Transparency and Fairness in Australian and UK Regulation of Standard Terms

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1 INTRODUCTION

When regulating standard terms in consumer contracts there is a fundamental choice.[1] On the one hand, the priority can be to protect consumers against the unfair substantive effects of the standard terms. On this approach, then, we are concerned with preventing traders from using and relying on terms that unduly favour their own substantive interests over the interests of consumers: eg terms excluding or limiting obligations or liabilities that would otherwise be owed to consumers or terms imposing onerous obligations and liabilities on consumers.

Alternatively, the priority can be transparency. In other words, unfairness in substance is routinely excused so long as the terms are reasonably transparent. In Australia and the UK, broadly, terms are considered to transparent when they are available at the point of contract; there is a reasonable opportunity to become acquainted with them; they are in clear, jargon free language and decent sized print; the sentences, paragraphs and overall contract are well structured; and appropriate prominence is given to particularly substantively detrimental terms.[2] The former of these approaches is obviously more protective of consumers than the latter. This article considers where the relatively new Australian regime stands on the issue. In doing so, it uses the UK regime as a comparator, which is particularly appropriate given that, as we shall see, the regimes have similarities (although

1 On this see Chris Willett, *Fairness in Consumer Contracts: The Case of Unfair Terms* (Ashgate Publishing Limited, United Kingdom, 2007), ch 2; Chris Willett, 'The Functions of Transparency in Regulating Contract Terms: UK and Australian Approaches' (2011) 60 *International and Comparative Law Quarterly*, 355; Chris Willett, 'General Clauses and Competing Ethics of European Consumer Law in the UK' (2012) 71 *Cambridge Law Journal,* 412; and Jeannie Paterson, 'The Australian Unfair Contract Terms Law: The Rise of Substantive Fairness as a Ground for Review of Standard Form Consumer Contracts' (2009) 33 *Melbourne University Law Review*, 934.

2 Australian Consumer Law s 24(3); Victorian Fair Trading Act 1999, s 163 (3) (repealed); *First National Bank v Director General of Fair Trading* 3 WLR 1297, Lord Bingham, 1308; Office of Fair Trading, Unfair Contract Bulletin, No 4, 1997; Office of Fair Trading, Unfair Contract Terms Guidance, 2001, Analysis of Terms Breaching Regulation 7-Plain English and Intelligible Language, para 19; and C Willett, *Fairness in Consumer Contracts: The Case of Unfair Terms* (above, n 1) 2.4.2.2, 2.4.3.4 and 6.4.2.

also crucial differences) in the way that they (a) carry out the basic assessment of unfairness and (b) determine which charges escape this unfairness assessment (the 'price term' exclusion). Although these key regulatory concepts are similar in both jurisdictions, the argument is that in certain key ways, the Australian approach is more protective. It is more focussed on protection against unfair substantive outcomes under the general unfairness test (less inclined to allow transparency as a 'defence' when there is substantive unfairness).[3] In relation to the price term exclusion issue, the Australian legislation makes it clear (and the UK legislation does not) that while some charges (the 'upfront' price) may be sufficiently core to the bargain to justify their exclusion from the general test of substantive fairness, others (in particular contingent charges) are not. Such charges should be subject to the 'full glare' of this test of substantive fairness.

It is argued that these Australian provisions are a sensible response to traditional judicial ethics of freedom of contract. Under regimes aiming at contractual fairness, open textured provisions may allow for judicial interpretations that minimise the protective impact. This is evident from the experience of the current UK regime and of prior Australian regimes. The current Australian provisions are drafted such as to address this, to better secure a pre-eminent role for substantive fairness. At the same time it is noted that questions remain as to the *level* of substantive fairness that will take hold.

2. Procedural and Substantive Fairness

As indicated above, one approach to regulating standard terms is to prioritise transparency. On this approach, substantive unfairness is generally acceptable, so long as there is transparency, ie the terms are available for the consumer to consult and are clearly presented. This is, in other words, about the *process* leading to the conclusion of the contract and is therefore often referred to as being about *procedural* fairness. Prioritising such procedural fairness over issues of fairness in substance can be said to be based on an underlying ethic of *self-interest/reliance*.[4] Trader self-interest is promoted in that traders get the substantive outcomes they have provided for; as long as they act in a procedurally fair manner, ie by providing transparent documentation. Equally, there is an expectation that the transparency enables consumers to act in a *self-reliant* way to protect their interests. First, they should read and understand the terms, so that even if they immediately then enter the contract, they have done so on the basis of 'informed choice'.[5] They may then

3 Note that we are only concerned here with the general tests of unfairness in the UK and Australia and not with those particular cases where certain terms are rendered wholly ineffective without the need to apply a general test (e.g. terms excluding liability for negligently caused injury and for breach of implied terms as to the quality and fitness of goods: UK Unfair Contract Terms Act 1977, ss. 2 (1), 6(2) and (3) and, in Australia, Competition and Consumer Act 2010, Chapter 3 (2), ss 64 (1).

4 Chris Willett, 'General Clauses and Competing Ethics of European Consumer Law in the UK', above, note 1

5 Chris Willett, 'The Functions of Transparency in Regulating Contract Terms: UK and

take further self-reliant responsibility to protect their interests, eg negotiating a change in the terms or finding other traders that offer fairer terms.

On the other hand and reflecting a more protective underlying ethic, the priority may be to protect consumers against the unfair substantive effects of the standard terms, so terms that are sufficiently substantively unfair are *not* readily justified simply on the basis that they have been presented transparently. Procedural fairness is *not* necessarily enough. The fundamental priority is to protect consumers against the detrimental impact of substantively unfair terms[6] to secure substantive fairness. This priority is driven fundamentally by the idea that the impact of substantive unfairness may be particularly severe for private consumers. So, traders are often better placed to absorb financial losses[7] than private consumers. Further, the effect on traders (at least larger businesses) may often be essentially economic: an impact on the profitability of the business. By contrast, an economic loss[8] might have a serious effect on the budget of the average consumer or family, and also have broader effects on family life: social inclusion, dignity etc. There may also be an impact on important 'social citizenship' rights: eg where terms allow withdrawal of services of general interest[9] or restrictions on access to justice.[10]

From a protective point of view, transparency (procedural fairness) cannot be trusted to protect consumers against these detrimental consequences. The view is that self-reliance will often simply not work. Consumers will usually not read standardised information even if it is transparent,[11] and even if they do read it they will often find it very difficult to understand it or to assess the risks.[12] Consumers will usually choose between suppliers on the basis of what they see as the core

Australian Approaches', above note 1, 357-8.

6 This can be linked to 'need-rationality' (Thomas Wilhelmsson, *Critical Studies in Private Law* (Kluwer, 1992); and to agendas such as welfarism, social justice and distributive justice (see Roger Brownsword, Geraint Howells and Thomas Wilhelmsson, *Welfarism in Contract Law* (Ashhgate, 1994)).

7 Eg through insurance, spreading losses across different divisions of the business, tax deductions etc.

8 Eg caused by a trader excluding liability for his own breach or imposing on the consumer a price escalation clause or a high charge for some form of consumer default.

9 H Micklitz, 'Universal Services: nucleus for a Social European Private Law', in M. Cremona, *Market Integration and Public Services in the European Union* (OUP, 2011).

10 Eg terms allowing very restrictive periods within which to make claims and terms or practices requiring expensive or other formalities for a claim to be made.

11 This is due to such factors as lack of time, prior psychological commitment to the purchase, 'over optimism' (Chris Willett, *Fairness in Consumer Contracts*, above note 1, 22-26, 59-62); and Jeannie Paterson, 'The Australian Unfair Contract Terms Law: The Rise of Substantive Fairness as a Ground for Review of Standard Form Consumer Contracts', above, n 1, 953-5.

12 See MJ Trebilcock, 'An Economic approach to Unconscionability', in B. Reiter and J. Swann (eds) *Studies in Contract law* (Butterworths, 1980) 416-417. This is due to the large number of terms, the complexity of the issues, lack of expertise etc (Chris Willett, *Fairness in Consumer Contracts*, above note 1, 22-26, 59-62). See also Jeannie Paterson, 'The Australian Unfair Contract Terms Law: The Rise of Substantive Fairness as a Ground for Review of Standard Form Consumer Contracts', above, n 1, 953-5 on how this applies in relation to particular types of common standard term.

aspects of the contract: the basic nature of the goods or services and the basic price they can expect to pay in the normal performance of the contract. They do *not* usually choose on the basis of the ancillary exclusions, charges etc, which are usually dealt with in the standard terms.[13] This being the case, it is unrealistic to expect them to take the sort of self-reliant (self-protecting) action described above: reading, understanding terms, making an informed choice etc. Even if they do, they will find it hard to take any further practical self-reliant action.

They will not have the bargaining power to persuade traders to alter the terms, ie to make them fairer. In addition, they are unlikely to find alternative and fairer ancillary terms being offered by other traders. This is because, as suggested, most consumers are choosing on the basis of the core aspects of the contract. This is where there is likely to be the competitive discipline that produces choices between what is offered by different traders (not on the ancillary matters covered in the standard terms).[14] So, the terms dealing with these ancillary matters must be subjected to substantive control.

3. The General Tests of Unfairness

(i) UK

(a) Unfair Contract Terms Act

First of all, there is the 'reasonableness' test under the *Unfair Contract Terms Act 1977* (UCTA). This test applies to terms excluding liability for negligence causing losses other than death or injury,[15] breach of contract[16] and misrepresentation,[17] and to terms requiring consumers to indemnify traders[18] and terms allowing traders to render a performance substantially different from that reasonably expected or no performance at all.[19] In applying this test, transparency has not been paid much attention in consumer cases. In the only House of Lords (now Supreme Court) consumer decision, the focus was on the substantive effect of the term and the justifications for its use (ie whether the service in question was a particularly difficult one and who was best placed to insure); along with the procedural questions as to the relative bargaining positions of the parties and whether a reasonable choice was available to the consumer. Taking all this into

13 Chris Willett, *Fairness in Consumer Contracts*, above note 1, 22-26, 59-62; and on notions of 'contractual' and 'competitive' transparency and their recognition by the ECJ see H. Micklitz, 'Unfair Terms in Consumer Contracts', in H. Micklitz, N. Reich and P. Rott, *Understanding EU Consumer Law* (Intersentia, 2009), 135-138.

14 V. Goldberg, 'Institutional Change and the Quasi Invisible Hand' (1974) 17 J. Law Econ, 461, 483; Chris Willett, *Fairness in Consumer Contracts*, above note 1, 24-25. Another self-reliance option is to negotiate for changes to terms, but this can be argued to be wholly unrealistic given the limited importance of the vast majority of individual consumers to traders.

15 S 2(2).

16 S 3(2)(a).

17 S 8.

18 S 4(1).

19 S 3(2)(b).

account, the term (which excluded liability for a negligent survey) was held not to be reasonable.[20] The term does appear to have been relatively transparent and known about by the consumers, so it would appear that transparency was not considered to be a legitimising factor.

The above notwithstanding, the UCTA case law is of extremely limited importance for two reasons. First, UCTA is a private law regime, ie terms can only be declared ineffective in private law litigation between the parties. There is no power for courts or regulatory bodies to *prevent* traders using unreasonable terms. So, even if courts were to continue to hold that substantive fairness is the priority under the UCTA test, this would only be significant in those very few instances of individual consumer litigation that might arise. It will not result in the terms in question being cleared from the market. Secondly, UCTA only applies to terms excluding or restricting trader liabilities and not, for instance, to terms imposing unfair obligations or liabilities on consumers, eg unfair charges, price variation clauses etc. So, the approach to exemption clauses under UCTA tells us nothing as to what attitude is likely in the case of these other types of terms.

(b) The Unfair Terms in Consumer Contracts Regulations

Of much greater practical significance is the regime under the *Unfair Terms in Consumer Contracts Regulations 1999* (UTCCR).[21] This covers exemption clauses *and* these other types of term. In addition, it has a real impact on the use of terms, as regulatory bodies are empowered to take preventive action against unfair terms.[22] A very considerable body of work against unfair terms has been done by the Office of Fair Trading (OFT) using these powers.[23]

Under UTCCR, a term is unfair if 'contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer'.[24]

It is accepted that for a term to be unfair, it must cause a significant imbalance in rights and obligations to the detriment of the consumer, *and* it must violate the requirement of good faith.[25] First of all, it is clear that there cannot be unfairness

20 Smith v Bush [1989] 2 All ER 514.

21 SI 99/2083, implementing the Unfair Terms in Consumer Contracts Directive, (UTD), 93/13/EEC.

22 UTCCR, regs 10-15.

23 See the Office of Fair Trading Unfair Contract Terms Bulletins 1-29 covering cases dealt with from the passing of the initial 1994 Unfair Terms in Consumer Contracts Regulations until September 2004; and see the lists of Unfair Terms cases with Undertakings that replaced the bulletins and run from October 2004 (available on the Consumer Regulation Website-http://www.crw.gov.uk).

24 UTD, art 3 (1)/ UTCCR, reg 5 (1).

25 DGFT v First National Bank [2001] 3 WLR 1297, Lord Bingham at 1307-8, Lord Steyn at 1313.

unless there is a 'significant imbalance' etc, and that this goes to the issue of *unfairness in substance*.[26] The accepted view, however, is that for a finding of unfairness, there must also be a violation of the good faith requirement.[27] The question, then, is how 'good faith' is to be understood. In *First National Bank*, Lord Steyn (in the then House of Lords-now Supreme Court) said that '[a]ny purely procedural or even predominantly procedural interpretation of the requirement of good faith must be rejected'.[28]

This does not state explicitly, but does strongly suggest, that procedural fairness (including transparency) cannot routinely justify a term that is sufficiently unfair in substance. However, there was no positive support from the other three judges for this.

In fact, the court was not required, as such, to answer the question as to whether transparency could function as a 'defence' where there is substantive unfairness because it was not accepted that the term in question did actually cause a significant (substantive) imbalance in rights and obligations.[29] So, whether unfairness in substance could be justified by transparency did not arise.

Nevertheless, the House of Lords *did* consider that the term in *First National Bank* was in sufficiently plain language to satisfy the requirement of good faith.[30] The indication, therefore, is that, for the House of Lords, even if the term had been viewed as unfair in substance, it may not have been unfair (as this requires violation of good faith). In short, transparency might well have justified unfairness in substance.

(ii) Australia

Under the Australian federal law, a term is unfair if it would cause

> a significant imbalance in the parties' rights and obligations arising under the contract; and…it is not reasonably necessary in order to protect the legitimate interests of the [trader]; and…it would cause detriment…to... [the consumer] if it were to be applied or relied on.[31]

26 Ibid.
27 Ibid.
28 Ibid, 1313.
29 Ibid, Lord Bingham at 1308, Lord Steyn at 1313-4, Lord Hope at 1316 and Lord Millett at 1319.
30 Lord Bingham at 1310.
31 Australian Consumer Law 2010, s. 24 (1) and generally on the regime see Nyuk Yin Nahan and Eileen Webb, 'Unfair Contract Terms in Consumer Contracts', in Justin Malbon and Luke Nottage (eds), *Consumer Law and Policy in Australia and New Zealand* (The Federation Press, 2013)

We can immediately see that this contains no reference to 'good faith'. Certainly, a simple reference to 'significant imbalance/detriment' without any 'good faith' gloss would generally be read to be referring simply to the *substantive* rights and obligations. This impression is strengthened by the reference to whether the term is 'reasonably necessary to protect the legitimate interests of the supplier'. After all, it is surely the *substantive* content of the term that is relevant to protection of these legitimate interests. So a trader might argue, for example, that it is necessary to exclude a particular liability because otherwise he would be overly exposed to (substantive) liability. By contrast, it is hard to see how the *transparency* of a term protects the interests of a trader as such.

Nevertheless, after setting out the basic test, the new federal law goes on to provide that in determining whether a term is unfair, consideration must be given to whether it is 'transparent',[32] ie whether it is plain language, legible, clearly presented and readily available.[33] The idea, presumably, must be that (even without good faith as part of the test) the 'significance' of a *substantive* imbalance is viewed as being affected by whether or not there is transparency. The question then arising is whether any such transparency can legitimise sufficiently substantively unfair terms. The government view seems to be that it cannot. It has been stated that

> [t]he extent to which a term is transparent is not determinative of the unfairness of a term … and transparency, on its own account, cannot overcome underlying unfairness in a contract term. The transparency of a term is simply a consideration that a court must take into account when considering whether a term is unfair.[34]

The suggestion, then, seems to be that transparency cannot legitimise a term that is sufficiently unfair in substance. Presumably, the real intended function of transparency as part of the Australian test is to allow for a term to be found unfair where there is *not* the degree of substantive unfairness that would normally be required, eg where the term would not otherwise be sufficiently substantively detrimental to be found to be unfair, yet the term lacks transparency. Another possibility might be where a term is substantively unfair, but is counterbalanced by another term that is especially favourable to the consumer. Although this might be said to have restored overall substantive balance, if the counterbalancing term lacks transparency, there might (notwithstanding the overall substantive fairness) be found to be unfairness.[35]

32 S 24(2)(a)

33 S 24(3).

34 *The Australian Consumer Law: Consultation on draft provisions on unfair contract terms* ('Unfair Terms Consultation'), Australian Government, The Treasury, 11 May, 2009, p 12; and this view is confirmed in *A Guide to the Unfair Contract Terms Law,* Australian Competition and Consumer Commission, 2010, 12.

35 See Frank Zumbo, 'Are Australia's Consumer Laws Fit for Purpose?' (2007) 15 *Trade Practices Law Journal* 227 at 237 in support of this as a likely role for transparency.

(iii) Australia-successfully drafting itself free of freedom of contract traditions

The above discussion shows an Australian approach that (relative to the UK) appears to be more focussed on protection against unfair substantive outcomes (less inclined to allow transparency as a 'defence' when there is substantive unfairness). Essentially, we can see that this has been achieved by two key strategic moves: leaving 'good faith' out of the general test and making a clear statement in the legislative guidance to the effect that transparency, on its own account, cannot overcome underlying unfairness in a contract term.[36]

The latter was obviously needed because of the reference to transparency as a relevant factor in the test. However, omitting 'good faith' from the unfairness test is very much about learning from history. Good faith is clearly an open textured concept that can be interpreted in various ways. It certainly requires transparency as a minimum.[37] The real question is what more it requires. It can certainly be understood to require substantive fairness, ie to mean that transparency is not sufficient, is not a defence, where there is a sufficiently substantively unfair term. This was the understanding of Lord Steyn in the UKHL. However, we saw above the reluctance of the majority in the HL to make a clear statement to this effect. The doors are therefore left open in the UK for straightforward substantive control of standard form contracts to be obstructed by the raising of a 'transparency defence'.

It seems that the Australian government could see the same risk arising in Australia if good faith was given a role in the test of unfairness. There is no space here to go into detail on the history of good faith and other fairness concepts in Australian law. However, the bottom line is this. Just as can be argued to be the case in the UK at the highest judicial levels,[38] there can also be argued to be a strong Australian judicial tradition of freedom of contract values. This is a tradition that is reluctant to move beyond standards of procedural fairness (eg transparency), reluctant to impose substantive fairness norms, unless there is some associated procedural unfairness. This was evident in earlier attempts to control unfair standard terms, eg through general clauses on 'unconscionability'; and it remained a risk under the relatively recent State of Victoria experiment, which used good faith as part of the test.[39] In short, the point is that, just as in the UK, if judges (who are steeped in the freedom of contract tradition) are presented with open textured notions that

36 Above, n 34.

37 Jeannie Paterson, 'The Australian Unfair Contract Terms Law: The Rise of Substantive Fairness as a Ground for Review of Standard Form Consumer Contracts', above, n 1, 950.

38 Chris Willett, 'General Clauses and Competing Ethics of European Consumer Law in the UK', above, n 1.

39 Chris Willett, 'The Functions of Transparency in Regulating Contract Terms: UK and Australian Approaches', above, n 1, 369-371; and Jeannie Paterson, 'The Australian Unfair Contract Terms Law: The Rise of Substantive Fairness as a Ground for Review of Standard Form Consumer Contracts', above, n 1, 937-9.

could be interpreted to require no more than procedural fairness, the significant risk was that this is the interpretation they might choose (or at least refuse to rule out). It appears that the Australian government has recognised this risk and sought to avoid it both by leaving good faith out of the test[40] and by making express reference in the guidance to the anticipated interplay between substantive and procedural fairness.

4. The Price Exclusion

(i) UK

Insofar as a term is plain and intelligible, there can be no assessment of fairness relating to '....the adequacy of the price or remuneration as against the services or goods supplied in exchange.'[41]

So, if there is transparency (in the form of plain language), there is no review of the substantive fairness of the 'price' under the unfairness test. Clearly the intention is to preserve a degree of freedom of contract in relation to the price. When it comes to such a central part of the contract, trader self-interest is preserved: they may charge what they wish. All that matters is that the trader practices procedural fairness, in the form of transparency. The consumer should act in a self-reliant manner. They should take advantage of this price transparency by comparing prices, 'shopping around' for the best deal. In other words, the consumer should make an 'informed choice' on this core element of the contract. To this extent the UK regime clearly opts for an ethic of self-interest and reliance (or informed freedom of choice), over one of protection.[42]

However, the question here is what is the intended *extent* of this freedom of contract, procedural fairness approach? The point is that, just like the general test of unfairness discussed above, the provision is very open-textured: leaving open precisely what *is* the 'price or remuneration'. There is very limited guidance. The preamble to the Unfair Terms in Consumer Contracts Directive (UTCCD), upon which the UK regime is based, explains that what is excluded is the 'quality/price ratio'.[43] But all this does is repeat the basic idea that there can be no assessment as to whether the price is too high, given the quality of the goods or services received. It does not actually tell us what the 'price' *is* and *which* of the various charges potentially made under a contract are intended to fall under this definition. The recent *Abbey National* case dealt with terms providing for large charges to be made in a variety of circumstances, including, for example, where consumers exceeded agreed overdraft facilities.[44] Under the terms, exceeding the overdraft

40 Jeannie Paterson, 'The Australian Unfair Contract Terms Law: The Rise of Substantive Fairness as a Ground for Review of Standard Form Consumer Contracts', above, n 1, 943.

41 UTD, art 4(2)/UTCCR, reg 6(2)(b).

42 See Hugh Collins, 'Good Faith in European Contract Law' (1994) 14 (2) OJLS 229, 238.

43 93/13/EEC, Recital 19.

44 *OFT* v *Abbey National and others* [2009] UKSC 6 and see S. Whittaker, 'Unfair Contract Terms, Unfair Prices and Bank Charges' (2011) 74 MLR 106.

facilities was not defined as a default or breach by the consumer. Rather, it was defined as an option exercised by the consumer. Following this logic through, the obligation to pay the relevant charge was not defined as compensation for a loss suffered by the bank. Rather, it was defined as a charge for the bank's *service*, ie the 'service' of allowing the payment to be made from the account.[45]

For the Office of Fair Trading and the Court of Appeal, the 'price' only covered charges that the typical consumer would view as 'essential' to the bargain; or, to express this otherwise, what such a typical consumer would reasonably expect to pay in the normal due performance of the contract. Given that consumers do not normally actually plan to take an unauthorised overdraft in the normal course of things, the Office of Fair Trading and Court Appeal concluded that the charges in question were not 'price' terms'.[46]

This seems to be an understanding of the 'price' concept that is grounded in a protective approach. The 'essential to the bargain' test seems to understand the price exclusion as only intended to cover those charges that, *by their substantive nature*, consumers will really focus on and that therefore have a realistic chance of being subject to market discipline. Following the analysis set out above,[47] it is not enough in itself that a term imposing a charge is formally transparent. It is only really likely to be subject to the competitive discipline of the market if it is of such a substantive nature that it is central to how consumers would perceive the bargain. If charges are subject to market discipline, there is some chance of improved choice (alternative market offerings) so that consumers might at least have some chance of acting in a self-reliant way by shopping around. In addition, the competitive discipline may mean that the charges that are fairer in substance (so that application of the unfairness test may not matter so much). If terms, by their substantive nature, are *not* central enough to the bargain to be subject to competitive discipline, then, from a protective point of view, no matter how transparent they are they should not be understood as 'price' terms. Rather, they should be exposed to a review of their substantive fairness under the test of unfairness.

The Supreme Court, however, refused to distinguish between what consumers would see as essential and non essential charges; viewing such an approach to be too complex and even to compromise the European law principle of 'legal

45 This is to avoid any risk of the tem being characterised as a 'penalty clause'; which would make it unenforceable at common law. Note also that the Court of Appeal and Supreme Court analysis was that payments by consumers were to be regarded in law as being in exchange for the 'whole package' of services offered by the banks (ibid, Lord Walker at [6], for instance).

46 *Abbey National plc and Others* v *OFT* [2009] EWCA Civ 116. See also S Whittaker, above, note 44, in support of the Court of Appeal's focus on the perspective of the 'average consumer' and their 'genuine choice', the latter tallying with the analysis in the text immediately following above as to what is likely to be subject to market discipline.

47 Above, at Part 2.

certainty'.[48] For the Supreme Court, identifying the 'price' was 'a matter of objective interpretation by the court'.[49] The Supreme Court accepted that, applying such an approach, charges flowing from consumer default were not the 'price'.[50] Beyond this, however, the Supreme Court appeared effectively to allow the technical provisions of the contract to determine what should be called the price. Basically, if the terms (as they did in *Abbey*) say that the charge is payable for services, then they are 'price' terms. In other words, the Supreme Court refused to make the sort of distinction drawn by the Office of Fair Trading/Court of Appeal, which broadly only excludes from control those charges that, by their substantive nature, are genuinely central to how the bargain would be generally perceived and which are therefore more likely to be subject to market discipline.

The UK Law Commission have recently considered the price term issue and suggest clarifying the position by emphasising that the price would only be excluded from the test of unfairness where it is expressed 'prominently'.[51] There is no space here to go into the implications of this in detail. However, it seems that this is no more than a transparency requirement. By this I mean that it looks like something in the way of a 'red hand' disclosure/highlighting type rule: emphasise in some highlighted manner prior to the contract being concluded that the charge exists and this is sufficient. The difficulty with this from a consumer protection point of view is that it misses the point as to whether the charge is really one that, by its *substantive* nature, is genuinely central to how the bargain would be generally perceived, and is therefore a term that is really likely to be subject to market discipline. The risk is that if it is not such a term then no matter how prominent it is made, it will not be given great attention and it will therefore not be likely to be subjected to market discipline. Taking the example of the unauthorised overdraft charges from the *Abbey* case, if consumers do not plan to be overdrawn then (no matter how prominent is the indication of the charges that are payable in cases of unauthorised overdrafts) they will not view such charges as a core matter for concern at the time when they make the contract.

We shall now see that that the Australian law takes a much clearer legislative approach to drawing this important line between charges that are in substance central to the bargain and those that are not.

48 *OFT* v *Abbey National and others*, above, n 44, Lord Mance at [112] and [115].

49 *OFT* v *Abbey National and others*, above, n 44, Lord Mance at [116].

50 *OFT* v *Abbey National and others*, above, n 44, at [102] and affirming the view that the 'interest after judgment' term in *First National Bank* was correctly viewed as such a default provision.

51 English and Scottish Law Commissions, *Unfair Terms in Consumer Contracts: Advice to the Department of Business, Innovation and Skills* (2013).

ii) Australia

(a) Substantive distinctions between what is central and what is contingent

The Australian test of unfairness does not cover the 'upfront price'.[52] So, as in the case of the UK, there is clearly an agenda to preserve a degree of freedom of contract in relation to the price, in the sense that the price escapes review of its substantive fairness. However, the essential argument here is that in this word 'upfront' (and associated supporting provisions) lies the key difference from the UK approach. This is what makes it pretty clear that the test of unfairness (with its focus on substantive fairness) *is* intended to cover those charges that are not 'upfront', not really central to the bargain. This substantive fairness test is intended, in other words, to cover non-upfront price terms that consumers are unlikely to be giving any meaningful consent to and which are therefore unlikely to be subjected to market discipline. As we saw above, the UK test, at least as interpreted by the UK Supreme Court, fails to make this key distinction between upfront and non-upfront prices.

First of all, the very use of a qualifying word such as 'upfront' emphasises that not all charges are to be excluded from the test of unfairness. The use of such a qualification immediately indicates that there are 'charges and changes, some (upfront ones) are what is intended to be excluded from review under the unfairness test, while others (those that are not upfront) are intended to be covered by this test.

Second, of course, for the purposes of distinguishing between types of charge, the 'upfront' concept is in itself not necessarily any more principled, obvious in meaning etc, than, for instance, the 'essential to the bargain' test used by the Court of Appeal in the UK and rejected by the UK Supreme Court. Without more, we could debate what substantive distinction is intended between types of charge: which charges in substance are upfront and which are not? Indeed, upfront might even be equated with 'prominent'; any charge, runs the argument, is upfront (whatever its substance), as long as it is prominent. This would, of course, bring us back to an essentially transparency based, procedural fairness approach – make the charge clear enough and thereby escape a review of substantive fairness (even if the substantive nature of the charge is such that it is not central to how consumers would view the deal and is therefore unlikely to be subject to market discipline).

Third, however, the regime does in fact go on to draw a *substantive* distinction between what does and does not count as 'upfront'. Background guidance has said that it covers any interest payable under the contact.[53] An upfront price will

52 ACL, s. 26 (1) (b)

53 Commonwealth of Australia, Explanatory Memorandum to the Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010, para 229.

also include future payments or a series of future payments,[54] provided that they have been disclosed at or before the contract is entered into.[55]Crucially, however, we are told that 'upfront price' does *not* include any contingent consideration.[56] Contingent charges are payments that are unnecessary for the supply, sale or grant under the contract, but are additional to the upfront price.[57] Vital here is the following explanation:

> Other forms of consideration (that is, further forms of consideration which are not part of the upfront price) under the consumer contract that is contingent on the occurrence or non-occurrence of a particular event, is excluded from the determination of the upfront price.
>
> Terms that require further payments levied as a consequence of something happening or not happening in the duration of the contract are covered by the unfair contract terms provisions. Such payments are additional to the upfront price, and are not necessary for the provision of the basic supply, sale or grant under the contract.[58]

Of course, this means that a provision openly drafted as a default provision (ie a charge for what is clearly a breach by the consumer) cannot be the upfront price – it is dependent on 'something happening or not happening in the duration of the contract'. But this is accepted even by the Supreme Court in the UK not to be the price.[59] The crucial point is that this Australian explanation very clearly excludes (from categorisation as upfront price) charges that are contingent on *anything* happening or not happening in the future. So, it seems clear that this also covers cases where the charge (as in the *Abbey* case in the UK) is *not* defined as being triggered by a default or breach by the consumer, but by a choice by the consumer, by an option exercised by the consumer. For the UK Supreme Court, as we have seen, such a charge counts as the price and is excluded from the fairness assessment. However, it is hard to see how this can be the case under the Australian regime. Simply, the charge depends on future action or inaction by the consumer and is therefore not the upfront price. .

This approach seems to recognise that such contingent charges (however they are technically and formalistically expressed) are simply not central to the bargain from a consumer's point of view.

(iii) Australia again drafting itself free of freedom of contract traditions

Here, as in relation to the general unfairness test, we see an Australian approach that is more focused (than is the UK regime) on protecting consumers from unfair

54 Ibid, para 231.
55 ACL s 26(2)(b), Ibid, 2.33.
56 ACL s 26(2). In the UK there is no similar provision.
57 Explanatory Memorandum, above n 53, para 228.
58 Explanatory Memorandum, above n 53, paras 235 and 236.
59 See above, n 50 and related text.

substantive outcomes. The price exclusion issue is approached in such a way as to recognise the difference between charges that are genuinely likely to be given attention by consumers when they enter the contract and those that are not. The latter are less likely to be subject to competitive discipline and there is therefore more of a case for them to be reviewed under the general test of unfairness.

The Australian legislation has been drafted such as to reflect this important distinction. If the legislation had referred simply to 'price' there would have been a risk that judges steeped in freedom of contract values might be inclined to understand this to cover any charge expressed technically as a primary payment obligation. The wording of the Australian legislation seems to limit this risk significantly.

5. Concluding Comment

This article has sought, using the UK as a comparator, to assess where the Australian unfair contract terms law now stands on the issue of procedural versus substantive fairness. It has shown how open textured concepts such as 'good faith' and 'price' have been understood in the UK in ways that either do not guarantee substantive fairness or actually positively restrict the prospects of achieving it. However, the Australian regime is designed to reduce the risk of this occurring. At the same time, it must be recognised that the provisions in question do not necessarily guarantee a high standard of protection. The legislation may ensure that certain types of charge are covered by the unfairness test and that transparency is not routinely taken to be a defence when such charges (and other standard terms) are substantively unfair. However, if judges seek to limit the level of protection, they can shift the focus elsewhere. The key here is the issue of substantive fairness itself. We saw above that, in order to be unfair, the Australian test (like the UK test) requires a 'significant imbalance in the parties' rights and obligations arising under the contract', this being the measure of whether there is substantive unfairness. Yet, just as 'good faith' and 'price' are open textured concepts, so too is 'significant imbalance'. If judges are inclined to limit the level of protection they simply need to interpret this to set a low level of fairness. Putting this in another way, they need simply require a very high level of unfairness in substance before being prepared to find there to be 'significant imbalance'. So, a key challenge for academic commentary is to carefully scrutinise how this concept is developed by courts. Is it, for example, being understood in such a way as to recognise that often the more vulnerable position of consumers relative to traders when it comes to absorbing losses?[60]

60 For a full discussion of different levels of substantive fairness and the approach to this in the UK, see Chris Willett, 'General Clauses and Competing Ethics of European Consumer Law in the UK', above, n 1.