Unfair Terms in Residential Land Contracts – Will the Australian Consumer Law Improve a Buyer’s Bargaining Position?

Sharon Christensen¹

WD Duncan²

The prohibition on unfair contract terms in standard form consumer contracts has the potential to significantly impact on the terms of contracts for the sale of land. The definition of ‘consumer contract’ includes contracts for the sale or grant of an interest in land to an individual wholly or predominantly for personal or domestic use. Therefore, a contract for the purchase of a residence for personal occupation by the buyer, as opposed to a purchase for investment purposes, will be a consumer contract potentially attracting the application of the unfair terms provisions. Significant consumer protection mechanisms already exist in most state jurisdictions requiring disclosure of relevant matters to the buyer and providing remedies for the provision of misleading conduct. Minimal evidence of unfair terms in land contract was presented to the Productivity Commission Inquiry into the Australian Consumer Policy Framework raising the question as to whether there is an identified problem of unfair terms in real estate contracts and if so, whether the same economic and ethical rationales justify regulatory intervention. This article examines what effect if any the introduction of the unfair contract provisions will have on the enforcement of residential land contracts and the viability of previously accepted conditions if challenged as being “unfair terms”. The article concludes that despite the existence of several potentially unfair terms in some land contracts, the intervention of the rules of equity to overcome perceived hardship or unfairness to buyers from strict enforcement of terms means the unfair terms provisions are only likely to operate on terms untouched by those principles. In the authors’ view the scope for operation of the unfair terms provisions will be limited to terms untouched by the principles of equity and consumer protection legislation making it unlikely that there will be any significant realignment of the contractual obligations and rights of buyers and sellers of land.

OVERVIEW

The prohibition on unfair contract terms in standard form consumer contracts was introduced on 1 July 2010, as part of the national review of the Australian consumer policy framework culminating with the introduction of the Australian Consumer Law (ACL) and the renaming of the Trade Practices Act 1974 as the Competition and Consumer Act 2010 (Cth). The catalysts for the national review were two Productivity

¹ LLB (Hons), LLM (QUT), Gadens Professor of Property Law, Queensland University of Technology.
² LLB (Qld), LLM (London), Professor, Faculty of Law, Queensland University of Technology.
Commission (PC) reports in 2006 and 2008. The core consumer policy objective favoured by the PC in the 2008 inquiry and upon which the ACL is based is:

To improve consumer well-being through consumer empowerment and protection fostering effective competition and enabling confident participation of consumers in markets in which both consumers and suppliers trade fairly.

Underpinning this objective are several operational objectives, the most relevant for the purpose of this article being ‘to prevent practices that are unfair’. While unfair practices such as misleading conduct and unconscionable conduct were already regulated under the Trade Practices Act 1974, no national approach to the prohibition of unfair terms existed. An unfair term was considered by the PC to be a term that disadvantages one party (usually consumers) but is not reasonably necessary for the protection of the legitimate interests of the other party.

The existence of unfair terms in standard terms contract was highlighted to the PC both prior to and as part of the Inquiry by the numerous articles and submissions calling for

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6 The other operational objectives include: (i) to ensure that consumers are sufficiently well-informed to benefit from and stimulate effective competition; (ii) to ensure that goods and services are safe and fit for the purposes for which they were sold; (iii) to meet the needs of those consumers who are most vulnerable and at the greatest disadvantage; (iv) to provide accessible and timely redress where consumer detriment has occurred and (v) to promote proportionate, risk-based enforcement: S G Corones, The Australian Consumer Law, Lawbook Co, Sydney, 2011,[2.40].
7 Unfair terms provisions for consumer contracts were enacted in Victoria in 2004 by amendment to the Fair Trading Act 1999 (Vic). In NSW the Contracts Review Act 1980, s 7 purported to regulate unjust contracts.
the introduction of legislation prohibiting unfair terms in contracts with consumers. Consumer groups argued that unfair terms were endemic in certain consumer contracts such as the supply of goods and services such as mobile phones, electricity, travel, or online software where complex standard contracts are used and little or no opportunity is provided to negotiate, although evidence of exploitation by suppliers of these terms against consumers was scant. Legal commentators argued that the existing common and statutory law did not adequately recognise the “substantive” unfairness in common consumer transactions almost exclusively undertaken by standard form agreements. Courts are traditionally only moved to relieve a party of performance of a bargain if “there [is a] circumstance, other than the mere terms of the contract itself that would render reliance on the terms of the contract ‘unfair’, ‘unreasonable’, ‘immoral’ or ‘wrong’”.

Therefore, in the absence of some unconscionable, misleading or inequitable conduct by the other party to the contract, the terms of the contract, even if inherently unfair, were generally enforced.

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11 Director of Consumer Affairs v AAPT Ltd (Civil Claims) [2006] VCAT 1493.

12 Contact Energy Ltd v Jones [2009] 2 NZLR 830.

13 Jetstar Airways Pty Ltd v Free [2008] VSC 539.


15 Trade Practices Act 1974 (Cth), ss 51AA, 51AB, 51AC (unconscionable conduct) and Contracts Review Act 1980 (NSW). These comments were not directed at the Fair Trading Act 1999 (Vic) which introduced unfair terms provisions for standard form consumer contracts in 2004.


17 Hurley v McDonald’s Australia Ltd (2000) ATPR 41-741.

Minimal evidence of the extent of unfair terms in real estate contracts\textsuperscript{19} was provided to the PC as part of the Inquiry, which raises the question as to whether there is an identified problem of unfair terms in real estate contracts and if so, whether the same economic and ethical rationales\textsuperscript{20} justify regulatory intervention in contracts for the sale of real estate as in other contracts. First, the article will seek to establish whether there is a problem facing consumers of real estate by (i) reviewing the evolution of standard form contracts for the sale of land and the extent to which consumers of land are affected by unfair terms; (ii) analysing consumer complaints data about unfair terms in relation to real estate transactions and, lastly, (iii) by reviewing the case law over the last 20 years to identify the incidence of claims related to unfair terms in real estate contracts.

Secondly, the impact of the unfair terms provisions of the ACL on real estate contracts will be examined and finally, a number of potentially unfair terms commonly appearing in contracts for the sale of strata lots will be examined against the criteria in the ACL. The article concludes that in all but the most egregious cases, the effect of the new provisions may be minimal, leaving open the question of whether, in the context of land contracts, the unfair terms provisions were warranted and what realignment (if any) of the contractual obligations of buyers and sellers of land will result from the provisions.

\textsuperscript{19} Real estate contracts will be used to refer to contracts for the sale of land. Some evidence was provided by Consumer Affairs Victoria that a small percentage of complaints about unfair or misunderstood terms involved ‘buying, selling or letting a home’: \textit{Consumer Detriment in Victoria: A Survey of its Nature, Costs and Implications}, Research Paper No 10, October 2006.

\textsuperscript{20} First, regulation could be justified by an extension of the ethical principle of fairness in contracts (a principle already recognised in statutes prohibiting unconscionability) and secondly, on the economic basis that inappropriate risk assessments by consumers will lead to market failures, such as underinsurance and inefficient risk bearing by suppliers. These benefits were weighed against the evidence of low additional compliance costs or unintended consequences for business, when the experience in other jurisdictions with unfair terms regimes was examined. Productivity Commission \textit{Review of Australia’s Consumer Policy Framework}, Report No 45, Canberra, Vol 2, p 433, 440. Available at <http://www.pc.gov.au/projects/inquiry/consumer/docs/finalreport> (accessed April 2011).
II - IDENTIFYING A PROBLEM

A. Community Expectations and Detriment

Community expectations of the ethical conduct of sellers of residential property have been used previously as the rationale for the introduction of information disclosure laws.\textsuperscript{21} Information disclosure regimes have been used extensively in Australian jurisdictions to overcome the perceived information asymmetry in the seller and buyer relationship and thereby improve the fairness of the transaction.\textsuperscript{22} However, there is growing evidence that information disclosure regimes have failed to take account of the reality of consumer behaviour and that consumers continue to enter into disadvantageous transactions despite information disclosure.\textsuperscript{23} The PC has again sought to justify intervention in the contractual relationship of parties on the basis that fairness is a highly valued ethical norm.\textsuperscript{24} The majority of submissions received by the PC sought to justify regulation of unfair terms on this basis. Not only do cases of unfairness undermine trust and social capital generally, it can have the effect of increasing costs and creating inefficiency in transactions.\textsuperscript{25} While the authors accept this is a strong rationale for intervention, and may be sufficient in the absence of persuasive data, the examples of

\begin{itemize}
\item \textsuperscript{21} New South Wales Fair Trading Minister, Reba Meagher, in responding to a case involving a failure by a real estate agent to disclose the fact a triple murder occurred in a house identified a community expectation of proper disclosure by sellers of real estate. Refer to \textless http://www.findlaw.com.au/news/default.asp?task=read&id=21951&site=LE\textgreater  (accessed 17 December 2009).
\end{itemize}
unfair terms provided to the PC existed primarily in contracts for the sale of goods and services.

Evidence of the existence and extent of unfair terms across a range of contracts was provided to the PC by a number of consumer groups. Considerable evidence and examples were provided of the existence of unfair terms in standard form contracts for mobile phones, hire cars, financial services, and electricity services.\(^\text{26}\) The only reference to unfair terms in real estate contracts was contained in the survey conduct by CAV\(^\text{27}\) where misunderstood or unfair terms in buying, selling and letting a home accounted only for 9% of the consumer detriment related to misunderstood or unfair terms.\(^\text{28}\) While the evidence of consumer detriment from unfair terms was only 2.4% of total consumer detriment, it translated to 200,000 cases per year in Victoria suggesting 750,000 Australia wide. International evidence of consumer detriment from unfair terms was similar with 3.8% in the UK and 4% in South Africa.\(^\text{29}\) Unfair terms in real estate transactions or residential lettings do not form a significant component of consumer complaints about unfair terms.\(^\text{30}\)

Despite the minimal evidence presented to the PC as part of the Inquiry, do standard form land contracts contain unfair terms?\(^\text{31}\)


\(\text{28}\) The total consumer detriment from misunderstood or unfair terms was only 2.4% of total detriment. The number is higher in the case of online transactions. See The European Online Marketplace: Consumer Complaints 2007, available at <http://ec.europa.eu/consumers/redress_cons/docs/ECC_E-commerce_report.pdf> (accessed 21 April 2011).

\(\text{29}\) Notably the European Union in reviewing the current consumer directives propose to replace 4 directives with one consumer rights directive, including unfair terms. Contracts for the sale of land will not be part of that directive. Refer to the summary at <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/08/609&format=HTML&aged=0&language=EN> (accessed 21 April 2011).

\(\text{31}\) An unfair term was defined by the Productivity Commission as a term that disadvantages one party (usually consumers) but is not reasonably necessary for the protection of the legitimate interests of the other party.
B. Standard Terms Contracts

Standard terms contracts for the sale of land are widely used in several Australian jurisdictions.\(^{32}\) The majority of sale transactions in Australia utilise the standard terms endorsed for use by the relevant Law Society or Real Estate Institute. Even if contracts are individually drafted, lawyers commonly adopt the standard terms with appropriate modifications.\(^{33}\) Like other standard terms contracts, the standard terms for the sale of land are rarely negotiated or changed by the parties, although additional conditions (referred to as special conditions) are commonly added at the request of the buyer for finance and building inspections. The fact standard terms for a land contract are rarely negotiated may suggest that these contracts have the potential to be disadvantageous to consumers.

If an unfair term is a term that disadvantages one party (usually consumers), but is not reasonably necessary for the protection of the legitimate interests of the other party,\(^{34}\) several potential examples of unfair terms in standard land contracts can be identified where:

1. the seller is given a unilateral right to rescind the contract if the seller was unable or unwilling to comply with a requisition as to title,\(^{35}\)
2. the buyer’s right to terminate for a defect in title, encroachment or misdescription is limited or removed;\(^{36}\)
3. the risk of damage or destruction to the property passes to the buyer upon signing the contract;\(^{37}\)
4. the seller may terminate the contract for any breach by the buyer.

\(^{32}\) Standard conditions of sale are commonly used in New South Wales, Queensland, Victoria, South Australia and Western Australia.

\(^{33}\) In addition to standard conditions of sale, Victoria and New South Wales also provide for the incorporation of standard conditions by regulation: Transfer of Land Act 1958 (Vic) s 48; Conveyancing Act 1919 (NSW) s 60.


\(^{35}\) See, for example, clause 8 NSW Standard Contract (2005 ed).

\(^{36}\) See, for example, clause 7.5 of the REIQ Houses and Land Contract 9\(^{\text{th}}\) ed (Qld).

\(^{37}\) See, for example, clause 8.1 of the REIQ Houses and Land Contract 9\(^{\text{th}}\) ed (Qld);
While a number of these clauses are potentially unfair, it is important to note the effect of equitable principles on land contracts. The operation of standard terms in land contracts have always given way to the rules of equity and there are numerous examples where standard terms have not been enforced against a buyer because the outcome would be unfair to the buyer. For example, a common standard term used by sellers is that no misdescription or error in particulars of the land specified in the contract will annul the sale, but the buyer is entitled to compensation for any deficiency. Whilst this provision benefits the seller in many cases, if the misdescription or error in particulars is material or substantial, the buyer will not be forced to take compensation, but may rescind the contract in equity.\(^{38}\) The rules of equity, where possible, will intervene to overcome any perceived hardship or unfairness that a buyer may suffer upon a strict interpretation or application of a standard term. For instance, in *Faruqui v English Real Estates Ltd*,\(^ {39}\) Walton J gave no effect to a standard term whereby the buyer was deemed to have knowledge of the contents of certain documents affecting the title, when in fact the evidence showed that the buyer had never read them. In Farrand’s words “the courts [have] no sympathy for a seller who not only misdescribes the property sold but also seeks to escape the consequences by reliance upon the conditions of sale”.\(^ {40}\) Therefore, regardless of the effect of the printed word, agreed to by the buyer, the courts generally attempt to do equity between the parties and not all standard conditions are strictly enforced.\(^ {41}\) In general, however, the conventional reason why equity would not enforce land contracts related, in the main, to the non-disclosure of a material or substantial defect in title\(^ {42}\) or a substantial want of title from that disclosed in the contract giving rise to a material misdescription.\(^ {43}\) Equity did not intervene because of a claim by the buyer that the terms were unfair in the sense understood by this legislation and the mere fact

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\(^{38}\) The rule became known commonly as the Rule in *Flight v Booth* (1834) 1 Bing (NC) 370 after the case that decided the point. See also HW Wilkinson, *The Standard Conditions of Sale of Land* (Longman, 4th ed, 1989) 241-246. See also *Re Hewitt’s Contract* [1963] 1 WLR 1298, 1301 per Wilberforce J (as he then was).

\(^{39}\) [1979] 1 WLR 963 at 965, 967; see also *Topfell v Galley Properties Ltd* [1979] 1 WLR 446.


\(^{41}\) See *Leominster Properties Ltd v Broadway Finance Ltd* (1981) 42 PC & R 372, 387 per Slade J.

\(^{42}\) *Phillips v Caldcleugh* (1868) LR 4 QB 159.

\(^{43}\) *Shepherd v Croft* [1911] 1 Ch 521.
that specific performance was not awarded in these circumstances did not, of itself, make any terms of contract unfair.

Unlike other commercially used standard form contracts, standard terms contracts for the sale of land in each jurisdiction are regularly reviewed by the relevant professional bodies with regard to regulatory changes and case law. Consequently, the standard terms contracts for the sale of land are more dynamic and responsive to the position of the seller and buyer than other standard terms contracts. These are key aspects underlying the view that standard terms contracts for the sale of land are generally regarded as providing an appropriate balance of obligations between the parties to the agreement. The NSW Law Society suggests that standard terms land contracts in each jurisdiction actually contribute to familiarity of terms, the use of comprehensive terms, compliance with legislation, efficiency in transactions and have the advantage of being endorsed and updated by professional bodies. Despite this view of the standard contracts having enjoyed some recent judicial acceptance in New South Wales, is there any evidence of unfair terms being used against buyers of real estate?

C. Claims by buyers of unfair practices

Reported cases involving land contracts are replete with claims by buyers that it would be unfair to enforce a contract against them because of unfair tactics, misleading conduct and unfair pressure in the purchase process. These cases commonly involve allegations of misleading conduct, estoppel or unconscionable conduct. Notably, the majority of

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44 Standard conditions of sale in NSW are endorsed by the Law Society of NSW; in Queensland by the Queensland Law Society and REIQ; in Victoria standard terms are given a statutory imprimatur by Table A of the 7th Schedule of Transfer of Land Act 1958 (Vic) and the REIV and Law Institute of Victoria, in South Australia by the REISA and in Western Australia by the REIWA. Similarly in the UK the standard conditions are endorsed by the Law Society for England and Wales.


46 Heilpern v Anasco [2010] NSWSC 317 at [37] per Brereton J, “It is impossible to identify any substantive injustice in the terms of the subject contract. The contract and its terms are not harsh or unjust. Its terms were the standard conditions for a contract for sale of land”.

reported cases involving unconscionability in relation to land contracts concern a taking advantage of the weaker position of the buyer, misrepresentation or a claim that the forfeiture of money paid is a penalty. Only a small minority have actually alleged that a term of the contract itself was unfair. For example, in *Mirvac (Docklands) Pty Ltd v La Rocca*, a buyer of an apartment “off the plan” claimed that a term of the land contract was unfair unjust and unreasonable. This term, which is standard in every contract for the construction and sale of residential property “off the plan”, provided that the seller might vary the building plans and specifications from time to time during construction in any manner that the seller considered necessary or desirable, including by substituting any fixtures or fittings specified in those plans with appliances of “like quality”. Hargrave J found that such a provision did not meet that alleged description as it was not unfair or unreasonable to permit the seller some “reasonable flexibility” to amend the building plans and specifications during the construction phase given the large scale of the development. The buyer also alleged that the clause permitting the seller to retain control of the body corporate to the exclusion of the buyer was unreasonable and unjust. Hargrave J held, to the contrary, that the clause was “commercially justifiable” in the circumstances.

In the few cases where buyers have alleged unconscionable conduct arising from the terms of the contract against their seller, they have not received the warmest reception from the courts. In *Hurley v McDonald’s Australia*, the Full Federal Court held that

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49 For example *Anthony v Vaclav* [2009] VSC 357.

50 For example *Byrne v Cope Street Pty Ltd* [2009] NSWSC 947; *Zhang v Vp302 Spv* [2009] NSWSC 73.

51 For example, *Tanwar Enterprises Pty Ltd v Cauchi* (2003) 217 CLR 315; *Barreau Peninsula Pty Ltd v Ambassador at Redcliffe Pty Ltd* [2008] QSC 90.


53 Ibid, [197].

54 Ibid, [200].

before ss 51AA, 51AB or 51AC of the *Trade Practices Act 1974 (Cth)* will apply, there must be some circumstance other than the mere terms of the contract itself that would render reliance on the terms of the contract “unfair”, “unreasonable”, “immoral” or “wrong”. A similar pattern is seen in other cases where successful buyers of real estate required evidence of conduct in the seller that was characterized as unconscionable or as taking advantage of the position of the buyer. Underlying the judicial emphasis on the need for the seller’s conduct as opposed to the terms of the contract to be unfair, is the traditional theory that a contract which is freely negotiated contains obligations voluntarily assumed. In the absence of conduct that impinges upon that assumption, a court will be loath to interfere with the contract agreed between the parties. For example, in *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd*, the lessor, in negotiations with the lessee for consent to an assignment of the lease, was able to secure an agreement beneficial to the lessor, but detrimental to the lessee. The lessor knew that the lessee wanted to sell the business and assign the lease due to personal circumstances and used that fact to secure a release from the lessee in relation to a prior claim against the lessor. A majority of the High Court merely viewed the lessor as driving a hard bargain rather than taking advantage of a weakness of the lessee, who was well aware of the consequences of their agreement. The fact that the final agreement contained terms detrimental to the rights of the lessee was irrelevant to the High Court’s decision.

A similar phenomenon has occurred in decisions based on the *Contracts Review Act 1980* (NSW), which, on its face, gives a court the right to declare void, refuse to enforce, vary or modify a contract or a provision in a contract found to be “unjust”. The expression “unjust” is defined in the Act as “unconscionable, harsh or oppressive”.

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56 These sections were re-enacted in the *Australian Consumer Law*, ss 20, 21 and 22. From 1 January 2012, s 21 and 22 have been combined and re-enacted at s 21 *Australian Consumer Law*.
58 See for example *Tanwar Enterprises Pty Ltd v Cauchi* (2003) 217 CLR 315 where the reliance by the seller on the time of the essence provision in the contract was not unconscionable because the seller did not contribute to or cause the buyer’s finance to be late.
60 *Contracts Review Act 1980* (NSW) s 7.
61 Ibid s 4 (1).
broad application to contracts generally, the provisions of this Act have rarely been used to strike down terms of land contracts, with the great majority of cases in the last 20 years concerning unjust contracts arising predominantly in relation to mortgages, guarantees or leases. The number of claims of unfair terms in land contracts or unfair practices by sellers of land is small with an estimated 18 claims of unconscionable conduct related to land contract terms and 7 claims of unjust contracts under the Contracts Review Act 1980 (NSW) by buyers in Australia in the last 10 years. In the majority of claims involving land contracts, an unjust contract has arisen largely from unfair lending or investment practices, misleading conduct or unconscionable conduct at the time of entry into the agreement, rather than the terms of the contract being substantively unfair. Even when a finding of substantive unfairness in the terms of the contract is made, the result has also depended upon the unmeritorious conduct of the other party in the negotiations for the contract. For example, in Mighell v Gargoura, elderly sellers under some financial stress were induced to sell their property to the manager of a financier upon improvident terms. The agreement included the payment of a wholly disproportionate fee (when compared to the value of their property) as consideration for the grant of an option to buy back the property and a leaseback at very high yearly rental payable in advance until they were in a position to buy the property back. Whilst Palmer

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63 Claims under common law principles, s 51AB Trade Practices Act 1974 (now Australian Consumer Law, s 21) and State Fair Trading equivalents as at 7 April 2010. Most of these claims concerned relief against forfeiture of money or where one party took advantage of a constitutional weakness such as age, blindness or lack of comprehension of the English language.

64 Claims of unfair terms under the Contracts Review Act 1980 (NSW) involving terms of a contract for the sale of land. Many of these cases involved misrepresentations or misleading conduct or taking advantage of a constitutional vulnerability.

65 Similarly under the Unfair Terms in Consumer Contracts Regulation 1999 (UK) (and its predecessor) only one claim involving a sale of land has been reported: Khatun v Newham LBC [2005] QB 37. In the proposal by the European Union for a Consumer Rights Directive, including unfair terms, contracts for the sale of land will be excluded from its operation. Refer to the summary at <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/08/609&format=HTML&aged=0&language=EN> (accessed 21 April 2011).

66 See for example Byrne v Cope Street Pty Ltd [2009] NSWSC 946; Zhang v Vp302 Spv [2009] NSWSC 73 (terms of contract not unjust but entered as a result of misleading conduct); Chalhoub v Chalhoub [2005] NSWSC 572 (based on unconscionable conduct); Xu v Lin [2005] NSWSC 569 (unconscionable conduct).

J considered the circumstances which led to the execution of the option by the sellers, his Honour also considered individual clauses in the Option Deed, which he noted had some “highly unusual features” such as:

1. the sellers were to pay the buyer’s stamp duty and legal fees on the contract;
2. the sellers were to pay rent and council rates in advance for a year;
3. the sellers were to pay the insurance on the property during the option term; and
4. the option fee might be forfeited if the property was not kept in a condition satisfactory to the buyer.68

Palmer J found the Option Deed to be “harsh, unjust and improvident in its terms”.69 If the sellers had not received ineffectual independent advice, which they appeared to ignore, Palmer J indicated that he would have found the buyer guilty of unconscionable conduct.70 He concluded that the transaction produced “both substantive unfairness – being the harsh terms in the agreements operating upon the sellers’ circumstances and procedural unfairness in that the sellers had no real opportunity to negotiate”.71 This decision is an excellent example of the difficulty in separating both forms of unfairness in any one transaction as the acceptance of unfair terms by the weaker party to the transaction usually arises from some oppressive conduct practised upon them.

The reported cases provide evidence that buyers of real estate do consider certain terms of land contracts to be unfair, either because they are substantively unfair72 or that sellers are using their bargaining position to unfairly take advantage of certain terms in circumstances where the buyer is unaware of the effect of the term. Even though the number of claims of unfair terms by buyers of real estate is comparatively small,73

68 Ibid [40].
69 Ibid [61].
70 Ibid [61].
71 Ibid [69].
72 For example clauses in contracts of the sale of units that allow a seller to alter the subject matter of the sale without the consent of the buyer: Mirvac (Docklands) Pty Ltd v La Rocca [2006] VSC 48.
73 Refer to the data collected by Consumer Affairs Victoria in 2006, Consumer Detriment in Victoria: A Survey of its Nature, Costs and Implications, Research Paper No. 10, October. Land contracts are a small component when compared to the numerous claims of unfair terms in contracts for financial products, mobile phones, gym membership and travel.
community expectation of ethical conduct by sellers and the need for market efficiencies may provide sufficient justification for regulatory intervention.

III WHICH LAND CONTRACTS ARE STANDARD FORM CONSUMER CONTRACTS?

The unfair terms provisions of the ACL apply only to standard form consumer contracts. A consumer contract is a contract for:

(a) a supply of goods or services; or
(b) a sale or grant of an interest in land;

to an individual whose acquisition of the goods, services or interest is wholly or predominantly for personal, domestic or household use or consumption.

Several important aspects of the definition in the context of land contracts should be noted. First, the consumer acquiring the interest in land must be an “individual”. This excludes from the operation of the provisions any contracts where the buyer of the land is a corporation, whether private or public. Secondly, the definition focuses on the purpose for which the land is acquired, rather than the nature of the land purchased. This means that whether the contract is a ‘consumer contract’ will be determined by reference to the subjective intention of the consumer. Theoretically, it is therefore, possible for a sale or lease of commercial land to be a consumer contract, if the acquirer is intending to use the land for personal purposes. This threshold requirement is problematic. First, can it be assumed that the purpose of the purchase, ie for personal residence or investment, is tested at the date of contract and not at the date of completion? Secondly, what evidence might be required to properly prove that intention of the consumer, a declaration in writing by the buyer at contract? The adoption of a definition governed by the purpose for which the consumer is acquiring the land creates difficulties for drafters of contracts who will need to assume that a contract involving residential land is a consumer contract, despite the fact the same contract may also be used to sell to investors. The inclusion of a warranty in the contract by the consumer that he or she is purchasing for business or

74 However, a declaration by the buyer that the land is purchased for commercial purposes may be difficult to overcome. See for example Leveraged Equities Limited v Goodridge (2011) 191 FCR 71.
investment purposes, while providing some initial comfort, is unlikely to prevent a court from finding a term to be unfair if the consumer ultimately acquired the land for personal purposes. A court is more likely to approach an examination of the purpose of acquisition by considering the reality of the transaction.

In most cases, therefore, the following contracts involving an interest in land will not be consumer contracts:

- a mortgage of land (this is a financial service and therefore subject to the equivalent provisions under ASIC);
- a transaction involving commercial, industrial or retail property (in most cases the purpose of acquisition will usually not be for personal, domestic or household use); or
- a transaction involving residential property where the purpose of acquisition is for investment.

In addition to being a consumer contract, the contract must also fulfil the requirements for a standard form contract. The vast majority of contracts for the sale and purchase of residential property are undertaken on printed form contracts approved by the relevant professional organisations within each Australian jurisdiction. For the purposes of this article, these contracts will be referred to as “printed form contracts”. Whether the terms of a contract are in a standard printed form is not determinative of whether it will be a “standard form contract” under the ACL. The definition is based upon qualitative factors relating to conduct, such as differences in bargaining power and whether an opportunity

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75 While there is no provision preventing the parties from contracting out of the ACL, in the writers’ view the courts are to approach the issue in a similar way to case of misleading conduct, having regard to the consumer protection policy of the ACL and that irrespective of the terms of the contract if the consumer did purchase for personal use, the contract will be considered to be a consumer contract.

76 This approach was adopted in Nooristani v Liberty Finance Pty Ltd [2009] VCAT 2724 when considering a similar test in the Fair Trading Act 1999 (Vic). A similar approach was adopted by courts considering the purpose of acquiring financial services under the Uniform Consumer Credit Code and National Credit Code: Linkenholt Pty Ltd v Quirk [2000] VSC 166; Jonsson v Arkway Pty Ltd (2003) 58 NSWLR 451; Benjamin v Ashikian [2007] NSWSC 735; Knowles v Victorian Mortgage Investments Ltd [2011] VSC 611.

77 Refer to Australian Securities and Investment Commission Act 2001 (Cth), ss 12BF – 12BM.
to negotiate was given, not the form in which the contract is presented. This makes formulation of a general rule about when a standard form contract exists, very difficult.

The definition commences with the presumption that, unless proven otherwise, a contract is a standard form contract if one of the parties to the proceeding alleges it to be a standard form contract.\(^78\) A court may take into account “such matters as it thinks relevant”: but also “must take into account” a number of factors listed in the section in reaching a conclusion about whether the contract is a standard form contract.\(^79\) The mandatory factors to be considered by a court can be summarised as a combination of inequality of bargaining power and “the take it or leave it” nature of the negotiations. Due to the requirement for a court to consider the relationship of the parties and the nature of the negotiations, it is possible for an identically worded contract to be a standard form contract in one context, but not in another. It is not clear whether some criteria will carry more weight than the others and whether a court will only find a standard form contract if all criteria are present. The difficulty in applying the definition to a land contract is best illustrated by an example:

**Example**

A corporate owner of numerous parcels in a large subdivision uses a printed form contract with no special conditions to sell their vacant land. The land is offered for sale on standard terms that the owner will not agree to alter, except by the addition of details for finance approval. Each time a change to the contract is suggested by a buyer, the seller rejects the amendment.

**Criterion (a) – whether one of the parties has all or most of the bargaining power relating to the transaction**

Does one party have all or nearly all the bargaining power in the transaction? In other words, the court is required to consider if there is an imbalance in the bargaining power of the parties. There is some similarity in this respect with the requirement under the

\(^78\) *Australian Consumer Law*, s 27(1).

\(^79\) *Australian Consumer Law*, s 27(2).
ACL, s 21\textsuperscript{80} for the court to consider the “relative strengths and weaknesses of the parties’ bargaining positions” and the \textit{Contracts Review Act 1980}, s 7(2), to consider if there is any “material inequality in the bargaining power” of the parties. In the context of those provisions, an imbalance or inequality in bargaining power is a factor relevant to whether a party has taken advantage of a weakness of the other party.\textsuperscript{81} The mere taking advantage of a superior bargaining position is usually insufficient for a court to intervene in the contract agreed on the basis of unconscionability.\textsuperscript{82}

The relevant importance of superior bargaining power is unclear in the definition of standard form contract. It appears as one factor in a list of five factors a court is required to consider. Will a court require a causal link between the superior bargaining position of the seller and the existence of a contract, unchanged from the one presented by the seller? Alternatively, will the fact a contract prepared by the seller is signed in an unchanged form indicate all the bargaining power was reposed in the seller? In the authors’ view, the definition requires an examination of the bargaining power of the seller in the context of the negotiation process and whether there was a genuine negotiation or a trampling of rights. Like unconscionable conduct, a superior bargaining position may be assumed more readily where an experienced seller is selling to an elderly buyer\textsuperscript{83} or a buyer unable to understand or speak English,\textsuperscript{84} a first home buyer,\textsuperscript{85} or a related party. There may also be circumstances in which the bargaining position of the seller may be greater because of demand in the property market or the fact the buyer is desperate to buy a particular property to complete a development. If, however, both parties are equally experienced or represented by lawyers, there is unlikely to be an imbalance in the bargaining position between the parties. In such a case, it will be difficult to conclude that the contract is a ‘standard form contract’ under the definition merely because a printed form contract is used with no amendment and minimal negotiation of terms.

\textsuperscript{80} Previously \textit{Trade Practices Act 1974}, ss 51AB and 51AC.
\textsuperscript{81} Usually the courts require a taking advantage of a constitutional disadvantage, such as inability to read or understand the document: \textit{Blomley v Ryan} (1956) 99 CLR 362, 415.
\textsuperscript{82} \textit{ACCC v C G Berbatis Holdings Pty Ltd} (2003) 214 CLR 51.
\textsuperscript{83} \textit{Anthony v Vaclav} [2009] VSC 357.
\textsuperscript{84} \textit{Australian Competition and Consumer Commission v Dukemaster Pty Ltd} [2009] FCA 682.
\textsuperscript{85} \textit{Astrilla Pty Ltd v Director of Consumer Affairs Victoria} [2006] VSC 289.
It is suggested that much of the complaint of a weaker party can be neutralised by the seller (as the stronger party) insisting upon negotiation through an independent legal representative of the buyer (as the weaker party) from an early stage in the transaction. This factor which has led to the insistence of independent solicitor’s certificates in loan transactions and, to an extent, in retail leasing, may become an industry benchmark in the contracting process, particularly for sales of residential land. This, at least, would open the opportunity for negotiation and discussion and permits exchange on variation of terms to suit the individual buyer and would protect the buyer whose characteristics, such as age, infirmity, illiteracy or inexperience may hinder their ability to negotiate or treat with the seller. The employment of a legal representative to negotiate on behalf of the buyer (or the seller for that matter) may create a more reliable evidentiary trail which may lead to the rebuttal of the presumption that the contract would be deemed to be a standard form contract until proven otherwise, but this fact would not be conclusive, one way or the other, until the totality of the negotiating and contracting process was tested in the light of the definitions.

**Criterion (b) – whether the contract was prepared by one party before any discussion relating to the transaction occurred between the parties**

A printed form of contract has been prepared by the seller without consultation with the buyer fulfilling criterion (b). This is a common attribute of printed form contracts, especially in large developments.

**Criterion (c) – whether another party was, in effect, required either to accept or reject the terms of the contract in the form in which they were presented or whether another party was given an effective opportunity to negotiate the terms of the contract**

Was the buyer given the opportunity to negotiate the terms or was the buyer required to accept the terms in the form provided? The seller has not prevented the buyer from putting forward new terms, but all new terms have been rejected. Arguably, the buyer has not been given an ‘effective’ opportunity to negotiate the terms of the contract. The seller was unwilling to agree to changes to the standard terms put forward and, on that basis,
may be seen by a court to have provided those terms on a take it or leave it basis, despite a willingness to allow further terms to the agreement.

**Criterion (d) – whether the terms of the contract take into account the specific characteristics of another party or the particular transaction**

Do the terms take into account the characteristics of a party or the transaction? In the case of the printed form of contract, it is prepared as a standard contract to be used for the sale of houses and land. To that extent, it takes into account the requirements for a transaction in which land and houses are sold, as compared to a transaction for the sale of a unit. However, there is no account of the particular circumstances of the buyer, except in some cases allowing the sale to be subject to finance and a building inspection. If the seller is willing to agree to the addition of special conditions requested by the buyer, this may be sufficient evidence that the seller has adequately consulted the buyer to take the contract out of the category of “standard form contract”? However, on the other hand, the inclusion of these special conditions over and above the printed conditions are not uncommon in the case of residential sales and some other factor might be needed to demonstrate that the buyer’s particular concerns in that transaction have been addressed in relation to other terms.

**E. Conclusions**

Land contracts to which the unfair terms provisions will apply are, therefore, limited to

1. contracts for the sale of residential property;
2. individuals who are proposing to live in the property; and
3. where the seller used their superior bargaining position to suppress amendments to the contract prepared by the seller.

The fact that the contract is a printed form contract is not decisive and, in the absence of an imbalance in the bargaining position of the parties, is unlikely to be a ‘standard form contract’.  

86 This narrow class of protected contracts does not include buyers of residential

86 *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447, 462-463 per Mason J (as he then was).
property for investment, some of whom may be buying their first investment and be no more experienced than any other consumer of real estate. Commonly, these buyers are purchasing strata title units ‘off the plan’ for investment from developers who are reluctant to negotiate changes to the contract of sale. Ironically, these types of contracts are the ones most in need of a fairness review with long and complex terms difficult for a lay person to understand and usually containing numerous one sided terms in favour of the seller. Buyers under ‘off the plan’ contracts, despite receiving significant information disclosure,\(^\text{87}\) usually execute contracts with numerous terms advantageous to the position of the seller, with few corresponding rights given to the buyer. The potential impact of the unfair terms provisions on common terms of ‘off the plan’ contracts will be examined.

### IV – UNFAIR TERMS IN LAND CONTRACTS

A key aspect of any regulatory response is that a net benefit is achieved. The final part of this article will examine the potential benefits to consumers by critiquing the effect of the unfair terms provisions on a number of common terms in contracts for the sale of units ‘off the plan’. The position of a buyer under the law existing prior to the unfair terms provisions will be compared against the position after application of the criteria for unfair terms in s 24 ACL.

The terms for consideration have been identified by reference to the examples of unfair terms within the ‘grey list’ in s 25. The grey list is an indicative, but non-exhaustive list, of terms that may be unfair. The list provides statutory guidance on the types of terms that may be of concern, but the section does not “prohibit the use of those terms, nor do[es it] create a presumption that those terms are unfair”.\(^\text{88}\) Although the list indicates potentially unfair terms, whether a term is unfair must still be assessed in accordance

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with the criteria in s 24 ACL in the context of the contract as a whole.\textsuperscript{89} The examples in s 25 ACL are prima facie terms, which depending upon the other provisions of the contract, may cause a disproportionate imbalance in the rights of the parties to the contract.

To properly critique the terms of a contract, it is first necessary to understand the criteria for determining the existence of an unfair term.

A. Approach for determining unfair terms

Whether a particular term is unfair should be determined by applying the three criteria in s 24 ACL having regard to the contract as a whole and the extent to which the term is transparent and any other surrounding circumstances the court considers relevant.

The three criteria in s 24 ACL are:

(a) Will the term cause a \textit{significant imbalance in the parties' rights and obligations} arising under the contract; and

(b) Is the term \textit{reasonably necessary to protect the legitimate interests} of the party who would be advantaged by the term; and

(c) Will the term cause detriment (financial or non-financial) if applied or relied upon by the other party?\textsuperscript{90}

The three criteria in s 24 ACL are, on their face, focused on the terms of the contract itself and do not prima facie require reference to the conduct of the parties leading up to or during negotiation of the contract. The additional contextual requirements of transparency and construing the particular term in light of the contract as a whole do not necessarily change that focus. The requirement for a court to consider the contract as a whole,\textsuperscript{91} necessitates an assessment of the written terms of the contract and whether, as a

\textsuperscript{89} Note the contrary comments of Cavanough J in \textit{Jetstar Airways Pty Ltd v Free} [2008] VSC 539, [115] “a term answering any of the descriptions in paragraphs (a) – (m) might, depending on all the circumstances, be found to be an unfair term notwithstanding full prior knowledge on the part of the consumer”.

\textsuperscript{90} \textit{Australian Consumer Law}, s 24(1).

\textsuperscript{91} \textit{Australian Consumer Law}, s 24(2).
whole there is balance in the rights and obligations of the parties. Factors such as whether the unfair term is linked to a benefit in the contract, such as a cheap price, or the purpose of the terms, may be considered. However, the mere fact the contract contains terms favourable to the buyer does not necessarily counter the existence of an obviously unfair term.

Whether a term is transparent will also involve an examination of the terms of the contract to determine if the potentially unfair term is in plain language, legible, clearly presented and readily available to any party affected by the term. The fact a term is drafted in legalese or complex language or is hidden in small print will be a factor in determining if there is a significant imbalance in the rights of the parties, but will not of itself mean the term is unfair. Likewise, a term drafted clearly, placed in a prominent position or drawn to the attention of the consumer may ultimately be substantively unfair despite being clear about its effect.

Finally, a court is given a broad discretion to take into account any other matters the court considers relevant. Potentially, a court may consider factors such as broad business practices in the relevant industry, the circumstances in which each relevant contract was made, whether the terms were brought to the attention of the consumer and whether the consumer had a reasonable opportunity to consider the terms of the contract. While the discretion appears prima facie wide, it is submitted that a court is more likely to have regard to circumstances or factors directly relevant to a consideration of the three criteria in s 24, which of their nature, concern the substantive terms of the contract. For example, factors relevant to whether a term creates a significant imbalance in the rights of the parties may include whether the term is essential or inessential to the bargain, whether the term is commonly used in the industry or whether the term is enforceable under the common law. Whether the term was brought to the attention of the consumer is suggested

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92 Jetstar Airways Pty Ltd v Free [2008] VSC 539.
93 Director of Consumer Affairs Victoria v Trainstation Health Clubs Pty Ltd [2008] VCAT 2092.
94 Jetstar Airways Pty Ltd v Free [2008] VSC 539, per Cavanough J.
by Paterson\textsuperscript{96} to be a further factor a court may consider either as part of transparency or as a discretionary factor. Knowledge of the term and an understanding of its effect may have some bearing on whether there is a significant imbalance in the rights of the parties, but, in the view of the authors, these procedural factors are not directly relevant to a consideration of the three criteria in s 24, as a term may be unfair irrespective of being brought to the attention of the consumer. Therefore, as a general proposition, whether a supplier’s conduct prior to contract is unconscionable,\textsuperscript{97} immoral or unfair, should not be determinative of whether a term itself is substantively unfair under the ACL,\textsuperscript{98} although it may ultimately influence a court’s view of the contract.\textsuperscript{99} Thus, whilst the failure to bring a term to the attention of a consumer may not amount to unconscionable conduct in certain circumstances, that fact may be a relevant consideration in determining whether the contract is a “standard form contract” within the meaning of the legislation. The same set of circumstances which give rise to a successful claim of unconscionable conduct, however, may not reveal an unfair term.

**Criterion 1 – Significant imbalance in the parties’ rights**

The requirement for a significant imbalance appears also in the *Unfair Terms in Consumer Contracts Regulation 1999* (UK). As stated by Bingham LJ in *Director General of Fair Trading v First National Bank plc*,\textsuperscript{100} the requirement for a significant imbalance is met if “a term is so weighted in favour of the supplier as to tilt the parties’

\textsuperscript{96} Ibid. Paterson suggests that this will minimize the impact of the traditional principle that a party who signs a contract is presumed to have read the contract and agreed to be bound by all terms including onerous terms. Instead, under the unfair terms provisions, signed and unsigned contracts will be on the same footing when determining if a term is unfair. Refer also to *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165.

\textsuperscript{97} A buyer will be able to seek redress separately for unconscionable conduct pursuant to the common law or the *Australian Consumer Law*.

\textsuperscript{98} Refer to the view of Lord Steyn in *Director General of Fair Trading v First National Bank plc* [2002] 1 All ER 97, 108 (HL).

\textsuperscript{99} This should be contrasted with the position under the *Unfair Terms in Consumer Contracts Regulations 1999* (UK) where the conduct of a supplier and whether they acted in good faith is a specific consideration under the Act. In *Director General of Fair Trading v First National Bank plc* [2002] 1 All ER 97, 108 (HL) the requirement of good faith was, in the view of Lord Bingham, a requirement for ‘fair and open dealing’ between the parties. Fair dealing required that the supplier did not take deliberate or unconscious advantage of the consumer’s “necessity, indigence, lack of experience, unfamiliarity with the subject matter of the contract or weak bargaining position”.

\textsuperscript{100} [2002] 1 All ER 97 (HL).
rights and obligation under the contract significantly in his favour.” 101 “Significant” is a word that takes its meaning from the context in which it is used. 102 It potentially covers a spectrum ranging from ‘not trivial’ through ‘appreciable’ to ‘important’, ‘substantial’ and ‘momentous’. 103 Likewise, when considering the now repealed unfair terms provisions of the Fair Trading Act 1999 (Vic), Cavanough J held that ‘significant’ meant ‘significant in magnitude’ or ‘sufficiently large to be important’ or, in other words, that the imbalance should be substantial. 104 This makes an assessment of this particular element, prima facie, a factual inquiry having regard to the particular term. 105 In reaching a conclusion, a court is required to examine the term in light of the other provisions in the contract taking transparency into account. Contextual factors that may be relevant include:

(i) whether there are other terms in the contract that are in favour of the consumer (ie reduced price, 106 other benefits) 107

For example, a term may give the buyer a right to compensation for any deficiency in subject matter, but this right may be limited by the condition that a buyer must give notice in writing prior to completion of their intention to claim compensation should the buyer intend to proceed with the purchase regardless. A failure to give notice would render the buyer’s right nugatory. Therefore, whilst a term giving a right to compensation would not appear to be offensive, if the rights are qualified too severely, that term may be struck down as an unfair term where the operation of the term significantly cuts down that right.

101 [2002] 1 All ER 97, 107 (HL).
102 Emaas v Mobil Oil Australia Ltd [2000] QCA 513, [26].
104 Jetstar Airways Pty Ltd v Free [2008] VSC 539, [105]. In Director of Consumer Affairs Victoria v AAPT Ltd [2006] VCAT 1493 the view was expressed that this was a normative judgment about extent of unfairness.
106 Jetstar Airways Pty Ltd v Free [2008] VSC 539; Director of Consumer Affairs Victoria v Backloads.com Pty Ltd (Civil Claims) [2009] VCAT 754; Office of Fair Trading v Ashbourne Management Services Ltd [2011] EWHC 1237; Kucharski v Air Pacific Ltd (General) [2011] NSWCTTT 555 (reduced price airfare did not influence the fact that no refund provision was an unfair term).
(ii) was the term legible and easy for a lay person to understand; and
(iii) was the meaning of the term readily apparent on a reading of the contract.

It should be emphasised that the mere fact a term is legible or brought to the attention of the parties does not mean that it will be fair. The term may be of such a nature that, despite disclosure, the term is still considered by a court to meet the three criteria.\(^\text{108}\)

However, where a term is the subject of genuine negotiation between the parties, it will not be lightly considered to be unfair.\(^\text{109}\) Although this is not expressly an element of the test of unfairness,\(^\text{110}\) it would seem otiose for a party to be able to resile from a contract that genuinely reflects the bargain as negotiated.

Other discretionary factors a court may take into account in determining a significant imbalance may include:

(i) the term brought to the attention of the consumer at the time of contract,
(ii) is the term common within the particular industry,
(iii) is the term an essential aspect of the bargain,
(iv) does the term follow the common law position;\(^\text{111}\) and
(v) is the term of a type listed in the examples of unfair terms in s 25 of the ACL.

**Criterion 2 – Protection of the seller’s legitimate interests**

The next element is that the term was not reasonably necessary to protect the legitimate interests of the party who would be advantaged by the term, unless that party proves otherwise.\(^\text{112}\) This reversal of the onus of proof will require the advantaged party to produce evidence of their legitimate interest and to prove on the balance of probabilities that the term was reasonably necessary to protect that interest. What is a legitimate

\(^{108}\) Refer to the comments of Cavanough J in *Jetstar Airways Pty Ltd v Free* [2008] VSC 539, [115].

\(^{109}\) Director of Consumer Affairs Victoria v Craig Langley Pty Ltd & Matrix Pilates & Yoga Pty Ltd [2008] VCAT 482, [66].

\(^{110}\) An opportunity to negotiate is an element of whether there is a standard form contract, *Australian Consumer Law*, s 27(2).


\(^{112}\) *Australian Consumer Law*, s 24(4).
interest will vary depending upon the nature of the land, the price paid for the land and the other terms of the transaction as a whole. In the case of a seller of land, the seller has a legitimate interest in being able to hold the buyer to the bargain within a reasonable or agreed time. Whilst the land is contracted to be sold to the buyer, it is not available for sale to another party and is effectively off the market. If the buyer fails to complete, the seller loses opportunities for other sales. Consequently, any security such as a deposit, binding the buyer to the bargain is arguably a term that is in the legitimate interests of the seller. This would be the case notwithstanding the buyer has no monetary security which binds the seller to the bargain.

Other discretionary contextual factors a court may take into account in determining the legitimate interests of a party include industry norms, risks inherent in the transaction, the financial position of the parties and the state of the real estate market for that product at the time of contracting. The latter consideration, that is, whether there is a seller’s or buyer’s market, can often determine the approach taken by a seller to the transaction. It is submitted that ultimately a court may be unwilling to find a term reasonably necessary to protect a legitimate interest unless the term is proportionate to the potential risk and the interest sufficiently outweighs the detriment to the consumer. This may result in close scrutiny of whether common standard conditions, long accepted and commonly found in land sale contracts, which reflect industry norms are in reality necessary to protect the seller’s interests. Whilst the interests of sellers of residential property are common to an extent, the varied nature of the subject matter (‘off the plan’, new, ‘renovators delight’) and the different personal attributes of sellers mean that what is required to protect one seller’s legitimate interests may differ from that required to protect those of another.\footnote{See for example \textit{PSAL Ltd v Kellas-Sharpe} [2012] QSC 31 where Applegarth J gave careful consideration to the business expenses of the application in deciding whether there was a legitimate reason for capitalising interest monthly.} It is suggested that a court is likely to find that a term is not reasonably necessary to protect the legitimate interests of a party where the party has adequate common law or statutory protection or where the term goes beyond that countenanced by the law. For example, in a different but related context, where a lender was entitled contractually to recover all loss and expenses it suffered as a consequence of a default, a term providing for interest
at a rate of 75% was considered to not be reasonably necessary to protect the legitimate interest of the mortgagee and unjust under the *Contracts Review Act 1980* (NSW).\textsuperscript{114} Although the provision for payment of higher interest was not a penalty at law, the recovery of additional interest together with costs and expenses arising from the breach was unjust and under the *Australian Consumer Law* may be an unfair term.\textsuperscript{115} This severable term would not only be unfair for that reason, but in the absence of the legislation would be struck down as a penalty. There is inevitably going to be crossovers with existing protective doctrines which have been widely accepted and may be easier to apply.

**Criterion 3 – Financial or non-financial detriment**

The final element is that the term if relied upon or applied would cause financial or non-financial detriment to the consumer.\textsuperscript{116} The consumer will, therefore, be required to prove that if the term is allowed to stand, the consumer will as a result suffer detriment financially or non-financially. There is no requirement for the consumer to prove that prior to enforcement of the term, detriment was suffered. Proof of financial detriment clearly requires proof of a financial loss or expenditure. Non-financial detriment may include mental distress, inconvenience – or other personal injury.

Detriment is not currently an element or factor expressly required for a finding of unconscionable conduct or an unjust contract, although loss of some kind will usually flow to the vulnerable party in those circumstances. Consequently, the most that can be stated about this requirement is that:

(i) actual detriment or loss is not necessary; potential or threatened detriment if the term is enforced is sufficient;

\textsuperscript{114} *Kowalczyk v Accom Finance Pty Ltd* (2008) 229 FLR 4, [161], [166], [174], [178] (CA) (under *Contracts Review Act 1980* (NSW)).

\textsuperscript{115} See also *PSAL Ltd v Kellas-Sharpe* [2012] QSC 31.

(ii) the detriment will have to be to the party to the contract and not a third party;
(iii) the disadvantaged party will have the onus of proving detriment;
(iv) failure to provide evidence of detriment is likely to be fatal to the disadvantaged party’s claim.

B. Assessing the identified terms in off the plan contracts

The approach to determining if a term is unfair, considered above, will be further examined in the context of common terms in off the plan contracts identified as potentially unfair. This examination will highlight the likely interaction of existing common law principles with the unfair terms provisions and the discretionary factors a court may take into account when assessing the fairness of particular terms.

**Term 1 – Limitation of right to terminate or claim compensation**

Land contracts commonly include a term providing that a misdescription or error in the particulars for the land in the contract will not annul the sale, but the buyer will be entitled to compensation for the deficiency, if notified to the seller prior to settlement.

**Example: Limitation of right to terminate or claim compensation**

No error or misdescription in the particulars of the land in the contract will annul the sale but the buyer will be entitled to compensation for the deficiency, if notified to the seller prior to settlement.

Does this term cause a significant imbalance in the parties’ rights? As the term falls within the example in s 25(1)(a) ACL:

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

First, the actual impact of the term on the rights of the parties should be considered having regard to a construction of the term in the eyes of the law. Terms to this effect have been the subject of previous litigation by buyers under the general law. Generally,
the operation of such a term has always been subject to the rule in *Flight v Booth*,\(^\text{117}\) which provides that a buyer should not be forced to complete a contract with compensation where the error or misdescription is so substantial that a buyer would be forced to accept a property substantially different from that which they contracted to buy. This rule is one of universal application to land contracts both in relation to misdescriptions and defects in title.\(^\text{118}\) At common law, therefore, the buyer would be able to withdraw from the contract, despite the term, if a substantial defect in title or misdescription were discovered. The effect of the term at law will therefore be:

(i) a buyer is unable to terminate the contract for a minor or immaterial defect or misdescription, but compensation is claimable;

(ii) a buyer is only able to claim compensation for a minor defect if notice is given prior to settlement.

Under equitable principles, the position of the buyer is similar. A buyer is unable to terminate a contract for a minor defect, but a court will not order specific performance of the contract unless compensation for the defect is paid.\(^\text{119}\) The only difference between the effect of the term and the common law is the requirement to notify of the claim. In the authors’ view, this will not be sufficient to reach the benchmark of creating a significant imbalance in the rights of the parties. Generally, the standard printed terms give effect to this common law principle, whereby the seller is required to disclose latent defects in title (traditionally difficult for a buyer to discover) and the buyer is required to satisfy themselves of the physical aspects and other rights to use the property.\(^\text{120}\) Some additional rights of termination may be provided by the printed terms where a matter (that is not a defect in title) adverse to the property is discovered\(^\text{121}\) and this adds weight to the

\(^{117}\) (1834) 1 Bing NC 370, 377; 131 ER 1160, 1160-1161.

\(^{118}\) *Torr v Harpur* (1940) 40 SR (NSW) 585; (existence of large storm water drain); *King v St Patrick’s Day (Minhamite) Pty Ltd* [1971] VR 777 (drainage easement undisclosed); *Re Glenning* [1987] 2 Qd R 523 (electricity authority easement).


\(^{121}\) Refer for example, to the REIQ Houses and Land Contract 9th ed, clause 7.7.
conclusion that the term, when considered in the context of the contract as a whole, does not create a significant imbalance in the parties’ rights.

Is there a legitimate interest of the seller protected by this clause? At law, a seller is required to disclose to a buyer the existence of latent defects in the seller’s title to the property. The buyer’s right to terminate for a failure to disclose a defect in title or misdescription is limited to substantial and material defects. In the absence of a term providing for compensation for a defect in title to be paid, a buyer is unable to seek compensation from the seller, unless ordered by a court as part of a claim for specific performance. The term, therefore, provides a benefit to the buyer that would not ordinarily be available at law.

Does the buyer suffer a detriment if the term is enforced? The only possible detriment to the buyer is that compensation will be denied if the claim is not notified prior to settlement. Arguably, a buyer is in no worse a position than under the common law where a buyer will only be able to enforce a right to compensation as part of a claim for specific performance.

An application of the unfair terms provisions is unlikely to alter the position of a buyer under this type of clause. The buyer’s right to terminate for substantial defects is protected by the common law and provision of a right to compensation is consistent with the common law position.

**Term 2 – Right of seller to avoid contract unilaterally**

A term to this effect commonly appears in contracts for the sale of strata units by developers. The purpose of the clause is to allow a developer to terminate the contract where they are unable to obtain approval for the development or sufficient funding.

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122 Refer to Faruqui v English Real Estates Ltd [1979] 1 WLR 963, 967.
123 Flight v Booth (1834) 1 Bing NC 370; (1834) 131 ER 1160; Liverpool Holdings Pty Ltd v Gordon Lynton Car Sales [1978] Qd R 279, (affirmed [1979] QdR 103); Re Glenning [1987] 2 Qd R 523
Example: Right of seller to avoid contract unilaterally

The seller may terminate the contract at any time if:

(i) the project is considered in the absolute discretion of the seller to be unviable; or
(ii) the seller does not receive development approval by 30 June.

Prima facie, this is a term that falls within s 25(1)(b) as:

*a term that permits, or has the effect of permitting, one party (but not another party)*

to terminate the contract.

Alternatively it is a term within s 25(1)(a) as it permits one party and not the other to avoid or limit performance. Does this term cause a significant imbalance in the parties’ rights? Prima facie, there is an imbalance because only the seller is able to elect to avoid the contract, usually in their absolute discretion. Terms of this nature have been challenged on the basis the seller has a discretion to perform, making the contract illusory. Where “words which by themselves constitute a promise are accompanied by words showing that the promisor is to have a discretion or option as to whether he will carry out that which purports to be a promise, the result is that there is no contract on which an action can be brought at all”. Terms allowing a seller to elect to terminate the contract are in danger of making the contract illusory, unless the discretion of the seller is required to be exercised within clearly articulated parameters. For example, it is readily accepted that where a contract is subject to the buyer obtaining finance ‘satisfactory to the buyer’ that this is not an unfettered discretion and must be exercised honestly. In the example given, the seller has an absolute discretion to avoid if the project is unviable and must do so by 30 June. If the term is not illusory, whether it causes a significant imbalance in rights should be considered in light of other terms in the contract. If the term appeared in a typical developer’s contract for the sale of a unit ‘off the plan’, there are usually other terms that restrict the buyer’s right of termination while allowing the seller flexibility to change aspects of the unit to be constructed. In

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126 *Biotechnology Australia Pty Ltd v Pace* (1988) 15 NSWLR 130, 135-137; *Demtear Pty Ltd v Abelian Pty Ltd* [2004] QSC 103.

this context, there is a reasonable argument that a term which allows a seller the
discretion to avoid the contract, albeit within limits, satisfies the first criteria of
creating a significant imbalance in the rights of the parties.

Is there a legitimate interest of the seller protected by this clause? A term of this nature
included in a contract for the sale of a unit yet to be constructed will often provide the
seller with the ability to sell units prior to obtaining development approval or
development finance. In practice, the seller will need to secure at least 60% - 80%
presales to obtain sufficient finance to proceed with the development, making it
important that the seller is able to enter contracts before finance is obtained, but if the
presales requirement is not met and finance refused, the seller can avoid the contracts.
Given the precarious nature of funding after the global financial crisis, this may be
viewed by a court as a legitimate reason for such a clause.

Does the buyer suffer a detriment if the term is enforced? If the term is relied upon by
the seller and the contract avoided, the buyer will be entitled to the return of their
deposit and in the absence of a term to the contrary, the interest earned. Indirect
detriment may arise if the buyer is prevented from purchasing another property because
of the contract which is ultimately avoided. This may not be sufficient to encourage a
court, given the findings in relation to the other criteria, to conclude the term is unfair.

Clauses that allow a seller under a developer contract to terminate within a certain time
frame if the project is financially unviable or development approval cannot be obtained
are unlikely to be unfair terms. Where the clause does not explicitly contain parameters
for the seller's discretion to terminate, the contract will be illusory under the common law
and not enforceable by either party. If the clause is enforceable, the detriment to the
buyer will be minimal as the deposit and interest earned are usually recoverable.
Term 3 – Seller may alter subject matter between contract and completion

Contracts for the sale of units yet to be constructed commonly contain a term that gives the seller a right to make alterations or changes to various aspects of the proposed property up to completion.

Example: Seller may alter subject matter between contract and completion

The buyer agrees that the seller may vary the building plans, area of the lot to be sold and the fixtures and fittings at any time during construction. The buyer shall not be entitled to terminate the contract or claim compensation for these changes.

Prima facie, such a term falls within s 25(1)(g) as a term that:

permits, or has the effect of permitting, one party unilaterally to vary the characteristics of the goods or services to be supplied or the interest in land to be sold or granted under the contract.

Does this term create a significant imbalance in the parties’ rights? In ordinary standard land contracts, a buyer may be able to claim compensation for misdescription where the description of the subject matter in the contract does not substantially meet the description of the actual property at completion.128 These standard provisions give buyers access to rights of compensation for contractual misdescription and are usually qualified by “words of approximation”129 which give the seller a small leeway in describing what is being sold, subject to the payment of compensation. In developer contracts,130 the buyer agrees to allow changes by the seller to various physical aspects of the property and, in addition, to relinquish any rights to termination or compensation for the changes. Where the changes are substantial a buyer will be entitled at law to terminate and claim compensation on the basis they are no longer getting substantially that for which they

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128 Edson v Sun Koyang Restaurant Pty Ltd (1991) 5 BPR 11,452, 11,459 (compensation calculated at cost of rectification to remedy the deficiency); Liverpool Holdings Pty Ltd v Gordon Lynton Car Sales Pty Ltd [1979] Qd R 103(FC).
129 Owmist Pty Ltd v Twynam Pastoral Co Pty Ltd [1983] 3 NSWLR 196, 197.
130 Developer contracts are usually presented to buyers in a common form and rarely negotiated or amended at the request of the seller. These contracts are likely to be standard form contracts under the Australian Consumer Law, s 27.
When viewed in light of the other terms of the contract, which commonly give other unilateral rights to the seller, there is some argument that the term creates an imbalance in the parties’ rights.

In any event, is there a legitimate reason for such a term? Proponents of the term argue that it is essential because of the nature of the construction process. Exigencies of building and the possibility of changes during the course of construction, which may be required by the local authority or some other similar agency, and which are unforeseen at the time of contract, may be necessary to complete the building. A similar view was accepted in Mirvac (Docklands) Pty Ltd v La Rocca. A buyer of an apartment “off the plan” claimed that a term which allowed the seller to vary the building plans and specifications from time to time during construction in any manner that the seller considered necessary or desirable, including by substituting any fixtures or fittings with appliances of like quality, was unfair, unjust and unreasonable. Hargrave J, found that such a provision did not meet that alleged description as it was not unfair or unreasonable to permit the seller some “reasonable flexibility” to amend the building plans and specifications during the lengthy construction phase given the large scale of the development.

Does the buyer suffer a detriment if the clause is enforced? Where there are major discrepancies in what was promised and what is delivered at completion, the buyer may terminate the contract despite the term. Conversely, if the change is only minor, the buyer is required to accept the property in that form and pay the full price. In the absence of the clause, a buyer would not be entitled to compensation for a minor defect, except as a consequence of an order for specific performance obtained by the seller. The absence of a term allowing compensation, coupled with a term giving the seller some discretion as

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131 For example, see Gold Coast Carlton Pty Ltd v Kamalessvaran [1984] Q Conv R 54-144 (failure of seller to provide private lift access to penthouse under construction at contract); Leighton Properties Pty Ltd v Hurley [1984] 2 Qd R 53 (omission from town house under construction at contract of a guest suite with sink and stove); Simons v Zartom [1975] 2 NSWLR 30 (undercover parking only provided instead of lock up garage as contracted).


133 Ibid [197].

134 Leighton Properties Pty Ltd v Hurley [1984] 2 Qd R 53.
to the nature of the subject matter might, at first glance, appear to cause detriment to a buyer. However, the key to testing such terms might be the degree to which the seller requires some leeway in the construction process. For example, allowing the seller a difference of some 5% in area in the finished product might not be unfair without compensation whereas a 10% difference may well be unfair.

The position of a buyer subject to a provision allowing the seller of a unit under construction, to make minor changes to the physical aspects of the property is unlikely to be unfair. Even if the clause purports to exclude liability where substantial changes are made, this will be read down by a court mindful of the industry practice and the exigencies of the construction process, avoiding an application of the unfair terms provisions.

Term 4 – No Representation Clause
Many standard contracts for the sale of land contain a clause which purports to deny legal effect to any representations that are not contained in the written contract.

Example: No Representation Clause

The buyer acknowledges that they have not relied on any representations by the seller, the seller’s agent or any other person or persons or corporation in entering into this contract other than as set out in this contract and that the conditions and stipulations in this contract constitutes the only agreement between the buyer and the seller.”

Generally, it has been held that in the absence of fraud, misrepresentations of fact made by a seller or a seller’s agent will not be actionable where the buyer and seller are parties to a contract of sale containing such a term. Consequently, an entire agreement clause could be described as limiting the effect, or having the effect of limiting the buyer’s right to sue the seller or, in the case, where an agent is employed by the seller, having the effect of limiting the seller’s liability for their agents. However, if the buyer

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135 Dorotea Pty Ltd v Christos Doufas Nominees Pty Ltd [1986] 2 Qd R 91, 97; Silverton Ltd v F S Carroll Pty Ltd [1983] 1 Qd R 72, 81.
136 Australian Consumer Law, s 25(1)(k).
137 Australian Consumer Law, s 25(1)(i).
can prove, in the alternative, misleading or deceptive conduct under the relevant statute,\(^\text{138}\) it is clear that a no representations clause will generally be ineffective to exclude or modify the buyer’s rights.\(^\text{139}\)

It could be argued that such a term does create a significant imbalance in the rights of the parties and goes beyond what is reasonable to protect the legitimate interest of the seller or the seller’s agent. The operation of the clause would have the effect of denying the buyer a right to claim damages for loss suffered as a result of a negligent misrepresentation should the buyer wish to proceed with the contract of sale as well as denying the buyer the right to rescind based upon an innocent or negligent misrepresentation.\(^\text{140}\) Although the statutory rights of a buyer under disclosure legislation to terminate for a failure to disclose or for a misleading disclosure are not affected by such a clause, it is difficult to divine a legitimate reason for a seller to be able to limit their liability for false representations that induce the contract. If the term is unfair, the contract could be performed without the term and it could be severed from the contract.

No representation clauses in standard form consumer contracts are at significant risk of being unfair. The right of a buyer to sue the seller for misrepresentation is significantly altered while the right of a seller to sue the buyer is retained, creating a significant imbalance in rights.\(^\text{141}\) A seller will struggle to provide evidence of a legitimate interest in limiting the buyer’s rights to avoid the operation of the presumption that no legitimate interest exists.\(^\text{142}\)


\(^\text{139}\) *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd* (1988) 79 ALR 83, 97-99; *Keen Mar Corporation Pty Ltd v Labrador Park Shopping Centre Pty Ltd* (1989) ATPR (digest) 46-048 (exclusion clause broke the chain of causation between the misleading conduct and entry into the contract); *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592 (disclaimer qualified the representation and made it clear the agent was merely passing it on for what it was worth).

\(^\text{140}\) *Wilde v Gibson* (1848) 1 HLC 605, 632-633; but contrast *Montgomery v Continental Bags(NZ) Ltd* [1972] NZLR 884, 893 per Speight J where it was held that rescission was available until registration of a transfer after settlement.

\(^\text{141}\) See for example, *Office of Fair Trading v MB Designs (Scotland) Ltd* [2005] SLT 691.

\(^\text{142}\) *Australian Consumer Law*, s 24(4).
V. CONCLUSIONS

Two aims of this article were posed. The first was to identify the problems, if any, faced by consumers of real estate who purchase residential property for personal occupation using standard form contracts. Interestingly, the analysis of reported case law failed to identify any endemic problems of unfairness with standard printed terms or land contracts more generally. This is consistent with the minimal evidence of unfair terms in land contracts presented to the Productivity Commission Inquiry. Although the prevailing view is that standard printed terms are on the whole balanced, consumers of land are still making claims of inequity, unfairness or unconscionable conduct, that are not insignificant. Buyers are currently unable to obtain a remedy where a term unfairly advantages the seller, unless the seller misrepresented the effect of the term or exercised some form of duress or influence to force the buyer to agree to the term. The difficulty of avoiding the operation of an unfair term, absent evidence of unconscionable conduct, estoppel, duress or misleading conduct, does in the authors’ view provide sufficient justification in light of community expectations of fairness and the need to ensure efficiency in the real estate market, to justify regulatory intervention.

The second aim was to explore the impact and discernible benefit to be gained by consumers of real estate from an application of the unfair terms provisions. The article identifies only a small number of common clauses which might in certain circumstances be subject to challenge. The analysis demonstrates that consumers of real estate are well protected by the operation of common law and equitable principles in the context of standard printed terms, as well as State, Territory and Federal laws providing for consumer safeguards such as mandatory disclosure and cooling off periods out of which the parties cannot contract. The potential application of the unfair terms provisions, are therefore, likely to be limited to terms impervious to the operation of those principles. In the authors’ view, the scope for operation of the unfair terms provisions is, therefore, likely to be limited to all but the most egregious terms. Changes to the practices of contracting parties are likely to centre on avoiding the existence of a standard form contract. Given the definition of standard form contract, this may produce changes in the negotiation phase where sellers may be more willing to bring unusual or detrimental
clauses to the attention of the buyer and insist that a buyer obtains independent legal advice about the terms before signature. Changes to the actual terms of standard form contracts are likely to be limited to those unfair or unbalanced terms, which are not already softened by the common law, equity or statute. The modest short list of unfair terms remaining after application of these principles or provisions, justifies the authors’ conclusion that in the context of land contracts, the unfair terms provisions are unlikely to result in any significant realignment of the existing contractual positions of buyers and sellers of land.