

Jeannie Paterson, *Unfair Contract Terms in Australia*, Thomson Reuters, 2012, ISBN 9780455229089, 221 pages, \$160

Introduction

Unfair Contract Terms in Australia is a comprehensive reference guide for substantially unfair terms that appear in standard form consumer contracts. Jeannie Paterson has not only outlined the process for the determination of unfair terms and the legislative framework that allows these determinations (*Competition and Consumer Act 2010* (Cth)), she has also provided a useful background of the constitutional basis to that legislation, its practical application for each state and territory and informative comparisons to the legal framework in the United Kingdom (*Unfair Terms in Consumer Contracts Regulations 1999* (UK)). Paterson has created a well written and easy to understand guide that would appeal to a wide audience of readers; from law students with a basic understanding of the law of contract, to solicitors, barristers, contractual drafters and regulators.

Main Points

Dr Jeannie Paterson is currently a Senior Lecturer in the School of Law at the University of Melbourne, lecturing specifically in consumer and contract law. Paterson had previously worked as a Solicitor for Mallesons Stephen Jaques in the area of Banking and Finance law before taking an academic position at Monash University. Paterson has published extensively in the area of contracts and consumer law, including having authored several books.

The subject matter of this book is accurately portrayed in the title and consequently a comprehensive discussion of unfair contractual terms existing in standard form Australian consumer contracts is presented throughout the text. As stated above, this book provides a detailed description of the background to this subject, including: the theoretical and legislative framework in Australia and the UK, types of contracts and terms that cannot be reviewed, interpretation of unfair terms and the tests for their determination, relevant matters to consider when reviewing potential unfair terms, the effect of unfair terms, the remedies available and a comprehensive list of terms which may be unfair.

Chapter 1 outlines the basis for focusing on standard form consumer contracts and why unfair terms often appear in these contracts. Paterson links the act of contracting to classical contract theory, where parties are free to contract as they please in a process that facilitates bargaining between the contracting parties. Paterson argues that in standard form contracts the bargaining process and revision of contracts prevalent in classical contract theory is null and void. Paterson argues most consumer standard form contracts are presented on a 'take it or leave it basis' and are filled with legalese which the average consumer

would not understand. She also argues that consumers are often not given enough time to read and consider standard form contracts fully. If the consumer does read the contract it is argued that they often do not understand the risks involved with certain terms because they are focused on other elements of the contract, such as price.

Chapters 2 and 3 of this text describe the legislative schemes that appear in Australia and the UK. For Australia, chapter 2 outlines the application of the Australian Consumer Law for each state and territory, the transition to this legislative scheme and what regime is followed when considering variations, renewals or new consumer contracts. In chapter 3 the legislative and common law framework for unfair terms in UK consumer contracts are considered, including the 'grey list' of the types of terms which may be unfair (the 'grey list' is explored exclusively in chapter 12). Chapter 2 also introduces the regulatory agencies for each Australian state and territory and their usual method of enforcement. There is a brief discussion of the typical approach in the UK enforcement of consumer protection law; however, chapter 3 contains a broader discussion of the comparisons between the legislative regimes in the UK and Australia (former and present).

Chapters 4 and 5 present similar subject matter from opposing standpoints. Whilst chapter 4 discusses what contracts and terms are exempt from review under the Unfair Contract Terms Law (UCTL), chapter 5 presents information on contracts the UCTL would apply to. Chapter 4 provides a general introduction to what kinds of contracts are specifically exempted from review, including certain marine contracts and contracts of insurance. The types of terms discussed in chapter 4 which are described as exempt under the UCTL are those that describe the core of the agreement (such as subject matter and price). Chapter 5 discusses which consumer contracts are reviewable under the UCTL and explains the definition of a 'standard form contract'. Chapter 5 lists specific factors that are taken into account when determining whether a contract is classified as standard form, such as whether one party prepared the contract before discussions took place with another party and whether one party had all or most of the bargaining power in a transaction.

Chapter 6 identifies terms of a contract that are reviewable under the UCTL, discussing how common law doctrines which determine the meaning, operation and interpretation of a contractual term work alongside, or predetermine, the operation of the UCTL. Paterson describes three models for consideration in this context. In the first model common law doctrines take priority and a term will not be reviewable under the UCTL. In the second model courts take a narrower approach to common law doctrines, leaving greater scope for review of unfair terms under the UCTL. In the third model both the common law

doctrines and the UCTL are given broad scope for operation, the common law doctrines can exercise control over unfair terms and the UCTL can interpret those under its consumer protection objectives. The operation of these models is discussed in relation to identifying whether a term has been incorporated into a contract and the principles relating to construction of a contract.

Chapters 7 and 8 analyse the test of an unfair term under the UCTL and describe any relevant matters in ruling the term unfair. Chapter 7 describes the elements of determining an unfair term as: one that creates a significant imbalance in parties' rights and obligations; is unnecessary in protecting the legitimate interests of the advantaged party; and would cause detriment to a party if it were upheld. Paterson expands on the meaning of each element, using cases as examples where applicable to enhance understanding. Chapter 8 takes the concept of determining unfair contractual terms a step further; in addition to the elements of determination listed in chapter 7, relevant matters that a court would likely take into consideration are described and explored by Paterson. Examples of other relevant matters outlined in chapter 8 that could influence the ruling of fairness of a term are: the transparency of the overall contract including the use of plain English, legibility and clarity; reasonable notice of the term given to the consumer; and time given for consumers to consider the term, or seek further legal advice about the consequences of the term.

Chapter 9 discusses the enforcement of the UCTL and remedies available when terms are deemed unfair under this legislative framework. Three possible methods of enforcement are discussed for challenges to unfair terms in standard form consumer contracts: the first as a defence by a consumer or regulator to an action for enforcement brought by a trader; the second, a consumer or regulator seeking remedies under the UCTL for a detriment suffered by the trader's continued use or reliance on the unfair term; and the third, a pre-emptive action being brought by a consumer or regulator to rule the term as unfair and prevent its future use. This chapter discusses the consequences of a term being declared unfair, including who can apply for the declaration and the power of the courts to award relief to the disadvantaged party (such as injunctions or compensation orders) if terms are found to contravene the UCTL.

Chapter 10 considers the relationship between the UCTL and provisions that prohibit unconscionable conduct, differentiating substantive fairness of a term(s) from the conduct of the trader whilst forming the contract. Instances where unfair terms can become unconscionable are discussed in this chapter, taking into account equitable doctrines. Finally the chapter discusses the possibility of a single provision regulating unconscionable conduct

encompassed in the Competition and Consumer Legislation Amendment Bill 2011 (Cth).

Chapters 11, 12 and 13 provide ancillary information that has been referred to, but not explained, in earlier chapters of the text. Chapter 11 focuses on information about the Australian Consumer Guarantees Law which provides minimum standards of quality to goods and services forming the substantive part of consumer contracts. Chapter 12 provides information about the grey list of terms that may be considered unfair; for example, terms that give authority for unilateral penalisation for breach or termination of the contract and terms that give authority for unilateral choice of contract renewal. Each term discussed on the grey list in chapter 12 is followed by a comprehensive review and referral to relevant case law and statute. Chapter 13 provides a list of common terms that may be considered unfair. The chapter includes a detailed discussion of entire agreement clauses, exclusion and limitation clauses, termination clauses and unilateral variation clauses amongst others.

Analysis

Unfair Contractual Terms in Australia is a fantastic reference guide in the area of consumer contract law; an area of law that Paterson shows considerable knowledge and expertise in. The brilliance of Paterson's approach to this book is that it truly speaks to all of its intended target audiences. There is no assumed knowledge regarding contract law, so unfamiliar readers such as students can understand the concepts presented; however, these concepts are presented interestingly enough not to frustrate more experienced legal professionals who will already have familiarity with the conceptual bases explored. Paterson consistently explains concepts clearly and provides examples to ensure understanding. As someone that has read through many similar guides on contract law, I found this text to be expressed as a practical reference guide, rather than a textbook which was refreshing.

Paterson states that the aim of this text is to 'consider ... the application and likely effect of the UCTL on standard form consumer contracts in Australia'. This aim is achieved by the text. Its opening chapters provided a concise and informative introductory discussion of the theoretical and policy considerations behind the new legislative framework, which forms a foundation for the reader's understanding. This introduction is essential because an assumed familiarity on the part of the readers with the legislative change and the reasoning behind it would alienate a large section of the target audience (largely students) from understanding the conceptual underpinnings of the change. Paterson draws upon strong peer reviewed and multidisciplinary research when discussing elements of theory in contract law such as limits on decision making (employing a cognitive psychology or economic behavioural perspective in

chapter 1) and engaging in a discussion between classical contract theory and economic theory (also chapter 1).

The central chapters in the text (4-10) act as a reference guide, dealing largely with the practical application of the UCTL in Australia. Each area of the reference guide provides many different examples and practical explanations of the concepts presented, which further aids the reader's understanding of the material presented and clarifies key information contained within each chapter. There is substantial evidence and case authorities referenced throughout these chapters that are consistent with many other texts on the law of contract. An example is the reference to *Oscar Chess Ltd v Williams* [1957] 1 WLR 370 used when discussing the parol evidence rule and several references to High Court decisions throughout, such as *Australian Broadcasting Commission v Australasian Performing Rights Association Ltd* (1973) 129 CLR 99. The concluding chapters (11-13 and appendices) act as supporting information for the reader on the area of consumer contracts, which bolster the text's role as a reference guide for legal professionals. The functionality of the text as a reference guide is greatly increased by the inclusion of these ancillary materials because they allow the reader to refer to these chapters easily and pinpoint key information they are seeking efficiently.

The only negative that can be drawn upon from this text is the neutral tone adopted by Paterson; if readers are seeking a critical evaluation of the new legislative framework for consumer law in Australia then they are looking in the wrong place. Paterson does not put forward her professional opinion on whether the new legislative framework is adequate, whether there are any major disadvantages to the framework, or how these changes compare to other legislative frameworks in the wider international community (outside Australia and the UK). These discussion points could be included in the introductory or ancillary chapters of the text to give the reader a greater sense of the legislative framework's performance in a contemporary legal context; discussion points which, considering Paterson's experience and knowledge of the subject, would likely be well received by her audience.

Evaluation and conclusion

Although this text does not contribute anything novel or groundbreaking in the area of consumer contract law and is not the only text available on this subject, it does provide a reference guide that is comprehensive, gives a clear guide to the new legislative frameworks in Australia and in the UK and is accessible to a wide range of readers. Students and readers less familiar with the subject area should be warned however, that this text is not 'light reading', but rather densely packed with practical and theoretical information and therefore this text

may be better suited to those with an interest in consumer contract law, or working as a legal professional within this area.

For all readers within the legal profession or readers with an interest in consumer contract law, this text is a valuable resource and a worthwhile investment. The application, effect and remedies available within the UCTL in Australia are well discussed, exemplified and clearly portrayed throughout. Paterson not only achieves her objectives, she exceeds these providing a comprehensive guide to not only the Australian legislative framework, but also discussing elements of similar framework found in the UK. This text is thoroughly recommended as a 'must have' addition to the legal professional or law student's literature on contract law.

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