The Pharmacy Guild of Australia

Ref: SBTAX/TPA WP:kk

15 June 2010

Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Sirs,

**Competition and Consumer Legislation Amendment Bill 2010**

Thank you for the invitation to comment on the Committee's inquiry into this Bill. Please find attached a submission from The Pharmacy Guild of Australia.

The Guild has long had an interest in the development of commercial law in Australia as it affects small businesses such as community pharmacy.

It has participated in inquiries such as the Productivity Commission Inquiry into Retail Tenancies, the Senate Economics Committee inquiry into the Unconscionable Conduct Provisions of Part IV of the Trade Practices Act and the first inquiry into the Australian Consumer Law.

Most recently, it made a submission to the Expert Panel established by the Government in 2009 to examine, amongst other things, the unconscionable conduct provisions of the Trade Practices Act 1974 which produced the February 2010 Expert Panel Report 'Strengthening Statutory Unconscionable Conduct and the Franchising Code of Conduct' and also the Inquiry into the Trade Practices Amendment (ACL) Bill (No. 2) 2010.

The Guild again appreciates the opportunity to make a submission to the Senate Economics Committee on this important area of trade practices law.

If we can be of further assistance with this issue, please contact Karen Killeen on (02) 6270 1888 or by email karen.killeen@guild.org.au.

Yours sincerely

Wendy Phillips
*Executive Director*

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The Pharmacy Guild of Australia

# SUBMISSION TO THE SENATE ECONOMICS COMMITTEE ON THE COMPETITION AND CONSUMER LAW AMENDMENT BILL 2010

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## COMPETITION AND CONSUMER LAW AMENDMENT BILL 2010 – SUBMISSION TO SENATE ECONOMICS COMMITTEE

### RECOMMENDATION

The Guild recommends that the unfair contract provisions contained in the *Independent Contractors Act 2006* be inserted into the *Competition and Consumer Legislation Amendment Act 2010*.

Alternatively, the Guild recommends that Schedule 2 of the Competition and Consumer Legislation Amendment Bill 2010 be removed so as to allow for a full independent inquiry as to whether the threshold at which small business can gain relief from oppressive contracts should be 'unfair' or 'unconscionable'.

# COMPETITION AND CONSUMER LAW AMENDMENT BILL 2010 – SUBMISSION TO SENATE ECONOMICS COMMITTEE

## Introduction

The Pharmacy Guild of Australia is a national employers' organization currently registered under the Fair Work (Registered Organisations) Act 2009 which functions as a single entity rather than a federation. It was first established in 1928 and currently has Branches in every State and Territory.

The Guild's members are the pharmacist proprietors of some 4,500 community pharmacies, which are small retail businesses operating throughout Australia. Almost 80% of all pharmacist proprietors are Guild members.

Community pharmacy makes a significant contribution to the Australian economy with an annual turnover of $12billion and employing some 50,000 people.

Approximately 98% of all community pharmacy owners, are required to enter into negotiations with landlords to establish the terms of their lease , as very few pharmacists own the premises from which they conduct their business. For this reason, unconscionable conduct in negotiations on retail tenancy is a very significant issue for community pharmacy.

It has participated in inquiries such as the Productivity Commission Inquiry into Retail Tenancies and the Senate Economics Committee inquiry into the Unconscionable Conduct Provisions of Part IV of the *Trade Practices Act* and the inquiries into both pieces of legislation introducing the Australian Consumer Law and is pleased to respond to the Issues Paper.

The Guild makes no submission on the amendments relating to creeping acquisitions and will focus on the schedule proposing amendments to the provisions relating to unconscionable conduct.

**What the Government has proposed**

There has always been dispute as to whether sections 51AB and AC of the *Trade Practices Act 1974*, provisions currently proposed to be transferred to sections 21 and 22 of the *Australian Consumer Law*, imports the meaning equity has given the term 'unconscionable conduct'.

As the Government's Expert Panel said at pages 6 – 8 of the November 2009 Issues Paper *The Nature and Application of Unconscionable Conduct Regulation – Can Statutory Unconscionable Conduct be Further Clarified in Practice?:*

> Arguably, section 51AC and possibly section 51AB are intended to go at least some small way beyond the bounds of the doctrine traditionally associated with unconscionable conduct. The previous Government, when introducing the provision, noted that it 'is envisaged that this section would prohibit conduct of a kind already covered by these equitable remedies (for unconscionable conduct, undue influence and economic duress) but would, in addition, extend to other conduct that is, in all the circumstances, unconscionable'. Exactly what is unconscionable 'in all the circumstances' but is not unconscionable at equity is not entirely clear.
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> However, section 51AC does not go so far as to prohibit conduct that is simply 'unfair'. In discussing the introduction of the provision, the previous Government indicated that the preference for the language of 'unconscionability' over 'unfairness' was quite deliberate:
>
> > This new provision will extend the existing common law doctrine of unconscionability expressed in the existing section 51AA of the current act. The bill will use the expression 'unconscionable conduct' in order to build on the existing body of case law which has worked with respect to consumer protection provisions of the act and which will provide greater certainty to small businesses in assessing their legal rights and remedies
>
> How far — if at all — the statutory prohibitions of unconscionable conduct go beyond the scope of the equitable and common law doctrines is a much debated question, and has not been firmly settled by the courts.
>
> With respect to section 51AA, at least, the courts are reasonably settled in interpreting 'unconscionable conduct' to mean the protections afforded by the common law and equity. However, there is some debate about whether section 51AA extends to conduct governed by doctrines such as equitable estoppel, undue influence and duress.
>
> In general, the courts have attempted to give the words 'unconscionable conduct', in sections 51AB and 51AC, their ordinary dictionary meaning, coloured at least to some extent by the meaning of unconscionable conduct at equity. That dictionary meaning is often cited as 'actions showing no regard for conscience, or that are irreconcilable with what is right or reasonable'. Considering section 52A in 1990 (before the introduction of Part IVA), Justice Hill noted that:
>
> > The cases have not sought to define unconscionability nor is it appropriate so to do because the criteria to be applied will depend upon all the circumstances. Nevertheless, in general terms, it may be said that conduct will be unconscionable where the conduct can be seen in accordance with ordinary concepts of mankind to be so against conscience that a court should intervene. At the least the conduct must be unfair. It invites comparison with the doctrines of equity.
>
> Clearly, then, sections 51AB and 51AC cover a broader range of conduct than the doctrines of equity. While the prohibited conduct is still characterised as 'unconscionable' rather than 'unfair', it is intended that 'unconscionable' be considered more broadly than at equity, at least by consideration of the relevant factors set out in those sections. Discussing section 12CC of the ASIC Act, which mirrors section 51AC, the Federal Court noted that:

> There is no foundation in the language or purpose of s 12CC to impose limitations from the unwritten law … Authority on s 51AC supports the proposition that the prohibition in s 12CC is not to be read down by limiting its operation only to circumstances where the common law would grant relief in respect of unconscionable conduct: … It is equally clear both from the actual language of s 51AC and of s 12CC and from the extrinsic materials relating to s 51AC that these provisions were intended to build on and not to be constrained by common law case law … The language must be given its ordinary meaning and must not be qualified by pre-existing constraints on liability.

> The scope of the statutory prohibition is not confined by the constraints of equity, but it is still built upon the understanding of 'unconscionable conduct' originally developed in equity. It still requires, for example, 'a high level of moral obloquy'. But how far it stretches beyond equitable principles is not yet clear, and this lack of clarity is exacerbated by a lack of guidance from the High Court. Without such guidance, the courts have generally had to adopt the standard dictionary meaning of the term 'unconscionable conduct', and have looked for conduct within that meaning to which some 'pejorative moral judgment' might be attached.

The Government proposes substantially settling this issue by not limiting the meaning of what is 'unconscionable conduct' to the meaning accorded by the 'unwritten law'.

A list of 'non-exhaustive' indicators of what could constitute unconscionable conduct is also contained in the legislation.

The proposed amendments finally permit a court to look at the terms of the allegedly unconscionable contract as well as the circumstances leading up to the making of the instrument, but must not have regard to matters not reasonably foreseeable at the time of the alleged contravention.

**The preferred outcome of the Guild**

As Dr Kennedy, the General Manager of the Competition Policy Division of the Treasury, said on 13 August 2009:

> Unfair contract terms regulation is about making a business think about risk realistically and working out what risk it can assume, having regard to the circumstances of the transaction, rather than simply through an exercise of superior bargaining power.[1]

One of the bugbears of pharmacy is dealing with large landlords owning large shopping centres, where there is:

- clear imbalance of the relative bargaining position of the listed companies operating the larger shopping centres and small business tenants such as pharmacies; and
- information asymmetry between companies specialising in the leasing of commercial properties and small business operators who may only have to consider leasing issues a couple of times during their business career.

Relevant examples are **attached** to this submission.

It is agreed that more likely than not these examples would fall below the threshold of what constitutes unconscionable conduct.

The Guild is of the view that when a large corporation (such as a landlord of a major shopping complex) takes advantage of the asymmetric relative dependency it possesses over the smaller trader (such as a pharmacist) to such an extent that 'hard bargaining' becomes objectively unfair, that should be grounds to call into aid remedial legislation.

The Guild believes the public interest would be served if the concept of 'unfair', as contained in the *Independent Contractors Act 2006,* should be inserted into competition law.

Subsection 12(1) reads as follows:

> (1) An application may be made to the Court to review a services contract on either or both of the following grounds:
>
> (a) the contract is unfair;
>
> (b) the contract is harsh.

The Federal Magistrates' Court has considered section 12 of the *Independent Contractors Act* in *Keldote Pty.Ltd v. Riteway Transport Pty.Ltd* (**Riteway**).[2]

[1] *The Future of Consumer Policy: Should we Regulate to Protect Homo Economicus?* Address to ACCORD Industry Leaders Briefing Old Parliament House Canberra 13 August 2009

[2] FMCA 1167 22 August 2008.

The court noted that the provision does not define 'unfair'. It applied the ordinary dictionary meaning of the term of unfair, as being:

> 1. not fair; biased or partial; not just or equitable; unjust. 2. Marked by deceptive dishonest practices. (Macquarie Dictionary)

or

> Not equitable; unjust; not according to the rules, partial (New Shorter Oxford English Dictionary)[3]

It also noted an applicant submission that, in the Australian Industrial Relations Commission, Munro J found in *Re Tranport Workers Union of Australia*:

> It is both well established and widely recognised that industrial tribunals have avoided rigidity in defining terms such as 'unfair' and harsh'. Those words are not terms of art. They should be understood by a commonsense approach, as words in common usage with no special or technical meaning.[4]

Drawing from NSW Industrial Commission jurisprudence, the Court in *Riteway* found that section 12 should operate in this manner:

> 96. Arising out of the above considerations and drawing on the reasons for judgment of the Full Court of the Industrial Court of New South Wales in *Port Macquarie Golf Club Ltd v Stead* (1996) 64 IR 53, which concerned the then s.275 of the *Industrial Relations Act 1991* (NSW), the following principles would appear to be applicable to considering applications for review under the ICA:
>
> > s.12 directs attention to the particular circumstances of the individual contract concerned. Whether or not a contract is unfair or harsh is a matter to be decided upon examination of the facts of each particular case;
> >
> > unfairness or harshness may arise either from the terms of the contract itself or from the circumstances surrounding its formation. That is to say, it may be substantively unfair or harsh or procedurally unfair or harsh;
> >
> > the test of unfairness involves the commonsense approach characteristic of the ordinary jury member by applying standards providing a proper balance or division of advantage and disadvantage between the parties who have made the contract

Were this to occur, there would be a situation where the law relating to independent contractors would apply to all classes of small business – which only appears logical.

[3] Paragraph 77 of *Riteway.*

[4] (1993) 50 IR 171 at 214.

This uniformity in statutory concept would also mean:

- a jurisprudential concept of 'fairness' when dealing with inequality of bargaining power between big and small business can evolve in the same way that the concept of 'unconscionable conduct' has developed for the purposes of other areas of the law; with
- the Federal Court developing a specific expertise in the determination of cases dealing with small business.

**The effectiveness of the legislation proposed in Schedule 2 of the Bill**

The Guild believes the Government does not really wish to extend the threshold as to when small business can gain access to relief when faced with harsh behaviour from large businesses taking advantage of unequal bargaining power.

The Guild notes that as recently as 21 August 2009 Mr Writer, the Manager of the Consumer Policy Framework Unit, Department of the Treasury, told the Senate Economics Committee:

> The concept of unconscionability in the Trade Practices Act relates to the common-law or equitable notion of unconscionability that exists generally, **and does not seek to define it in any particular way beyond that concept which has been developed by the courts over many centuries**.[5] (emphasis added)

reprises the words from the Expert Panel, extracted earlier:

> However, section 51AC does not go so far as to prohibit conduct that is simply 'unfair'. In discussing the introduction of the provision, the previous Government indicated that the preference for the language of 'unconscionability' over 'unfairness' was quite deliberate

and finally notes the Government did not permit its Expert Panel to consider whether 'unfairness' should replace 'unconscionablility' in competition law. As the Panel said on page 2 of its report:

> Policy options for regulating unfairness, as distinct from unconscionability**, are not within the scope of this Issues Paper or the deliberations of the panel.** (emphasis added)

The Guild believes that it is no result for small business to have the ACCC litigate for 5 years or so to see how far, if at all, the concept of what is called 'statutory unconscionable conduct' is extended from its meaning in equity.

The Guild finally notes the rather clunky nature of the drafting of sections 21 and 22 of the Australian Consumer Law, as opposed to the relatively straightforward nature of the construction of section 12 of the *Independent Contractors Act*.

The Guild recommends that the unfair contract provisions contained in the *Independent Contractors Act 2006* be inserted into the *Competition and Consumer Legislation Amendment Act 2010*.

Alternatively, the Guild recommends that Schedule 2 of the Competition and Consumer Legislation Amendment Bill 2010 be removed so as to allow for a full independent inquiry as to whether the threshold at which small business can gain relief from oppressive contracts should be 'unfair' or 'unconscionable'.

The Guild looks forward to Parliament's consideration of this Bill.

[5] Senate Economics Legislation Committee *Hansard* Reference Trade Practices Amendment (Australian Consumer Law) Bill 2009, 21 August 2009 Page E3

**APPENDIX 1**
**Pharmacy Cases**
**Lease Negotiations**
**Case 1:**

It is unlawful under the Pharmacists Act 1964 (WA) for a non pharmacist to have a pecuniary interest in a pharmacy. In the case of a pharmacy negotiating a lease renewal in a medium sized metropolitan shopping centre we are advised that the agent for the landlord Metiers Consulting advised during their lease renewal negotiations that they knew what "he could afford". They knew this because in good faith the pharmacy owner had furnished turnover figures on request of the Centre management who advised they needed them to assist with their marketing of the centre.

When the time came to renew his lease the leasing agent also advised at various times in the negotiation that:

- The landlord had another tenant ready to replace him who would pay the rate.
- The increase was to be 48% later reduced to 25%
- The rate is well above market ($1200/m2 up to $1776m2 later reduced to $1500m2). When this was commented on the agent responded that they "knew what the tenant could afford"
- There is potential breach of privacy (by the landlord or centre management) and sharing of turnover figures with a third party (the agent) which must have occurred for someone to have agreed to pay the rent being demanded
- The agent demanded increase in outgoings of 150% and increased base rent

This case is an example of behavior that should be deemed unconscionable by way of example in that:

- The increase demanded was clearly well above market
- There was unfair pressure to settle combined with the threat of losing their tenancy to another tenant (signed expressions of interest were taken)
- There was attempted use of turnover figures to set rent for a pharmacy
- There appears to have been a breach of privacy by sharing the business performance figures with at least two third parties

**Case 2**

The proprietor of pharmacy located in Perth CBD discount outlet shopping precinct wished to take up her option on her lease. Unfortunately she did not expressly do so believing she was going through this process after the expiry date to do so had passed.

She was then advised that the lease had expired and she was on a monthly holding lease She was asked for her turnover figures repeatedly by Centre Management. After advice from the Guild she ceased handing over the figures and was advised that centre management "knew what her business did" and would "make something up". Additionally the landlords representative suggested she move to a smaller less prominent alternative at exactly the same rent or accept an increase which she cannot afford. The agent made several attempts to present a take it or leave it offer.

In a meeting with the asset manager for the landlord he expressed it was the pharmacists fault as she had no lease and that the business could not pay the new rent demanded as the owner was not a good business woman. The owners asset manager advised the pharmacist she was not a preferred tenant and another would be found if she did not pay the new rate.

Accountant's figures were provided to the owner that demonstrated the new lease being demanded was unaffordable.

The pharmacist was in a position of weakness as she cannot relocate due to the rules governing location of pharmacy premises, cannot afford what was demanded and was repeatedly told to hurry up and accept or she would be without a premises.

The balance of power in this negotiation became unbalanced and the owner took opportunity to leverage up the rent 21% from $620m2 to $750m2 plus additional outgoings.

The pharmacist has since signed at a rate that will put her business at jeopardy.

**Case 3**

A northern metro 24 Hour Chemist is negotiating their market review. It is alleged the landlord has at no time negotiated in good faith. They have refused to respond to fair and reasonable market reviews and initiated negotiations with a clearly unfair and unreasonable ambit claim. The pharmacists is prepared to go to the State Administrative Tribunal (SAT). Whilst it might be argued that SAT is there for this purpose we believe the tactic is to force people who cannot afford the time or sometimes the expense required to prepare a case to accept unreasonable terms.

Comments
There is a clear pattern in the above cases of unreasonable demand or unfair treatment made from a position of power. No lease means no business and no ability to negotiate.

Tactics that include the following could be listed as examples of unconscionable conduct:

- making unreasonable initial ambit claims to ramp up the benchmark rent
- threatening replacement with another tenant
- making a take it or leave it offer combined with a threat of replacement tenant
- procuring interest in a site prior to lease renewal negotiations being commenced
- use of turnover figures in any way (requires some changes to state acts)
- forced relocation
- landlords maintaining silence and refusal to act prior to a deadline (would require a change of in state acts)
- passing on business turnover figures or any other private information from centre management to a third party including the landlord