the absence of a 'good faith' requirement and the exclusion of only the 'upfront price' from the test of unfairness. However Willett notes the requirement that there be a 'significant imbalance' in the parties' rights and obligations under the contract in Australian law may yet prove to be an important limitation on the extent of consumer protection.

In ‘Challenges for the Development of Unfair Contract Terms Law in Nigeria’ Dr Adejoke Oyewunmi and Dr Abiola Sanni examine the history of the law with respect to unfair contract terms in Nigeria since 1961. That history includes early proactive interpretation by the Nigerian judiciary to improve consumer protection, its ostensible abandonment by the Supreme Court of Nigeria in 1986 following the *Photo Production Limited v Securicor Transport* case in the UK, and the more recent convergence of legislative and judicial approaches to revive consumer protections against comprehensive exclusion clauses and other unfair contract terms. Although these have been positive developments the authors highlight the need for a statutory framework for consumer protection in Nigeria. They also note the importance of legal developments in Nigeria reflecting the socio-economic context of that country.

Kate Tokeley’s article ‘New Zealand Moves to Prohibit Unfair Terms: A Critical Analysis of the Current Proposal’ compares the current proposals for the prohibition of unfair contract terms in New Zealand with the legislation in Australia and the United Kingdom. Tokeley argues that the revised Consumer Law Reform Bill, which prohibits unfair contract term provisions based upon substantive unfairness, is a novel and drastic move away from the principles of freedom and sanctity of contract. However, she welcomes the reforms as an important addition to New Zealand’s consumer protection law, given their restricted application to only unexamined (non-core) terms in standard form consumer contracts which are not subject to market forces and for which the ordinary rules of contract law do not provide sufficient protection. However, Tokeley identifies some aspects of the proposed legislation which are either confusing or fail to correspond with the rationale for unfair terms prohibition. Another significant shortcoming is the failure to provide consumers with the capacity to bring unfair contract term proceedings, with this option vesting solely in the proposed Consumer Commission.

In ‘Small Business – Forgotten and in need of Protection from Unfairness?’ Aviva Freilich and Eileen Webb highlight the failure of the ACL to protect small businesses against unfair contract terms. Freilich and Webb argue that, contrary to the evidence, this omission presumes that all businesses are ‘one and the same’ and better resourced and informed than consumers. The article also includes a useful review of the potential protections at common law and under s 21 ACL (for unconscionable conduct) for small businesses affected by unfair contract terms which, Freilich and Webb argue, indicates that the lack of protection for small businesses may be more apparent than real. Nonetheless the authors contend that if the term of a contract is unfair it should not matter to whom it is directed.

In ‘The Applicability of Unfair Contract Terms Legislation to Franchise Contracts’ Elizabeth Crawford Spencer examines the exclusion of franchisees from the ACL protections relating to unfair contract terms. She argues that the consumer/business distinction which excludes franchisees from the ACL is not

a sound basis for excluding the operation of the legislation. Indeed, Crawford Spencer postulates that franchising provides the paradigm example of a drafting party having all or most of the bargaining power and the capacity to prepare the contract prior to any discussion between the parties. As the franchisor/franchisee relationship is almost by definition imbalanced, the author argues that franchisors should be limited in the exercise of their discretion so as not to unduly harm franchisees. However as virtually all of the unfair contract terms listed in section 25 of the ACL are commonly used in franchising contracts, Crawford Spencer suggests that franchise contracts may not be amenable to the ACL protections in its current form and a different approach may need to be adopted.

Lisa Goldacre's article 'The Contract for the Supply of Educational Services and Unfair Contract Terms: Advancing Students' Rights as Consumers' examines the reasons why students seldom seek redress in relation to infringement of their rights as consumers despite the transformation of the landscape of the higher education sector into a culture of consumerism. A particular impediment to claims for redress has been that claims in relation to academic matters are considered to be non-justiciable. However, Goldacre argues that this may not to be such an impediment in relation to unfair contract terms as the adjudication is not based on the quality and standard of educational services supplied but on the fairness of the term (provided the supply of the service can also be brought within the definition of being provided in 'trade or commerce' and is not otherwise excluded by the ACL). Goldacre concludes that the ACL can provide effective protection to students as consumers of educational services by providing more extensive and wide-ranging remedies.

Gail Pearson's article 'Regarding Unfair Terms in Financial Services Contracts' examines the unfair contract terms applying to financial services pursuant to the *Securities and Investments Commission Act 2001* (Cth) (mirroring the terms of the ACL) and the *Insurance Contracts Act 1984* (Cth). Pearson examines some of the significant exclusions and ambiguities under this regime and concludes that the biggest current unresolved issue is whether investment is an acquisition for personal reasons. If not, many acquirers of financial products and services will not have protection under the unfair terms regime.

In 'Unfair Contract Terms: Termination for Convenience' Anthony Gray examines clauses in business to business contracts which grant one party the right to terminate the contract at their convenience. Gray regards such clauses as effectively 'contracting out' of the traditional law of contract which would only allow termination for a breach of a condition and not a warranty. As unfair contract terms provisions in the ACL do not apply because these are not consumer contracts, Gray considers the potential applicability of good faith principles in contracting, in particular reasonableness, as well as the doctrines of unconscionability and unjust enrichment.

In 'Legitimate Interests and Unfair Terms: the other Threshold Test' Anthony Hevron uses the case law on the common law doctrine of restraint of trade, which focuses upon the reasonable protection of legitimate interests as a framework for exploring unfairness under the ACL, specifically the proviso which allows contractual terms to stand should these be reasonably necessary to protect the legitimate interests of the party who will benefit from them. Hevron concludes that if this key part of the test under the ACL was modelled on the restraint of trade cases, it would provide for a very practical and commercially appropriate test.

Is contract law up to the challenge?

The dramatic changes to contract law highlighted in this special edition and the calls for even more reform may give us reason to doubt Professors Hillman and Rachlinski's 2002 conclusion that '[a]lthough the electronic environment is a truly novel advance in the history of consumerism, existing contract law is up to the challenge'.[7] However, as they also pointed out:

> *Courts in both [electronic and paper] worlds either must trust the market and enforce the standard terms, or decide that the market has failed and refuse to enforce them.*[8]

While the form and parameters of 'market failure' will clearly be impacted by the changing nature of commerce, the fundamental basis for intervention through the law - namely, that the market has failed to provide the parties with the capacity to effectively protect their interests, remains unaltered. The challenge is for the law to remain alive to the changing commercial environment so that it continues to be relevant and effective in assessing whether the market has failed, in this sense.

Professor Michael Blakeney, Associate Professor Aviva Freilich and Professor Eileen Webb, the student editors, together with the contributing authors are to be commended for producing a thought-provoking special edition on unfair contract terms which so ably assists in the continuing development of this important area of law.

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7 Robert A. Hillman & Jeffrey J. Rachlinski, 'Standard-Form Contracting in the Electronic Age' May, 2002 77 NYUL Rev 429, 495.

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