New Zealand Moves to Prohibit Unfair Terms: A Critical Analysis of the Current Proposal

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This article critically analyses the current proposals in New Zealand for the introduction of a prohibition of unfair terms. The article explains the details of the proposal and compares it to the unfair terms legislation in Australia and the United Kingdom. The justifications for a prohibition on unfair terms are explained. The article then considers whether the scope of the current New Zealand proposal is adequately aligned with these justifications.

1. INTRODUCTION

Regulators in both the United Kingdom (UK) and Australia have accepted that in the case of non-core terms in standard-form consumer contracts there is an imbalance of power that favours the supplier. They have therefore legislated to prohibit unfair non-core terms from being inserted into these contracts.[1] The question of whether New Zealand should follow suit and legislate against unfair terms has been debated for several years. The New Zealand Ministry of Consumer Affairs initially voiced its support for introducing such a prohibition back in 2006 during the early stages of a comprehensive review of all New Zealand Consumer laws.[2] In a discussion paper

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* NOTE: on 10 December 2013, as this issue of the UWALR went to print, the Consumer Law Reform Bill passed its third reading. After it receives Royal Assent it will become law in New Zealand. The unfair terms provisions do not come into force until 15 months after the legislation is enacted. This is to give businesses time to assess their standard form terms for compliance with the new law.

1 UK unfair terms rules are currently contained in The Unfair Terms in Consumer Contracts Regulations 1999 (UK). In 2013 the UK Consumer Rights Bill was published. It aims to clarify and simplify UK consumer laws including unfair terms law. If enacted it will replace the Unfair Terms in Consumer Contracts Regulation 1999. Australian unfair terms rules are found in Parts 2-3 of the Australian Consumer Law contained in schedule 2 of the Competition and Consumer Act 2010. The Australian unfair terms law is based on recommendations from the Australian Productivity Commission, see Review of Australian Consumer Policy Framework, Inquiry report No 45 (2008) <http://www.pc.gov.au/inquiry/consumer/docs/finalreport>.

2 See Ministry of Consumer Affairs, Review of the Reform of the Redress and Enforcement Provisions of Consumer Protection Law — International Comparison Discussion (2006) at pp 24-28 where the Ministry proposes that the Fair Trading Act 1986 should be amended to specifically prohibit unfair terms in consumer contracts.

published in 2010 the Ministry repeated that there is a strong case for prohibiting unfair contract terms in New Zealand.[3]

The New Zealand consumer law review eventually culminated in the New Zealand Consumer Law Reform Bill 2011.[4] The most striking omission from the Bill was the lack of provisions about unfair contract terms. The government had chosen not to proceed with the unfair terms prohibition and proposed instead to monitor the Australian experience over the next few years.[5] This reluctance to adopt a prohibition on unfair terms was influenced in part by resistance from the New Zealand business community.[6] It may also have been informed by the fact that the current consumer law review is based on the debatable premise that moving toward less regulation is an important policy goal for New Zealand.[7]

Nonetheless, during the first reading of the Bill, a new Minister of Consumer Affairs invited the Select Committee to consider examining whether unfair terms provisions should be introduced.[8] The Commerce Select Committee reported back on the original Bill in October 2012.[9] The Committee's report launched New Zealand back on track toward regulating unfair terms. It recommended a revised Bill that included a prohibition of unfair terms.[10] The prohibition provides that suppliers are banned from including unfair terms in standard-form consumer contracts and must not apply, enforce or rely on such terms.[11] The new law is expected to come into force

3 See New Zealand's Ministry of Consumer Affairs, Consumer Law Reform Additional Paper – September 2010: Unfair Contract Terms at http://www.consumeraffairs.govt.nz/pdf-library/legislation-policy-pdfs/CLR-Additional-paper---Unfair-contract-terms.pdf For an examination of standard-form consumer contracts and the problem of unfair terms in general see Kate Tokeley, 'Introducing a Prohibition on Unfair Contractual Terms into New Zealand Law: Justifications and Suggestions for Reform' (2009) 23 New Zealand Universities Law Review 419.

4 Consumer Law Reform Bill (No. 287–1) 2011 (NZ).

5 See Cabinet Paper Consumer Law Reform (December 2010), 20 available at < http://www.consumeraffairs.govt.nz/pdf-library/legislation-policy-pdfs/CLR-Cabinet-Paper-1.pdf>. Australia, in fact, already has significant experience concerning the impact of unfair contract terms regulation, as Victoria enacted a similar scheme in 2002.

6 Cabinet paper above n 4, 20.

7 New Zealand Ministry of Consumer Affairs, Consumer Law Reform; A Discussion Paper (June 2010) 8, available at < http://www.consumeraffairs.govt.nz/pdf-library/legislation-policy-pdfs/consumer-law-review-a-discussion-paper.pdf. See also Hon Bill English and Hon Rodney Hide "Government Statement on Regulation: Better Regulation, Less Regulation" August 2009 available at<www.treasury.govt.nz/economy/regulation/statement>. Jane Kelsey argues that the "better regulation, less regulation" slogan essentially advocates a light-handed pro-market approach which she contends "can no longer claim to be uncontested orthodoxy" in New Zealand. See Jane Kelsey "Regulatory Responsibility: Embedded Neoliberalism and its Contradictions" (2010) 6(2) Policy Quarterly 36, 39.

8 See speech by Minister of Consumer Affairs, Chris Tremain, available at <http://www.beehive.govt.nz/speech/consumer-law-reform-bill-first-reading>.

9 Available at <http://www.parliament.nz/en-NZ/PB/Legislation/Bills/6/f/6/00DBHOH_BILL10613_1-Consumer-Law-Reform-Bill.htm>.

10 Consumer Law Reform Bill (No. 287– 2) 2011 (NZ).

11 Section 26A (to be inserted in to the Fair Trading Act 1986 by clause 11A of the NZCLR Bill).

by late 2013.

This article critically analyses the unfair terms provisions of the New Zealand Consumer Law Reform Bill (NZCLR Bill) and compares them to the unfair terms provisions of the Australian and UK unfair terms law. Part 2 of the article considers the extent to which New Zealand law already restricts the use of such terms and argues that prohibiting a contractual term on the basis of substantive unfairness is a novel and drastic move away from principles of freedom and sanctity of contract. Such a move is accompanied by the dangers of loss of certainty and the risk that a court or other decision-maker will make false assumptions about consumer preferences. Despite these dangers it is argued that a prohibition on unfair terms can be justified if it is limited to unexamined, standard-form terms in consumer contracts. These terms are not taken into account by consumers when making purchasing decisions. Market forces are therefore inoperative and there is a danger that some of these terms may be unfair. Parts 3 to 7 explain the scope and approach of the proposed unfair terms provisions in the current NZCLR Bill and assess whether these provisions will deliver a workable and justifiable intervention into freedom of contract. It is concluded that overall the provisions are a welcome and important addition to New Zealand consumer protection law. They fill a gap in the current law. However, there are some areas where the scope or details of the provisions are either confusing or fail to match well with the justifications and rationale behind the law. The provisions are also limited by setting up the Commerce Commission as gatekeeper. A term can only be found "unfair" if the Commerce Commission applies to the courts to have the term declared unfair. Consumers themselves cannot apply for this declaration.

2. UNFAIR TERMS LEGISLATION: POTENTIAL DANGERS AND JUSTIFICATIONS

Before considering the details of the proposal to regulate unfair terms in New Zealand it is important to briefly consider the dangers of regulating against unfair terms and begin to explain why such regulation is justified in certain limited circumstances.

A. The potential dangers

A prohibition on unfair terms represents a critical move away from traditional contractual doctrine. One legal academic describes the equivalent legislation in the UK as being "possibly the single most significant piece of legislation in the field of contract law."[12] Classical contract theory is based on the notions of

12 Elizabeth Macdonald "Scope and Fairness in Consumer Contracts Regulations: *Director General of Fair Trading v First National Bank*" (2002) 65 The Modern Law Review 763, 763.

freedom and sanctity of contract.[13] People should be free to enter any bargain that suits them. Once the bargain is struck our economic system is founded on the certainty that the deal will be binding and must be performed. Banning unfair terms is directly contrary to notions of freedom and sanctity of contract.

Introducing such a ban would not, however, be the first time that inroads have been made into this classical theory of contracts. During the twentieth century the equitable doctrine of undue influence and the common law doctrine of duress were developed in order to provide relief where a party did not freely give consent to the contract. The notion of a freely given consent is also behind the common law rules that require a party to give explicit notice of particularly onerous terms.[14] Equity also allows contracts to be set aside on grounds of unconscionability. At no time, however, has equity or common law allowed a contract to be set aside simply because the terms themselves are deemed unfair. The focus has always been on the relationship between the parties and the conduct of the stronger party.[15] In recent times, in both New Zealand and other jurisdictions, consumer protection statutes have been introduced that prohibit some specific types of unfair terms such as misleading contractual terms, oppressive terms in credit contracts and terms that attempt to limit statutory consumer guarantees.[16] In addition, the New Zealand Disputes Tribunals are entitled, although not required, to set aside or vary an agreement where it considers the agreement or a term of the agreement to be harsh or unconscionable.[17] There is, however, no general ban on unfair terms. Many problematic terms are not prohibited by current laws. For example, there is nothing to prevent terms that allow a supplier of goods or services to unilaterally terminate, vary or renew a contract or terms that impose unreasonable penalties on the consumer for a breach or termination of a contract.

For the New Zealand law to be reformed so as to require a contractual term to be set aside simply because a third-party (either a government agency or a

13 See Printing and Numerical Registering Co v Sampson (1875) LR 19 Eq 462, 465. See also P Atiyah, The Rise and Fall of Freedom of Contract (Claredon Press, Oxford, UK, 1979); J Beatson and D Friedman, "From Classical to Modern Contract Law" in J Beatson and D Friedman (eds), Good Faith and Fault in Contract Law (Claredon Press, Oxford, UK, 1995).

14 See, for example, Thornton v Shoe Lane Parking Ltd [1971] 2 QB 163; and Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd [1989] QB 433.

15 See O'Connor v Hart [1985] 1 NZLR 159, 171; Nichols v Jessup [1986] 1 NZLR 226, 235 per Somers J.

16 Part 5 of the Credit Contracts and Consumer Finance Act 2003 (allows courts to re-open oppressive credit contracts, contracting -out is prohibited under s 135), The Fair Trading Act 1986 (prohibits misleading conduct and misrepresentations in trade, the Consumer Guarantees Act 1993 s 43 (prohibits contracting out of the guarantees provided under the Act) There are also other Acts which are designed to protect consumers from unfairness in specific types of contract. See, for example, s 7 of the Door to Door Sales Act 1967 which overrides the normal rules of contract law in door to door sales involving payment by credit by allowing the consumer to cancel an otherwise valid contract within a period of seven days after the making of an agreement.

17 Disputes Tribunal Act 1988 (NZ), s 19.

court) considers it to be unfair would be a significant additional encroachment on freedom of contract. It has two disadvantages. The first is increased uncertainty. Traditionally contract law has endeavoured to provide predictability and clarity by refusing to allow people to escape from their contracts simply because they were foolish enough to enter into a bad bargain. When a Court or government agency is able to assess the fairness of terms in a concluded contract a degree of uncertainty is introduced into the law of contract. The notion of "unfairness' is inevitably subjective. It is extremely difficult to draft a statutory provision that adequately defines the concept. If people are able to escape from their obligations under a contract because they are "unfair" the law of contract becomes less certain and less predictable. It is therefore understandable that many New Zealand businesses are opposed to unfair terms regulation.[18]

The second disadvantage is the risk that the third-party decision-maker might unwittingly decrease overall consumer welfare. Determining whether a term is unfair often requires a complex assessment of various factors. Some suppliers might pre-emptively remove terms from consumer contracts in order to prevent future allegations of "unfair" terms. They might compensate for this by introducing new disadvantageous term, such as a price increase. Yet it is possible that most consumers would have preferred a perceived "unfair" term and a cheaper price to a less "unfair" term with a higher price.

The adoption of a ban on unfair terms needs to be carefully thought through so that it does not cause more problems than it is attempting to solve.

B. Justifications in limited circumstances

One argument in favour of a ban on unfair terms is that it would bring New Zealand into line with Australia. After all, one of the stated policy objectives of the NZCLR Bill is to achieve alignment with Australian consumer law, as appropriate, in accordance with the New Zealand government's agenda to form a single economic market with Australia.[19] However, imitating Australia is not, on its own, a theoretically sound reason for introducing such a significant law change.

Despite the dangers there are in fact strong arguments that support allowing external scrutiny of fairness in respect of unexamined terms in standard-form consumer contracts. This statement contains three elements:

- The term must be a *standard-form* term;
- The term must be an *unexamined* term;
- The term must be in a *consumer* contract.

18 Cabinet paper above n 4, 20.
19 See NZCLR Bill 2011 (NZ), General Policy Statement in the Explanatory Note, 1.

Limiting legislative intervention to only these terms reduces the risk of unnecessarily interfering with terms when there is no market failure. If there is no market failure then there is no justification for increasing uncertainty in contract law by replacing the terms that a consumer has agreed to with terms that a court or government agency considers to be fair.
Each of these three elements is included in the proposal under the NZCLR Bill. The following discussion examines why each element is crucial. It then critically examines the provisions of the Bill in order to assess how well the Bill aligns with the underlying rationale for each element.

3. STANDARD-FORM CONTRACTS

A. Reasons for limiting unfair terms law to standard-form contracts

The first element that should exist in order to justify an enquiry into the fairness is that the term should be a standard-form term. The NZCLR Bill has incorporated this restriction into its unfair terms provisions.[20] This follows the approach taken by the Australian and UK unfair terms legislation.[21]

Standard-form contracts are common in today's market place. Examples of products where suppliers normally use a standard-form contract include motor vehicles, mobile telephones, insurance, real estate, banking services, package holidays and gym membership. In recent years the sale over the internet of software and other products such as airline tickets has introduced another area of the market governed by the use of standard-form contracts. The terms are usually written in a scroll-down box on the screen and the consumer has to click "I agree" in order to proceed with the purchase.

The nature of the standard-form contract is such that most consumers almost always fail to read most of the terms of the contract. They typically read the terms that describe the price and the broad nature of the product but they are not likely to read all the other terms that spell out the details of the parties' contractual duties. The vast majority of people in today's world, for example, automatically click "I agree" in a software licensing agreement without scrolling down the box of terms to read them all. Even if a consumer does read all the terms they may have difficulties comprehending the meaning of some of those terms. Moreover, there is no real ability for the consumer to influence those terms.

The fact that most consumers do not bother to read most of the terms of a standard-form contract does not mean that they are lazy or irrational. Quite the contrary,

20 Clause 26A.

21 See Competition and Consumer Act 2010, Schedule 2 (Australian Consumer Law) section 23(1)(b). The UK unfair terms law does not use the words "standard-form contract" but instead limits coverage to terms that have "not been individually negotiated", see The Unfair Terms in Consumer Contracts Regulations 1999 (UK), 5(1).

economic theorists have described consumers' behaviour as "rational ignorance"[22] or as an example of "bounded rationality".[23] It makes more sense for consumers to pay heed only to the few terms that are of most importance to them, such as price and product characteristics. Moreover, most of the unread terms deal with risks that are unlikely to eventuate. For example, they specify what will happen if either of the parties defaults, or if the supplier wishes to terminate the contract or change the terms. Consumers may assume that these things won't happen to them and therefore decide not to devote the time and effort required to read and understand them.[24] If consumers are not making choices in respect of these terms then there is no incentive for suppliers to ensure that these terms are fair.

B. The definition of "standard form contract" under the NZCLR Bill

Neither the New Zealand nor Australian law provide a prescriptive definition of a standard-form contract. Both countries instead provide guidelines for the Court to use when determining whether a contract is a standard-form one. While this might lead to some uncertainty as to whether a particular contract is covered by the provisions it does allow for a flexible approach which captures the essence of a standard-form contract.

The NZCLR Bill provides that the court may determine that a contract is a standard-form one in any case where the terms of the contract have not been subject to effective negotiation between the parties.[25] It then requires that the court, in making this determination, take into account the following factors:[26]

(a) Whether one of the parties has all or most of the **bargaining power** relating to the transaction;
(b) Whether the contract was **prepared** by one or more parties **before any discussion** relating to the transaction occurred with the other party or parties;

22 Randy E Barnett, "Consenting to Form Contracts" (2002–2003) 71 Fordham L Rev 627, 631; Todd D Rakoff, "Contracts of Adhesion: An Essay in Reconstruction" (1983) 96 Harv L Rev 1173; See also Friedrich Kessler, "Contracts of Adhesion — Some Thoughts about Freedom of Contract" (1943) 43 Colum L Rev 629.

23 Russell Korobkin, "Bounded Rationality, Standard-form Contracts, and Unconscionability" (2003) 70 The University of Chicago Law Review 1203. See also Wayne R Barnes, "Toward a Fairer Model of Consumer Assent to Standard-form Contracts: In defense of restatement subsection 211(3)" (2007) 82 Washington Law Review 227, 252-262 and Schmel I Becher "Behavioural Science and Consumer Standard-form Contracts" (2007) 68 Louisiana law review 117.

24 David A. Armor & Shelley E. Taylor When Predictions Fail: The Dilemma of Unrealistic Optimism, in Heuristics and Biases: The Psychology of Intuitive Judgment (Thomas Gilovich et al. eds. 2002) (reviewing literature about optimistic bias).

25 Clause 26A inserts the new section 46J into the Fair Trading Act 1986.

26 Section 46J(2) inserted into the Fair Trading Act 1986 by Clause 26A of the NZCLR Bill 2012.

(c) Whether 1 or more of the parties was, **in effect, required either to accept or reject** the terms of the contract ...in the form in which they were presented;
(d) The extent to which the parties had an **effective opportunity to negotiate the terms** ...of the contract;
(e) The extent to which the terms of the contract take into account **the specific characteristics of any party** to the contract.*(emphasis added)*

Where one party to the proceedings alleges that the contract is a standard-form one then the presumption is that the contract is a standard-form contract unless another party to the proceedings can prove otherwise.[27]

The list of factors is the same as the list used in the Australian definition of a standard-form contract.[28] Unlike the Australian provision, however, the New Zealand one begins with a general direction which limits the contracts to which the court may determine to be standard-form to those contracts in which the terms "have not been subject to effective negotiation between the parties". This provision is an improvement on the Australian model in that it gives the court a clear indication as to the key feature of a "standard-form" contract. It is this lack of effective negotiation between the parties that is central to the rationale for allowing courts to scrutinise the fairness of the terms. If consumers are unable to negotiate many of the terms of standard-form contracts they are likely to remain rationally ignorant of these terms. Market forces are therefore ineffective in respect of these terms and unfair terms regulation is justified.

The wording of the general direction does not, however, make it clear what happens when the contract appears to be a standard-form one because most or all of the terms of a contract have *not* been subject to effective negotiation but the allegedly unfair term *was* subject to effective negotiation. It would be unprincipled for the legislation to cover situations where it can be proved that the consumer did in fact individually negotiate an allegedly unfair term. The Bill should make it clear that if a specific term within a standard from contract has been individually negotiated then the legislation will not apply to that term.

A further potential difficulty with both the New Zealand and Australian approach is that requirement that the unfair term to be in a standard-form contract does not cover the possibility of only one or two unfair terms being pre-formulated in a contract which is otherwise not a standard-form one. The UK unfair terms legislation is drafted more widely so that any term that has not been individually negotiated (so long as it does not relate to price or product characteristics) is subject to the legislation regardless of whether or not the entire contract can be

27 Section 46J(3) inserted in to the Fair Trading Act 1986 by Clause 26A of the NZCLR Bill 2012.
28 See Competition and Consumer Act 2010, Schedule 2 (Australian Consumer Law) section 27.

characterised as a standard-form one.[29] Interestingly, current proposals to reform the UK unfair terms rules extend the scope of the rules even further. The proposals would allow all consumer contract terms (except for exemptions relating to terms as to price terms and subject matter) to be assessed for fairness regardless of whether or not they have been individually negotiated.[30] This extension would allow an unjustifiably wide intervention into freedom of contract.

The current UK approach is sensible. Whenever any term has been drafted in advance so that the consumer has been unable to influence the substance of the term, that term will be regarded as having not been individually negotiated and therefore subject to the unfairness provisions. Regulation 5 of The Unfair Terms in Consumer Contracts Regulations 1999 (UK) provides that:[31]

> (1) A contractual term which has not been individually negotiated shall be regarded as 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.
>
> (2) A term shall always be regarded as not having been individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term.
>
> (3) Notwithstanding that a specific term or certain aspects of it in a contract has been individually negotiated, these Regulations shall apply to the rest of a contract if an overall assessment of it indicates that it is a pre-formulated standard-form contract.

The fact that the UK legislation covers even a single pre-formulated term seems appropriate given that the rationale behind regulation of unfair terms is to protect consumers in situations where the consumer is unable to influence the terms and unlikely to bother examining them. It may be true that some consumers are more likely to read one or two pre-formulated terms than they would be to read pages of pre-formulated terms. Nevertheless, unless the terms relate to an essential element of the contract, the pre-formulated nature of the terms means that consumers have little incentive to examine them in any detail or to make the effort to understand their meaning. They are unlikely to be able to change them and unlikely to take them into account when making a purchasing decision. Although a single pre-formulated term is far less common than a largely or entirely pre-formulated contract, it is desirable for the legislation to provide protection to consumers in both situations. This approach would also avoid arguments about how many terms in a contract need to be pre-formulated in order for a contract to become a standard-form covered by the legislation.

29 The Unfair Terms in Consumer Contracts Regulations 1999 (UK), 6(2).
30 See the Draft Consumer Rights Bill (2013) (UK)
31 Ibid, reg 5.

4. UNEXAMINED TERMS

A. Reasons for limiting unfair terms law to "unexamined terms"

The second element that should be present in order for a term to be legitimately assessed for fairness is that the term should be an "unexamined term". The phrase "unexamined term" means any term that is not considered important enough to make it rational for consumers to read it and take it into account in making the purchasing decision. An "examined term", on the other hand, is a term of sufficient importance that consumers will read it and allow the term to influence their decision to purchase. Academic writers have also referred to this kind of term as "invisible",[32] "non-salient"[33] or "non-core".[34] The proposed New Zealand unfair terms provisions follow the UK and Australian approach by including a limitation of this nature.[35]

The normal workings of the market can operate effectively only in respect of the terms of a contract that are regularly examined by consumers, such as those relating to price and the characteristics of the product. While consumers may not always be able to alter these terms in standard-form contracts, they do have the option of not entering into the agreement at all. So if the product is not what they are wanting or if it is too expensive they will choose to not make the purchase. The consumer can then investigate what terms are being offered by other suppliers of that type of product. Legal intervention is unnecessary because there is an incentive for the supplier to offer the consumer favourable terms. In contrast, unexamined terms do not form part of the consumer's purchasing decisions and so there is no incentive for the supplier to compete on the basis of them. In fact some suppliers may deliberately insert unfair terms in order to be able to increase the competitiveness of those terms which are more likely to be examined by consumers, such as price.

B. How the NZLCR Bill attempts to limit the unfair terms law to "unexamined terms"

The NZCLR Bill endeavours to restrict the scope of the unfair terms rules to those terms that are unexamined by excluding any term that:[36]

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32 See Todd D Rakoff, "Contracts of Adhesion: An Essay in Reconstruction" (1983) 96 Harv L Rev 1174.

33 See Russell Korobkin, "Bounded Rationality, Standard-form Contracts, and Unconscionability" (2003) 70 The University of Chicago Law Review 1203.

34 See Roger Brownsword and Geraint Howells, "The Implementation of the EC Directive on Unfair Terms in Consumer Contracts — Some Unresolved Questions" [1995] Journal of Business Law 243, 247.

35 See The Unfair Terms in Consumer Contracts Regulations 1999 (UK), reg 6(2); Competition and Consumer Act 2010, Schedule 2 (Australian Consumer Law) s 26.

36 See s 46K(1) inserted by clause 26A.

(a) defines the main subject matter of the contract: or

(b) sets the upfront price payable under the contract;

It also excludes terms required or expressly permitted by any enactment. This latter exclusion is not because the terms are likely to be examined ones but because it would clearly be unsatisfactory to allow scrutiny of the fairness of a term that is required or permitted by law.

The New Zealand exclusions (a) and (b) are an exact copy of the Australian Consumer Law exclusions.[37] The UK legislation is similar but worded slightly differently. Regulation 6(2) provides that:

[i]n so far as it is in plain intelligible language, the assessment of fairness of a term shall not relate

(a) to the definition of the main subject matter of the contract, or

(b) to the adequacy of the price or remuneration, as against the goods or services supplied in exchange.

Terms relating to price and subject matter are excluded by all three countries because they are of sufficient importance to consumers that they will examine them and make purchasing decisions on the basis of them. In principle *all* examined terms should be excluded, but to avoid uncertainty it seems reasonable to restrict the exclusion to the two main core terms that are routinely examined by consumers –price and subject matter. However, drafting the legislation in such a prescriptive manner reduces flexibility and removes the possibility of excluding other terms that might also be routinely examined by consumers.

Even with two specifically identified categories of examined term there may be uncertainty as to scope and meaning. For example, it may not always be easy to determine whether some terms as to payment should be considered terms as to "price" or are better thought of as terms relating to obligations on default or some other type of contingent fee. The UK case, *Office of Fair Trading v Abbey National plc* illustrates this potential difficulty.[38] In this case, UK bank customers alleged that a term that imposed unauthorised overdraft fees was unfair. Both the High Court and the Court of Appeal held that the term did not relate to "price or remuneration, as against the goods or services supplied in exchange" because it was not a "core" or 'essential" price term. There was therefore jurisdiction to assess the fairness of the banks' unplanned overdraft fees. The Supreme Court reversed this and decided that the concept of "price or remuneration" covers a

37 Competition and Consumer Act 2010, Schedule 2 (Australian Consumer Law) s 27(1).
38 [2010] 1 All ER 667

payment that is contractually payable on the occurrence of a particular event and therefore the unfair terms legislation does not apply.[39] Unfortunately, this interpretation unduly restricts the concept of "price or remuneration" without giving sufficient weight to the policy underpinning the legislation. It removes terms that consumers routinely fail to examine from being subject to scrutiny for fairness. These terms are not subject to market forces and therefore have the potential to be unfair. The decision has been criticised by one academic as leaving little scope for the operation of the unfairness, and being based on an unrealistic view of the 'average consumer'.[40]

Current proposals to reform the UK unfair terms rules include a provision that terms relating to price should be exempt from review if they are transparent and prominent.[41] The term would be considered "prominent" if it is bought to the attention of the consumer in such a way that the average consumer would be aware of the term. This change was recommended by the UK Law Commission to provide greater clarity to the price exemption rule.[42] The proposal will not, however, make it any clearer what charges are covered by the concept of "price". It also makes the dubious assumption that the average consumer will examine and make a purchasing decision on the basis of all transparent and prominent terms in standard-form contracts.

Both the New Zealand and Australian provisions include more specific guidance on how to interpret the concept of "the upfront price payable under the contract" by adding in a definition of "upfront price". The Australian Consumer Law introduces a narrow definition thereby reducing the range of terms that can be excluded from the unfair terms rules. It defines "upfront price as the consideration that:[43]

(a) is provided, or is to be provided, for the supply, sale or grant under the contract: and;
(b) is disclosed at or before the time the contract is entered into; **but does not include any other consideration that is contingent on the occurrence or non-occurrence of a particular event.** (*emphasis added*)

This definition ensures that bank charges such as those in *Office of Fair Trading v Abbey National plc* would not be excluded from review under the Australian unfair terms provisions. It is more consistent with the rationale behind unfair terms legislation than the approach taken by the Supreme Court.

39 As per Lord Mance para 104.
40 Mindy Chen-Wishart "Transparency and Fairness in Bank Charges" (2010) 126 Law Quarterly Review 157.
41 See clause 67 of the Draft Consumer Rights Bill (2013) (UK).
42 Law Commission UK Unfair Terms in Consumer Contracts Advice paper (March 2013) para 3.109 at page 33.
43 Competition and Consumer Act 2010, Schedule 2 (Australian Consumer Law), s26.

The drafters of the NZCLR Bill have taken the exact opposite approach from the one taken by Australia. They have widened the definition of "upfront price" in such a way that a large range of terms will not be able to be scrutinised for fairness. The "upfront price" is defined as:[44]

> [t]he consideration (**including any consideration that is contingent upon the occurrence or non-occurrence of a particular event**) payable under the contract, but only to the extent that the consideration is set out in a term that is transparent. (*emphasis added*).

This wording codifies the unconvincing approach taken by the Supreme Court in the UK in *Office of Fair Trading v Abbey National plc*. It significantly reduces the usefulness of the New Zealand unfair terms legislation and does not accord with the natural meaning of "upfront price". In a broad sense all the terms of a contract are in some way related to "consideration payable under the contract**"** as they all form part of the bargain that is supposedly being struck between the parties. One party agrees to give *x* in return for the other giving *y*. This far-reaching exclusion does not accord with the policy underpinning the legislation.[45] It results in the exclusion of the types of terms that consumers do not routinely examine. The fact that the exclusion will not apply if the term is "transparent" does not alter the improbability of the consumer examining most of these contingent payment terms.[46] Take the example of a scroll-down box of contingent terms in a standard-form contract made online. It does not matter if the terms are in plain English, in bold capitals and easy to scroll through. Consumers will still not examine them, will not make a purchasing decision based on them and will not try to negotiate them. Assuming that transparency will ensure that consumers routinely examine these terms before entering the contract is unrealistic. Acknowledging the reality of consumer behaviour when entering a standard-form contract lies at the heart of the rationale for unfair terms legislation.

Terms that relate to payment obligations on default, termination or variation can all be viewed as part of the consideration payable "contingent on the occurrence or non-occurrence of particular events". Specific terms that the extended definition of "upfront price" in the New Zealand proposal might exclude from scrutiny include:[47]

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44 See s 46K(2) inserted by Clause 26A..

45 See, for example, Ministry of Consumer Affairs Consumer Law reform Additional Paper – September 2010 Unfair Contract Terms, 2 (the paper refers repeatedly to the problem of consumers not having the opportunity to read all the terms of standard-form contracts and suppliers therefore not being subject to competition in respect of these terms. This is cited as providing part of the justification for imposing unfair terms legislation)

46 A "transparent" term is defined in clause 6 of the NZCLR Bill as one which is expressed in reasonably plain language, is legible, presented clearly and readily available to any party affected by the term.

47 Many of these examples are taken from contracts found on the internet. Some are taken

- a term in a broadband supply agreement that imposes excessive penalties on consumers who choose to switch providers,;
- a term in a retirement home contract which states that the weekly maintenance and gardening fee may increase at any time if the retirement home makes this decision with no need to give the grounds for the increase to the consumer;
- a term in a gym membership agreement that charges an excessive fee to consumers who move out of town and cancel their membership.
- A term in a broadband supply agreement that states "If your phone line is disconnected for any reason, we will be unable to provide broadband service to you and this will mean that you have terminated our agreement for the provision of that service. If services are reinstalled, even on the same phone number, you may incur installation charges;
- A term in a software click wrap agreement which imposes monetary penalties for purchasers who publicly report an evaluation of the product;
- A term in a twelve-month magazine subscription contract that commits the customer to paying for further six months supply if the customer fails to notify the supplier that they wish to discontinue the subscription after twelve months;
- A term in a mobile telephone agreement that allows the phone company to vary charges or rates or charge to the customer any taxes or duties imposed in relation to the Services at any time without prior notice.

Confusingly, one of the examples that the Bill gives in its list of potentially unfair terms refers to terms that penalise a party for a breach or termination of the contract. The interpretation difficulties that arise from the conflict between this example and the extended definition of "upfront definition" are discussed below in Part 6(F).

The current definition of "upfront price" contained in the Bill should be removed for the reasons outlined above. The phrase "upfront price payable under the contract" should be defined as "the consideration that is provided, or is to be provided, for the supply, sale or grant under the contract and is disclosed at or before the time the contract is entered into." This follows the wording of the first part of the definition of "upfront price" in the Australian Consumer Law. New Zealand should not, however, go so far as to follow the Australian approach of adding a blanket provision that never allows any term that relates to any contingent consideration to be excluded from the unfair terms legislation. It would be preferable instead to add a more flexible provision that establishes a presumption that such terms will not be excluded. However, if it can be proved by the supplier that consumers ordinarily read and take into account a particular term of this type then that term should be excluded from scrutiny for unfairness. Each case should be considered on its own facts. There may be some uncommon cases where a

from a list of real-life examples given by the Australian Consumers' Association in its submission on the Trade Practices Act Review 2002 <www.tpareview.treasury.gov.au>.

term relating to consideration that is contingent, either on the occurrence or non-occurrence of a particular event, is so central to the contract that it is routinely examined by consumers. In this case the term should not be subject to scrutiny for fairness. This approach accords with the underlying policy and justifications for unfair terms legislation. The focus, of course, should always be on the reality of whether most consumers are examining the term not on an assessment of whether consumers *should* have been taking the term into account.

5. CONSUMER

A. Reasons why unfair terms legislation should be limited to consumers

The third element that should be present in order to justify a law intervening to prohibit unfair terms is that the contract should be a *consumer* contract. The New Zealand proposal follows the Australian and UK approach of limiting the unfair terms rules to consumer contracts.[48]

Consumer contracts are generally regarded as those contracts entered into by individual consumers buying goods and services for private use and not for business purposes. Consumers are most at risk of not reading many of the terms of standard-form contracts and consequently market forces fail to operate on these terms. When a business enters into a standard-form contract it is more likely than a consumer to examine the terms because it usually has more power to negotiate the terms.

There has been some debate in recent years as to whether small business should be offered the same legal protection as consumers because they do not have the same degree of bargaining power as large corporations.[49] Unfortunately, attempting to draw a line between small and large businesses inevitably involves a high degree of arbitrariness. There has not yet been an attempt in any New Zealand legislation to draw a line between small businesses and large commercial entities.

48 See NZCLR Bill (NZ) Clause 11A which inserts section 26A into the Fair Trading Act 1986; The Unfair Terms in Consumer Contracts Regulations 1999 (UK), reg 4; Competition and Consumer Act 2010, Schedule 2 (Australian Consumer Law), s 23.

49 See Part 4 of the Ministry of Consumer Affairs, Review of the Reform of the Redress and Enforcement Provisions of Consumer Protection Law — International Comparison Discussion (2006); Part 5 of the UK Law Commission and the Scottish Law Commission Report, Unfair Terms in Contracts (Law Com 292, Scot Law Com 199, 2005), 78-99, available online at <www.lawcom.gov.uk> (last accessed 31 May 2009). See also Ministry of Consumer Affairs paper Consumer Credit Law Review: Part 2 (2000) part 3.2, pp 13-18 and part 4.3, p 22 for discussion on the issue of whether small businesses should be covered by consumer credit laws.

B. The definition of "consumer" under the NZCLR Bill

A definition for "consumer" can be drafted by reference to the *actual* purpose for which the product is purchased or with reference to the purposes for which the product is *ordinarily* purchased. The former approach limits "consumers" are to buyers who actually purchase for personal purposes rather than business purposes. This is the approach used in both the Australian and the UK unfair terms legislation.[50]

The proposed New Zealand unfair terms legislation diverges on this point and instead uses an "ordinary use" test. "Consumer" is defined by reference to the purposes which the goods and services in question are *ordinarily* purchased and then excludes situations where these products are bought for certain business purposes. "Consumer" is defined as a person who: [51]

(a) Acquires from a supplier goods or services of a kind ordinarily acquired for personal, domestic, or household use or consumption; and
(b) Does not acquire the goods or services, or hold himself or herself out as acquiring the goods or services, for the purpose of—
    (i) Resupplying them in trade; or
    (ii) Consuming them in the course of a process of production or manufacture; or
    (iii) In the case of goods, repairing or treating in trade other goods or fixtures on land.

The main argument in favour of this definition is that it is consistent with the definition used in the New Zealand *Consumer Guarantees Act 1993*, which is arguably New Zealand's most important piece of consumer legislation to date.[52] This statute offers consumers protection when products breach various statutorily implied guarantees such as the guarantee of acceptable quality and the guarantee as to fitness for purpose. It would be confusing and complicated for the unfair terms legislation to have a different definition of "consumer" from the *Consumer Guarantees Act*.

The chief benefit of the "actual purpose" test used in the UK and Australia is that it excludes precisely those buyers that should be excluded from the legal

50 See Competition and Consumer Act 2010, Schedule 2 (Australian Consumer Law), s 23(3); The Unfair Terms in Consumer Contracts Regulations 1999 (UK), reg 3(1). An "actual purpose" approach is also used in New Zealand's consumer credit laws. See Credit Contracts and Consumer Finance Act 2003, s 11(1)(a)-(b) where a "consumer credit contract" is limited to credit contracts where the debtor must be a natural person who enters the contract primarily for personal, domestic or household purposes

51 The NZCLR Bill, clause 6(2).

52 See the Consumer Guarantees Act 1993 (NZ) s 2. Under s 43 the parties are entitled to contract out of the Act if the consumer is acquiring the goods or services for a business purpose.

protection, namely those buying for business purposes. The New Zealand "ordinary use" definition, on the other hand, has the pragmatic advantage of allowing suppliers who sell a product that is ordinarily supplied to businesses but, occasionally supplied to someone for personal use, to remain unfettered by unfair terms legislation. So, for example, a supplier of large photocopiers would not be required to comply with the consumer legislation which seems reasonable given the nature of the products being sold. Any fears that a small subset of people buying for personal use will be exposed to unfair terms with no legal protection are probably exaggerated. The fact that the majority of purchasers entering these standard-form contracts are businesses means that market forces are likely to operate effectively to ensure that terms are fair.

6. DETERMINING WHETHER A TERM IS "UNFAIR"

The concept of "unfair" is extremely difficult to pin down. *Director General of Fair Trading v First National Bank*,[53] a UK case, illustrates the inevitably subjective nature of the term "unfair". The disputed term entitled the bank to charge a customer its contractual interest rate after a judgment for default on a credit agreement. Without this term the bank would have ceased to have a right to interest on the amount owing after judgment. The trial Judge found the disputed term to be *not* unfair. The Court of Appeal took a different view and found the term *was* unfair. On appeal, the House of Lords unanimously found that the term was *not* unfair. One academic commentator has said that the effect of the term could reasonably be described as "onerous, unexpected, disagreeable or even shocking" and protested that the House of Lords decision does little to reassure consumers that the law really works for their benefit.[54]

It is important that any unfair terms legislation provides a useful definition of "unfair terms" that allows for guidance without being so restrictive that new and previously unanticipated types of unfair term are excluded. The provisions of the NZCLR Bill that establish how to determine whether a term is unfair are modelled on the corresponding provisions in the Australian Consumer Law and are similar in many respects to the UK provisions.[55] They establish a set of broad principles that define an unfair term which are followed by a list of examples of terms that may be unfair. The wide definition allows for flexibility and the list of examples increases certainty without becoming undesirably prescriptive.

53 Director General of Fair Trading v First National Bank [2002] 1 All ER 97.

54 Meryll Dean, "Defining Unfair Terms in Consumer Contracts — Crystal Ball Gazing? Director General of Fair Trading v First National Bank plc" (2002) 65 The Modern Law Review 773, 780.

55 See Competition and Consumer Act 2010, Schedule 2 (Australian Consumer Law) s24 and 25; The Unfair Terms in Consumer Contracts Regulations 1999 (UK), reg 5 and 6.

A term will be unfair if the court is satisfied that the term: [56]

(a) Would cause a significant imbalance in the parties' rights and obligations arising under the contract; and
(b) Is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and
(c) Would cause detriment (whether financial or otherwise) to a party if it were applied, enforced or relied on.

The onus is on the party who would be advantaged by the term to prove that it is reasonably necessary in order to protect the legitimate interests of that party. The advantaged party will typically be the supplier. In determining whether a term is unfair the court may take into account any matter it thinks is relevant but *must* take into account:

(a) the extent to which the term is transparent; and
(b) the contract as a whole.

One minor criticism is that the provisions refer to unfair terms in a "consumer contract". It would be more accurate to have referred to terms in a "standard-form consumer contract'. The Bill appropriately limits scrutiny to terms in standard-form contracts and this should be reflected in the provisions that define what is unfair.[57]

The following sections examine whether the general broad principles are appropriate and whether the examples given in the list are constructive.

A. Significant imbalance in the parties' rights and obligations under the contract

A term will only be unfair if it causes a significant imbalance in the parties' rights and obligations arising under the contract. This "significant imbalance' test can be found in both the UK and Australian unfair terms provisions and encapsulates the essence of what is meant by an unfair contractual term. In the UK case, *First National*, Lord Bingham explained this test of "significant imbalance":[58]

> The requirement of significant imbalance is met if a term is so weighted in favour of the supplier as to tilt the parties' rights and obligations under the contract significantly in his favour. This may be by the granting to the supplier of a beneficial option or discretion or power, or by the imposing on the consumer of a disadvantageous burden or risk or duty.

56 See section 46L is to be inserted into the Fair Trading Act 1986 by clause 26A of the NZCLR Bill.
57 See section 46H inserted to be inserted in to the Fair Trading Act 1986 by clause 26A of the NZCLR Bill.
58 Director General of Fair Trading v First National Bank [2001] 3 WLR 1297, [17].

New Zealand has adopted the proper approach by basing the test for unfairness on an imbalance of rights and obligations.

B. Term reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term

The New Zealand and Australian provisions add a further test to the "significant imbalance" requirement that is not included in the UK provisions. They require the term to be "not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term". This introduces imprecise and subjective notions of "reasonably necessary" and "legitimate interest" which probably do not add any more clarity to the concept of "unfair".

The test might be used to cover situations where the supplier is using a term to protect themselves from risks inherent in the transaction ("legitimate interests") and the term is a proportionate response to the risks ('reasonably necessary'). However, this kind of scenario can easily be taken into account in the second part of the provision where the court is authorised to consider all the matters it thinks relevant and required to take into account the contract as a whole when determining whether the term is unfair.

C. Detriment (whether financial or otherwise) to a party if the term were applied, enforced or relied on

The final test for unfairness under the NZCLR Bill is that the term would cause detriment (whether financial or otherwise) to a party, if it were enforced or relied on. This test has been imported from the Australian Consumer Law. In one respect this term is an improvement on the UK provision which requires that the imbalance in rights or obligations be "to the detriment of the consumer" but does not add in the proviso that this only needs to be "if [the term] is enforced or relied on".[59] In the Australian and New Zealand test it is clear that it is not necessary to prove that the term was actually relied on by supplier or to show that the consumer has actually suffered harm because of an unfair term. However, in another respect the UK test is superior to the NZ and Australian test. The UK test specifies that it is "consumer" detriment that is important. The NZ and Australian provisions merely refer to detriment to "a party". The reference to *consumer* detriment is helpful because it makes it clear that unfair terms legislation is designed to protect consumers, not suppliers, from unfair terms.

59 See The Fair Trading Act 1999 (Vic), s 32W; The Unfair Terms in Consumer Contracts Regulations 1999 (UK), reg 5(1).

D. Good faith and transparency – procedural fairness versus substantive fairness

The definition of "unfair" given in the UK adds a reference to "good faith" in its test for unfairness. A term is to be regarded as 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".[60] This "good faith" element has sensibly been omitted from the Australian and New Zealand provisions.

The reason Australia did not include the "good faith" element was because of its "uncertain application".[61] A further problem with the notion of good faith is that it is essentially a procedural issue and arguably introduces a consideration of the motives of the supplier rather than the substantive content of the terms. It is important that a prohibition on unfair terms is limited to substantive unfairness and not extended to procedural fairness. Procedural unfairness usually refers to the unfairness of the contractual process. So it can include such factors as unconscionability, undue influence, duress, terms written in confusing English, hidden terms and misleading information. It means that the way the contract was made was unfair. Substantive unfairness, on the other hand, refers to the unfairness of the content of the terms. It relates to the meaning and effect of specific terms. Procedural unfairness may, of course, increase the likelihood of substantive unfairness. In fact, the whole notion of the standard-form contract is a procedural device likely to increase the chances of substantively unfair terms. But if the substance of the contract is fair in spite of procedural unfairness then unfair terms legislation should not interfere with the contract. To mix up procedural and substantive unfairness into one concept of an "unfair term" is bound to create confusion and uncertainty.[62] Moreover, there are other statutory, common law and equitable rules that already deal with various aspects of procedural unfairness.[63] Although the New Zealand and Australian legislation avoid the reference to "good faith" there is a requirement that the court take into account "the extent to which a term is transparent". A term is transparent if it is:

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60 See The Fair Trading Act 1999 (Vic), s 32W; The Unfair Terms in Consumer Contracts Regulations 1999 (UK), reg 5(1).

61 See Treasury consultation paper entitled The Australian Consumer Law — Consultation on draft provisions on unfair contract terms (2009) <www.treasury.gov.au> (last accessed 29 May 2009) 3.

62 See Susan Bright, "Unfairness and the Consumer Contract Regulations", ch 9 in Andrew Burrows and Edwin Peel (eds), Contract Terms (Oxford University Press, UK, 2007) 173, 178-187 where Bright discusses the confusion under the UK regulations as to the extent to which either procedural or substantive issues can alone render a contractual term unfair. See also Jeannie Paterson "The Australian Unfair Contract terms Law: The Rise of Substantive Unfairness as a Ground for Review of Standard Form Consumer Contracts" (2009) Melbourne University law review 934, 951.

63 For example: misleading conduct under the Fair Trading Act 1986, the equitable doctrine of undue influence and the common law doctrine of duress.

(a) expressed in reasonably plain language; and
(b) legible; and
(c) presented clearly; and
(d) readily available to any party affected by the term

There is no current statutory requirement in New Zealand for transparency. However, rather than incorporating this matter of procedural fairness into a definition of an "unfair" term, it should be dealt with quite separately. A provision could be inserted into the *Fair Trading Act 1986* that requires a supplier to ensure that any written term of a consumer contract is expressed in plain, intelligible language, is readily available to the consumer and that any ambiguity is interpreted in a way that is most favourable to the consumer.[64] This would ensure that the core terms of the contract (those terms that refer to price and subject matter) are not misunderstood by consumers. Unfair terms legislation, on the other hand, regulates only the non-core terms of the contract. Incorporating the idea of transparency into the test for the unfairness of these terms is problematic in two ways.

First, it creates uncertainty and confusion by mixing up concepts of substantive and procedural fairness which require consideration of quite separate questions. Second is the danger that the legislation might be interpreted as meaning an otherwise imbalanced and disproportionate term is not unfair simply because the supplier can show that the term was highly transparent. The purpose of unfair terms legislation should be to move beyond the idea that a contract need not be fair so long as it is clear. The reason that legislation is required is that rational consumers will not read the non-core terms of standard from contracts irrespective of transparency.[65] If transparency was the problem we would not need unfair terms legislation. The legislation is needed to allow the courts to scrutinise whether these non-core terms are unfair in substance. In the Australian case of *Jetstar Airway Pty Ltd v Free* Cavanough J discussed the unfair terms rules that were at that time part of the law of Australian State of Victoria.[66] He stated that the regime:[67]

64 The UK legislation includes a similar provision, see The Unfair Terms in Consumer Contracts Regulations 1999 (UK), reg 7.

65 See Mindy Chen-Wishart above n 37, 160. Chen-Wishart argues that "[c]onsumer protection law should take cognisance of the fact that rational consumers do not ready lengthy complicated standard from contracts for goods or services they need, whether or not in plain intelligible language."

66 The Fair Trading Act 1999 (Vic), Part 2B. These provisions have now been amended to mirror the unfair contract terms provisions under the Australian Consumer Law.

67 [2008] VSC 539 (Unreported, Cavanough J, 3 December 2009) [115]. For articles that argue that consumer protection law should only be about transparency and not the reasonableness of the terms see H. E. Brander and P. Ulmer "The Community Directive on Unfair Terms in Consumer Contracts: Some Critical Remarks on the Proposal Submitted by the EC Commission." (1991) 28 C.M.L.Rev 647 at 656-657 and Hugh Collins "Good Faith in European Contract Law" (1994) 14 O.J.L.S 229.

> proceeds on the assumption that some terms in consumer contracts, especially in standard from consumer contracts, may be inherently unfair, regardless of how comprehensively they might be drawn to the consumer's attention.

By specifically requiring the Court to consider the transparency of the term when assessing whether the term is unfair there is a real risk that comprehensive transparency might be taken to outweigh arguments regarding substantive unfairness.

E. The contract as a whole

In addition to the "transparency of the terms" the NZCLR Bill requires the court to also take into account "the contract as a whole" when determining unfairness. The Australian unfair terms law also includes this requirement. A harsh term may be "unfair" in one contract but in another contract, where the harsh term is offset by a lower price or other term favourable to the consumer, it might not be so readily viewed as "unfair".

All the other terms in the contract, both examined and unexamined ones, need to be considered when determining the fairness of a term. It is only when assessing the term in the broad context of the contract as a whole in this way that a rational assessment of fairness can be made. The task should require consideration of other economically viable combinations of terms and whether, taken as a whole, these would have been any less preferable for consumers. For example, if an allegedly unfair term relating to exclusion of liability had not been used it might have resulted in a much higher price being charged to the consumer. This might lead to a finding that in the context of the contract as a whole the term is not unfair. On the other hand if the harsh term has resulted in only a slight price reduction at the expense of imposing a huge potential loss on the small number of consumers ultimately affected by a supplier 's misconduct then there may well be a finding of unfairness.

Some harsh terms are in fact necessary in order for the contract to be feasible. For example, a bank that lends to a high risk borrower needs a term that provides them with a high level of security. Banning this type of harsh term might not result in these contracts being re-written with more lenient terms. The outcome might instead be that these contracts are no longer available and it becomes impossible for low income consumers to get access to loans.

The UK legislation likewise requires consideration of the contract as a whole. It also gives an additional set of factors to be taken into account. It requires that the unfairness of a contractual term be assessed by taking into account:[68]

68 The Unfair Terms in Consumer Contracts Regulations 1999 (UK), reg 6(1).

> the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent.

The New Zealand and Australian provisions allow the court to consider "any matters it thinks are relvant". Therefore the additional factors listed in the above UK provision could also be considered by a New Zelaland court. Nevertheless, it would be prefereable if the New Zealand provision was re-drafted so that "all other relevant matters/circumstances" were something that the court *must* take into account rather than something that it *may* take into account.

Obviously the assessments required for determining whether a term is unfair are not easy and involve a degree of subjectivity. It may be difficult for a court to determine what alternative combination of terms would have been used if the alleged unfair term had been removed or re-drafted. It may be difficult for a court to determine whether these alternatives would in fact have been more or less detrimental to consumers. At this stage in the analysis it is tempting to protest that there is too great a danger that a court or other decision-maker will make false assumptions about consumer preferences and that they should not therefore be tampering with these contractual terms. What needs to be remembered, however, is that although the system of an external decision-maker assessing fairness may not be perfect it is an improvement on leaving the decision to consumers in the marketplace. This is because consumers simply do not make the decision. It is irrational for them to spend the time and energy required to read, understand and make decisions based on non-core terms. It is therefore better to allow a court to intervene in regulating the fairness of these terms notwithstanding the difficulty of this task. Without such legal control, the content of these terms will, in the absence of effective market forces, be determined only by suppliers.

F. What kind of terms should be on the indicative list?

The NZCL Bill sets out a non-exhaustive indicative list of terms that might be considered unfair. This follows the approach taken in the UK and Australian unfair terms legislation.[69] The kinds of terms that may be unfair include:

(a) a term that permits, or has the effect of permitting, one party (but not another party) to avoid or limit performance of the contract;

(b) a term that permits, or has the effect of permitting, one party (but not another party) to terminate the contract;

(c) a term that penalises, or has the effect of penalising, one party (but not

69 See schedule 2 of The Unfair Terms in Consumer Contracts Regulations 1999 (UK); Competition and Consumer Act 2010, Schedule 2 (Australian Consumer Law), s25(1).

another party) for a breach or termination of the contract;

(d) a term that permits, or has the effect of permitting, one party (but not another party) to vary the terms of the contract;

(e) a term that permits, or has the effect of permitting, one party (but not another party) to renew or not renew the contract;

(f) a term that permits, or has the effect of permitting, one party to vary the upfront price payable under the contract without the right of another party to terminate the contract;

(g) a term that permits, or has the effect of permitting, one party unilaterally to vary financial services to be supplied under the contract;

(h) a term that permits, or has the effect of permitting, one party unilaterally to determine whether the contract has been breached or to interpret its meaning;

(i) a term that limits, or has the effect of limiting, one party's vicarious liability for its agents;

(j) a term that permits, or has the effect of permitting, one party to assign the contract to the detriment of another party without that other party's consent;

(k) a term that limits, or has the effect of limiting, one party's right to sue another party;

(l) a term that limits, or has the effect of limiting, the evidence one party can adduce in proceedings relating to the contract; and

(m) a term that imposes, or has the effect of imposing, the evidential burden on one party in proceedings relating to the contract.

Both the New Zealand and Australian lists refer to terms that disadvantage "one party" without referring to whether that party is the consumer or the supplier. In contrast, the UK list refers to terms that favour the supplier to the disadvantage of the consumer. The UK approach is preferable in this respect. It makes it clear that the unfair terms legislation is intended to protect consumers. The references in the list to "one party" and the "other party" should be re-drafted to refer to the "consumer" and "supplier". This would accord more directly with the policy objectives of the legislation.

Many of the examples of unfair terms given in the list give the impression that fairness depends on whether a right given to the supplier is mirrored by a similar right given to the consumer. Perfect symmetry of rights and obligations is not, however, a requirement in order for the terms of a contract to be fair. The important question will always be whether a term is fair in the context of the contract as a whole. There may be times where a non-symmetrical term is not unfair in a particular contract because it is balanced by a beneficial term elsewhere in the contract.

One interesting aspect of the list is example (c). It states that a term may be unfair if it penalises, or has the effect of penalising, one party for a breach or termination of the contract. This type of term could be viewed as one that provides for consideration to be paid contingent on the occurrence or non-occurrence of an event. In other words, if the consumer breaches or terminates the contract (this will occur by way of the occurrence or non-occurrence of an event) then the consumer will be subject to a penalty (this is the contingent consideration that the consumer agrees to pay under the contract). This seems to be in direct conflict with the earlier provision in the Bill which excludes cover for any term that sets any consideration that is contingent upon the occurrence or non-occurrence of a particular event.[70] It is therefore surprising that one of the terms listed as an example of a possibly unfair term appears to fit within this exclusion. It has been argued above that an exclusion of this kind is not appropriate. It is not clear whether or not a term such as the one in *Office of Fair Trading v Abbey National plc* (UK) that imposed unauthorised overdraft penalty fees on its bank customers would be subject to scrutiny under the NZCLR Bill.[71] On the one hand it appears to be one of the types of excluded terms under section 46(K). On the other hand it also appears to fit into sub paragraph (c) in the listed examples of potentially unfair terms. Quite apart from the question of whether this type of term should be covered by the legislation, the provisions need to be re-drafted in order to remove the current uncertainty and confusion.

7. Penalties and Enforcement

A person who breaches the ban on unfair terms will be subject to existing criminal and civil remedies under Part 5 of the *Fair Trading Act 1986*. Fines are proposed to triple under the NZCLR Bill to up to $200,000 for individuals and $600,000 for businesses. Where is can be shown that a person has or is likely to suffer loss because of the unfair term, the court could, make a declaration that the unfair term is void, make an order that the terms of the contract are varied, or make an order that the party who used an unfair term refund money to the other party.[72] The available civil remedies have not been drafted specifically for unfair terms. It might have been clearer to have also introduced specific remedies for breach of the unfair terms rules. These could have declared, for example, that any unfair term is not binding on the consumer and that if the contract is capable of operating without the unfair term then the contract continues to be binding on both parties.[73]

One key difference between the Australian provisions and the New Zealand proposal is that under the New Zealand model a term will only be considered unfair if the High Court or District Court declare it as such after an application from the Commerce Commission.[74] Australia and other jurisdictions that prohibit unfair terms do not require a regulator to initiate proceedings but instead allow

70 See section 46(K)(1) and 46(K)((2) inserted into the Fair Trading Act 1986 by clause 26A of the NZCLR Bill

71 [2010] 1 All ER 667

72 Section 43(2) Fair Trading Act 1986.

73 This is the approach taken in the UK. See The Unfair Terms in Consumer Contracts Regulations 1999 (UK), reg 8(1) and 8(2);

74 Clause 26A.

consumers to bring an action alleging that a term is unfair. It is unfortunate that New Zealand consumers will be deprived of the right to take independent legal action against suppliers who are attempting to enforce an unfair term. The proposed scheme does, however, allow consumers to ask the Commerce Commission to apply to the court for a declaration of unfairness on their behalf. Ideally the legislation would have allowed either consumers or the Commerce Commission to initiate proceedings rather than making the Commission the gatekeepers for unfair terms proceedings. Nevertheless, the role of the Commission is an important one. There will be many consumers who are unaware of their rights or do not have the time, money or energy required to resolve a dispute in the courts. The Commerce Commission will ideally, given sufficient resources, take both post-dispute action on behalf of consumers and also implement preventative strategies by working with industry groups to develop fair standard-form terms.[75]

8. Conclusion

The inclusion of an unfair terms prohibition in the NZCLR Bill is a significant and important step forward for New Zealand consumer protection law. It represents an acknowledgement that non-core terms in standard from consumer contracts are not subject to market forces and that ordinary rules of contract law do not provide consumers with sufficient legal protection. The proposed legislation has the additional benefit of aligning New Zealand consumer law more closely with Australian consumer law.

While the New Zealand proposed legislation is to be welcomed, there are nevertheless some aspects of it that are either confusing or fail to correspond directly with the rationale for an unfair terms prohibition. For example, the proposal:

- fails to clearly exclude individually negotiated terms in standard-from consumer contracts from the legislation;
- fails to cover pre-formulated standard from terms in consumer contracts that are otherwise not standard-form contracts;
- Unduly restricts the coverage of the legislation by excluding all terms that establish consideration that is contingent upon the occurrence or non-occurrence of a particular event;
- fails to clarify that the unfairness should relate to an imbalance in rights or obligations to the detriment of the *consumer* and not the supplier;
- Adds in the confusing and arguably irrelevant concept of "transparency" into the definition of "unfair terms".

75 Both the UK and Victorian schemes use this preventative strategy. In the UK, the Director General of Fair Trading is given the relevant powers and in Victoria, Australia, it is the Director of Consumer Affairs.

It is crucial that unfair terms rules are carefully drafted to match, as far as possible, the parameters of the justifications for a contravention of the principles of freedom and sanctity of contract.

One further shortcoming of the New Zealand proposal is that its enforcement is left entirely in the hands of the Commerce Commission. While the involvement of a government agency such as the Commission is desirable, it is regrettable that individual consumers will not have the right to bring their own action against a supplier for breach of the prohibition on unfair terms.