Regarding Unfair Terms In Financial Services Contracts

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Financial services contracts are central to the wellbeing of Australian financial citizens. There is a large jurisprudence on the entry into such contracts, centred largely on issues of unconscionability and unjustness. The content of financial services contracts has received less judicial scrutiny and this may change as the still new unfair terms legislation impacts on patterns of litigation. Disclosure rules, rules to protect the consumer prior to entry into the contract, and content rules are all designed to guard against behavioural biases and protect financial citizens from irrationality.[1] Unfair terms in a financial services contract which disadvantage the consumer are not just a matter between the provider and acquirer. Unfair terms also advantage the provider vis a vis providers of similar products and services. This impacts on economic efficiency just as do matters of available information and choice of product, and circumstances of entry into a contract. As referred to in the New South Wales Court of Appeal, Finn J said extra judicially if parties are held to a bargain once it is made, the law should promote the conditions necessary to make the freedom of contract effective, free and just. [2] Now, in certain circumstances, the law will not hold parties to the entirety of their bargain if the content of that bargain is unfair. For standard form consumer contracts it promotes an assessment of whether aspects of the bargain are fair.

For financial services the national unfair terms regime is in the Australian *Securities and Investments Commission Act 2001* (Cth) (ASIC Act) and shortly the *Insurance Contracts Act 1984* (Cth). [3] The first is in virtually identical terms to legislation in the Australian Consumer Law, which covers other sectors of the economy. The proposed insurance provisions are designed to fit within a specialised regime for the allocation of risk between the contracting parties. The proposed modifications will perpetuate the unique status of insurance. In the ASIC Act, the unfair terms provisions apply to a contract for a financial product or to a contract for the supply or possible supply of financial services.[4] The provision

1 On behavioural biases see Kahneman, D *Thinking Fast and Slow* New York, Farrer Straus and Giroux 2011. For a discussion in the context of unfair terms see the Law Commission and the Scottish Law Commission *Unfair Terms in consumer contracts: A New Approach? Issues paper* 2012 pp 24 - 26

2 *Tonto Home Loans Australia Pty Ltd v Tavares* (2011) ASC 155-107 at [269]

3 Until it is amended *Insurance Contracts Act 1984* (Cth) s 15 excludes relief under other Acts including the *Australian Securities and Investment Commissions Act* 2001 (Cth) ASIC Act.

4 ASIC Act s 12BF (1) (c)

does not use the language of 'in relation to' or 'in connection with'. This narrows the reach of the provisions as it is unlikely all attendant contracts will be amenable to assessment for unfairness.[5]

Financial services and financial products are widely defined.[6] Broadly, a financial product is a facility by which a person makes a financial investment, manages financial risk or makes non-cash payments. It includes products and services. [7] The definition also encompasses products which will come into existence in the future. [8] Financial services include providing financial product advice, dealing in a financial product, operating a registered scheme and providing a custodial or depository service.[9] Potentially contracts concerning financial advice, advice about borrowing, savings and deposit accounts, cheque accounts, credit, foreign exchange contracts, investments in securities and managed funds, superannuation and insurance all fall within these definitions [10] and without more would be amenable to scrutiny of their terms for unfairness.

Yet there are a number of carve outs and exclusions. The operation of a regulated superannuation fund does not fit within the definition of a custodial or depository service and is not the provision of a financial service.[11] Entitlement to superannuation is as a beneficiary of a trust which is different from a contractual right. [12] There is a contractual element to superannuation and this is in the employment contract. This is about the obligation of the employer to pay qua the employee. If superannuation monies are taken as a lump sum rather than an income stream, individuals may enter financial services contracts with respect to those monies that are assessable for fairness. The unfair terms regime does not apply to the constitution of a corporation or a managed investment fund, meaning that a unit trust financial product will not be covered by the scheme.[13] Until the proposed legislation is passed the unfair contract terms regime does not apply to insurance contracts.[14] Other potential exclusions such as contracts for investment are discussed below.

5 For instance a contract for stay of execution subsequent to a loan agreement would not be likely to be amenable. This type of contract was at issue in *Wolfe v Permanent Custodians [2012] VSC 275* where in any case it was not a standard form document as it was negotiated.

6 Australian Securities and Investments Commission Act 2001 (Cth) s12BAB, s 12 BAA

7 ASIC Act s12BAA (1)

8 *Australian Securities and Investments Commission v Australian Lending Centre* (2012) ASC 155-108 per Perram J at [176] The issue here was an unadvanced loan.

9 ASIC Act s 12BAB (1)

10 For the positive list of things that are financial products see ASIC Act s 12BAA (7). Note that unlike the *Corporations Act, 2001* (Cth) credit falls within the ASIC Act definition: s 12BAA (7) (k)

11 ASIC Act s 12BAB (14) (c)

12 The obligations of the trustee for superannuation are set out in the *Superannuation Industry (Supervision) Act 1993* (Cth) s 52.

13 ASIC Act s 12 BL

14 Insurance Contracts Amendment (Unfair Terms) Bill 2013, amending *Insurance Contracts Act 1984* (Cth). The proposals apply to " certain standard from consumer contracts of general insurance" see proposed s 15 (3)

If a term in a financial services contract is judged unfair, the term is void and provided the contract can stand without that term, it persists.[15] The financial services provider will still be bound but will not have the advantage of that void term.

In order to commence the enquiry into whether any particular term in a financial services contract is unfair the contract must be a standard form contract and a contract with a consumer.[16]

Who is a consumer?

The definition of who is a consumer for the purposes of regulating unfair terms is identical between the Australian Consumer Law and the ASIC Act. Both require the consumer to be an individual person. In contrast with the definition of a consumer for other purposes within the two sets of legislation which takes an objective approach to the kind of goods or services being acquired, the unfair terms definition rests on a subjective approach to the purpose for which goods or services are acquired. A consumer contract is one where the individual acquires goods or services wholly or predominantly for personal domestic or household use or consumption.[17] This is also the proposed definition for amendments to the *Insurance Contracts Act 1984* (Cth).[18] It is possible that a person who is otherwise a wholesale client for financial services law due to the assets test, may still acquire financial services for personal, domestic or household use.[19] It is clear, that for unfair terms, it is the uses of the individual consumer which are tested.

The purposes of individuals in acquiring financial products or financial advice will be examined carefully. The language of the section is important. It refers to "whose acquisition of what is supplied under the contract is…use or consumption." [20] This focuses on what the acquisition is for. This language should forestall the situation that arose in interpreting a not dissimilar provision in the old Consumer Credit Code where conflicting lines of authority developed as to whether in judging purpose one looked to intention or the substance of the resulting transaction.[21] The reference to "acquisition" accompanied by "use" suggests the approach should be to examine the resulting transaction rather than any intention of the consumer in order to ask if it is for personal, domestic or household use.

It is unclear if investment will be regarded as falling within personal, domestic or

15 ASIC Act s 12BF
16 ASIC Act s 12BF(1); s 12BF(1) b)
17 ASIC Act s 12BF (3); *Competition and Consumer Act 2010* (Cth) Schedule 2 s 23(3)
18 See Insurance Contracts Amendment (Unfair Terms) Bill 2013 s 15A (4)
19 *Corporations Act 2001* (Cth) s 761G
20 ASIC Act s 12 BF (3)
21 For an account see Pearson, G *Financial Services Law and Compliance* Cambridge University Press 2009 pp 414; see also *Knowles v Victorian Mortgage Investments Limited* [2011] VSC 611

household use.[22] There is no provision in the unfair terms part of the legislation that says investment is not for household use. Investment is to use money to acquire property in order to obtain a return.[23] Investment to generate income for personal or domestic purposes should be for such use. A better approach would be to contrast personal, domestic or household use with business use.[24]

If the distinction is between personal and business use, consumers should be wary of signing any documentation which indicates their acquisition is for a business purpose (unless it clearly is) as this will take their contract out of the unfair terms regime. In credit legislation, knowing or recklessly giving false or misleading information in the course of engaging in a credit activity now engages a criminal penalty.[25] In general, the person engaging in credit activity will be the broker or the lender.[26] This provision should forestall any remaining practices where a broker takes blank declarations or alters declarations to circumvent the application of protections in the legislation.

In *Tonto Home Loans Australia Pty Ltd v Tavares*[27] the Court of Appeal did not have to decide whether the credit and mortgage were for domestic purposes. The relevant test here was "ordinarily acquired". The Court noted that such an enquiry was "not straightforward." The Lodoc loans in this case were for "a home", or "an investment property or to access equity for personal or investment reasons." The Court said:

> "Judicial notice can be taken of the wide investment in the community for the provision of retirement saving. Such borrowing for such purposes is not infrequently undertaken for the personal use of saving for one's retirement. To a degree that is a business use; to a degree it is a personal or household use – for personal savings. - - -
> Looking here at the characteristics of this so-called financial product, were it necessary to decide, I would conclude that "ordinarily" such loans are used for the personal use of investment saving."[28]

In the Federal Court in *Oliver v Commonwealth Bank of Australia (No 1)*[29] Perram J stated that while sympathetic to the view that a margin loan is not for household

22 Lenders have been concerned at this. See for instance Bank of Queensland Limited Submission on the Trade Practices Amendment (Australian Consumer Law) Bill 2009 to the Senate Economics Legislation Committee 21 July 2009

23 *Will of Sherriff; In the Will of Lawson* [1971] 2 NSWLR 438.

24 On the distinction between investment and business purposes see Pearson, G and Batten, R *Understanding Australian Consumer Credit Law* CCH 2010 pp 33,34

25 *National Consumer Credit Protection Act 2009* (Cth) (NCCPA) s 160D (2)

26 Ibid s 6, s 7

27 [2011] NSWCA 389

28 Ibid per Allsop J (with whom Bathurst CJ and Campbell J agreed) at [296], [298]. The Court at [297] affirmed the approach in *Bunnings Group Limited v Laminex Group Limited* [2006] FCA 682.

29 [2011] FCA 1440

or domestic purposes, *Leveraged Equities v Goodridge* [2011] FCAFC 3; (2011) 191 FCR 71 is not authority for the proposition that borrowing money to buy securities is not for household purposes, as in that case, the borrower signed a business purpose declaration. Further , Perram J said that a business purpose declaration is not conclusive of the purpose. [30] In *Leveraged Equities* the evidence that the funds were invested to provide for retirement was treated as not relevant due to the business purpose declaration.[31] The Court in *Richards v Macquarie Bank (No 3)* 2012 FCA 1523 did not appear unfavourably disposed to treat borrowing for margin loans as for a domestic purpose. Reeves J said:

> "I consider there is sufficient logical connection between, on the one hand, the evidence of the Ensors' personal circumstances, including their lack of experience with matters of business and investment and interrelated factors such as their education and, on the other hand, the probability of the existence of the "consumer" fact in issue."[32]

There are inconsistencies in the applicability of the protective provisions of the *National Consumer Credit Protection Act 2009* (Cth) and the unfair terms provisions. The consumer credit legislation requires credit to be provided or intended to be provided wholly or predominantly for personal domestic or household "purposes". [33] Additional provisions extend this to credit for residential property for investment purposes. [34] Investment is specifically excluded from being a personal, domestic or household purpose suggesting that without this specific exclusion credit for investment purposes might fall within "personal, domestic or household."[35] This may lead to the possibility that the disclosure and responsible lending provisions of credit regulation do not govern a credit contract, yet the contract may still be regarded as a consumer contract for unfair terms assessment.

Under the old Consumer Credit Code borrowers were afforded some protection by the form of words required for a valid business purpose declaration. [36] There is no similar protection for any declarations of use in regard to the application of the unfair terms laws. In *Australian Securities and Investments Commission v Australian Lending Centre*[37]it was held that borrowers who signed letters stating their loan was for a business purpose were at a special disadvantage for the purpose

30 ibid at [86] – [88]
31 *Leveraged Equities Limited v Goodridge* [2011] FCAFC 3 at [416]
32 *Richards v Macquarie Bank (No 3)* 2012 FCA 1523 at [13]. This matter, resulting from the collapse of Storm Financial, was settled. See *Richards v Macquarie Bank (No 4)* 2013 FCA 438
33 *National Consumer Credit Protection Act 2009* (Cth) Schedule 1 s 5 (b) (i)
34 ibid Schedule 1 s 5 (b) (ii), (iii)
35 ibidSchedule 1 s 5(3). Note that borrowing for the purchase of shares by way of a margin loan is regulated separately in the *Corporations Act 2001* (Cth)
36 See for example *Australian Securities and Investments Commission v Australian Lending Centre* (2012) ASC 155-108 at [190]
37 [2012] FCA 43

of an enquiry into unconscionability. This was on the basis that a business loan in association with the broking contract with a large termination fee meant they risked being forced into a loan without the protection of the credit legislation.[38] If a statement by the acquirer of the use of a financial product or financial service can be treated as a term of the contract, such a term may in turn be assessable for unfairness, unless it is characterised as a main subject matter term.

The enquiry as to the whole or predominant use of the financial product or services will be important in many instances. "Wholly or predominantly" played a role in assessing the purpose of credit under the old Consumer Credit Code. This may become a critical enquiry in cases of financial advice and investments.

Standard Form Contracts

A further hurdle is whether the contract is a standard form contract.[39] These are contracts that in general have not been negotiated and are in a take it or leave it form at the time of contemplation of entry into the contract. The contract is presumed to be a standard form contract unless proved otherwise.[40] The legislation sets out a list of factors the court may take into account if the question of it being a standard form contract is contested.[41] The proposed amendments to the Insurance Contracts Act are in similar terms.[42] There are some differences as a contract of general insurance is specifically a standard form contract.[43]

Many financial services contracts are standard form contracts. This is the case for loans, margin loans, mortgage broker, stock broker, and financial planner contracts.[44] Whether the additional costs of negotiation as a means of avoiding the legislation would be worthwhile is moot.[45] ASIC says it will not treat "trivial or token negotiated" terms as indicative of a non standard form contract.[46] In UK law, which is drafted differently from the Australian legislation, a term is regarded as not being negotiated if it has been drafted in advance and the consumer has been unable to influence the substance of the term.[47]

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38 ibid at [192], [194],[203], [229]

39 ASIC Act s 12BK

40 ASIC Act s 12 BK (1); proposed Insurance Contracts Act 1984 (Cth) s 15E (1)

41 These relate to bargaining power, discussion and negotiation, and whether the terms take into account the specific party or transaction characteristics. ASIC Act s 12BK (2)

42 Insurance Contracts Amendment (Unfair Terms) Bill 2013 s 13A (3) ; s 15E

43 ibid s 15A (3) (b)

44 For instance the loan and security agreement for a margin loan was in a standard form in *Leveraged Equities Limited v Goodridge* [2011] FCAFC 3 at [48]

45 This is put forward as a strategy that may be adopted in Nahan, N Y and Webb, E Unfair Contract Terms in Consumer Contracts in Malbon, J and Nottage, L *Consumer Law and Policy in Australia and New Zealand* The Federation Press 2013 p 150

46 ASIC, Regulatory Guide 220 *Early termination fees for residential loans: Unconscionable fees and unfair contract terms* August 2011, RG 220.57

47 *Unfair Terms in Consumer Contracts Regulations* UK Reg 5 (2)

Financial products are sold with Product Disclosure Statements (PDS). This is a document that is in a standard form for different products. In *Macquarie Capital Advisers Ltd v Brisconnections Management Co Ltd*[48] it was held that a Product Disclosure Statement is not contractual. [49] However, in *Andrews v Australian and New Zealand Banking Group Limited* [50] the Product Disclosure Statement was treated as contractual. This PDS stated that it contained terms and conditions. As Gordon J said "That description was, however, not determinative of whether a particular provision in the PDS was a term or condition or was capable of giving rise to a breach."[51] An application form and confirmation letter taken together will constitute a binding contract to acquire a financial product as held in *Basis Capital Funds Management v BT Portfolio*[52] . Such documents are likely to be standard form documents. *Basis Capital*[53] concerned the acquisition of an interest in a unit trust.

Credit is not provided with a Product Disclosure Statement as it does not fall within the financial services regime of the *Corporations Act 2001* (Cth). The relevant document for consumer credit is the National Credit Code precontractual disclosure document which may be separate from but may also be the contract itself.[54] This document will contain information about interest rates, credit fees and charges, whether these can be changed and when they can be imposed.[55] Other documents associated with the provision of credit are the Credit Guide and the suitability assessment, which must be provided on request, though will not be contractual. Undertaking the suitability assessment is a statutory obligation not a contractual obligation, as is the potential debtor's obligation to provide information for that suitability assessment.

Excluded Terms

Neither "up front price" nor "subject matter of the contract" terms can be assessed as unfair.[56] Consumers are expected to bear the risk of choosing to enter into a contract for any particular subject matter at the relevant price. There are extensive disclosure obligations to assist consumers with this. The implied terms of due skill and care and fitness for purpose are available if required for post contract assessment of the subject matter of the contract.[57]

48 [2009] QSC 82
49 Ibid at [60]
50 [2011] FCA 1376; (2011) ASC 155-106
51 Ibid at [9] The contractual nature of the PDS was not at issue in the High Court *Andrews v Australian and New Zealand Banking Group Limited* [2012] HCA 30; (2012) ASC 155-109.
52 [2008] NSWSC per Austin J at [101]
53 Ibid
54 *National Consumer Credit Protection Act 2009* (Cth) Schedule 1 s 16 (5)
55 ibid Schedule 1 s 17
56 ASIC Act s 12BI; Insurance Contracts Act 1984 (Cth) proposed s 15D
57 ASIC Act s 12ED

Main Subject Matter

"To the extent that" a term "defines the main subject matter of the contract" it cannot be assessed for unfairness.[58] The converse of this is that a term which is incidental to the subject matter of the contract, without more, can be assessed. This may not be straightforward for some financial services contracts. Not all required disclosure will fall within defining the main subject matter. If the Product Disclosure Statement is contractual, it is unlikely that every term will define the main subject matter. Mandatory information about the benefits to a holder of a product and other significant characteristics or features of the product (if contractual) may in part define the main subject matter.[59]

There is an issue as to whether "cover" should be the main subject matter of an insurance contract. The extent to which exclusions from accepted risk define the main subject matter of the contract has been examined in the UK. The insurance industry there argued that "terms which define or circumscribe the insured risk and the insurer's liability" should not be assessable for unfairness.[60] In the English case *Bankers Insurance Co v South*[61], a travel insurance policy term that excluded compensation for accidents involving possession of motorised waterborne craft was not assessable. When the UK Law Commissions examined the approach of the Financial Services Authority they found that terms excluding damages for "settlement, shrinkage or expansion", and treatment of pets that was not "reasonable or necessary" were treated provisionally as main subject matter terms.[62] The extent to which an exclusion or limitation of liability clause defines the main subject matter of the contract will require judicial interpretation. Courts may look to the general law on defining the principal obligation of the contract.

A not dissimilar issue may arise with respect to financial advice. The practice of the industry has been to provide comprehensive financial plans. The intent of the Future of Financial Advice legislation is to encourage scaleable advice, advice limited to certain objectives.[63] If the insurance approach is adopted, any terms which circumscribe the advice may be main subject matter terms.

UPFRONT PRICE TERMS

The Australian legislation excludes "the upfront price" from consideration for unfairness. [64] This is the consideration for the supply under the contract that is

58 ASIC Act s 12BI (1) (a); Insurance Contracts Act 1984 (Cth) proposed s 15D (1) (a)
59 On the PDS see *Corporations Act 2001* (Cth) s 1013D (1) (b); s 1013D (1) (f)
60 The Law Commission and The Scottish Law Commission *Unfair Terms in Consumer Contracts: A New Approach? Issues Pap*er July 2012 p 69
61 [2003] EWHC 380 (QB) [2004] Lloyd's Rep IR 1
62 The Law Commission and The Scottish Law Commission *Unfair Terms in Consumer Contracts: A New Approach? Issues Paper July 2012* p 70
63 *Corporations Act 2001* (Cth) s 961B
64 ASIC Act s 12BI (1) (b)

disclosed at or before entry into the contract, but does not include "any other" contingent consideration.[65] The Australian approach is not concerned with the adequacy of the price, nor its intelligibility.[66] This contrasts with the UK rules which do not exclude contingent fees from the upfront price. [67] The Australian rules on price terms should overcome some of the uncertainty issues faced in UK Courts as to whether any particular price term was assessable. There may still be an issue with contingent fees.

The Product Disclosure Statement requires information about the cost of the product and amounts that "will or may be" payable after the acquisition of the product.[68] This is disclosed before entry into the contract. Amounts that will be payable should form part of the upfront price. Amounts that may be payable may be payable contingent on the occurrence or non-occurrence of a particular event and should be excluded from the upfront price. The premium of an insurance contract will be the upfront price. Interest for a loan will be the upfront price and other fees may be included.[69]

Terms in residential loan contracts may include early termination fees, payable if the borrower ends the contract prior to the expected time. These are distinct from discharge fees payable whenever the loan comes to an end. Early termination fees include deferred establishment fees and break fees for fixed rate loans. Such fees should be disclosed in the contract or precontractual statement as an amount or as a method of calculation.[70] Some termination fees are prohibited.[71] ASIC has provided guidance to its treatment of early termination fees for unfairness. It says it will treat terms imposing early termination fees and deferred establishment fees as assessable, that is they do not form part of the upfront price.[72]

Exception fees, other fees and charges such as honour fees, dishonour fees, over-limit fees, non-payment fees and late payment fees are currently the subject of litigation in *Andrews v Australian and New Zealand Banking Group Ltd* .[73] A similar sort of fee for unauthorised overdrafts was at issue in *Office of Fair Trading v Abbey National plc.*[74] The fee there was tested against UK legislation.

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65 ASIC Act s 12BI (2)

66 Contrast with Unfair Terms in Consumer Contracts Regulations 1999 Reg 6(2)

67 The extent to which contingent fees can be included as part of the up front price in Australia, if at all, will require judicial decision. For an analysis see Paterson, J *Unfair Contract Terms in Australia* Thomson Reuters 2011 at 4.120. See also the subsequent discussion of the type of terms that may be included as part of the upfront price.

68 *Corporations Act 2001* (Cth) s 1013D (1) (i) (ii)

69 Application fees and establishment fees are not interest. *Director of Consumer Affairs v City Finance Loans (Credit)* [2005] VCAT 1989 but may also be part of the upfront price.

70 National Consumer Credit Protection Act 2009 (Cth) Schedule 1 ss 16, 17

71 National Consumer Credit Regulations 2010 Reg 79A

72 ASIC, Regulatory Guide 220 *Early termination fees for residential loans: Unconscionable fees and unfair contract terms* August 2011, RG 220.63, RG 220.64

73 *Andrews v Australian and New Zealand Banking Group Ltd* [2011] FCA 1376 ; *Andrews v Australian and New Zealand Banking Group Ltd* [2012] HCA 30

74 [2009] UKSC 6 [2010] 1 AC 696

The Australian approach is closer to that of the High Court and Court of Appeal in *Office of Fair Trading v Abbey National plc*[75] which was ultimately rejected in the Supreme Court. The Lower Courts held charges on unauthorised overdrafts were not part of the core bargain and would not have been recognisable as part of the price of the overdraft. In the language of the Australian legislation they were not part of the upfront price, and further they were contingent on the event of an unauthorised overdraft. This would mean they would have been assessable for unfairness. This was not the approach adopted in the Supreme Court.[76]

The fees in *Andrews* are also contingent fees. The honour and dishonour fees depended on the customer being overdrawn and the discretion of the bank in honouring or dishonouring the payment instruction. The overlimit fees on credit cards also depended on the customer's payment instruction and the bank's acceptance of that instruction. The late payment fee on credit card accounts was imposed if the customer failed to make the payment by the stipulated time.[77]

It is possible that some commissions if disclosed up front and part of the transaction could be included as part of the upfront price of the product or service. Under credit assistance and credit contract legislation methods of calculation of fees and commission must be disclosed to the prospective party to the contract.[78] The issue for the unfair terms legislation will be at what point statements about fees become contractual, if at all. Brokerage commissions on the sale of shares generally involve a minimum fixed cost and secondly a percentage of proceeds which decreases according to the sale price or volume. That part of any commission which is contingent should not be part of the upfront price. In the UK a commission payable on the completion of the sale rather than entry into the contract was assessed for unfairness.[79] Ongoing fee arrangements paid for instance to a financial planner must be disclosed and the client given a choice every two years.[80]

Is the term unfair?

Just because a term is assessable for unfairness does not make it unfair. The test of unfairness requires consideration of any significant imbalance between the

75 [2008] EWHC 873; [2008] EWHC 2325

76 Above at [74]

77 Above at [73] per Gordon J at [15], [17], [19], [22]. Whether or not they were contingent was not at issue. The question was whether there had been a breach of contract that is whether the fees were payable on breach of contract.

78 *National Consumer Credit Protection Act 2009* (Cth) Schedule 1 s 17(14); *National Consumer Credit Protection Act 2009* (Cth) s 113 (2) (e), 136 (2) (e), 158 (2) (e), 114 (2) (d), 121 (2), (c) (d). For an example of undisclosed mortgage broking commissions see *Steve Karamihos and Aristea Karamihos v Bendigo Bank and Adelaide Bank Limited v Steve Karamihos and Aristea Karamihos* [2013] NSWSC 172

79 *Foxtons v O'Reardon* [2011] EWHC 2946 (QB). This concerned land rather than financial services.

80 *Corporations Act 2001* (Cth) ss 962G, 962H, 962K, 962L. Note s 962CA

parties, whether the term was necessary to protect the legitimate interests of the supplier, and if relied on whether the term would cause detriment to the acquirer.[81] These three prongs are tested along with consideration of the contract as a whole and the transparency of the term.[82]

This test for unfairness has some similarity with statutory unconscionability with respect to conduct as found in the *ASIC Act* and the unjust contract enquiry provided for in the *National Consumer Credit Protection Act*. As pointed out in *Wolfe v Permanent Custodians*[83] the equitable doctrine echoed in one of the ASIC Act statutory provisions is limited to entry into the transaction. [84] Under the National Credit Code scheme certain fees and charges can be reviewed for unconscionability.[85] Such fees cannot be examined for unjustness.[86] In *West* v *AGC Advances*[87] McHugh J famously said " a contract will not be…unjust unless the contract or one of its terms is…unfair …"[88] However there is no identity between a conclusion of unjust or unfair. ASIC suggests however that if an early termination fee is found to be unconscionable for credit legislation it will also be unfair.[89]

Insurance contracts are contracts of utmost good faith. The proposed legislation will make both a declaration that a term in a general insurance contract is unfair and an attempt by an insurer to rely on such a term a breach of the duty of utmost good faith.[90] Arguments for and against the introduction of unfair terms legislation for insurance contracts ranged from the argument that the reciprocal statutory obligation of utmost good faith would already render any unfair clause void [91] to enumeration of instances unfair terms in insurance contracts. [92] The latter included unhighlighted exclusion from liability for the main driver of the vehicle, exclusion of liability for home insurance for damage caused by an invitee, claims refusal under a no fault motor vehicle policy for failure to take 'all precautions to

81 ASIC Act s 12BG (1)
82 ASIC Act s 12BG (2)
83 [2012] VSC 275
84 ibid at [327]-[331]
85 These are changes to the annual percentage rate, establishments fees, early termination fees, and prepayment fees. National Consumer Credit Protection Act 2009 (Cth) Schedule 1 s 78 (1)
86 National Consumer Credit Protection Act 2009 (Cth) Schedule 1 s 76 (6)
87 (1986) 5 NSWLR 610
88 Ibid at [622]
89 ASIC RG 220.65;
90 Insurance Contracts Act 1984 (Cth) proposed s 15A
91 Insurance Council of Australia 28 August 2009, Submission to the Senate Economics Legislation Committee Trade Practices Amendment (Australian Consumer Law) Bill 2009. http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=economics_ctte/completed_inquiries/2008-10/tpa_consumer_law_09/submissions.htm
92 Treasury. Corporations and Financial Services Division. *Unfair Terms in insurance contracts: Options Paper*. 17 March 2010

avoid the incident'.[93]

Transparency

ASIC has indicated that just because a term is transparent it will not automatically be fair.[94] Unfairness for failure to be transparent, that is use plain language, be legible, present the term clearly and have it readily available, [95] has been justified as promoting consumer choice and promoting competition.[96] The standard of transparency for unfair terms is similar to the standard of mandatory financial services disclosure which is "clear concise and effective". [97] In credit regulation, the emphasis is on "clear explanation".[98] However, meeting mandatory disclosure will not automatically equate with the unfair terms standard of transparency. [99] An ongoing issue for financial products is that while many products, responding to PDSs, and Key Facts, are now relatively transparent, many complex and sophisticated products are not transparent.

Three Prongs and a List

As well as the tests of significant imbalance in the parties rights and obligations, no necessity to protect the legitimate interests of the advantaged party, and detriment to a party, the legislation sets out a grey list of unfair terms.[100] The unfair terms enquiry is not dissimilar to an unconscionability enquiry. ASIC suggests that if a fee is found unconscionable it is likely that a significant imbalance will exist. [101] ASIC suggests that in the case of fees, costs of processing, costs to the lender for early termination of a contract unrecovered establishment costs, are likely to be legitimate while seeking to recover cost that have already been recouped , making a profit from a fee and penalising a customer are likely to be illegitimate.[102] The regulators have taken a wide view of what is detriment to the consumer noting that no actual detriment must be proved.[103]

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93 Ibid p 3

94 ASIC, Regulatory Guide 220 *Early termination fees for residential loans: Unconscionable fees and unfair contract terms* August 2011, RG 220.132

95 ASIC Act s 12BG (3); Insurance Contracts Act 1984 (Cth) proposed s 15B (3)

96 The Law Commission and The Scottish Law Commission *Unfair Terms in Consumer Contracts: Advice to the Department for Business, Innovation and Skills* March 2013p ixf, p17f

97 *Corporations Act 2001* (Cth) s 715A

98 See for example National Consumer Credit Protection Regulations 2010 Reg 28E.

99 ASIC, Regulatory Guide 220 *Early termination fees for residential loans: Unconscionable fees and unfair contract terms* August 2011, RG.133

100 ASIC Act s 12BH; Insurance Contracts Act 1984 (Cth) proposed s 15C

101 ASIC, Regulatory Guide 220 *Early termination fees for residential loans: Unconscionable fees and unfair contract terms* August 2011, RG 220.74

102 ASIC, Regulatory Guide 220 *Early termination fees for residential loans: Unconscionable fees and unfair contract terms* August 2011, RG 220.79, RG 220.78

103 ASIC, Regulatory Guide 220 *Early termination fees for residential loans: Unconscionable fees and unfair contract terms* August 2011, RG 220.82

The treatment of terms that give a provider the unilateral right to vary the contract will need to be resolved. The National Credit Code contemplates unilateral variation of fees and charges by regulating the way notice must be given to the debtor. [104] The unfair terms grey list includes the example of a term that gives one party but not the other the right to vary the contract.[105] As Paterson points out, this reference to a change in fees and charges in the credit legislation is not required by law, therefore it does not fall within the exclusion of terms required or expressly permitted by a Commonwealth law.[106] ASIC says that complying with the credit legislation notification requirements of a variation will not automatically mean that a term is fair.[107]

Penalties are currently on the agenda. The High Court in *Andrews v Australian and New Zealand Banking Group Limited*[108] decided that a term may be a penalty even if it had not been breached. [109] This leaves the way open to assess a term as imposing a penalty in a wider range of circumstances. This raises the question of the relationship between an assessment of a term as a penalty and as unfair. Since a penalty is a "collateral or accessory" stipulation which imposes a detriment, in older language a punishment, [110] it will create a significant imbalance and detriment and as it is not limited to cost recovery will not be necessary to protect the legitimate interests of the supplier. The pleadings in *Andrews* raised the Victorian unfair terms legislation. There is as yet no judicial consideration of this. If a term is judged as a penalty it should also be unfair. It does not follow that an unfair term will always be a penalty.

CONCLUSION

There is greater clarity around the application of unfair terms legislation to credit products than to other financial services products. It will be necessary to resolve the relationship between the upfront price and contingent payments as these are a feature of many financial products and services. Variation of credit contracts should be assessed. The biggest issue that will need to be resolved is whether investment is an acquisition for personal reasons. If it is not, many financial products and services accessed by retail clients will not be accorded the protection of the unfair terms regime. The Australian Securities and Investments Commission should consider bringing a test case to resolve this.

104 NCCPA Schedule 1 s 66
105 ASIC Act s 12BH (1) (d)
106 Patterson, J op cit 4.190
107 ASIC, Regulatory Guide 220 *Early termination fees for residential loans: Unconscionable fees and unfair contract terms* August 2011, RG 220.106
108 [2012] HCA 30
109 Ibid at [78]
110 Ibid at [9], [10]