THE FUNCTIONS OF TRANSPARENCY IN REGULATING CONTRACT TERMS: UK AND AUSTRALIAN APPROACHES

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Abstract This article considers the functions of transparency in regulating consumer contract terms in the UK and Australia. The discussion is set in the context of EU level regulation with various references to civil law approaches. The main issue explored here is the extent to which transparency is capable of legitimizing substantively unfair terms. However, I also explore *other* roles that may be played by transparency and the extent to which these are facilitated in the UK and Australia.

I. INTRODUCTION

The role and limits of transparency in consumer law has been much discussed in recent years;[1] but this discussion must continue. Firstly, it is of significant practical importance for consumers. Are they protected from substantively unfair terms even when these are clear? Is transparency used effectively, for example, in aiding access to justice? Secondly, it is of theoretical importance to understand the roles played by transparency. Indeed, this theoretical significance extends beyond the area of contract terms. Regulation of contract terms goes to the core of the trader–consumer relationship; so an understanding of the approach to transparency in this particular context is an important part of the larger picture when it comes to the values of consumer law and policy.[2]

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[1] See, for example, D Kennedy, 'Distributive and Paternalist Motives in Contract and Tort Law with Special Reference to Compulsory Terms and Unequal Bargaining Power' (1982) Maryland Law Review 563; S Grundman, W Kerber and S Weatherill (eds), *Party Autonomy and the Role of Information in the Internal Market* (De Gruyter, 2001); C Willett, 'Good Faith in Consumer Contracts: Rule, Policy and Principle' in A Forte, *Good Faith in Contract and Property Law* (Hart, Oxford, 1999) 181; S Weatherill, *EU Consumer Law and Policy* (Elgar, Cheltenham, 2005), ch 4; S Smith, *Atiyah's Introduction to the Law of Contract* (OUP, Oxford, 2005) 319–329 and 323; G Howells, 'The Potential and Limits of Consumer Empowerment by Information' (2005) 32 Journal of Law and Society 3, 349; C Willett, *Fairness in Consumer Contracts* (Ashgate, Aldershot, 2007), 2.4.3.4-5, 3.44, 6.4.2 and 6.5; and, in the context of trade practices, see C Willett, 'Fairness and Consumer Decision Making', (2010) 33 Journal of Consumer Policy 247.

[2] For a very recent analysis of the tension in EU law between a social justice, consumer need based approach (which would favour the 'irreducible rights' approach discussed below) and a more free market, self reliant consumer choice approach (which is likely to incline to greater focus on transparency as a legitimizing factor) see H-W Micklitz, 'Jack is out of the Box-the Efficient Consumer-Shopper' (2009) JFT 3–4/2009, s 417.

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Third, it is a particularly appropriate time to raise these issues, as many of the rules affecting them have been the subject of suggested or actual reform recently in both the UK and Australia. In the UK, the Law Commissions have proposed a unified regime to replace the Unfair Terms in Consumer Contracts Regulations (UTCCR) 1999[3] (which implement the EU Unfair Terms in Consumer Contracts Directive[4] (UTCCD)) and the Unfair Contract Terms Act (UCTA) 1977.[5] There is also now a proposal for a new EU Consumer Rights Directive (CRD) covering unfair terms.[6] Further, the law on transparency and disclosure has been affected substantially by the Consumer Protection from Unfair Trading Regulations (CPUTR) 2008,[7] which implement the EU Unfair Commercial Practices Directive (UCPD).[8] In Australia, there have been a number of developments over the last few decades. These have included the New South Wales Contracts Review Act; the Victorian Fair Trading Act; and various important judgements. Then, following proposals in 2009, a new federal law on unfair terms was passed in 2010.[9]

It is argued here that the UK position on the role of transparency in legitimizing substantively unfair terms is uncertain and unstable. Of course, some terms are actually treated by the legislation itself as ineffective based entirely on their substantive effects (so that transparency clearly does not perform a legitimizing function in these cases). However, these terms apart, the issue depends on the proper interpretation of the general test of unfairness. Under this test it can be said, on the one hand, that the combination of the indicatively/presumed unfair approach and regulatory practice supports the idea that transparency *cannot* legitimize sufficiently substantively unfair terms. On the other hand, the stability of this position is threatened by the presence of the 'good faith' concept in the unfairness test. In short, in dealing with this concept, the problem is that the House of Lords (now the 'Supreme Court') has never indicated clearly that transparency cannot legitimize sufficiently substantively unfair terms.

In Australia, the story is of a change over time. In the case of the earlier provisions, it seems fairly clear that transparency probably *could* legitimize substantively unfair terms. By contrast, under the Victorian Fair Trading Act

[3] SI 2083.

[4] 93/13/EEC.

[5] English and Scottish Law Commissions, *Unfair Terms in Contracts*, Law Com No 292, Scot Law Com 199.

[6] COM (2008) 614 final. The CRD would bring together, with some amendments, the existing Directives on Unfair Contract Terms (n 4), Consumer Sales (99/44/EEC), Distance Selling (97/7/EC) and Doorstep Selling (85/577/EEC).

[7] SI 1277.

[8] 2005/29/EC.

[9] *An Australian Consumer Law: Fair Markets-Confident Consumers* (hereafter, 'An Australian Consumer Law'), 17 February 2009, available at http://www.ag.gov.au/cca, ch 6; followed by, *The Australian Consumer Law: Consultation on draft provisions on unfair contract terms* ('Unfair Terms Consultation'), Australian Government, The Treasury, 11 May, 2009; and finally the Competition and Consumer Act 2010, Schedule 2, Chapter 2, Part 2 (3) (and on this reform see *A Guide to the Unfair Contract Terms Law*, Australian Competition and Consumer Commission, 2010).

1999, it seems that transparency was not understood as having this effect. Now under the new federal law, what we find is at least a small degree of uncertainty. The government commentary on the new federal test seems to confirm that transparency is *not* intended to be able to legitimize terms that are sufficiently unfair in substance. However, the test itself does not make this clear, so the position remains uncertain. Protection against the substantive effects of terms is also weakened by the decision not to ban outright a number of terms.

Apart from addressing the question as to whether transparency can legitimize substantively unfair terms, I argue that transparency has *other* roles to play, ie in recognizing a right to a chance to understand terms, in furthering market discipline and in relation to post contractual access to justice. In order to achieve these goals it is necessary to require that *all* voluntarily used terms are transparent. The UK and Australian approaches to this could be improved by reference to the previous model in the State of Victoria and the current approach taken by the European Commission's Draft Common Frame of Reference. It is also necessary to require disclosure of certain important legal rights; and in this context EU law may have brought a significant advance in the UK that does not exist in Australia.

II. TRANSPARENCY AS A LEGITIMATING FACTOR VERSUS IRREDUCIBLE SUBSTANTIVE RIGHTS

Terms are 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 important terms (whether those that significantly reduce the rights of consumers or those that impose significant burdens on consumers).

These are the sort of criteria that tend to be insisted upon in relation to transparency in previous, existing or proposed legislative measures and by courts and regulators.[10] Our question here is regarding the significance of meeting such criteria. To what extent are terms made fair—to what extent are they legitimized—when they meet these standards of transparency? To the extent that transparency is required, and is then treated as a legitimating factor, the idea seems to be to prioritize the notion of (assisted) informed freedom of choice. Consumers are helped (by transparency) to better understand the

[10] Victorian Fair Trading Act 1999, s 163 (3) (repealed); English and Scottish Law Commissions, *Unfair Terms in Contracts* (n 3), Draft Unfair Contract Terms Bill, ss 14 (1) and (3); *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* (n 1) 2.4.2.2, 2.4.3.4 and 6.4.2.

terms; and, if they agree to them, they are bound on the basis that they have made an informed choice.

An alternative approach is to hold that transparency does *not* legitimize terms that cross a certain threshold of substantive detriment.[11] To some extent this approach can be said to be based on the view that transparency is not usually capable of *genuinely* informing consumers. This is because consumers are unlikely to read terms even when they are transparent. There are a number of reasons for this. First of all, there may be a large quantity of information to be processed prior to the decision to enter the contract;[12] meaning that consumers focus only on the core aspects of the transaction. Further, consumers may suffer from being overly optimistic and an inclination to discount future risks.[13] This may be because of factors such as the very positive general marketing messages; prior psychological commitment to purchases;[14] the way in which certain risks and benefits are 'framed;[15] and the 'normal' experience of routine, non-problematic performance by both parties, with terms (and their possibly negative consequences) not usually coming into play.[16] Also, consumers will know that traders will be unlikely to agree to any changes in any case; and may even believe that the terms have a legal sanction and represent 'the law'.

All of these factors make it unlikely that consumers will attempt to get to grips with the terms even when they are transparent. As such, transparency of terms cannot be viewed, in practice, as producing the level of pre-contractual understanding that would make for *real* informed freedom of choice. This perspective is increasingly supported by behavioural scientists.[17]

However, if the inability of transparency to produce informed consent was the only issue, then *no* standard terms would be legitimized by transparency: the substantive features of the terms would not matter. If and when

[11] For the purposes of this article I am assuming (as is often, but not always the case) that no alternative (and substantively fairer) terms are offered by the trader in question or by other traders. If the term under scrutiny is sufficiently transparent and there *is* a transparent, accessible and fairer alternative, the question arises as to whether the law should and/or does uphold the term under scrutiny even although it crosses a certain threshold of unfairness in substance. However, in the absence of this possible justification for upholding the term, we return to the question as to whether transparency alone is sufficient. On the issue of alternatives see C Willett, ibid, 2.4.2.2 and 2.3.4 (v).

[12] On quantity, in particular, see Better Regulation Executive and the National Consumer Council, *Warning: Too Much Information Can Harm* (Interim Report), NCC, London, 2007.

[13] So called 'hyperbolic discounting', on which see S Frederick, G Lowenstein and T O'Donoghue 'Time Discounting and Time Preference: A Critical Review' (2002) XL Journal of Economic Literature 351.

[14] Willett (n 1) 2.4.2.2.

[15] See I Ramsay, *Consumer Law and Policy* (Hart, Oxford, 2007) 73–74.

[16] Willett (n 1) 2.4.2.2.

[17] See Ramsay (n 15) 71–85; S Frederick, G Lowenstein and T O'Donoghue (n 13) 'Time Discounting and Time Preference: A Critical Review' (2002) XL Journal of Economic Literature 351; J Lee and JM Hogarth, 'The Price of Money: Consumer' Understanding of APRs and Contract Interest Rates' (1999) 18 Journal of Public Policy and Marketing 1, 66–76; and TA Durkin, 'Credit Card Disclosures, Solicitations and Privacy Notices: Survey Results of Consumer Knowledge and Behaviour' (2006) August, Federal Reserve Bulletin A109–A121.

transparency does not legitimize terms, it is obvious that a key rationale must be that consumers should be protected from terms that impose unacceptable substantive risks and burdens on consumers. Often, as we shall see below, the agenda seems to be the protection of certain 'irreducible rights':[18] for example, to be compensated for negligence and to goods that meet certain quality standards.

In the following section it is argued that there is uncertainty in both the UK and Australia as to just how far we have moved from the 'assisted informed freedom of choice' model to one recognizing irreducible substantive rights.

III. UK AND AUSTRALIAN APPROACHES TO TRANSPARENCY AS A LEGITIMIZING FACTOR

An introductory point is required here. In both the UK and under the new Australian federal regime, core price terms are excluded from the test of unfairness.[19] So, in relation to such terms, a freedom of contract approach applies. However, the focus here is on the values that apply in the case of the non-core, ancillary terms to which the tests of unfairness applies.

A. The UK

There is a category of terms where it is quite clear that transparency is not viewed as sufficient, ie terms that are not even subject to a general test of unfairness, but are deemed wholly ineffective based purely on their substantive features. In the UK this applies to terms excluding or restricting liability for negligently caused death or injury; and (in consumer cases only) for goods supplied in breach of the implied terms as to description, quality and fitness for particular purpose.[20] At present, no terms are wholly ineffective in this way under the general EU unfair contract terms regime (the UTCCD); although the Sales Directive (similarly to the aforementioned UK approach) renders ineffective exclusion or restriction of the liability for non conforming goods.[21] Further, the CRD would introduce a list of terms 'which are in all circumstances considered unfair'.[22] This (like the UK) would include terms

[18] This is a phrase used by Hugh Beale in this context in H Beale, 'Legislative Control of Fairness' in J Beatson and D Freidmann, *Good Faith and Fault in Contract* (OUP, Oxford, 1995) 245. Insisting on a certain level of fairness in substance has also been referred to as being about creation of a 'social market', within which certain basic social rights are guaranteed even within a market exchange (see H Collins, 'Good Faith in European Contract Law' (1994) 14 Oxford Journal of Legal Studies, 228, 246).

[19] UTCCR, reg 6 (2) (b) (93/13/EEC, art 4 (2)); *An Australian Consumer Law* (n 9) 34; and the Trade Practices Amendment Bill 2010, (n 9) s 26 (1) (b). On the UK provision, see recently Office of Fair Trading v Abbey National and Others [2009] UKSC 6.

[20] Unfair Contract Terms Act-UCTA-1977, ss 2 (1), 6 (2) and 7 (2).

[21] 99/44/EC, arts 2, 3 and 7 (1).

[22] CRD (n 5) art 34 and Annex II.

excluding or restricting liability for death or injury.[23] However, it would go further and cover terms by which traders deny responsibility for commitments undertaken by their agents.[24] There would also bans on terms that in varying ways interfere with consumer access to justice.[25]

However, beyond these bans, our question as to the role of transparency as a legitimating factor must be answered by reference to the applicable *general* tests of unfairness. First of all, there is the 'reasonableness' test under UCTA 1977. This applies to terms excluding liability for negligence causing losses other than death or injury,[26] breach of contract,[27] and misrepresentation;[28] and to terms requiring consumers to indemnify traders[29] and terms allowing traders to render a performance substantially different from that reasonably expected or no performance at all.[30] In applying this reasonableness test, transparency has been considered as a relevant factor in several business to business cases;[31] but seems to have been given little consideration in consumer cases. In the only House of Lords decision involving a consumer contract the focus was on the substantive impact of the term and the related questions as to 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 these matters into account, the term (which excluded liability for a negligent survey) was found not to be reasonable.[32] 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 legitimizing factor.[33]

However, the significance of the UCTA case law is extremely limited for two reasons. First, UCTA is a purely private law regime; there being no power for courts or regulatory bodies to *prevent* traders using unreasonable terms

[23] CRD, Annex II, para (b). [24] Para (b).

[25] Excluding or hindering the right to take legal action or exercise a legal remedy, particularly by requiring consumers to take disputes exclusively to arbitration not covered by legal provisions (para (c)); restricting the evidence available to the consumer or imposing on him a burden of proof that, under the applicable law, would lie with the trader (para (d)); and giving the trader the right to determine if the goods or services are in conformity or the exclusive right to interpret any term of the contract (para (e)).

[26] UCTA, s 2 (2). [27] S 3 (2) (a).

[28] S 8. [29] S 4 (1). [30] S 3 (2) (b).

[31] See *George Mitchell (Chesterhall) Ltd v Finney Lockseeds Ltd* [1983] 2 AC 803 (HL); *Stag Line Ltd v Tyne Ship Repair Group Ltd, The Zinnia* [1984] 2 Lloyd's Rep 211; *Britvic Soft Drinks v Messer UK Ltd* [2002] EWCA Civ 548, [2002] 2 Lloyd's Rep, 368; this being based on the reference in guidelines specifically applicable to such cases to 'whether the customer knew or ought reasonably to have known of the existence or extent of the term....' (UCTA, Sch 2 (c)).

[32] *Smith v Bush* [1989] 2 All ER 514.

[33] Indeed, even in cases involving exclusion or restriction of liability to commercial customers (where it might be thought that transparency would be more readily viewed as a legitimizing factor) the courts have been prepared to hold that a term can fail the test of reasonableness (on the basis of factors such as the substantive content, the insurance position and relative bargaining power) despite the term being known of and understood by the customer. See, for example, the *George Mitchell* case (n 31).

(only a power for courts to declare a term ineffective in a private law action between the parties). So, even if we assume that the courts would continue to take the view that transparency cannot necessarily legitimize terms under the UCTA test, this will only have any impact in those very few instances of individual consumer litigation that will arise. It will not lead to such terms being cleared from the market. Secondly, UCTA only applies to exemption clauses and not to terms imposing unfair obligations or liabilities on consumers or granting unfair powers and rights to traders where this does not, as such, amount to an exclusion or restriction of liability within the meaning of UCTA. 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.

Of much greater practical significance is the regime under the UTCCR. 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.[34] A very considerable body of work against unfair terms has been done by the Office of Fair Trading (OFT) using these powers.[35]

Under the UTCCR (following the UTCCD, which they implement) a term is unfair if:

> [C]ontrary 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'[36] (This same test is used in the proposed CRD).[37]

Before turning to the detail of this test, it is important to recognize that there is currently an 'indicative and non-exhaustive list of the terms which may be regarded as unfair'.[38] This includes those mentioned above that would, in future, be blacklisted by the proposed CRD.[39] It also includes terms inappropriately excluding liability for breach[40] (obviously breaches other than those mentioned above that are affected by the blacklist); binding the consumer, but not the trader;[41] requiring consumers to pay for goods or services not received;[42] allowing traders to retain deposits when consumers do not perform, without allowing for equivalent compensation for the consumer in

[34] UTCCR, regs 10–15.

[35] See the 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).

[36] UTCCR, reg 5 (1) (UTCCD, art 3 (1)); which also provide that, in order to be subject to the test, the term must be one that has not been individually negotiated. This obviously raises separate issues as to the underlying attitude to freedom of choice and fairness. These are beyond the scope of this paper, but see C. Willett, 'Unfair Terms', in L Antoniolli and F Fiorentini, *A Factual Assessment of the Draft Common Frame of Reference*, (Sellier, Munich, 2011) 41, 42–53.53–76.

[37] CRD (n 6) art 32 (1).

[38] UTCCR, reg 5 (2) and Schedule 2 (UTCCD, art 3 (3) and Annex).

[39] CRD (n 6) paras 1 (a), (m), (n) and (q).

[40] Para 1 (b).

[41] Paras 1 (c) and (o).

[42] Para 1 (f).

the opposite situation;[43] imposing disproportionate compensation on consumers that are in breach;[44] allowing traders, but not consumers, to terminate at will;[45] allowing traders to terminate contracts of indeterminate duration without reasonable notice, except on serious grounds;[46] automatic extension of contracts where the deadline expressed for the consumer to express a desire not to extend is too early;[47] allowing for alteration of the terms or performance without valid reasons;[48] allowing price to be fixed at the time of delivery or increased, without there being a corresponding consumer right to cancel if the final price is too high;[49] and allowing transfer of consumer rights (where this would reduce consumer rights) without consent.[50]

Of course, this list only being 'indicative', it must still be established that such terms are unfair by applying the general test of unfairness. The proposed CRD would retain this list (absent those mentioned above that would actually be blacklisted). However, the balance of protection would be shifted further towards consumers by providing that these terms are no longer simply *indicatively* unfair; they would, rather, be 'presumed to be unfair' (unless proven not to be unfair under the general test of unfairness).[51] Putting this in another way, the presumption would be against transparency (or, indeed, anything else) operating as a legitimizing factor in the case of these terms.

In applying the current test, the regulatory practice of the OFT certainly appears, routinely, to be to find many of the terms on the indicative list to be unfair based on their substantive features.[52] In other words, transparency is not viewed as legitimizing the use of such terms. Of course, terms such as exemption clauses come in such a huge variety of forms and some will be much less unfair in substance than others. However, even in the context of exemption clauses, it is clear that the OFT view many as unfair however they are presented. So, for instance, the OFT generally views terms as unfair where they completely exclude a particular liability that would otherwise arise; or where they significantly *limit* liability (eg limitation of the damages claimable so as not to cover consequential losses).[53] The extent to which a limitation of liability is acceptable also appears to depend upon whether the effect is to allow the trader to escape liability in cases where there is an element of *fault*.[54] None of these approaches appear to be qualified by any notion that the term is acceptable as long as it is transparent.[55] At the same time, the stability of this

[43] Para 1 (d).
[44] Para 1 (e).
[45] Para 1 (f).
[46] Para 1 (g).
[47] Para 1 (h).
[48] Paras 1 (j) and (k).
[49] Para 1 (l).
[50] Para 1 (p).
[51] Above (n 6) art 35.
[52] See discussion by Willett (n 1) 6.3.3 and 6.5.
[53] Unfair Contract Terms Guidance, 2001, paras 1.3, 2.2.2, 2.3.1 and 2.3.3.
[54] ibid paras 2.6.5. Limitation of liability for delays seems generally to be viewed as unfair if the limitation applies in circumstances that were within the control of the trader.
[55] See Willett, *Fairness in Consumer Contracts* (n 1) 6.5.

position in relation to these terms, and more generally, is ultimately dependent on the general test itself; and how it is interpreted by the courts. This is the issue to which we now turn.

There is a fairly broadly accepted view that the concept of 'significant imbalance in rights and obligations to the detriment of the consumer' is fundamentally focussed on the substantive features of the terms.[56] The idea, which seems to reflect various national traditions, as well as national understandings of the UTCCD test,[57] seems, broadly, to be that terms may violate this element of the test by allocating the substantive rights and obligations in ways that are unduly detrimental to the consumer (eg by adding to the responsibilities of the consumer by comparison with the legal default position or subtracting from the responsibilities of the trader relative to the default position); where there cannot be said to be a counterbalancing substantive benefit[58] for the consumer (whether in the term itself or in another provision of the contract or another contract on which this one is dependent).[59]

Then we turn to the 'good faith' element of the test. There is a view to the effect that it has no role that is independent from significant imbalance, ie that the only question is whether there is a significant imbalance; and that if there is such a significant imbalance then there is also automatically a violation of good faith.[60] This view is something of an elaboration of the view that a key reason for good faith being used as a part of the test was simply to reflect those national traditions that were tied to the good faith concept; so that good faith can be viewed simply as a label that 'explains' to these national traditions what is meant by the significant imbalance/detriment

[56] H Collins, 'Good Faith in European Contract Law' (n 18) 249; R Brownsword, G Howells and T Wilhelmsson, 'Between Market and Welfare: Some Reflections on Article 3 of the EC Directive on Unfair Terms in Consumer Contracts' in C Willett (ed), *Aspects of Fairness in Contract* (OUP, Oxford, 1996) 45; H Beale, 'Legislative Control of Fairness' (n 18) 243.

[57] See K Zweigert and H Kotz, *An Introduction to Comparative Law* (3rd edn, OUP, Oxford, 1998) 329; in relation to Austria see P Kolber, 'Report on the practical implementation of directive 93/13/EEC in Austria', in European Commission *The Unfair Terms Directive Five Years on Evaluation and Future Perspectives*, Brussels 1–3/7/1999); and in relation to Italy, see P Nebbia, 'Law as Tradition and the Europeanization of Contract Law: A Case Study' (2004) Yearbook of European Law 381. In addition, imbalance (specifically as a test for the fairness of consumer contract terms) seems to have roots both in Germany where art 9 of the 1976 AGBG referred—along with good faith—to 'unreasonable disadvantage', a concept that seems similar to imbalance (the new Civil Code-BGB—art 307 (1) uses the same language) and France (where the travaux preparatoires to the Loi Scrivener of 1978 referred to an 'evident imbalance in parties' rights and obligations').

[58] The ECJ seems to have given a central role to the question as to whether there are any 'benefits' for the consumer (see C-237/02 *Freiburger Kommunalbauten GmbH Baugesellschaft & Co KG* (Judgment) 1 April 2004).

[59] See UTCCR, reg (1) (UTCCD art 4 (1)), emphasizing the relevance of other terms in this (and other) contracts 'on which it is dependent'.

[60] M Tenreiro, 'The Community Directive on Unfair Terms and National Legal Systems' (1995) 3 European Review of Private Law 279; and S Smith (1994) 47 Current Legal Problems 8.

concept. There is, however, a difficulty with this view given that there appear to be positive guidelines on good faith in the preamble to the UTCCD. It is said that

> the assessment . . . of the unfair character of terms . . . must be supplemented by a means of making an overall assessment of the different interests involved; whereas this constitutes the requirement of good faith; whereas in making an assessment of good faith, particular regard shall be had to the strength of the bargaining position of the parties, whether the consumer had an inducement to agree to the term and whether the goods or services were sold or supplied to the special order of the consumer; whereas the requirement of good faith may be satisfied by the seller or supplier where he deals fairly and equitably with the other party whose legitimate interests he has to take into account.[61]

The key word above seems to be 'supplemented'. If the assessment as to unfairness is to be 'supplemented' by these various criteria that are germane to good faith, it seems impossible to avoid the conclusion that violation of good faith is, at least something of, an independent requirement (whether independent from significant imbalance or, with the same practical result, playing some independent role in determining when an imbalance *is* 'significant').[62] Now, it does not obviously follow from this that transparency has a potential role to play in legitimizing terms. It is true that transparency is a recognized element of good faith in certain systems.[63] It is also true that the references to 'dealing fairly and equitably' and taking into account 'legitimate interests' *could* both be viewed as an indication that transparency is a necessary element of good faith under the UTCCD; and also (and crucially for our enquiry) as an indication that transparency is (or, at least, *can be*) *sufficient* in establishing good faith. However, transparency is not mentioned in this recital and the 'fair and equitable' and the 'legitimate interests' concepts could, plausibly, refer to a further review (building on the significant imbalance/detriment question) of the degree of unfairness in *substance*. Also, of course, even if these concepts cover transparency, one view might be that, while transparency is *necessary* for fair, equitable, legitimate interest respecting (good faith) behaviour, it is never *enough*; or, at least, certainly not where there is a sufficient degree of unfairness in substance.

However, the problem is that the issue is left unclear; so that the fundamental question as to the role of transparency is unclear. There is, in other

[61] Recital 16 to the Preamble.

[62] See C Willett, *Fairness in Consumer Contracts* (n 1) 5.7.2; and on this approach in Australia, below at 373 (iii).

[63] See generally, S Whittaker and R Zimmerman, *Good Faith in European Contract Law* (CUP, Cambridge, 2000); M Hesselink, 'Good Faith' in A Hartkamp et al (eds), *Towards a European Civil Code* (Kluwer, The Hague, 2004) 471; H-W Micklitz, *The Politics of Judicial Co-operation in the EU* (CUP, Cambridge, 2005) 372–373; AGB 1976, art 9 (now BGB, art 307) (Germany); and Hoge Raad 15-11-1957 (Netherlands).

words, considerable scope for debate as to whether a high degree of unfairness in substance can ever be legitimized by transparency.

The proposed CRD would retain the Preamble reference to the above good faith criteria, but remove the reference to the idea that the test is 'supplemented' by these criteria.[64] However, it would also provide, expressly, that, in assessing whether a term is unfair, account should be taken of whether there has been transparency.[65] It is not made clear whether the intention is simply that a lack of transparency can make a term unfair where, otherwise, there would not be sufficient unfairness in substance; or whether, in addition, transparency can legitimize a term that is particularly substantively unfair.

Certainly, the understanding in some civil law countries is that transparency is not necessarily a legitimizing factor under the test in the UTCCD. One German scholar has strongly criticized what he views as an undue fixation with the procedural aspects of good faith at the expense of the substantive aspects.[66] Indeed, the German law implementing the UTCCD arguably emphasizes that transparency is not necessarily a legitimizing factor in two ways. There are actually separate provisions on 'surprising' terms (aimed at lack of transparency) and 'review of subject matter'.[67] The latter refers to whether the terms 'contrary to the requirement of good faith, . . . place the [consumer] at an unreasonable disadvantage'. This good faith/disadvantage test goes on to provide that an unreasonable disadvantage 'may *also* result from the fact that the provision is not clear and comprehensible'. Obviously the primary purpose here is to indicate that an unreasonable disadvantage *may* be caused by a lack of transparency, even if the term is fair in substance. However, the implication of the word 'also' is that, in addition (and this being the normal and more typical situation), such an unreasonable disadvantage may be caused by unfairness in substance, *irrespective of transparency, ie transparency does not necessarily legitimize*.

However, the issue remains uncertain in the UK. This uncertainty can be found in the approach of the House of Lords in *Director General of Fair Trading v First National Bank*.[68] First of all, let us unpack some basics about the approach of the House of Lords to the test. In broad terms the approach was that there needs to be significant imbalance/detriment and, separately, a violation of good faith. This certainly represents the approach of Lord Bingham and, to a large extent, the other judges;[69] although, there was also recognition of a 'large area of overlap' between the imbalance/detriment and good faith elements.[70] The view was certainly that the significant imbalance/

[64] CRD (n 6) preamble, recital 48.
[65] CRD (n 6) art 32 (2).
[66] Micklitz (n 63) 355–423.
[67] See, respectively, BGB, art 305c and BGB, art 307 (1).
[68] [2001] 3 WLR 1297.
[69] Lord Bingham at 1307–8 and Lord Steyn, 1313.
[70] At 1313.

detriment element is essentially about substantive rights and obligations. Lord Bingham said that:

> 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.[71]

Lord Bingham said that the indicative list of terms provided guidance as to unfairness in substance.[72] He also said that whether a term caused a significant imbalance to the detriment of the consumer was a question that involved looking not only at the term in question but also at the contract as a whole, ie at the other terms of the contract.[73] Lord Steyn also thought that 'significant imbalance' related to matters of substantive unfairness.[74]

Turning to good faith, Lord Bingham equated this with 'fair and open dealing.[75] He said that 'openness' meant that terms should be 'expressed fully, clearly and legibly'; not containing 'concealed pitfalls or traps'; and being given 'appropriate prominence' where they might 'operate disadvantageously' to the consumer.[76] 'He said that 'fair' dealing:

> [R]equires that the supplier should not, whether deliberately or unconsciously, take advantage of the consumer's necessity, indigence, lack of experience, unfamiliarity with the subject matter of the contract [or] weak bargaining position . . . .[77]

This may mean simply that consumers (as a class) are presumptively treated as suffering from the various weaknesses listed (ie these are weaknesses *relative* to the trader); and that traders are to be viewed as taking advantage of these if they use terms that are unduly detrimental in substance to consumer interests. In short, a reasonable level of fairness in substance is required for 'fair' dealing. If this is the case then, given that fair dealing is expressed as a *separate* requirement to 'open' dealing (fair *and* open), the suggestion would be that (for Lord Bingham) transparency *cannot* legitimize terms that are sufficiently unfair in substance. However, the difficulty is that it is far from clear that the above quotation *does* refer simply to unfairness in substance. It might be argued, for instance, that there is only 'advantage taking' where there is some positive procedural impropriety and/or the consumer is especially vulnerable in some way. In other words, it is not possible to say for certain that Lord Bingham viewed fairness in substance as an entirely free standing requirement.

Lord Steyn approved Lord Bingham's views as to good faith.[78] However, he also said that: 'Any purely procedural or even predominantly procedural

[71] At 1307.
[72] ibid.
[73] 1307–1308.
[74] At 1313.
[75] At 1308.
[76] ibid.
[77] ibid.
[78] At 1313.

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interpretation of the requirement of good faith must be rejected'.[79] This does not state explicitly, but does strongly suggest, that procedural fairness (including transparency) cannot legitimize a term that is sufficiently unfair in substance. However, there was no positive support from the other three judges for this. They did not reject any of Lord Steyn's judgment; but simply referred to their approval of the judgment of Lord Bingham.[80] In fact, the House of Lords did not *need* to answer the question as to the legitimizing function of transparency; because they did not accept that the term in question actually caused a significant (substantive) imbalance in rights and obligations[81] (so, whether unfairness in substance could be legitimized by transparency did not arise).

The Court of Appeal *did* take the view that certain terms could be sufficiently unfair in substance as to violate good faith irrespective of procedural fairness. Peter Gibson LJ cited the following comment by Hugh Beale:

> I suspect good faith has a double operation. First it has a procedural aspect. It will require the supplier to consider the consumer's interests. However, a clause which might be unfair if it came as a surprise may be upheld if the business took steps to bring it to the consumer's attention and to explain it. Secondly, it has a substantive content: some clauses may cause such an imbalance that they should always be treated as being contrary to good faith and therefore unfair.[82]

However, the position of the House of Lords (now the 'Supreme Court') remains unclear on this crucial point. The position of lower courts is also unclear. Terms providing for substantial commission to be paid to an estate agent for minimal services in return have recently been held to be unfair by the High Court.[83] These were considered to cause a significant imbalance to the detriment of the consumer[84] (ie to be unfair in substance). It was also found that these commissions were not given sufficient prominence as to satisfy the requirement of good faith.[85] The suggestion, certainly, is that a greater degree of prominence might have sufficed. Now, it does not necessarily follow from this that the court would take the view that *some* terms might *not* be able to be legitimized (via the good faith concept) by transparency. Equally, there was certainly no express indication of such a view.

It does, as stated above, seem routinely to be taken by the OFT that certain terms are unfair and must be made fairer in substance, irrespective of transparency.[86] However, the stability of this position remains unclear as long as the position of the Supreme Court remains unclear.

[79] ibid.
[80] See the Judgments of Lord Hope (1314–1318), Lord Millett (1318–1320) and Lord Rodger (1320–1324).
[81] Lord Bingham, 1308, Lord Steyn, 1313–1314, Lord Hope, 1316 and Lord Millett, 1319.
[82] From Beale, 'Legislative Control of Fairness' (n 18) 245, cited at [2000] 2 All ER 759, 769.
[83] *Office of Fair Trading v Foxtons Ltd* [2009] EWHC 1681 (Ch).
[84] See paras 90, 101 and 103.
[85] See paras 94, 101 and 106.
[86] Willett, *Fairness in Consumer Contracts* (n 1) 6.5.

It should also be noted here that the proposal of the English and Scottish Law Commissions to replace the good faith/imbalance test with a 'fair and reasonable' test[87] would not, in itself, resolve this question. This, as we have seen, is a question that arises because of the reference to 'good faith' in the test. However, this being a test deriving from a European Directive (the UTCCD), EU law requires that the national measures implementing the test be interpreted so as to give effect to its meaning.[88] In other words, good faith (whatever it means in terms of the role of transparency) must be read into any new UK test (whatever terminology it uses). Further, the proposed 'fair and reasonable' test would actually refer explicitly to transparency as a key factor to be taken into account.[89] It is true that the view of the Law Commissions is that the test be should be viewed as one under which a term can be sufficiently unfair in substance to be held to be unfair whatever the circumstances in which the agreement is made[90] (which I take to include the question as to transparency). However, such a possibility is not provided for expressly in the test; so it would remain uncertain as to how the courts would approach the issue.

One suspects that it may well ultimately be accepted by the House of Lords/Supreme Court (whether under the current test or a new 'fair and reasonable' test) that a sufficient degree of unfairness in substance *cannot* be legitimized by transparency. However, even if it is, there remains the question as to whether the presence of transparency as a relevant factor in the test will mean that a greater degree of unfairness in substance will be taken to be required where there is transparency than would be the case where transparency played no role in the test. In short, transparency might be treated as a legitimating factor in relation to terms that it would not be viewed as legitimating if it was not mentioned in the test.

The ECJ might be read to take the position that terms can be sufficiently unfair in substance as to be unfair (transparency notwithstanding). The ECJ has said that if there is no benefit at all to the consumer (this presumably referring to substantive benefit) then it is prepared to conclude that the term is unfair.[91] However, in the case involving the term to which the ECJ was referring,[92] no argument seems to have been raised as to transparency; so, as with the English courts, the position of the ECJ remains unclear on our core question.

[87] *Unfair Terms in Contracts* (n 4) 3.84-96 and Draft Unfair Terms Bill, s 4 (1).

[88] *Marleasing SA v La Commercialde Alimentacion [1992] 1 CMLR 305*; *Faccini Dori [1995] All ER (EC) 1*.

[89] *Unfair Terms in Contracts* (n 5) Draft Unfair Terms Bill, s 4 (2) (1).

[90] ibid 3.93.

[91] See *Freiburger Kommunalbauten* (n 58).

[92] An 'exclusive jurisdiction' clause (Joined Cases C-240/98 and C-244/98 *Oceano Grupo Editorial SA Quintero* [2000] ECR I-4941).

B. Australian Approaches to Transparency as a Legitimizing Factor

Essentially, what we find in Australia is a change in approach over time. The story begins with a series of provisions under which it seems that transparency probably *could* legitimize substantively unfair terms. In contrast, in the case of the more recent Victorian Fair Trading Act, the understanding seems to have been that transparency could not legitimize a term that was sufficiently unfair in substance. Now, under the new federal law, what we find is at least a degree of uncertainty.

The first element of the picture here is the equitable doctrine of unconscionability as understood by the Australian courts. The well known *Amadio* case[93] offered some hope that the doctrine of unconscionability might be understood in a broad enough way to address at least some of the modern unfairness problems arising in relation to standard form contracting. This is because there was actually specific mention of such contracts as putting the other party (such as a consumer) at the type of 'special disadvantage' required for a finding of unconscionability.[94] However, it was still emphasized in *Amadio* that more than a 'special disadvantage' was required; it was also necessary that 'unfair or unconscientious advantage should then taken of the opportunity thereby created',[95] ie created by the special disadvantage. These requirements continued to be insisted upon by the Australian courts.[96] For our purposes, a key point is that it became clear that unconscientious advantage taking is not taken to exist simply by virtue of a party having taken advantage of a superior bargaining position.[97] So, for instance, it could not, apparently, be said that a trader had behaved unconscientiously by taking advantage of his superior bargaining position to impose substantively unfair terms. Of course, it seems that there *would* possibly be unconscientious advantage taking where the weaker party was in such a position as not to be able to assess his best interests and the nature of the transaction.[98] However, even if this applies to the situation affecting a consumer in the face of the lack of transparency often to be found in consumer contracts, the implication would be that (for the courts) this problem could be cured, whether by legal advice or (one imagines) by a sufficient degree of transparency.

In 1986, a statutory form of unconscionability was introduced by section 51 AB of the Trade Practices Act (TPA) 1974. This (like the common law notion of unconscionability) can apply much more broadly than in relation to the terms of a contract as such. However, it does certainly apply to terms; and, in particular, the measure of fairness in substance is whether terms are 'reasonably necessary for the protection of the legitimate interests of [the trader]'.[99]

[93] *Commercial Bank of Australia Ltd v Amadio* (1983) 46 ALR 402.
[94] Per Kitto J., 415.
[95] ibid.
[96] See, for example, *ACCC v C G Berbatis Holdings Pty Ltd* (2003)197 ALR 153.
[97] Per Gleeson CJ, ibid 157.
[98] Per Gummow and Hayne JJ, 168.
[99] TPA, s 51 AB (2) (b).

There are also a variety of procedural criteria: the relative bargaining positions of the parties,[100] whether there was undue influence or pressure,[101] the availability of alternative price/term packages[102] and, importantly, for our purposes, 'whether the consumer was able to understand any documents.'[103] What is vital for our purposes is the attitude of the courts to the interplay between these procedural criteria (particularly the issue of transparency) and the substantive features of the term. Essentially, the courts appear to have taken an approach that requires a degree of procedural unfairness. The line taken by the Full Federal Court in recent cases such as *Hurley v McDonald's Australia Ltd*[104]and *Australian and Competition and Consumer Commission v Lux Pty Ltd*[105] is that there must be something more than the terms themselves that makes reliance on them unconscionable. This suggests that unfairness in substance is not enough in itself. It would be logical, then, to say that transparency can legitimize substantively unfair terms (unless, of course, but this is not our present concern, there is some *other* form of procedural unfairness).

Next we turn to the New South Wales Contracts Review Act 1980.[106] Section 7 (1) allows for a variety of sanctions against an 'unjust' contract; while section 9 provides a variety of criteria (going to the substance of the term and procedural matters) to be taken into account in assessing whether a contract is indeed unjust. Transparency is one of these factors in that section 9 (2) (g) refers to: 'where the contract is wholly or partly in writing, the physical form of the contract, and the intelligibility of the language in which it is expressed'. As early as 1986, it became evident that there would rarely be a finding of an unjust contract without there being procedural unfairness. In *West v AGC (Advances) Ltd*[107] McHugh J said that: 'Most unjust contracts will be the product of both procedural and substantive injustice'.[108] Earlier, he seems to go further by saying that: 'I do not see how that contract can be considered unjust simply because it was not in the interest of the claimant to make the contract or because she had no independent advice.'[109] More recently in *Elkofairi v Permanent Trustee Co Ltd* the court said that the trend of authority since the *West* case was to look beyond the substantive terms to the circumstances in which the contract was made.[110]

So, as with the other approaches considered so far, it has not been accepted that terms can be unfair on substantive grounds alone; the corollary being that

[100] S 51 AB (2) (a).
[101] S 51 AB (2) (d).
[102] S 51 AB (2) (e).
[103] S 51 AB (2) (c).
[104] [1999] FCA 1728.
[105] [2004] FCA 926.
[106] Generally on which see F Zumbo 'Dealing with Unfair Terms in Consumer Contracts: Is Australia Falling Behind?' (2005) 13 Trade Practices Law Journal 70; ibid. 'Dealing with Unfair Terms in Consumer Contracts: The search for a new regulatory model' (2007) 13 Trade Practices Law Journal 194; and ibid.(2007), Submission to the Productivity Commission's Inquiry into Australia's Consumer Policy Framework.
[107] (1986) 5 NSWLR 610.
[108] At 622.
[109] At 621.
[110] [2002] NSWCA 413.

transparency would often be viewed as legitimizing terms (subject, of course, to there not being some independent procedural impropriety).

In 2003 the State of Victoria introduced a new Part 2B into the 1999 Victorian Fair Trading Act. This provision has now been repealed and replaced with a new federal law that we shall turn to below. Prior to its recent repeal, s. 32W of the Victorian Fair Trading Act (which was clearly based on the UK/EU test) provided that:

> A term in a consumer contract is to be regarded as unfair if, contrary to the requirements of good faith and in all the circumstances, it causes a significant imbalance in the parties' rights and obligations arising under the contract to the detriment of the consumer.

In fact, not very long before repeal, this provision had been amended and no longer contained any reference to 'good faith'. However, what we are interested in here is how good faith was approached in Victoria while it was still part of the test. In brief, the answer is that the view seems to have been that transparency could not necessarily legitimize a term that is sufficiently unfair in substance.

It will be recalled that the UK/EU test is elaborated on in the preamble to the UTCCD; adding weight to the view that violation of good faith is a requirement that is separate from the existence of imbalance/detriment; this, in turn, raising the possibility that transparency can prevent there being a violation of good faith, potentially legitimizing terms no matter how unfair in substance they may be. The Victorian test *did not* elaborate on the concept of good faith. Nevertheless, it was held that the concept was *not* 'mere surplusage'.[111] The approach taken was one of those we discussed above as being possible to countenance in relation to the UK test, ie that whether there was a violation of good faith was relevant to whether any imbalance was 'significant';[112] so that the good faith question performed what was described as an 'adjectival role' in determining whether the term caused an imbalance that is significant.[113] Of course, it is the other alternative that seems to have been taken up in the UK, ie that violation of good faith is a separate requirement from significant imbalance/detriment. Nevertheless, as suggested above, the practical result seems the same, ie that there is some positive content to good faith; content that would not be there if the reference was simply to significant imbalance/detriment.

The key, of course, is as to what this positive content is. In the *AAPT* case, the court reviewed the approach of the House of Lords in *First National Bank* (as to 'fair and open dealing'[114] and 'community standards of decency,

[111] *Director of Consumer Affairs Victoria v AAPT* [2006] VCAT 1493, para 34.

[112] ibid para 34 and 44*; Free v Jetstar Airways Pty Ltd, Civil Claims* [2007] VCAT 1405; and see (n 62) and related text.

[113] Para 47.

[114] At para 41 (see (n 75) and related text on Lord Bingham in the *First National Bank* case on 'fair and open dealing').

fairness and reasonableness in commercial transactions')[115] and other views of good faith. These included the German approach, which is more focussed on the substantive terms, in that it is concerned with terms causing an 'unreasonable disadvantage';[116] and the views of Sir Anthony Mason to the effect that good faith comprised requirements of cooperation, honesty and reasonableness having regard to the interests of the other party.[117] Although these were all deemed to be helpful perspectives, there was no strong commitment to any of them as such; and the overriding emphasis was as to good faith as an adjectival 'touchstone' to help determine the significance of the imbalance and, therefore, the overall question of unfairness.[118]

However, for our purposes the most significant element of the judgment was where the court specifically approved the view of Hugh Beale referred to above.[119] (This, of course, was also approved by the English Court of Appeal, but not commented on by the House of Lords).[120] First, this confirms the view of the court that the presence of good faith in the equation means that transparency is a relevant consideration. However, it also, of course, confirms the view that if there is enough unfairness in substance then there is unfairness, transparency notwithstanding, ie that transparency cannot legitimize terms in such cases.

There is now a new federal law. This replaces the Victorian provisions on unfair terms, which no longer apply. Under the new 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.'[121]

We can immediately see that this contains no reference to 'good faith'. The first consultation (ie the document initially proposing a new regime) referred to the view of the Productivity Commission that good faith is subject to differing interpretations and that other definitions may be equally apt.[122] At the time of the first consultation the exclusion of the good faith concept seemed to confirm that there was no place for the notion of transparency as a legitimizing factor. 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 would be

[115] At para 43, citing Lord Steyn in *First National Bank* (n 78) 1313.
[116] At para 39. [117] At para 47. [118] ibid.
[119] ie that good faith requires transparency, but that transparency is not sufficient where the term is unfair enough in substance (see n 82 and related text).
[120] Para 48 and see (n 82).
[121] Competition and Consumer Act 2010 (n 9) 24 (1); and *An Australian Consumer Law* (n 9) 30.
[122] *An Australian Consumer Law*, ibid; although the Productivity Commission were, in fact, ambivalent about good faith, also stating that there were good grounds for retaining it (Productivity Commission, *Review of Australia's Consumer Policy Framework*, No 45, April 2008, vol 2, at 159).

strengthened, first of all, by the specific choice *not* to use the prior Victorian model with its reference to good faith. It would also be strengthened by the reference (in the test outlined above that was finally adopted) 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 instance, that it is necessary to restrict a particular liability because, otherwise he would be exposed to too much potential (substantive) liability. By contrast, it is hard to see how the *transparency* of a term protects the interests of a trader.

However, matters are not so simple. 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';[123] ie whether it is plain language, legible, clearly presented and readily available.[124] The idea, presumably, must be that (even without good faith as an adjectival guide) 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 legitimize sufficiently substantively unfair terms. The government view seems to be that it cannot. In the second consultation it was stated that:

> The 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.[125]

The suggestion, then, seems to be that transparency cannot legitimize a term that is sufficiently unfair in substance; but (and presumably this is where it comes into play) a lack of transparency *can* render a term unfair where the term would not otherwise be sufficiently substantively detrimental to be found to be unfair. However, it is unfortunate that this is not made clear in the actual legislative text; and the possibility must always remain that courts will not follow this analysis and will, sometimes, find significantly substantively detrimental terms to be fair on the grounds of transparency.

The first consultation also proposed what would have been a separate (very clear) rejection of the 'informed freedom of choice' model by banning a large number of terms outright;[126] (and we shall outline these shortly). However, the final law simply provides a list of examples of terms that 'may be unfair';[127] an approach similar to the 'indicative list' approach in the UK/EU (although not going as far as the approach in the proposed CRD, which creates a *presumption* of unfairness for such terms). The second consultation had

[123] Competition and Consumer Act (n 9), s 24 (2) (a). [124] ibid s 24 (3).
[125] *Unfair Terms Consultation* (n 9)12; and this view is confirmed in *A Guide to the Unfair Contract Terms Law* (n 9) 12. [126] *An Australian Consumer Law* (n 9) 35–42.
[127] Competition and Consumer Act (n 9), s 25 (1).

proposed that there would be provision for *future* regulations to be made to ban terms outright.[128] However, the final law only appears to provide powers to add to the list of terms that 'may' be unfair.[129] As in the UK/EU, there have long been bans on terms excluding or restricting liability for negligently caused injury and for non conforming goods; and, going further than in the UK/EU, there is a ban on terms excluding or restricting liability for negligence causing *any* losses, ie extending beyond death and personal injury and including, for example, loss of, or damage to, property.[130] These bans are retained under the new Australian law.[131] However, to reiterate, the *main* approach under the new Australian law is simply to have an illustrative list of terms that 'may' be unfair.

Broadly, this illustrative list covers similar sorts of terms to those on the UK/EU list outlined above. So, it covers, for example, exclusion/limitation clauses and terms allowing scope for traders to vary, terminate or renew the contract.[132] It also covers various terms that in some way hinder access to justice, ie by limiting the right to sue or the evidence that can be brought or by imposing an evidential burden on the consumer.[133] However, certain particular terms compromising access to justice would actually have been banned outright under the proposals in the initial consultation.[134] Terms excluding liability for statements made by agents are also on the illustrative list;[135] but, again, these would have been banned outright under the initial proposal.[136]

In fact, the illustrative list says nothing at all about certain other terms that would have been subject to an outright ban under the initial proposal. First of all, here, I am referring to another sort of term affecting access to justice, ie a term in a building contract stipulating for full, or substantially full, pre-payment. A key issue here is that such terms compromise the ability of consumers to persuade traders to rectify defects; and such terms would have been banned under the initial proposals.[137] Secondly, I have in mind terms allowing for onerous and disproportionate enforcement by the trader. So, under the initial proposals, there would have been bans on terms retaining title (for the trader)

[128] Unfair Terms Consultation (n 9) s 4 (n).

[129] Competition and Consumer Act (n 9), ss 25 (1) (n) and 25 (2).

[130] Trade Practices Act 1974, Part V, Division 2.

[131] *An Australian Consumer Law* (n 9) 37–38; Competition and Consumer Act 2010 (n 9), Chapter 3 (2), ss 64 (1).

[132] Competition and Consumer Act (n 9), s 25 (1) (a), (b), (d) and (e).

[133] ibid s (k), (l) and (m).

[134] *An Australian Consumer Law*, (n 9). Bans were proposed on terms stipulating that certain things (e.g. a certificate or statement by the trader) are conclusive evidence of something (eg the amount owed) (at 37); terms deeming something to be a fact (at 35); and terms mandating arbitration or otherwise hindering access to courts or arbitration (at 42).

[135] Competition and Consumer Act (n 9), s 25 (1) (i).

[136] *An Australian Consumer Law* (n 9) 35–36.

[137] ibid 40–41 and on the approach of the UK OFT to such terms under the general test of unfairness see C. Willett, *Fairness in Consumer Contracts* (n 1) at 6.3.3.2 (ii) (a).

where this would allow the trader to remove from consumers' premises, goods that cannot be removed without damage;[138] terms imposing flat or fixed early termination fees on consumers;[139] terms requiring consumers to pay trader enforcement costs irrespective of the reasonableness of the amounts;[140] and terms allowing retention, debit or set-off of disputed amounts.[141]

In sum, then, not only does the new Australian federal test contain uncertainty as to the scope for transparency to legitimize terms under the general test, but it has also made a very significant number of terms subject to this uncertainty, when the initial plan was to ban these terms altogether.

IV. OTHER ROLES FOR TRANSPARENCY

Quite apart from whatever scope there is for transparency to legitimize terms, it is submitted that it has quite separate roles to play.[142] First of all, it may be viewed as a basic social right that consumers should be placed in a position that they have at least a chance of understanding what they are agreeing to. In other words, there is a right to have the *chance* to exercise informed consent; notwithstanding whether this opportunity will, realistically, be taken up by most consumers.

Second, transparency can be viewed as being important in furthering market discipline. Even if the average consumer cannot take advantage of transparency[143] there may be a section of consumers who have the time, resources and education to overcome the lack of transparency and gain a good understanding of the terms and their implications. This so-called 'active margin' of consumers may then exert market discipline on traders with the result that terms are more substantively fair and/or that there is improved choice.[144] Of course, this all depends upon there being a sufficiently large margin of consumers that reads and digests terms and makes market choices on this basis.[145] It must be seriously questionable as to whether such a margin will often exist. It seems more likely that many of those who are ready and able to take positive steps to protect their interests will tend not to do so until there is a dispute. Such consumers may well scrutinize terms and/or seek advice as to their meaning when the trader seeks to rely upon the terms. This may enable such consumers to persuade traders to agree a compromise that is more favourable than what will be achieved by those who do not scrutinize and question the

[138] *An Australian Consumer Law* (n 9) 35.
[139] ibid 38–40.
[140] ibid 40.
[141] ibid 41–42.
[142] Willett, *Fairness in Consumer Contracts* (n 1) 2.4.3.4.
[143] Because of the factors set out at the text related to notes 12–16.
[144] MJ Trebilcock, 'An Economic Approach to the Doctrine of Unconscionability' in BJ Reiter and J Swann, (eds), *Studies in Contract Law* (Caswell, Toronto, 1980) 379; and C Willett, *Fairness in Consumer Contracts* (n 1) 2.3.2.1.
[145] See the discussion by W Whitford, Contract law and the Control of Standardised Terms in Consumer Contracts: An American report (1995) 3 European Review of Private Law, 193, 195–199.

terms.[146] However, these will be individual victories and will not serve to discipline what traders offer in general. Nevertheless, there seems to be no reason why the *chance* of market discipline should not be increased by insisting on transparency.

Finally, transparency can be viewed as independently important in helping consumers to protect their interests' *post contractually*, potentially enhancing their access to justice, when there is some form of dispute. Even if there is little chance that consumers will ever really make much real *pre contractual* use of transparency, behavioural science research seems to suggest that consumers are much more likely to make use of information at the post contractual phase.[147] This is perhaps not so surprising. At this point they are at least not affected by distracting factors such as the psychological commitment to the purchase and the positive advertising signals. In addition, they do not have the other decisions to make as to the basic desirability of the purchase. Further, there is a need to find some solution to the problem; so there may be more likelihood that consumers will focus on reading terms to discover what rights they have.

All of the above goals seem to require that there should be transparency when it comes to terms voluntarily used by the trader that actually give rights to consumers. Here, I have in mind, for example, terms more or less reflecting the legal default position (or possibly improving on it), eg terms describing the consumer's right to claim damages or terminate for improper performance or terms describing a statutory right to cancel. Obviously, these rights need to be clear to consumers if they are to be able to understand them and be more likely to take advantage of them at the dispute stage. However, they should be clear to consumers at the pre-contractual stage if we believe in a basic right to transparency to give the opportunity for informed decision making; given that part of what is important to a decision are the rights that will be gained by making it. Such rights also need to be clear to further the market discipline agenda; so as to encourage traders to compete to offer better rights.

Then, of course, there are terms that in some way deviate from the default position *to the detriment* of the consumer. So, the term might exclude or restrict obligations or liabilities that would normally be owed by the trader to the consumer; or it might add to the obligations or liabilities that the consumer would otherwise owe to the trader. This, of course, is the sort of term that is potentially going to be viewed as being unfair in substance. However, even if we do not believe that such a term can necessarily be legitimized by transparency, the '*opportunity* for informed consent' agenda demands that consumers at least be in a position to know of the risks pre-contractually; and the market discipline agenda requires that such terms be clear so as to encourage competition that might result in fewer risks being loaded onto consumers (or at least in a range of choices as to degrees of risk). Further, as far as the

[146] Whitford ibid.

[147] See Durkin (n 17).

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access to justice agenda is concerned, it may be of post contractual assistance to consumers that the term is very clear, so that they can see what the trader is claiming the right to do.

Indeed, all of the above agendas are likely to be best served if the terms deviating from the default position to the detriment of the consumer are not only transparent per se; but if there is also a requirement to give a clear indication as to the way in which the term is altering the position relative to the default position, eg by stating the default position in clear terms and then indicating what is being provided for as compared with this. This improves pre- and post-contractual consumer understanding, because it highlights what consumers are having taken from them. Such awareness arguably enhances the potential for an informed decision to enter the contract. It may also make for a more aggressive active margin of consumers; fuelled, as they may be, by a greater sense of 'informed resentment' towards those traders that seek to offer them less than the default protections. Also, post-contractually, the awareness as to the default position might prompt consumers to challenge the trader for seeking to rely on the term.

It might also help if there was actually a requirement to indicate that the terms are subject to a test of unfairness. There is almost certainly a wide spread, deep seated notion amongst even intelligent, educated consumers that they are bound-full stop-by the terms in contracts with traders. This is only partly addressed by requiring the default position to be disclosed; as, although this does lay down a reference point, it does not make it clear that the terms are actually subject to review. Making this clear would mean giving a fuller picture to all consumers, pre and post contractually; it would possibly be likely to affect the behaviour of the active margin; and it might actually induce more consumers to challenge terms pre- and post-contractually.

Enhancing post contractual self protection and access to justice also leads us to focus on terms that give the consumer a right to, in some way, self protect against *other* provisions that may be detrimental. So, for instance, a term may be included that gives the trader the right to increase the price from the initially agreed price. At the same time, it may also be provided, whether in the same term or elsewhere in the contract, that if this power is exercised, the consumer has the right to respond by cancelling the contract. In fact, if there is not such a balancing provision then the term allowing for the price increase may well be viewed as unfair in substance.[148] However, the point for present purposes is that it is vital for the consumer to be able to be aware of the right to respond to a price increase by cancelling; so it is vital that this right is clearly expressed in a way that connects it easily to the price increase issue.

[148] Such a term is one of those in the UK that is on the 'indicative and non-exhaustive list of terms that may be regarded as unfair' (UTCCR, supra, n 2, reg 5 (2), and Schedule 2, para. 1 (l)); and, under the CRD such a term would actually be 'presumed to be unfair' (n 6) art 35, Annex III, para I (g).

There is another way in which consumers can be helped to self protect and obtain access to justice in post contractual dispute situations. We have just been discussing contractual rights that can help consumers self protect, ie the right to respond to a price increase by exercising a contractual right to cancel. However, it may be that there are *legal* rights that could, in a broader sense, protect the consumer from the effects of the term. So, for example, there might be a term that results in consumers owing some onerous financial obligation to the trader. At the same time, quite apart from court powers to assess the fairness of the term as such, there might be a power available to a court to review the general financial circumstances of consumers and, possibly to reduce what they must pay and/or to give a longer time to pay it. Such a power might reduce the severity *of the impact* of the term in question. It is therefore a power that (from a fairness point of view) we might wish to be transparent to consumers, so as to increase the chances that they will ask for it to be exercised. It may also be important for consumers to be aware of certain generally applicable legal rights, e.g. as to the quality of goods and services and the relevant remedies.[149]

The question, then, is to what extent UK and Australian approaches require both beneficial and detrimental terms to be transparent; and require *disclosure* of relevant legal rights. In the discussion to follow it is argued that, in relation to the first form of transparency, the UK and Australian approaches to this could be improved by reference to the previous approach in the State of Victoria and the model in the European Commission's Draft Common Frame of Reference. In relation to the second form of transparency, it is argued that EU law may have brought a significant advance in the UK that does not exist in Australia.

V. AUSTRALIAN AND UK APPROACHES TO THE OTHER ROLES OF TRANSPARENCY

A. Transparency of Voluntarily Used Terms in Australia and the UK

In Australia, there has long been the general prohibition (under section 52 of the Trade Practices Act 1974)[150] of conduct that is 'misleading or deceptive or is likely to mislead or deceive'. The view seems to have been that this covered the use of (both detrimental and beneficial) terms that are insufficiently clear;[151] but it was never been systematically applied in such a way as to address the issue.

In the state of Victoria, there was a provision that was more clearly focussed on the particular issue of term transparency. (This certainly covered terms

[149] Having said this, disclosure of legal rights is unlikely to be very successful unless it is backed up by programmes to educate consumers about these rights. This is because consumers will often have very limited knowledge of these rights.

[150] This has been replaced by similar provisions on misleading conduct in the Competition and Consumer Act 2010 (n 9) Schedule 2, Chapter 2, Part 2 (1).

[151] *An Australian Consumer Law* (n 9) 91.

whether they were detrimental or beneficial to consumers in substance, so catching the sort of term that gives rights, but in a misleading way). It provided that consumer documents must be 'easily legible'; if printed or typed, it must use a minimum 10 point times new roman font or a minimum font of an equivalent size; and be 'clearly expressed'.[152] This was obviously a much more tailored approach than one reliant on the general misleading and deceptive conduct provision as in federal law. As such, the initial unfair terms consultation asked whether federal law should introduce a similar approach for consumer documents as that taken in Victoria.[153] However, the Victorian provision has itself been repealed and no equivalent provision appears in the new federal law.

As far as the UK is concerned, regulatory *practice* has made a huge stride in requiring terms to be transparent. This has applied both to terms that are detrimental in substance and to those that might be beneficial, but are misleading. The OFT insists on decent sized print, clear language, eradication of jargon, clear structuring etc.[154] As far as terms that are substantively detrimental are concerned, the conceptual basis for this is very clear. The OFT powers are to act against terms that are 'unfair', ie terms that fail the test of good faith/significant imbalance/detriment.[155] Terms that are substantively detrimental to consumers can be viewed as causing a significant imbalance in (substantive) rights and obligations; if they lack transparency, they can be viewed as violating the (other) good faith element of the test (which, as we saw above, requires transparency); such terms are, therefore, unfair and the OFT is entitled to take action against them.

The approach is more convoluted in the case of terms that give rights, but that are misleading, eg the sort of term that gives consumers the right to cancel in response to a price increase, or that is simply more favourable than the default position in some respect, but that is not clearly expressed. The OFT only have power to act where terms are 'unfair'. There is no power to act simply on the basis that terms lack transparency, except to the extent that this can, indeed, be said to make the term unfair. However, non-transparent terms giving rights to consumers are treated as unfair by the OFT. There is a requirement that written terms be in 'plain and intelligible language'.[156] This requirement does not appear to be enforceable as such. However, it is also provided that if there is doubt as to the meaning of the term, the interpretation most favourable to the consumer should prevail.[157] At the same time, it is provided that this does not apply to preventive action.[158] The OFT take this to mean that the *least* favourable interpretation should be found, ie the most negative interpretation that the average consumer might (because of the lack

[152] Victorian Fair Trading Act 1999, s 163 (3).
[153] *An Australian Consumer Law* (n 9) 91.
[154] OFT (n 10).
[155] UTCCR, reg 10.
[156] Reg 7 (1).
[157] Reg 7 (2).
[158] Reg 7 (2).

of transparency) place on the term. Where terms are not transparent, the OFT view is that consumers might not understand that they are actually being given rights. Indeed, they might believe that rights are being taken away. On this basis it can be said that the term causes (from the point of view of the average consumer) a significant imbalance in rights and obligations (and the lack of transparency also violates the good faith requirement).[159]

A more straightforward approach to the whole issue would be simply to have an enforceable requirement that all terms must be transparent. The proposed CRD (in addition to the plain language and interpretation rule[160] and the unfairness test[161]) contains a separate article containing 'transparency requirements'.[162] Unfortunately, there still appears to be no sanction for non compliance. The better model appears to be that in the Draft Common Frame of Reference (DCFR) that has recently been published as (at least in the consumer sphere) a set of model rules and definitions for the European Commission to make use of in revising existing Directives and drafting new ones.[163] In addition to a general test of unfairness,[164] the DCFR provides expressly that terms should be plain and intelligible[165] and that a term supplied in breach of this duty of transparency 'may on that ground alone be considered unfair'.[166] This, of course, reflects the German provision cited above;[167] under which terms can be unfair on the basis of a lack of transparency, without the need for unfairness in substance.

B. Disclosure of Legal Rights in the UK and Australia

Apart from requiring transparency in relation to all terms voluntarily used by traders, it was argued above that disclosure of certain legal rights might be needed if there is to be market discipline and access to justice; and if the regime is to be said to respect a consumer right to transparency. In particular, I referred to disclosure of the legal rights that a term removes; disclosure of the right to challenge terms; disclosure of legal rights that might, in some other way, mitigate the impact of the term on the consumer; and disclosure of important generally applicable legal rights.

Of course, there are many specific instances in which there must be disclosure of legal rights. So, for example, in hire-purchase contracts in the UK, there must be disclosure of the consumer's right to terminate and of the restriction on the creditor's right to repossess protected goods;[168] in distance

[159] OFT, 2001 Guidance (n 10) at 19.6.
[160] CRD (n 6) art 38 (1).
[161] Art 32.
[162] Art 31 (1)–(2).
[163] C Von-Bar, E Clive, H Schulte-Nolke, H Beale, J Herre, J Huet, M Storme, S Swann, P Varul, A Veneziano and F Zoll, *Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference, Outline Edition* (Sellier, Munich, 2009).
[164] Art II.-9:403.
[165] Art II.-9:402 (1).
[166] Art II.-9:402 (2).
[167] See (n 67) and related text.
[168] Consumer Credit (Agreements) Regulations 1983, SI 1983/1553, regs 2–5.

selling contracts there must be disclosure of any cancellation rights that may exist;[169] and the Australian credit legislation requires disclosure of certain consumer statutory rights.[170] In addition, a recent UK White Paper outlined plans for a publicity campaign to inform consumers as to key legal rights. Specifically mentioned were the implied terms as to description, quality and fitness of goods; and the implied term as to reasonable care and skill in service contracts.[171]

However, what we are really interested in here is what happens where there is no specific requirement to disclose any given legal right. To what extent can an argument for disclosure be made under a more general principle? This could be very important in practice. It would allow for action to be taken (without the need for legislation) where research shows that there is a case for requiring disclosure of certain particular legal rights.

On a general test of unfairness that takes transparency as a requirement (whether or not it is *sufficient*) there is at least scope to argue that fairness may sometimes require disclosure of such rights. So, under the UK/EU approach, where good faith is relevant, and given that good faith requires transparency,[172] failure to disclose rights relevant to the term might conceivably amount to a violation of good faith.

However, the good faith concept probably does not provide a solid enough foundation for the sort of 'disclosure of legal rights' duty under discussion. The issue as to disclosure of rights arose in the *First National Bank* case. Here, the House of Lords considered whether a term was made unfair (at least in part) by the failure of the Bank (at the stage of seeking a judgment in relation to consumer debts) to draw the attention of consumers to certain court review processes. These review processes would only take place if the consumer asked for them expressly; and would (potentially) have protected consumers from the effects of the term[173] (a term allowing the bank to recover contractual interest on top of the amount awarded in the judgment). The Court of Appeal had taken the view that the term was indeed unfair without such disclosure.[174] However, the House of Lords (in denying that any such obligation existed) said that such disclosure was not a common practice, it was not required by

[169] See, for example, the Consumer Protection (Distance Selling) Regulations 2002, SI, 2334, reg. 7; and more generally, the Consumer Protection from Unfair Trading Regulations, reg. 6 (4) (g).

[170] See, for example, the Queensland Consumer Credit Code, reprint, 22 June, 2009, s 14 (1) (b).

[171] HM Government, A Better Deal for Consumers: Delivering Real Help Now and Change for the Future, Cm 7669, July 2009, 3.5.1.

[172] See the above discussion of the *First National Bank* case (in particular n 76 and related text).

[173] The powers in question were those under CCA, s 129 to grant a time order and under CCA, ss 137–140 (now replaced by the new s. 140A regime) to review the amounts due.

[174] [2000] QB 672, 688–689.

independent rules of law and that what was needed was that *the law* be reformed so that the consumer be informed of these matters independently.[175]

This serves to highlight a key feature of a concept such as 'good faith' that makes it an unsuitable foundation for a disclosure of legal rights approach. It is clear that 'good faith' involves an objective analysis of the appropriate degree to which the interests of the consumer (procedural and substantive) should be protected. However, this analysis certainly also seems to involve account being taken of the extent to which *traders* should be expected to go to protect consumers. Indeed, as we saw above, the preamble to the UTCCD says, expressly, that good faith involves an 'overall evaluation of the different interests involved'.[176] Once this is clear, it is not implausible to say that the sort of factors looked at by the House of Lords are relevant. What one can be expected to do in terms of disclosure might, at least on some views, be said to be affected by what is normally done in the trade and by whether the law sends a clear signal that this must be done. We might (as did the Court of Appeal and the House of Lords) disagree as to where the appropriate balance lies; in particular, whether these 'trader sided' factors were given too much weight over consumer needs for the information. However, it cannot be denied that the trader sided factors are a legitimate part of the mix. This being the case, there is always the possibility that they will be taken to outweigh the consumer sided interests. The same seems to be true of an open textured 'fair and reasonable' test (such as suggested by the UK Law Commissions).[177]Again, it might always be argued that whether it is 'fair and reasonable' to require disclosure of legal rights requires account to be taken of what can reasonably be expected of the trader; including, for example, what is normal market practice.

Now, however, there is a UK concept that seems to focus exclusively on the consumer side of the equation. The CPUTR (implementing the UCPD)[178] gives powers to bodies such as the OFT and local trading standards authorities to seek enforcement orders against unfair practices, including misleading actions and 'omissions'.[179] It is provided that:

> A commercial practice shall be regarded as misleading if, in its factual context, taking account of all its features and circumstances and the limitations of the communication medium, it omits material information that the average consumer needs, according to the context, to take an informed transactional decision and thereby causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise.[180]

[175] See Lord Bingham, 1310.
[176] Preamble, recital 16.
[177] See (n 5) and (n 89).
[178] See (n 8).
[179] CPUTR (n 7) reg 26 and UCPD, art 5 (4) (a).
[180] Regs 6 (1) and 6 (3) (a). Even if information is provided there is still a misleading omission if it is hidden, unclear, unintelligible, ambiguous or untimely (reg. 6 (1) (b) and (c)). For discussion of the omissions concept see Willett, 'Fairness and Consumer Decision Making' (n 1).

It is hard to see how the sort of trader-sided considerations mentioned by the House of Lords have any place under a test based on consumer 'need', which must surely focus squarely on the importance of the information to the consumer and the ability to access it if it is not provided. It is true that the above test refers to 'factual context', 'features and circumstances' and the 'limitations of the communication medium'. However, it seems that these factors are to be taken into account in determining the needs of the consumer, rather than as possible justifications for traders not to disclose information, even although it is needed by consumers.

This being the case, it is certainly arguable that consumers may 'need' the sort of information under analysis in the *First National Bank* case in order to make an informed decision, ie a decision as to whether to ask for a review that might significantly reduce their liabilities. More generally, the consumer need test may provide a platform for regulators to develop a disclosure of legal rights approach.[181] (As indicated above, this could be a very useful, flexible tool to enable regulators to respond to research findings as to what information is most needed by consumers).

There is no such test in Australia. The main basis upon which a disclosure requirement might be built would be the general misleading practice concept.[182] Certainly, omission of information *has* traditionally been able to amount to a misleading practice.[183] The accepted test seems to have been whether, in all the circumstances, there is a reasonable expectation of disclosure of the information in question.[184] In practice, such an expectation has generally found where there has been some statement that represents a 'half truth' or was originally true, but has been rendered untrue by a change of circumstances.[185] It is fairly self evident that this sort of approach does not provide a solid foundation for routine insistence on disclosure of legal rights.

VI. CONCLUDING COMMENTS

A key element of my argument has been that there is uncertainty (in both the UK and the Australian approaches to unfair terms) on the key question as to

[181] It may be very important for regulatory bodies to provide a strong research based justification as to the limited consumer awareness as to their rights in order to support the argument that such information is 'needed'. This is particularly important because the notion of the 'average consumer'—the benchmark for assessing what information is needed—as 'reasonably well informed and circumspect' is often viewed as setting a relatively non protective standard (see, on these issues, Willett, 'Fairness and Consumer Decision Making' (n 1)).

[182] This was formerly contained in the Trade Practices Act 1974, s 52; which has now been replaced by the Competition and Consumer Act 2010 (n 9) Schedule 2, Chapter 2, Part 2 (1).

[183] See discussion in L Griggs, E Webb and A Freilich, *Consumer Protection Law* (OUP, Oxford, 2008) 54–56.

[184] *Demagogue Pty Ltd v Ramensky* [1993] ATPR 41–203*; Stora Enso Australia Pty Ltd v CPI Group Ltd* (2007) ATPR (Digest) 46–270.

[185] See *Collins Marrickville Pty Ltd v Henjo Investments Pty Ltd (1987) 72 ALR 601* and *Tiplady v Gold Coast Carlton* [1984] ATPR 40–491.

whether transparency is capable of legitimizing terms that reach a certain level of unfairness in substance. This is an issue of great practical importance when it comes to the enforceability of contract terms. It also reflects a deeper theoretical tension between an ethic of (assisted) informed freedom of choice and a more protective ethic that gives priority to granting certain 'irreducible substantive rights' to consumers. Indeed, given the centrality of standard contract terms to the overall trader-consumer relationship, the approach to regulating standard terms tells us a great deal about the balance between values of freedom of choice and values of protection in this overall trader-consumer relationship.

The uncertainty as to the scope for transparency to legitimise substantively unfair terms arises in the case of all those terms that are subject to the general tests of unfairness in the two jurisdictions; ie those terms that are not treated as ineffective in all circumstances. Of course, *most* terms are not treated as ineffective in all circumstances; and are, therefore, subject to the general tests of unfairness. In other words, the uncertainty as to the role of transparency (and the practical and theoretical issues this raises) is something that applies in the case of very many types of term. The problem of uncertainty derives from the tests making reference to 'good faith' (which can be interpreted as including an enquiry as to transparency) (UK); and to 'transparency' itself (Australia). The uncertainty, then, surrounds whether transparency is not just a necessary requirement; but can also play the role of legitimising terms even where these terms display a significant degree of unfairness in substance.

Given the practical and theoretical importance of this issue, it is surely undesirable that there should be such uncertainty. As such, what is arguably needed is for the legislative test in both jurisdictions to be amended in such a way as to make it clear that transparency is not necessarily sufficient to legitimise a substantively unfair term (so long, of course, as this does indeed reflect the intentions of legislators). It was suggested above that the German legislation seems to have this effect. However, an even better approach may be to say quite explicitly (which the German approach does not do as such) something like: 'terms can be found to be unfair on the basis of their substantive features alone' or 'transparency does not necessarily prevent a term from being unfair'.[186]

The other main theme of the article has been as to the quite separate roles of transparency in giving at least some better opportunity to understand terms; in furthering market discipline; and in relation to post contractual access to justice. One key conclusion here was that, in order to best serve these agendas, the requirement must be that *all* voluntarily used terms are transparent.

[186] Of course, even if it is made clear that terms that are sufficiently unfair in substance cannot be legitimised by transparency, this only clarifies one important part of what we mean by fairness. The obvious related question is as to what level of unfairness in substance a term must reach before transparency loses its legitimising force. There is no space to develop this here, but see C Willett, *Fairness in Consumer Contracts* (n 1) 5.5.6.

The UK and federal Australian approaches to this could be improved by reference to the models in the European Commission's Draft Common Frame of Reference; or by the previous approach in the State of Victoria.

Another aspect of the discussion was as to the importance of transparency in relation to certain consumer (legal) rights. It was concluded that the UK (EU based) 'misleading omissions' concept provides a better foundation for insisting on transparency in relation to legal rights than does the 'misleading practice' concept used in Australia. It will be important to observe how the misleading omissions concept is unpacked by regulators in the UK (and the rest of the EU) when it comes to disclosure of legal rights. It will also be important to see how the courts react to arguments as to whether failure to disclose certain legal rights could amount to a misleading omission.[187] This will tell us how useful a tool the misleading omission concept can be in this regard; and may inform opinion in Australia as to whether a similar concept should be introduced.

[187] See above (n 183) on the importance of there being a strong research base for such disclosure arguments.

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