

UNFAIR CONTRACT TERMS IN AUSTRALIA

Unfair Contract Terms in Australia, by Jeannie Paterson, Thomson Reuters, 2012, 221 pp +21 pp tables: ISBN 9780455229089. Softcover \$160.00.

Every week courts are faced with allegations that a person should be relieved from his or her contractual obligations because the contract is unfair. Whilst there have been handy books on the *Contracts Review Act 1980* (NSW) and on the *Trade Practices Act 1974* (Cth), it was good to see the production of an up-to-date book which claims to cover the field.

Unfortunately, the book does not cover the field. It is handy as far as it goes, but it does not give sufficient coverage for lawyers practising in New South Wales. This is because, apart from three minor references, there is no attempt to deal with three decades of case law under the *Contracts Review Act 1980* and little consideration is given to the traditional equitable remedies of undue influence and catching bargains. The book virtually confines itself to what might be considered unfair under the uniform *Competition and Consumer Act 2010* (Cth).

However, once one realises that the title is a little exaggerated and judges the book on its exposition of the statute on which it is focused, one then looks to judge it on whether the author has, as she claims in her preface, covered the scope of the legislation, the test of an unfair term, relevant matters to determine whether a term is unfair and the remedial regime. Under the legislation, a term is unfair if:

- (a) it would cause a significant imbalance in the parties' rights and obligations arising under the contract;
- (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.

As the author points out, the emphasis of this legislation is different from the traditional emphasis on the fairness of making the contract. The present legislation does not seem to concern itself with how the contract was made, rather than whether, when it is made, a term is substantially unfair.

Unfortunately, whilst this may appear to the academic mind to be a more concrete approach, it causes difficulty in that contracts cannot be divorced from the surrounding circumstances of their making. A person who has a good credit record can negotiate for a loan contract on balanced terms: a person who is desperate for funds may well agree to borrowing at 120% pa with draconian powers reserved to the lender. Is the latter always to be classed as unfair?

Unfortunately, the author does not have much reliable authority to guide her in her attempt to answer the matters stated in her preface. She has to rely on authorities from VCAT or single judge decisions in Victoria or England on different legislation.

One really has to wait to see how the superior courts interpret this legislation. It is not the author's fault that she has not this material available. She has made a valiant attempt to provide guidance as to the operation of legislation which is likely to have a far reaching effect and she is to be congratulated on her attempt.

Acting Justice Peter W Young