

THE UNFAIR CONTRACT TERM PROVISIONS: WHAT'S TRANSPARENCY GOT TO DO WITH IT?

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Provisions in the Australian Consumer Law allow a court to declare an 'unfair' term in a 'consumer contract' or a 'small business contract' void. When determining whether a term is unfair, a court must consider the extent to which it is transparent. Transparency is important since it is one of only two factors that a court must consider when making this determination. This article will examine whether transparency is logically relevant to the legislative test for whether a term is unfair. It will argue that it is of limited relevance and hence should not be a mandatory consideration for determining unfairness. It will then consider several alternatives to making transparency a mandatory consideration.

I INTRODUCTION

The *Australian Securities and Investments Commission Act 2001* (Cth) ('ASIC Act') and *Australian Consumer Law* ('ACL') contain provisions addressing unfair contract terms ('UCT provisions') in standard form contracts. The ACL¹ requires a court to consider the extent to which a term is transparent when determining whether the term is unfair. Strangely, transparency has limited logical relevance to whether a term is unfair. This is due to the narrow test in the ACL for determining unfairness. If a broad test were used, such as 'the court must determine whether the term is unfair in all the circumstances', transparency may be of greater relevance, but that sort of test has not been adopted. This article will first examine the relevance of transparency to the test for whether a term is unfair and argue that it has limited relevance. It will then address how the ACL could be amended to account for this limited relevance.

Transparency is one of only two factors that a court must consider when determining whether a term is unfair. For this reason, transparency and its logical relevance to the test for whether a term is unfair are important.

II THE MEANING OF 'UNFAIR' AND 'TRANSPARENT'

A *The Meaning of Unfair*

Section 24(1) of the ACL states the test for whether a term 'unfair'. It provides as follows:

- (1) A term of a consumer contract is *unfair* if:
 - (a) it would cause a significant imbalance in the parties' rights and obligations arising under the contract; and

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¹ For simplicity, this article will only refer to the UCT provisions contained in the ACL. Equivalent provisions exist in the ASIC Act but those provisions only relate to financial products and financial services.



- (b) it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and
- (c) it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.

The test for whether a term is unfair is quite specific. A term is only unfair if it fulfils each of the three requirements in s 24(1). The test is not cast in wide terms, such as a ‘term will be unfair if it is unfair in all the circumstances’.

Section 24(2) provides that a court *may* take into account such matters as it thinks relevant when determining whether a term is unfair, but *must* take into account ‘the extent to which the term is transparent’ and the ‘contract as a whole’. The second of these two mandatory considerations is unlikely to result in a court considering anything which it would not have considered in the absence of s 24(2). Due to s 24(1)(a), a term will not be unfair unless ‘it would cause a significant imbalance in the parties’ rights and obligations arising *under the contract*’ [emphasis added]. In order to determine whether this requirement has been fulfilled, a court must surely consider the contract as a whole, since s 24(1)(a) is not limited to a consideration of the rights and obligations arising under the impugned term or some other discrete part of the contract.

The other mandatory consideration—‘the extent to which the term is transparent’—is unlikely to be considered by a court in the absence of s 24(2), since it is not readily associated with any of the three requirements listed in s 24(1) and, as will be argued in this article, transparency is of limited relevance to these requirements.

B *Transparent*

‘Transparent’ is defined in s 24(3) of the ACL as follows:

- (3) A term is **transparent** if the term is:
 - (a) expressed in reasonably plain language; and
 - (b) legible; and
 - (c) presented clearly; and
 - (d) readily available to any party affected by the term.

The elements of this definition will be considered later in greater detail. For now, it is worth noting that transparency is defined as an absolute concept. There are no degrees of transparency. A term is only transparent if it fulfils each of the four requirements listed in s 24(3) of the ACL. If it does not fulfil all these requirements, it is not transparent. Despite this, s 24(2) requires a court to consider ‘the *extent* to which the term is transparent’ [emphasis added]. It is difficult to reconcile this approach with the absolute terms in which transparency is defined. Any term which does not fulfil all four requirements of s 24(3) will fail to be transparent. Hence, the only way to assess the extent of transparency is to judge the extent to which a term fails to be transparent. This, however, is not considering ‘the extent to which the term *is* transparent’ because the term is actually not transparent according to s 24(3); rather, it is considering the extent to which a non-transparent term falls short of being transparent.

C *Case Law Concerning the UCT Provisions*

There are presently few decisions from the Federal Court of Australia or state or territory Supreme Courts considering the UCT provisions.² At the time of writing, there were four Federal Court decisions: *ACCC v CLA Trading Pty Ltd* (*Europcar*),³ *ACCC v Chrisco Hampers Australia Limited* (*Chrisco*),⁴ *ACCC v ACN 117 372 915 Pty Limited (in liq) (formerly Advanced Medical Institute Pty Limited)*⁵ and *ACCC v Get Qualified Australia Pty Ltd (in liq) (No 2)*.⁶ There was another matter, *ACCC v Bytecard Pty Ltd*,⁷ but there are no published reasons for it since it was settled by consent orders. Similarly, *Europcar* was resolved by the parties submitting an agreed statement of facts and admissions whereby the respondent (which traded as *Europcar*) substantially admitted the allegations made by the ACCC. None the less, Gilmour J considered the law regarding UCT provisions in detail so as to be satisfied that he had the power to make the orders and declarations sought and that they were appropriate.⁸ As a result, his Honour published detailed reasons.

There are decisions of the Federal Court, High Court and Supreme Court of Victoria concerning the unfair contract term provisions in the now repealed *Fair Trading Act 1999* (Vic) (*Fair Trading Act*). These are the Supreme Court decision of *Jetstar Airways Pty Ltd v Free* (*Free*),⁹ the Federal Court decision of *Paciocco v Australia and New Zealand Banking Group Ltd*¹⁰ (*Paciocco*) and the Full Federal Court and High Court decisions concerning appeals from the *Paciocco* decision.¹¹ *Paciocco* considered s 32W of the *Fair Trading Act* for the period of 11 June 2009 to 1 July 2010¹² and *Free* considered it for the period of 9 October 2003 to 11 June 2009.¹³ In *Paciocco*, s 32W was in the following form:

A term in a consumer contract is to be regarded as unfair if, 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 *Free*, s 32W was in the following form with underlining used to indicate how the provision is different from that considered in *Paciocco*:

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.¹⁴

² Perhaps this is because, until 12 November 2016, the UCT provisions were limited to disputes concerning consumer contracts, which are more likely to be dealt with by administrative tribunals.

³ (2016) ATPR 42-517; [2016] FCA 377.

⁴ (2015) 239 FCR 33; [2015] FCA 1204.

⁵ (2015) ATPR 42-498; [2015] FCA 368. The decision was upheld on appeal in *NRM Pty Corporation Pty Ltd v ACCC* (2016) ATPR 42-531; [2016] FCAFC 98.

⁶ [2017] FCA 709.

⁷ Proceeding number VID301 of 2013. See the orders made on 24 July 2013.

⁸ *Europcar* [2016] FCA 377 [8]–[10].

⁹ [2008] VSC 539.

¹⁰ (2014) 309 ALR 249.

¹¹ (2015) 236 FCR 199 (Full Federal Court); and (2016) 333 ALR 569 (High Court).

¹² See *Paciocco* (2014) 309 ALR 249 [326]–[327] and [332]–[341].

¹³ The impugned term in *Free* was entered into on 14 September 2006: see *Free* [2008] VSC 539 [5]. Section 32W of the *Fair Trading Act 1999* (Vic) was unchanged from 9 October 2003 to 11 June 2009.

¹⁴ See *Free* [2008] VSC 539 [2].

It can be seen that the provisions considered in *Free* and *Paciocco* are different from the UCT provisions in the ACL. Further, the concept of transparency did not exist in the version of the *Fair Trading Act* considered in those cases. For these reasons, *Free* and *Paciocco* should be relied on with a degree of caution. However, in *Europcar*, Gilmour J referred to *Free* in detail and said it provided ‘assistance in the interpretation and application’ of the UCT provisions.¹⁵

III THE RELEVANCE OF ‘TRANSPARENT’ TO ‘UNFAIRNESS’

It is submitted that transparency is defined in such a way that it is logically irrelevant to the second and third requirements of the definition of ‘unfair’ listed in s 24(1) of the ACL and of limited relevance to the first element. Each of the three requirements will be examined in turn below. For convenience, the party who is challenging an allegedly unfair term will be referred to as the ‘plaintiff’ and the party seeking to enforce it, the ‘defendant’.

A *The First Requirement of ‘Unfair’: A Significant Imbalance in Rights and Obligations*

The first requirement for a term to be unfair is that it ‘would cause a significant imbalance in the parties’ rights and obligations arising under the contract’. This is stated in s 24(1)(a) of the ACL. Sirko Harder examined the role of transparency in the UCT provisions¹⁶ and concluded:

there is only one situation in which the requirements of unfairness set out in s 24(1) can easily accommodate considerations of transparency, and that is where the parties’ rights and obligations directly depend upon the ... [plaintiff] being aware of the term.¹⁷

Harder gave two examples of such a situation: first, a fixed-term contract which provides for its automatic extension unless one of the parties gives notice before the term expires and second, a contract for architectural work which prohibits the customer from making a claim for defective work unless they notify the architect of the defect within a certain time period.¹⁸ In both of these examples, a time limit is being placed on the plaintiff’s ability to exercise their rights. In the first example, the plaintiff’s right to bring the contract to an end may be lost if notice is not given within a certain time while in the second example, the plaintiff’s right to bring a claim is limited by a time bar.

1 *Situations Where the Parties’ Rights and Obligations Depend on the Plaintiff Being Aware of the Term*

Situations ‘where the parties’ rights and obligations directly depend upon the ... [plaintiff] being aware of the term’¹⁹ can be broken into two categories. First, there are situations where a term limits a plaintiff’s rights and second, situations where a term limits a plaintiff’s ability to avoid an obligation. I will consider each in turn.

A plaintiff may be unaware of the limitation on their rights due to a lack of transparency in the term imposing the limitation. As a result, they may fail to abide by the limitation and lose a right. For example, as suggested above, a term could limit the time during which a plaintiff may

¹⁵ *Europcar* [2016] FCA 377 [54].

¹⁶ Sirko Harder, ‘Problems in Interpreting the Unfair Contract Terms Provisions of the Australian Consumer Law’ (2011) 34 *Australian Bar Review* 306.

¹⁷ *Ibid* 319.

¹⁸ *Ibid* 318.

¹⁹ *Ibid* 319.

bring a claim for defective work. If the plaintiff is not aware of the term due to a lack of transparency, they may not bring a claim in time and hence lose their right to do so. This could cause ‘a significant imbalance in the parties’ rights and obligations arising under the contract’ in two ways. First, the right may be lost, resulting to a situation where there is a significant imbalance. Second, the difficulty that the lack of transparency creates for the plaintiff in exercising their right may diminish the value of the right, leading to a significant imbalance. Returning to the example of a term concerning claims for defective work, the term may deprive the plaintiff of the right to bring an action, creating a situation where the defendant has a right to payment for the defective work and no obligation to repair it, while the plaintiff is obliged to pay for the defective work and has no right to have it repaired. This situation could amount to a ‘a significant imbalance in the parties’ rights and obligations arising under the contract’, to quote s 24(1)(a). Alternatively, the limitation on the plaintiff's right to bring a claim for defective work could be viewed as devaluing the right, and leading to a significant imbalance. The transparency of the term is relevant to the significant imbalance in each scenario.

Dr Harder does not give an example of a situation where a term limits a plaintiff's ability to avoid an obligation, but one example would be a term that imposes a penalty on the plaintiff for breach or termination of the contract. Consider a situation where, due to the term lacking transparency, the plaintiff is unaware that it penalises them heavily for termination. The plaintiff terminates the contract believing they will only be liable for damages assessed at common law. Had they known they would be penalised, they would not have terminated. The plaintiff is now under an obligation to pay a significant penalty and has no right to receive the goods or services they contracted for from the defendant. By contrast, the defendant is under no obligation to provide the goods or services and has a right to be paid a windfall amount. Due to the plaintiff's ignorance of the term, resulting from a lack of transparency, a situation has arisen where there is a significant imbalance in the parties' rights and obligations. The same scenario could arise if the plaintiff were penalised for breach. It is important to note that in both cases the obligation of the plaintiff was contingent on an event, being termination or breach, and the plaintiff was able to avoid that event. Matters would be different if the plaintiff were unable to avoid the event and hence the significant imbalance would have arisen in any case. We will now consider the relevance of transparency in that situation.

2 Terms Imposing Obligations

Let us now consider a term which imposes an obligation which a plaintiff is unable to avoid through their own action. Such a situation would arise if, for example, a term imposed the evidentiary burden on the plaintiff for all matters in a proceeding arising from the contract.²⁰ Another example, may be a term that requires the plaintiff to indemnify the defendant for any loss suffered by the defendant whether the plaintiff contributed to that loss or not. It is submitted that in this situation, the transparency of the term is irrelevant to whether it would cause a significant imbalance in the parties' rights and obligations.

Due to a lack of transparency, a plaintiff may be unaware of an obligation prior to entering into a contract. Had they been aware of the obligation, they may have demanded an amendment to the contract so that the obligation was removed or lessened.²¹ In this way, a lack of transparency has resulted in a term which imposes an obligation on the plaintiff being included in the

²⁰ Such a term is referred to in s 25(1) of the ACL which gives examples of terms that are potentially unfair.

²¹ If the plaintiff is able to obtain an amendment to the contract, there may be an issue regarding whether the contract is a standard form contract, which is a requirement of the UCT provisions under s 23(1)(b).

contract. The existence of an obligation in itself will not result in a 'significant imbalance in the parties' rights and obligations arising under the contract'. Whether there is a significant imbalance will depend on an assessment of all the terms of the contract and their effect. A lack of transparency may provide an explanation as to why the plaintiff entered a contract containing an onerous obligation, but will have no bearing on whether there is in fact a significant imbalance. For this reason, it is submitted that transparency is irrelevant to whether a term imposing an obligation, which the plaintiff could not avoid, creates a significant imbalance.

This view is supported by case law which says the negotiation of a contract is irrelevant to whether there is a significant imbalance. In *Chrisco*, Edelman J clearly stated that he was proceeding 'on the basis that the lack of individual negotiation of the contracts' was irrelevant to determining whether there was a significant imbalance.²² In *Free*, Cavanough J said 'individual negotiation of a term is not relevant to whether the term causes a significant imbalance'.²³ Cavanough J's view appears to have been endorsed in *Paciocco*.²⁴ The views regarding individual negotiation were expressed in *Free* and *Paciocco* notwithstanding that s 32X of the *Fair Trading Act* provided:

Without limiting section 32W, in determining whether a term of a consumer contract is unfair, a court or the Tribunal may take into account, among other matters, whether the term was individually negotiated ...

A lack of transparency in a term imposing an obligation could be relevant in another way. Consider a situation where the term imposing the obligation is stated so vaguely that the defendant is able to lead the plaintiff to believe the obligation is more onerous than it actually is. The over-stated obligation may lead to a 'significant imbalance in the parties' rights and obligations arising under the contract'. This raises the question of whether the over-stated obligation is an obligation 'arising under the contract', as required by s 24(1)(a) of the ACL. On one view it is, since the over-stated obligation originated from a term in the contract and in that sense arose under the contract. On another view, the over-stated obligation did not arise under the contract but from a misinterpretation of the contract propounded by the defendant. Hence, it is the defendant's conduct and not the contract which is the source of the over-stated obligation. Depending on the answer to this question, the issue of whether transparency is relevant may not even arise because any significant imbalance in rights and obligations does not fall within s 24(1)(a) to begin with.

This scenario also raises a further question as to whether the term could fulfil the third requirement of unfairness, being that the term would cause detriment 'if it were to be applied or relied on'. The defendant would be *purporting* to rely on the term because they are actually relying on a misinterpretation of it. Due to the definition of 'rely on' in s 2 of the ACL, such purported reliance appears to be adequate. 'Rely on' is defined as including an 'attempt to exercise a right ... *purportedly* conferred, by the term; [and to] assert the existence of a right ... *purportedly* conferred, by the term' [emphasis added].

Regardless of how these two questions may be resolved, the above scenario is rather hypothetical for two reasons. First, if the term were challenged by the plaintiff, a court would determine the correct interpretation of the term. This would prevent the defendant from leading

²² *Chrisco* (2015) 239 FCR 33 [50].

²³ *Free* [2008] VSC 539 [112].

²⁴ *Paciocco* (2014) 309 ALR 249 [331].

the plaintiff to believe they must comply with the over-stated obligation and hence there would be no need to resort to the UCT provisions. Second, it is more likely that a would-be defendant would draft a term that clearly imposes an obligation so as to avoid any need for exaggeration. A lack of transparency in a term imposing an obligation could be relevant as an indicator of a significant imbalance. This view appears to be propounded in the Explanatory Memorandum to the Trade Practices Amendment (Australian Consumer Law) Bill 2010 (No 2) ('Explanatory Memorandum'), which introduced the UCT provisions. It addresses transparency as follows:

A lack of transparency in the terms of a consumer contract may be a *strong indication* of the existence of a significant imbalance in the rights and obligations of the parties under the contract.²⁵

It is submitted transparency has little to no relevance as an indicator of whether a term creates a significant imbalance. The logic underlying the statement quoted above is somewhat unclear. Perhaps the logic is that if a term creates a significant imbalance, a defendant may try to conceal it from the plaintiff by not making it readily available to them or obscuring it with unclear drafting. This logic assumes the following:

- The defendant performed a proper construction of the contract and concluded that the term gave rise to a significant imbalance or might do;
- As a result of this conclusion, the defendant decided to obscure the term so that the plaintiff could not become aware of the significant imbalance; and
- In light of the defendant's conduct, the court should feel greater comfort in concluding that the term gives rise to a significant imbalance.

There are several problems with this logic. First, it assumes that the defendant is capable of performing a process of legal reasoning concerning whether a term creates a significant imbalance with such a level of precision that the court ought to give weight to it when performing its own reasoning. There is no basis for this assumption. In some circumstances, deliberate conduct by a defendant may be a reliable indication of whether a particular legal test has been fulfilled but not in the present case. For example, a court may more readily conclude that conduct was misleading or deceptive in breach of s 18 of the ACL if the defendant intended to mislead the plaintiff.²⁶ For misleading or deceptive conduct, there is a clear connection between someone intending to mislead and actually achieving that end, but there is no similar connection between concealing a term and that term causing a 'significant imbalance in the rights and obligations ... under the contract'.

Second, the logic assumes that the defendant has deliberately deprived the term of transparency. The term may lack transparency due to careless drafting by the defendant, the defendant simply

²⁵ Explanatory Memorandum, Trade Practices Amendment (Australian Consumer Law) Bill 2010 (No 2) (Cth) [5.38] [emphasis added], quoted in *Chrisco* (2015) 239 FCR 33 [72].

²⁶ See *Campomar Sociedad, Limitada v Nike International Ltd* (2000) 202 CLR 45 [33], referred to subsequently in *National Exchange Pty Ltd v ASIC* (2004) 49 ACSR 369 [28] (Full Federal Court); *Veda Advantage Limited v Malouf Group Enterprises Pty Limited* [2016] FCA 255 [204]; *Verrocchi v Direct Chemist Outlet Pty Ltd* [2015] FCA 234 [91]; *Samsung Electronics Australia Pty Limited v LG Electronics Australia Pty Limited* [2015] FCA 227 [91]; *Telstra Corporation Limited v Phone Directories Company Pty Ltd* [2014] FCA 568 [489]; *Owston Nominees No 2 Pty Ltd, Clambake Pty Ltd* (2011) 248 FLR 193 [227] (WA Court of Appeal); *James Hardie Industries NV v Australian Securities and Investments Commission* 274 ALR 85 [245] (NSW Court of Appeal); and *National Exchange Pty Ltd v ASIC* (2004) 49 ACSR 369 [28] (Full Federal Court).

forgetting to make it available to the plaintiff or it being impossible to draft the term 'in reasonably plain language' due to the complexity of the subject matter it addresses.

Another way to look at how transparency may indicate a significant imbalance is to say that if a term is clearly disclosed to the plaintiff, it is unlikely to cause a significant imbalance because the plaintiff would presumably not accept a term which is significantly against their interests. This approach is also problematic. It assumes the plaintiff can perform a process of legal reasoning concerning whether a term creates a 'significant imbalance'. It also assumes that the plaintiff understood the term and made an entirely free choice to accept it.

3 *Terms Granting Rights*

Let us now consider a term which grants a right to the plaintiff. Due to a lack of transparency, a plaintiff may be unaware of a term granting them a right and hence be unable to exercise that right. If the right offsets an obligation imposed on the plaintiff by another term or a right granted to the defendant, the inability of the plaintiff to exercise the right may create a significant imbalance. For example, consider a term that allows the defendant to vary the contract unilaterally, and a second term that permits the plaintiff to strike out the variation provided they notify the defendant of their objection within a set time. If the plaintiff is unaware of the second term due to a lack of transparency, they will be unable to exercise their right to prevent the variation.

It is important to note that s 24(2)(a) does not mandate transparency as a consideration in this situation. Section 24(2)(a) requires the transparency of the allegedly unfair term to be considered, but *not* the transparency of another term which is *not* allegedly unfair.²⁷ The present example involves considering the transparency of an unchallenged term in order to determine whether a challenged term is unfair. However, a court may consider the transparency of a term granting a right even though it is not challenged by the plaintiff. This is because s 24(2) permits a court to 'take into account such matters as it thinks relevant' when determining whether the impugned term is unfair and requires it to consider the contract as a whole.

Let us now consider a term that grants a right to the defendant; for example, a right to unilaterally vary the contract, change the nature of the services or goods to be provided under the contract or terminate the contract without notice. This scenario is similar to that where a term imposes a heavy obligation on the plaintiff, which was considered above. A lack of transparency may explain why the plaintiff entered into a contract granting the defendant a far-reaching right, but will have no bearing on whether there is in fact a significant imbalance in rights and obligations. A slightly different scenario would be a term that grants a far-reaching right to the defendant but also grants the plaintiff the right to limit the defendant's exercise of the right: for example, a term that allows the defendant to vary the contract unilaterally but also allows the plaintiff to strike out the variation, provided they give the defendant notice of their objection within a set time. In that scenario, transparency would be relevant to whether there is a significant imbalance because the plaintiff cannot exercise their right unless they are aware of the term. This is much the same as the scenario considered above, where the plaintiff's right to bring a claim for defective work is subject to a time bar.

²⁷ *Chrisco* (2015) 239 FCR 33 [43].

B *The Second Requirement of ‘Unfair’: Protection of a Legitimate Interest*

The second requirement for a term to be unfair is that it is ‘not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term’.²⁸ It is submitted that transparency is irrelevant to determining what the legitimate interests of the defendant are and irrelevant to whether the term is reasonably necessary to protect those interests. The legitimate interests of a party cannot be influenced by the clarity with which a term is drafted or its availability to another party. Those interests are determined by the nature of the party’s business and the industry it operates in.

When determining whether a term is ‘reasonably necessary in order to protect’ a legitimate interest, the primary questions are (i) what rights and obligations does the term create, and (ii) are those rights and obligations reasonably necessary to protect the legitimate interest? It is submitted that transparency is irrelevant to answering these questions. As for the first question, the rights and obligations granted by the contract will be determined by a proper interpretation of the contract and not how clearly it is drafted. As for the second question, whether those rights and obligations go beyond protecting a legitimate interest will be determined by considering the scope of the rights and obligations, the scope of the legitimate interest and whether the rights and obligations go beyond protecting that interest.

There is perhaps a secondary matter to consider: if the term does protect a legitimate interest, has the term been *expressed* in a way that is reasonably necessary in order to protect that interest? To put things another way, could the term have been expressed more simply and still achieved the same end? Consider a situation where a defendant operates in a complex environment. In those circumstances, a term that protects its legitimate interests may need to be so complex that it is difficult or impossible to express in plain language. It is submitted that transparency is not relevant to determining whether the term could have been expressed more simply. That issue will be determined by the degree of complexity of the environment and how a drafter could respond to that complexity.

C *The Third Requirement of ‘Unfair’: Detriment*

The third requirement for a term to be unfair is that it ‘would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on’.²⁹ It is difficult to conceive of a situation where transparency would be relevant to whether a term causes the plaintiff detriment. The consequences of a term being applied or relied on depend on the rights the term grants to the defendant and the obligations it imposes on the plaintiff. These matters are not affected by the clarity with which the term is expressed but by the proper interpretation of the term. A lack of clarity will not prevent a court from interpreting the term unless it is so vaguely expressed that it is void for uncertainty, in which case it will not be a source of rights or obligations for any party.

Transparency may at first appear to be relevant to detriment in two rather hypothetical situations, but on further analysis, it is submitted that it is not.

²⁸ ACL, s 24(1)(b).

²⁹ ACL, s 24(1)(c).

The first situation was identified by Harder who said that detriment could take the form of the plaintiff being surprised or angered on becoming aware of a non-transparent term.³⁰ He dismissed this argument for two reasons. First, the detriment must be caused by the defendant applying or relying on the term. The plaintiff would usually become aware of the term before it is relied on. Hence, the defendant's applying or relying on the term would not cause the surprise or anger, rather *the plaintiff's discovery* of the term would be the cause.³¹ Second, for the purposes of s 24(1)(c), the detriment must result from the actual effect of the term and not the discovery of it.³²

It is submitted that Harder is correct but some additional observations can be made. First, the primary cause of the plaintiff's surprise or anger upon discovering the term is its initial concealment by the defendant rather than the discovery of the term by the plaintiff, which is a secondary matter. As Dr Harder noted, it is the defendant's reliance or application of the term which must cause the detriment. The concealment by the defendant is a different act from relying on or applying the term. Second, the Explanatory Memorandum states that the detriment must be caused 'by the practical effect of the term'.³³ This supports Harder's second argument. It is submitted that the practical effect of the term is the effect it has on the parties' rights and obligations and not an incidental effect it may have on a party's emotions. Third, a situation where a plaintiff tries to rely on surprise or anger to fulfil the requirement of detriment is quite hypothetical. A plaintiff will need to suffer some non-emotional detriment if they are to establish that the term would cause a 'significant imbalance in the rights and obligations of the parties arising under the contract', as required by s 24(1)(a). The plaintiff is likely to rely on this non-emotional detriment to fulfil the requirement of s 24(1)(c) as well, rather than resort to relying on feelings of surprise or anger.

The second situation where transparency could be relevant to detriment is where the transparency of the term affects the *extent* of the detriment suffered by the plaintiff. As noted above, a vaguely drafted term may allow a defendant to over-state the plaintiff's obligations. In this way, transparency could affect the extent of the detriment. However, s 24(1)(c) is not concerned with the extent of detriment, only whether there is detriment. Hence, transparency could not be relevant in this way.

In light of the above, it is submitted that transparency is not relevant to whether a term 'would cause detriment ... to a party if it were to be applied or relied on'.

D Summary

In summary, transparency is of limited relevance to the first requirement of the test for unfairness, being whether the term would cause 'a significant imbalance in the parties' rights and obligations arising under the contract'. It is irrelevant to the two remaining requirements of the test: whether the term is reasonably necessary to protect a legitimate interest of the defendant, and whether it would cause detriment to the plaintiff if it were relied on. For the first requirement, transparency is only relevant in situations where the plaintiff's rights and obligations depend on their knowledge of the allegedly unfair term. As explained above (see heading *Situations Where the Parties' Rights and Obligations Depend on the Plaintiff Being*

³⁰ Harder, above n 16, 319.

³¹ Ibid.

³² Ibid.

³³ Explanatory Memorandum [5.33]; see also [5.32].

Aware of the Term), such a situation will arise if (i) a term places a limitation on a right of the plaintiff and the plaintiff would be able to avoid that limitation, or (ii) a term imposes an obligation on the plaintiff, which is subject to the occurrence of an event that the plaintiff would be able to avoid. There will be many terms outside these scenarios such as terms that (i) impose an obligation on the plaintiff, which is not subject to the occurrence of an event, or (ii) grant a right to the defendant.

IV WHAT ROLE SHOULD TRANSPARENCY PLAY IN THE UCT PROVISIONS?

Given the limited relevance of transparency, what role should it play in the UCT provisions? It is submitted that transparency should not continue as a mandatory consideration for assessing unfairness because of its limited relevance. As a matter of logic, it is unsatisfactory to mandate a consideration which is largely irrelevant, but more importantly, it is practically undesirable. This is because (i) it is an inefficient use of the courts' and parties' resources to address a consideration that is largely irrelevant, and (ii) there is a risk that the consideration could lead to incorrect outcomes. The latter is of greater concern.

The Explanatory Memorandum clearly states that transparency is not determinative of unfairness:

Transparency, on its own account, cannot overcome underlying unfairness in a contract term. Furthermore, the extent to which a term is not transparent is not, of itself, determinative of the unfairness of a term in a consumer contract and the nature and effect of the term will continue to be relevant.³⁴

This was accepted in *Chrisco*.³⁵ However, there remains a real risk that the test for unfairness may be distorted by the inclusion of a largely irrelevant consideration. This is for two reasons. First, transparency is given greater weight in the ACL than it deserves, due to its being one of only two mandatory considerations. This is particularly so when the other mandatory consideration, being the requirement that a court consider the contract as a whole, is so trite that it adds little guidance. Further, the Explanatory Memorandum says that a 'lack of transparency may be a *strong indication* of the existence of a significant imbalance in the rights and obligations of the parties under the contract.'³⁶ This statement was noted in *Chrisco*.³⁷

Second, the test for transparency is more easily applied than the test for unfairness, and hence it is tempting for a decision maker to rely heavily upon it when determining unfairness. One of the requirements of the test for unfairness is whether the term causes a significant imbalance in the rights and obligations arising under the contract. Fair minds may easily differ on what amounts to a significant imbalance, but there is less likely to be a difference of views about transparency, since it turns on matters which are more objective, such as plainness of expression and the availability of the term. Hence, a conclusion regarding unfairness that is based largely on transparency is less likely to appear idiosyncratic.

If transparency is not a mandatory consideration for determining 'unfairness', what role should it play? There are four options.

³⁴ Explanatory Memorandum [5.39].

³⁵ *Chrisco* (2015) 239 FCR 33 [43].

³⁶ Explanatory Memorandum [5.38] [emphasis added].

³⁷ *Chrisco* (2015) 239 FCR 33 [72].

A *Add Transparency to the Test for 'Unfairness'*

The first option is to incorporate transparency into the test for unfairness in s 24(1) as a new fourth requirement so that a term is only unfair if it is not transparent. A term would still have to fulfil the existing three requirements to be unfair. If this option were adopted, it would be a substantial change to the test for 'unfairness'. Whether this is appropriate depends on what the test for unfairness is intended to achieve.

The Explanatory Memorandum states that the UCT provisions are based on the recommendations made by the Productivity Commission in its report *Review of Australia's Consumer Policy Framework* ('PC Report'),³⁸ suggesting the test for unfairness is intended to implement the recommendations of the Productivity Commission. The PC Report recommended that a term be declared unfair if (i) contrary to the requirements of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract and (ii) it would cause material detriment to consumers either individually or as a class.³⁹ It recommended that when deciding whether a term is unfair, a decision-maker must consider 'all of the circumstances of the contract' and take into account 'the broader interests of consumers, as well as the particular consumers affected.'⁴⁰ The recommendations did not mention transparency or a similar concept.

It is submitted that including transparency as a fourth requirement in the test of unfairness would depart from the Productivity Commission's recommendation, which was the foundation for the introduction for the UCT provisions. The PC Report is a comprehensive document devoting approximately 60 pages to the consideration of unfair contract terms. It was the culmination of over 16 months of work from the release of the terms of reference on 11 December 2006 to the release of the report on 30 April 2008. In preparing its Report, the Productivity Commission released a draft report for consultation, received over 250 written submissions, met with over 70 individuals and organisations within Australia, and met with governments, consumers and businesses in several other countries.⁴¹ Hence, one should be slow to depart from its recommendations until an equally comprehensive review of consumer protection policy is undertaken.

The fact the PC Report did not mention transparency in its recommendation is a further reason for removing transparency as a mandatory consideration for determining unfairness in the ACL.

B *Specify Transparency as a Discretionary Consideration*

A second option is for transparency to be referred to in the ACL as a discretionary consideration for determining unfairness. Referring to transparency as a discretionary consideration is preferable to making it a mandatory consideration because then a court will only consider it when it is relevant. However, since transparency will be irrelevant on many occasions, there seems little point in giving it specific mention. If it is specifically mentioned, we might as well refer to various other matters that might be relevant on some occasion. Further, the list of

³⁸ Explanatory Memorandum [5.3].

³⁹ Productivity Commission, *Review of Australia's Consumer Policy Framework*, Report No 45, Vol 2, (2008) 168.

⁴⁰ *Ibid.*

⁴¹ *Ibid* 14.

contractual terms which are potentially unfair, in s 25 of the ACL, already gives a court sufficient guidance on what may be unfair.

The ACL could make transparency a mandatory consideration for the element of the test for unfairness contained in s 24(1)(a)—whether there is a significant imbalance in the parties' rights and obligations. As noted above, transparency may be relevant to this element on some occasions. However, since it will be irrelevant on many other occasions, it is preferable that transparency is not a mandatory consideration.

C *Adopt a Broad Test for 'Unfair'*

As already noted, the test for whether a term is unfair in s 24(1) is quite specific. The test is not cast in broad terms, such as a 'term will be unfair if it is unfair in all the circumstances'. This can be contrasted with the prohibition on unconscionable conduct in s 21 of the ACL, which provides that a person must not 'engage in conduct that is, in all the circumstances, unconscionable'. The transparency of a term would be relevant to whether the term is unfair under a broad test. For example, a term could be judged unfair if it was so unclear that a plaintiff could not understand what it required of them.

A comprehensive analysis of whether a broad test for unfairness is desirable is beyond the scope of this paper, but a few points can be made. First, a broad test may give greater latitude to the subjective views of the decision-maker and hence create a risk of idiosyncratic decision-making. This could lead to greater uncertainty for contracting parties about whether terms in their contract will be enforceable. Even if idiosyncratic decision-making does not eventuate, the perception of such a risk could still create a sense of uncertainty among contracting parties. Second, the common law will not invalidate a term simply because it is unfair.⁴² Hence, a broad test for unfairness would be a significant departure from common law principles. Third, a broad test for unfairness was not recommended by the PC Report.

D *Create a Separate Prohibition on Terms Lacking Transparency*

The PC Report does not address a specific prohibition on terms which lack transparency or are unclear by some other definition, although such a prohibition is not unprecedented. One previously existed in the now repealed *Fair Trading Act* and another currently exists in the *Consumer Rights Act 2015* (UK) (*Consumer Rights Act*).

Section 163 of the *Fair Trading Act* specified minimum requirements regarding clarity for a consumer contract. Unlike the UCT provisions, a consumer contract did not need to be a standard form contract for the purposes of s 163.⁴³ Section 163(3) required a consumer contract to be 'easily legible', use a font of no less than 10 points if it is printed or typed, and be 'clearly expressed'. Section 163(4) permitted the Director of Consumer Affairs Victoria to apply to the Victorian Civil and Administrative Tribunal or a court for an order that a provision did not comply with s 163(3).⁴⁴ If the Tribunal or court was satisfied that it did not comply, it could

⁴² *Europcar* [2016] FCA 377 [47], citing *Biotechnology Australia Pty Ltd v Pace* (1988) 15 NSWLR 130, 132–3 (Kirby P); *Woolworths Ltd v Kelly* (1991) 22 NSWLR 189, 193–4; Elizabeth V Lanyon, 'Equity and the Doctrine of Penalties' (1996) 9 *Journal of Contract Law* 234, 250.

⁴³ See *Fair Trading Act* s 3.

⁴⁴ Originally, the application could only be made to the Tribunal but this was altered to include a court, with effect from 30 May 2007, by the *Fair Trading and Consumer Acts Amendment Act 2007* (Vic).

order that a supplier not use the provision in the same or similar terms in consumer contracts. There was no right for a person other than the Director to seek such an order.

Section 68 of the *Consumer Rights Act* requires a term in a consumer contract to be transparent, which is defined as 'expressed in plain and intelligible language' and 'legible'. If a term is not transparent, the regulator may apply for an injunction in relation to it.⁴⁵ Section 68 is clearly comparable to s 163 of the *Fair Trading Act*. However, the *Consumer Rights Act* contains another provision, in s 69, which does not have an equivalent in the *Fair Trading Act*. Section 69 of the *Consumer Rights Act* provides that if a term in a consumer contract 'could have different meanings, the meaning that is most favourable to the consumer is to prevail'. Unlike the UCT provisions, neither s 68 or s 69 is limited to standard form contracts.⁴⁶

The main issue is whether there is a need for a provision akin to s 163 of the *Fair Trading Act* or s 68 of the *Consumer Rights Act* in the ACL. A comprehensive analysis of this issue is beyond the scope of this paper, but a few points can be made. First, s 163 existed from 27 May 2003 until 19 October 2010. In that seven-year period, it appears to have only been relied on seven times.⁴⁷ This suggests it may be unnecessary. Second, the PC Report did not contain a recommendation that such a provision be included in the ACL. Third, the risk of people being misled by unclear terms is already addressed to an extent by the prohibition in s 18 of the ACL on conduct that is likely to mislead.

V CONCLUSION

Section 24(2) of the ACL provides that when a court is determining whether a term is unfair it may take into account such matters as it thinks relevant, but *must* take into account the extent to which the term is transparent and the contract as a whole. It is submitted that s 24(2) should be removed. A court does not need to be told to consider such matters as it thinks relevant or the contract as a whole. Further, transparency should cease to be a mandatory consideration for three reasons. First, it is of limited relevance to determining whether a term is unfair. Second, the recommendation in the PC Report, which was the basis for the introduction of the UCT provisions, made no mention of transparency. Third, retaining transparency as a mandatory consideration is undesirable since it is logically unsatisfactory to mandate a consideration of limited relevance and practically undesirable because there is a risk that it could lead to incorrect outcomes when the test of unfairness is applied. Transparency could play some role in the ACL but this would require an amendment to the legislation. For example, transparency could be part of a new prohibition on unclear terms or it could be relevant if the test for unfairness was amended to a broad test instead of the narrow test that currently exists.

⁴⁵ *Consumer Rights Act* sch 3 cl 3.

⁴⁶ See *Consumer Rights Act* sub-ss 61(1) and (3).

⁴⁷ See *Director of Consumer Affairs Victoria v Australian Tourism Centre Pty Ltd* [2010] VSC 571; *Director of Consumer Affairs v Parking Patrols Vic Pty Ltd* [2012] VSC 137; *Director of Consumer Affairs v Palamara* [2012] VSC 311; *Director of Consumer Affairs v AAPT Ltd* [2006] VCAT 1493; *Director of Consumer Affairs Victoria v Craig Langlely Pty Ltd & Matrix Pilates and Yoga Pty Ltd* [2008] VCAT 482 and [2008] VCAT 1332; *Director of Consumer Affairs Victoria v Trainstation Health Clubs Pty Ltd* [2008] VCAT 2092; and *Director of Consumer Affairs Victoria v Backloads.com Pty Ltd* [2009] VCAT 754. Section 163 has also been referred to in three proceedings brought by private litigants: *Braithwaite v GH Operations Pty Ltd* [2007] VCAT 415; *Elliott v Simonds Homes Pty Ltd* [2010] VCAT 1827; and *Worthing v Advance Heating & Cooling Pty Ltd* [2014] VCAT 1532, but, as noted, only the Director of Consumer Affairs can rely on s 163.