ABSTRACT. Good legislation depends on clearly articulated policy objectives. This paper argues that a significant threat to effective consumer protection is posed by fuzzy thinking at the policy-making stage. Three major Australian law reform initiatives are examined: the Contracts Review Act 1980 (New South Wales); new uniform truth in lending laws; and product liability legislation. In each case, effective policy choices were left unresolved, either because the choice was politically too difficult or simply because of a failure by the policy makers to perceive that there was a choice needing to be made. In each case, the problem has been disguised by resort to drafting at a high level of abstraction, and this serves to make rhetorical claims in support of the legislation seem plausible. The truth, however, is that legislation drafted this way is bound to be indeterminate and it is left to the courts to invent policy as part of the interpretation process. This is not a legitimate judicial function.

The future of consumer protection is assured, in the sense that hardly anyone is opposed to the concept. It is easy to make a commitment to consumer protection – politicians do it all the time. However, a commitment to consumer protection does not exhaust the policy choices that need to be made. On the contrary, it marks only the beginning. For example, who does the word “consumer” cover? The consumer interest is not necessarily a homogeneous one. Where there is a clash between different consumer interests, which set of interests is to prevail? Short-term and longer term consumer interests may sometimes conflict. In that event, which is to take precedence? Again, what does “protection” mean? One school of thought holds that consumers are protected best by laws which facilitate their freedom of choice. This suggests that consumers need protection against fraud and other forms of exploitation in the bargaining process, but it also suggests that consumers should bear responsibility for their own mistakes. Another school of thought holds that consumers are not necessarily the best judges of their own interests, and that the law should make choices for them. A corollary of this view is that consumers should be relieved of the consequences of their own mistakes. With all these variables in mind, it does not make much sense to talk about the future of consumer protection at large.
In keeping with the tenor of these introductory remarks, I argue in what follows that a significant threat to the future of effective consumer protection is posed by fuzzy thinking at the policy making stage. I will take as my text Arthur Leff’s withering statement about the unconscionability provision in s. 2–302 of the United States Uniform Commercial Code:

The gist of the tale is simple: it is hard to give up an emotionally satisfying incantation and the way to keep the glow without the trouble of the meaning is continually to increase the abstraction level of the drafting and explaining language . . . but the lesson of its drafting ought nevertheless to be learned: it is easy to say nothing with words. Even if the words make one feel all warm inside, the result of sedulously preventing thought about them is likely to lead to more trouble than the draftsman’s cozy glow is worth, as a matter not only of statutory elegance but of effect in the world being regulated. Subsuming problems is not as good as solving them (Leff, 1967, pp. 558–559).

My focus will be on three major Australian consumer protection initiatives about which precisely the same observation could be made, namely:

- Australia’s own unconscionability legislation;
- recently revised truth in lending requirements;
- Commonwealth reforms to product liability law.

The underlying problem in each case is the legislature’s failure to resolve key policy choices. The problem is disguised by resort to drafting at a high level of abstraction, and this serves to make rhetorical claims in support of the new laws seem plausible. The truth, however, is that laws drafted according to this model are bound to be indeterminate – hence Leff’s characterisation of UCC s. 2–302 as the “Emperor’s new clause.” The courts are left with the task of resolving the indeterminacy problems, but they can only do this by confronting the policy choices that the legislature itself has overlooked. This is not a legitimate judicial function. It is one thing to say that courts should be required to take policy into account when interpreting legislation. It is quite another to have them invent policy as part of the interpretation process.

UNCONSCIONABILITY LEGISLATION

Unconscionability legislation has been high on the Australian legislature’s agenda for the past decade or so. New South Wales enacted