



Via email: unconscionableconduct@treasury.gov.au

Unconscionable Conduct Issues Paper
Competition and Consumer Policy Division
The Treasury
Langton Crescent
PARKES ACT 2600

Dear Sir or Madam,

Unconscionable Conduct Issues Paper

I have pleasure in enclosing a submission to the Competition and Consumer Policy Division of the Treasury on the issues paper concerning various options for clarifying the scope of the unconscionable conduct provisions of the *Trade Practices Act 1974*.

The submission has been prepared by the Trade Practices Committee of the Business Law Section of the Law Council of Australia. The submission has been endorsed by the Business Law Section. Owing to time constraints, the submission has not been reviewed by the Directors of the Law Council of Australia Limited.

If you have any questions regarding the submission, in the first instance please contact the Committee Chair, Dave Poddar, on (02) 9296 2281.

Thank you for giving us the opportunity to comment.

Yours faithfully,.

Bill Grant
Secretary General

23 December 2009

Enc.

Treasury - Unconscionable Conduct Issues Paper

**The Nature and Application of Unconscionable
Conduct Regulation**

**Can Statutory unconscionable conduct be further
clarified in practice?**

**Submission by the Trade Practices Committee of
the Business Law Section of the
Law Council of Australia**

December 2009

**Trade Practices Committee of the Business Law Section
of the Law Council of Australia**

Submission in response to Treasury Issues Paper

The Nature and Application of Unconscionable Conduct Regulation

1 Introduction and Executive Summary

1.1 Introduction

The Trade Practices Committee of the Business Law Section of the Law Council of Australia ("**Committee**") is pleased to offer the following brief submission on certain aspects of the Treasury Issues Paper to assist the Expert Panel ("**Panel**") appointed by the Government.

As it would appear that Treasury has not precluded the Panel from conducting consultation in person, the Committee would be pleased to meet with the Panel to supplement this submission which is intended to be a short submission.

1.2 Executive Summary

The concept of unconscionable conduct is sufficiently broad and flexible

The Committee believes that recent cases (over the last 3 years), have shown that the existing provisions in the *Trade Practices Act 1974 (Cth)* ("**TPA**") in relation to unconscionable conduct are sufficiently broad so as to capture conduct which is actually "unconscionable". The Committee does accept that minds might reasonably differ on how well the concept of "unconscionable conduct" has been applied in various individual cases, but such debate is inevitable in this area (irrespective of how the law is amended or clarified). Indeed the Committee believes that recent cases brought by the Australian Competition & Consumer Commission ("**ACCC**") have shown that the concept is sufficiently flexible and broad. For example see:

- *ACCC v Craftmatic Australia Pty Ltd* [2009] FCA 972;
- *ACCC v Dukemaster Pty Ltd (ACN 050 275 226)* [2009] FCA 682 (24 June 2009); and
- *ACCC v Zanok Technologies Pty Ltd* [2009] FCA 1124 (2 October 2009).

Some of these cases will inevitably have some element of controversy because they involve fine judgment calls as to whether some commercial conduct was or was not against "good conscience". There are some views, even among our Committee, that the law should be strengthened in this area. Having regard to those views, while the Committee is against the use of examples in the TPA in this area as it may inhibit the development of this area, the Committee understands the desire for the identification of principles which provide more clarity and supports that exercise. However, the Committee is not yet convinced that the principles set out in the existing TPA provisions require expansion or change.

The Australian Consumer Law Reforms

By the very nature of this area of the law, the incidence of section 51AC cases is likely to be low - given it involves "highly unethical" conduct. However, one very significant change which is likely to impact on the ACCC's enforcement of section

51AC is the introduction of civil pecuniary penalties. This change will give the ACCC a significantly stronger position in negotiations in relation to unconscionable conduct cases. The other proposed powers of the ACCC in the Australian Consumer Law should also be able to be used by the ACCC in these types of cases. Again, this may mean that unconscionable conduct cases will be limited.

“Unfair” vs “Unconscionable”

The Committee has observed that there has been some pressure to extend the interpretation of “unconscionable” to “unfair”. The Committee believes that the Government’s reforms in relation to unfair contract terms in business to consumer matters appropriately deal with these concerns. There is also a danger that some of the calls for reform are more focused around factual situations of some parties driving a “hard bargain”, rather than practices that are “unconscionable”.

To the extent that issues have been raised in relation to franchising, this can be more specifically and appropriately dealt with in the Franchising Code of Conduct.

Moreover, to the extent that the Expert Panel identifies any specific harmful conduct which is not currently covered (by sections 51AA, 51AB or 51 AC - or section 52 for that matter) or is not covered by the new unfair contract terms provisions, the Committee would be pleased to assist the Panel on targeted reforms to specifically deal with issues and minimise the risk of unintended consequences for legitimate trade and commerce.

Interaction with the ASIC Act

The Committee also recognises that its main area of responsibility and commentary is the operation of the TPA and, as appropriate, the work of the ACCC in relation to the TPA. However, for a number of years now, the role of the ACCC in relation to unconscionable conduct and related matters has overlapped with the areas of responsibility given to the Australian Securities and Investments Commission (**ASIC**). It also has the responsibility of protecting consumers from unconscionable conduct in the context of the provision of financial services. Indeed, the Treasury Issues Paper, at page 3, recognises this.

Any draft proposals from the Expert Panel should be discussed and evaluated by ASIC to reflect its administration of the corresponding provisions in the Australian Securities and Investments Commission Act 2001 (**ASIC Act**). Failure to do so will, in our view, leave open the possibility that different points of emphasis and coverage may be regarded as relevant by that regulator and stakeholders in that area, compared to those which specialise in matters relating to the TPA. Indeed, one of the most significant and important cases on the meaning of unconscionable conduct noted in the Issues Paper is the decision of the Full Federal Court in *Australian Securities and Investments Commission v National Exchange Pty Limited* (2005) 148 FCR 132 which dealt with the ASIC Act. Overlooking consideration of this interaction would, in our view, be unfortunate.

Summary

In conclusion, the Committee’s considered view is that the law and Courts should be left to continue to develop this concept on a case by case basis, as the cases recognise that the concept is flexible and evolving, and attempting a statutory definition or examples is likely to be overly restrictive.

The Committee would also welcome the opportunity of meeting with the Panel to discuss suggested solutions in dealing with relevant proposals to ensure the results of the process of review are as complete as possible.

2 Background to Issues Paper - Response to the Senate Standing Committee's Inquiry into the Statutory Definition of Unconscionable Conduct

The Committee wishes to note expressly the sound approach by the Government in its response to the Senate Economics Committee and in particular the establishment of the Panel to provide a considered view on what should constitute "unconscionable conduct".

The Committee wishes to provide its comments on the Issues Paper in context and in particular to highlight legal issues for the broader community, as well as the business community, in relation to both the Government's extensive Australian Consumer Law reforms (including the reform of unfair contract terms) and the Senate's approach on unconscionable conduct reform. The Committee does not believe that either reform can be considered in isolation.

While supportive of the consumer protection law reforms in general, the Committee has previously expressed concerns with the extent of some of those reforms in relation to unfair contract terms. In particular, the Committee has expressed concerns with the approach taken by the Government to interfere with the freedom to contract by imposing what amounts to presumptions against some forms of language in standard form contracts, without a greater consideration of:

- the economic consequences of this reform;
- whether the amendments are appropriately limited and targeted against unfair practices; or
- whether the amendments could inadvertently adversely affect legitimate efficient standard form contracting intended to reduce transaction costs for businesses and consumers.

Nonetheless, the Committee recognises and supports the Government's approach at this time not to include business to business contracts in that area of reform.

In this context, the Committee would be concerned if the unconscionable conduct provisions were extended in a way which was contrary to the developing law on unconscionable conduct such that they were in effect unfair contract provisions. An amendment to the Act to redefine or "clarify" unconscionability to incorporate mere unfairness would be a significant shift away from the definition of unconscionability that has been accepted by the Courts.

The Committee believes that it is important to recognise the judicial basis for unconscionable conduct as a situation where a party to a transaction is at a special disadvantage in dealing with the other because of non commercial factors such as illness, ignorance, inexperience, impaired faculties, financial need or other circumstances, and the other party unconscientiously takes advantage of the opportunity.¹

¹ See Kitto J in *Blomley v Ryan* (1956) 99 CLR 362 at 415 per Kitto J and Justice Mason in *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447 at 461-462

The Committee supports the legal position distinguishing unconscionable conduct and conduct that may have been said to be unfair as stated by Chief Justice Spigelman of the NSW Supreme Court in *Attorney-General (NSW) v World Best Holdings Limited* (2005) 63 NSWLR 557 at 583.

"Unconscionable conduct is a concept which requires a high level of moral obloquy. If it were to be applied as if it were equivalent to what was "fair" or "just", it could transform commercial relationships ... The principle of "unconscionability" would not be a doctrine of occasional application, when the circumstances were highly unethical, it would be transformed into the first and easiest port of call when any dispute ... arises"

The Committee believes that with the Government's introduction of unfair contract reforms between business and consumers, care needs to be taken with blurring "unconscionable conduct" with "unfair" contract terms and maintaining the difference in these concepts in accordance with the balanced statements of Australia's leading judges.

3 Committee's views on the concept of unconscionable conduct and providing principles and examples

The Committee believes that it is not appropriate to define unconscionability beyond the current provisions of the TPA as the concept will depend to a great degree on the factual circumstances that arise in a particular matter. The Committee would express concerns with too narrowly defining the concept whether by means of "principles" or "examples", which may inadvertently restrict Courts from finding in favour of people who, for whatever reason, deserve the protection of our judicial system against the more unscrupulous.

When the misleading and deceptive conduct provisions in section 52 were introduced, the extent of those provisions could not have been described. As the law has developed through the courts, it has picked up a range of factual circumstances which would not necessarily have originally been contemplated. For example, the way that silence in certain circumstances can be regarded as misleading.

The Committee therefore does not believe that it is appropriate to seek to define the concept beyond the current provisions in the TPA (sections 51AA, 51AB and 51AC). This position is consistent with the Committee's views set out in our submission to the Senate Economics Committee of 28 October 2008. In particular, the Committee restates its position set out in that submission that:

"There is a developing body of sound Australian jurisprudence in the area which should be allowed to continue to develop without further intervention.

In a recent case of Hoy Mobile, Rares J referred to Australian Securities and Investments Commission v National Exchange Pty Ltd,² which considered provisions analogous to section 51AC under the Australian Securities and Investments Commission Act 2001 (Cth), and held that:

- *"[U]nconscionable conduct" has its ordinary and natural interpretation and means doing what should not be done in good conscience'; and*

² (2005) 148 FCR 132.

- *The Court will focus primarily on the unconscionable conduct of the corporation and determine whether that conduct was contrary to the norm of conscientious behaviour. In ASIC v National Exchange, the relevant conduct consisted of a carefully formulated and systematic approach which clearly offended basic notions of good conscience and fair play.*

The developing body of jurisprudence requires the Courts to be satisfied that there has been "serious misconduct or something clearly unfair or unreasonable" before a finding of unconscionability under section 51AC may be made.

When considering proposals to insert a definition of unconscionability into the Act, it is worth considering that section 52 of the Act does not contain a definition of misleading and deceptive conduct. Whether particular conduct is misleading or deceptive under section 52 is a question of fact to be determined in the context of the evidence as to the alleged conduct and to the relevant surrounding facts and circumstances. The strength of the generality of the terms of section 52 is illustrated in its broad application as a guiding norm for commercial conduct.

Sections 51AB and 51AC similarly lay down a guiding norm for commercial conduct of general application. The generality of the terms of section 51AC is necessarily part of the strength of the section."

Providing principles

The Committee notes that there is a call from some sections of the community to address certain issues that have arisen in the franchising sector. The Committee has reservations, but not strong objections to statements of principle in order to provide greater guidance, particularly as the Government has introduced legislation to increase the sanctions for unconscionable conduct. Naturally, the Committee's view is that any statements of principles should be consistent with concepts of unconscionability put forward in *Attorney-General (NSW) v World Best Holdings Limited* (2005).

In addition the Committee believes any statement of principles should be consistent with existing case law. We would be pleased to work with the Expert Panel to refine such a set of principles consistent with the existing provisions of the TPA and case law.

Problems with using a list of Examples

However, as set out in the Committee's 28 October 2008 submission, and our previous comments in this submission on section 52, the Committee believes that including examples is undesirable as it potentially could limit the application of the provisions and a non-exhaustive list of factors in the TPA provides sufficient statutory guidance. As set out in that submission we include our previous comments that:

"In fact, the current non-exhaustive list of factors in sections 51AB and 51AC give the Courts greater flexibility than would a list of examples, which are highly likely to be confined to specific sets of facts. Further, it would be impossible to describe by way of example all the situations in which conduct might be unconscionable.

Further, the suggested recasting of the list of factors in sub-sections 51AB(2), 51AC(3) and 51AC(4) into examples of unconscionable conduct poses a number of problems. For instance:

- while unequal bargaining power is obviously a relevant factor in deciding if a person has acted unconscionably, unequal bargaining power is common in commercial negotiations and should not, by itself, be the foundation of an allegation of unconscionable conduct;*
- it is problematic to suggest that a supplier's unwillingness to negotiate the terms and conditions of any contract with the business consumer is unconscionable in and of itself, even where, for example, the business consumer has obtained legal advice on the terms and conditions of the contract, or the terms and conditions are themselves fair, necessary or reasonable to protect the legitimate interests of the supplier, or the supplier had previously negotiated the terms and conditions and is seeking to renew the existing contract on the same terms and conditions. There is also the potential for tension between this factor and sections 51AC(3)(f) and (4)(f), which touch on consistency of treatment;*
- similarly, exercising a right to unilaterally vary an agreement should not, by itself, amount to unconscionable conduct as there may be circumstances in which it will be appropriate to unilaterally vary an agreement.*

The examples above are more indicative of "unfairness" and the existence of "unfair terms" than unconscionability. An amendment to the Act to redefine unconscionability to incorporate mere unfairness would be a significant shift away from the definition of unconscionability that has been accepted by the courts.

Removing the Court's ability to consider the factors currently set out in section 51AB and 51AC and replacing it, instead, with a list of example of unconscionable conduct, would make the section unduly prescriptive and unreasonably impinge upon legitimate business conduct.

The Committee also submits that such a proposal may have the unintended effect of causing the Courts to adopt overly restrictive assessments of conduct in individual cases.

In contrast, the current wording of sections 51AB and 51AC vests substantial discretion in the Courts to make findings based on the individual facts of each case. This discretion is a guided or principled discretion, reducing judicial subjectivity and at the same time allowing flexible decision-making. The guided discretion that the Courts currently enjoy is a necessary part of the strength of section 51AC as it is currently drafted."

The Committee has noted the issue highlighted on page 8 of the Issues Paper as to unconscionable conduct in business to consumer (section 51AB) and business to business transactions (section 51AC) and the need to avoid inconsistency. However, the Committee believes that it is preferable that the concept should be the same. As such, great care needs to be taken in the treatment of any examples in unconscionable conduct in franchise situations so as not to create distortions and inconsistency in concepts. The Committee believes that if specific issues are arising

in franchising it is better to have targeted reform in that area under the Franchising Code and not create unintended consequences and uncertainty for business and consumers in other areas of commerce. The Committee therefore recommends that:

- any list of principles of unconscionable conduct be consistent with the concept put forward by the Courts and does not venture into situations which are more properly legally characterised as “unfair”;
- issues of “unfairness” or “unconscionability ” which are problematic in franchising agreements should be more specifically focused upon in that sector under the Franchising Code;
- any principles (let alone examples if the Government were to proceed down that path) of unconscionable conduct should be limited to situations actually used by the Courts to provide guidance; and
- any principles (or examples) of unconscionable conduct should not be statutory presumptions of contraventions as this area of the law depends so critically on the facts of each particular circumstance.

The Committee would be particularly concerned if new provisions were to shift the burden of proof to franchisors and other small business facilitators. Franchise operators would be subject to significant uncertainty and regulatory burdens in circumstances where disaffected opponents could take unmeritorious matters through the courts and significantly disrupt legitimate businesses. This needs to be balanced of course with the practical reality that most of these complaints will be taken to the ACCC which will be a “filter” in this area. Nonetheless, there is a danger that shifting the legal balance in these areas will in fact be to the detriment of a dynamic and growing industry when broad changes are introduced to deal with issues created by a relatively small minority.

Specific Issues raised in the Issues Paper

In terms of the Issues Papers questions 2.1 to 2.3, for convenience, we summarise our position as follows:

- 2.1 Yes, there are dangers in a statement of principles that it narrows and stultifies the development of this area of law. It has not been needed for section 52.
- 2.2 If the Expert Panel determines it is appropriate to have a series of principles, the Committee believes that they should be consistent with existing case law and guidance in the TPA and not a mandatory consideration but a non exhaustive list of principles. The Committee does not believe that it is necessary to introduce statutory defences although further consideration of that issue may be appropriate in light of the Australian Consumer Law reforms.
- 2.3 The Committee is mindful that distilling a set of principles from case law is risking creating a “kitchen sink” range of issues that a Court and parties will find it necessary to refer to in each matter creating additional costs and lack of focus in Court cases. The Committee believes that it is preferable to distill principles from the existing TPA provisions. The Committee would be pleased to assist in this exercise but realises it is a much more involved and time consuming exercise than Treasury has perhaps indicated in the last paragraph on page IV of the Issues Paper that the issues paper was to seek

views on "possible next steps". This distillation would include detailed legal drafting which the Committee would be pleased to assist on in January 2010.

4 *Some practical comments on unconscionable conduct cases and the number of cases that have been brought*

In providing this submission, the Committee also wishes to address comments as to the number of cases that have been brought based on views from the Committee's membership. It has variously been suggested the unconscionable conduct provisions are not working because of the limited number of cases that have been brought. However, some of the practical issues with bringing unconscionable conduct cases are illustrative, because they demonstrate that it is quite often the factual evidentiary basis that is appropriately needed in order to bring such cases, not deficiencies in the law.

It is understood there are a number of practical reasons why a number of strong section 51AC cases have not been taken by the ACCC or are resolved before a final decision by the Courts. First, the strongest potential cases are often settled well before litigation. In cases where conduct is highly unethical, the trader usually changes their conduct or simply offers a financial settlement. This inevitably leads enforcers such as the ACCC with the more borderline or difficult cases. Second, complainants are often minded to use action by enforcement authorities as leverage against their landlord or supplier in a dispute. Therefore once the leverage has been successful, the complainant ceases providing information to the enforcer and resolves the matter. Finally, cases involving possible unconscionable conduct often also involve misleading and deceptive conduct. As section 52 conduct is generally less complex and easier to prove, a substantial number of cases which involve possible unconscionable conduct are resolved primarily, or solely, on the basis of section 52.

5 *Alternative Approaches*

The Committee appreciates that guidance from regulators is often helpful and would not discourage such guidance. However, the Committee notes that it is only guidance and does not have the force of law.

The increased use of section 87B undertakings to settle regulatory disputes in appropriate matters may assist in building up additional material accessible to practitioners and companies as to areas of concern but this would not have the force of law.

However, the ACCC has been given extensive powers in relation to the new Australian Consumer Law in relation to unconscionable conduct including infringement notices and civil penalties. The Committee believes that this should be provided to allow the law and approach of the ACCC in these areas to develop.

As noted earlier, the Committee is supportive of specific changes to address any demonstrated and proven issues in the Franchising sector relating to "unconscionable conduct". In view of the fact that the industry is already subject to the Franchising Code of Conduct additional amendments to this code as appropriate to deal with particular identified problems would not be difficult and would assist in providing a level playing field.

December 2009