The Pharmacy Guild of Australia

Ref: SBTAX/TPA WP:kk

19 April 2010

The Secretary
Senate Economics Legislation Committee
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Sirs,

Trade Practices Amendment (Australian Consumer Law) Bill (No.2) 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'.

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

(...)

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The Pharmacy Guild of Australia

SUBMISSION TO THE SENATE ECONOMICS COMMITTEE ON THE TRADE PRACTICES AMENDMENT (AUSTRALIAN CONSUMER LAW) BILL (NO.2) 2010 ('the Bill')

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RECOMMENDATIONS

Recommendation 1

With respect to the proposed 'statement of interpretative principles' to be subsequently inserted into Part 2-2 of the Australian Consumer Law in 2010 in cooperation with the states and territories, this Committee should seek to ask the government:

(a) If paragraph 4.29 of the explanatory memorandum is correct, why is there a need for the proposed interpretative principles?

(b) Are the principles going to replace the examples currently contained in the law? If not, what is going to be the precise relationship between the interpretative principles and the examples?

(c) Are the interpretative principles to have the standing of an extrinsic aid or an example, or are they going to be a rule of interpretation in a manner similar to, for example, section 15A of the *Acts Interpretation Act*?

Recommendation 2

The Government should establish a clear mechanism that will allow interested stakeholders to make submissions on the nature of these proposed interpretative principles.

Recommendation 3

This mechanism should also consider whether the concept of 'unconscionable conduct' should be replaced with 'unfair conduct' as the threshold permitting small business access to trade practices law relief.

1. 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.

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 Practice 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* (**the Act**) which produced the February 2010 report *Strengthening Statutory Unconscionable Conduct and the Franchising Code of Conduct* (**the Expert Panel Report**).

The majority of the Bill constitutes the second tranche of amendments to the Act[1] to give effect to Council of Australian Government (**COAG**) decisions made in 2008 to create a single national consumer law for Australia, including a national product safety law.

The Guild supports the concept of a single consumer law for a single national market, and so for the most part satisfied with the contents of the Bill.

It will focus its attention on Part 2-2 of the Australian Consumer Law (**the Law**) dealing with unconscionable conduct provisions to be inserted into the Act by Schedule 1 of the Bill.

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[1] To be renamed by this Bill as the *Competition and Consumer Act 2010*

2. The Guild position on what constitutes unconscionable conduct

The Guild's position on what should constitute unconscionable conduct is contained in the Executive Summary to the submission made to the Expert Panel, when it said:

> All the matters that the law 'may have regard to' in Part IVA add not much more than a gloss to what is in law unconscionable conduct – whilst allowing access to a statutory right to damages contained in Part VI of the Act. Part IVA otherwise does not provide small business much additional access to relief where there has been an exercise of unequal bargaining power over that provided by the general law in cases such as *Bromley v.Ryan*[2] and *Commercial Bank of Australia v. Amadio.*[3]
>
> This is something which has disappointed the retail sector as, however erroneous they may have been in law (accepting unfairness generally falls short of the threshold of 'unconscionability'), many participants were under the impression the section went much further.
>
> Rather than wait for the High Court to determine whether there is a Part IVA statutory concept of unconsiconability...... there should be created a statutory concept of unacceptable conduct, capturing:
>
> - behaviour that would fall into what would be regarded under the general law as 'unconscionable conduct'; and
> - other specified behaviour, as listed in the legislation.
>
> In that way the equitable principle of unconscionable conduct can continue to develop without it being overly contaminated by Part IV cases whilst permitting a clear line of authority of what does constitute Part IVA 'unacceptable conduct' to develop.

The Guild also said:

> The Guild believes that it was highly unfortunate that the Government chose to scope out of (the Expert Panel's reference) the issue of whether 'unfair' conduct should fall within the terms of Part IVA of the Trade Practices Act, and to merely 'note' the recommendation of the minority members (of the Senate Economics Committee) in the *Commonwealth Government Response to the Senate Standing Committee on Economics Report on the Need and Scope of a Definition of Unconscionable Conduct for the Purposes of Part IVA of the Trade Practices Act 1974* that 'unfair' contract provisions be extended to cover business to business relationships involving small business.
>
> If there is to be a genuine review of the effectiveness of Part IVA of the Act, then the Expert Panel must canvass whether the concept of 'unfair contract' as contained in the *Independent Contractors Act 2006* should be incorporated into the Act so that a substantial body of case law can be developed over time so that what may be considered as being 'unfair' commercial conduct can be identified, thereby levelling the playing field between big business and small.

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[2] (1956) 99 CLR 362
[3] (1983) 151 CLR 447

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.

This uniformity of 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 other areas of the law; with

- The Federal Court developing a specific expertise in the determination of case dealing with small business.

The full submission to the Expert Panel is **attached** to this submission.

3. What the Bill does and does not do with regards to statutory unconscionable conduct

The Bill repeals Part IVA of the Act[4], which currently houses the unconscionable conduct provisions, and inserts them into clauses 20 - 23 of the Law.

- The only change to the current law is contained in proposed paragraph 22(2)(j), for the reasons explained in the extract from the Bill's explanatory memorandum set out below. These changes are welcomed by the Guild.

However, the Bill does **not** do a number of things, as this extract from the Bill's explanatory memorandum sets out:

Future changes to statutory unconscionable conduct

4.10 In December 2008, the Senate Standing Committee on Economics (Senate Committee) released an inquiry report into the need, scope and content of a definition of unconscionable conduct for the purposes of Part IVA of the TP Act. The Senate Committee recommended:

- a clarifying amendment to ensure that section 51AC applies to the behaviour of parties under a contract, in addition to their behaviour during the process of agreeing the terms of the contract;

- that the Government further consider the need for a guiding statement of principles in the law, with particular regard to the retail tenancy leasing and franchising industries; and

- that the Australian Competition and Consumer Commission (ACCC) should undertake targeted investigation and funding of unconscionable conduct test cases.

4.11 An amendment giving effect to the first recommendation of the Senate Committee is included in section 22(2)(j) of the ACL.

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[4] See Item 49 of Schedule 5 to the Bill

4.12 On 5 November 2009, the Australian Government released its response to the Senate Committee. The Government agreed to a clarifying amendment to the 51AC, along the lines of that recommended by the Senate Committee. The Government also established an expert panel to consider:

- whether a list of examples of unconscionable conduct should be incorporated into the TP Act; and
- the case for amendments to strengthen the Franchising Code of Conduct.

4.13 The expert panel reported to the Government in February 2010 and on 3 March 2010, the Government responded to the expert panel's report. The Government has announced that it will:

- insert a statement of interpretative principles into the provisions; and
- redraft sections 51AB and 51AC to either harmonise or unify them.

4.14 No amendments to implement the Government's response to the expert panel report are included in the ACL Bill. The Government has announced that it will implement its response through separate legislative amendments to be introduced later in 2010 and in cooperation with the States and Territories.

It follows that Part 2-2 of the Law should be regarded as being no more than a 'work in progress'.

4. Observations of the Guild

The Guild makes two comments.

Firstly, there is the prospective proposal to insert a statement of interpretative provisions into Part 2-2, which will 'guide' the interpretation of unconscionable conduct (an outcome somewhat less than the preferred Guild position).

Paragraph 4.29 of the Explanatory Memorandum suggests that the section does not define 'unconscionable conduct' and also 'does not limit it to the concept as understood under the 'unwritten law, from time to time".[5]

For the reasons discussed in Page 8 of the Guild's submission to the Expert Panel (attached to this submission), this contention is disputed.

However, if that is right, it is because of the list of examples a court 'may have regard to' set out in subclauses 22(2) and (3).

In that case, there is a question the role the proposed 'statement of interpretative principles' will play. In particular:

(a) if paragraph 4.29 of the explanatory memorandum is correct, why is there a need for the proposed interpretative principles?

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[5] Whilst this clause note is written to clause 21 of the Law, it is equally applicable to clause 22, which deals with business consumers

(b) are the principles going to replace the examples currently contained in the law? If not, what is going to be the precise relationship between the interpretative principles and the examples?

(c) are the interpretative principles to have the standing of an extrinsic aid or an example, or are they going to be a rule of interpretation in a manner similar to, for example, section 15A of the *Acts Interpretation Act 1901* (a statutory command that an Act will be read Every Act shall be read and construed subject to the Constitution, and so as not to exceed the legislative power of the Commonwealth)?

Secondly, it is noted that the statement of interpretative principles is intended to be the device extending the concept of 'statutory unconscionable conduct' beyond its meaning in equity, which is behaviour displaying 'moral obloquy'.[6]

As previously discussed, the Guild would prefer the *Independent Contractors Act* test of 'unfair' as behaviour that is as being the touchstone allowing for access to relief (rather than unconscionable conduct), which takes its dictionary definition of 'not fair; biased or partial; not just or equitable; unjust'[7].

It is important that all interested parties are able to make submissions on the structure of the proposed interpretative principles.

The Guild notes that the principles will be introduced through legislation introduced later in 2010 'in cooperation with the States and Territories'.

When considering the Health Practitioner Regulation (Administration Arrangements) National Law Bill 2008 (the forerunner to the national registration and accreditation law for health professionals) the Queensland Scrutiny of Legislation Committee said:

> In The Constitutional Systems of the Australian States and Territories, Professor Gerard Carney provides a summary of concerns regarding the legislative scrutiny of national scheme legislation:
>
> A risk of many Commonwealth and State cooperative schemes is 'executive federalism'; that is, the executive branches formulate and manage these schemes to the exclusion of the legislatures. While many schemes require legislative approval, the opportunity for adequate legislative scrutiny is often lacking, with considerable executive pressure to merely ratify the scheme without question.
>
> Thereafter, in an extreme case, the power to amend the scheme may even rest entirely with a joint executive authority. Other instances of concern include,for example, where a government lacks the authority to respond to or the capacity to distance itself from the actions of a joint Commonwealth and State regulatory authority. Public scrutiny is also hampered when the details of such schemes are not made publicly available. For these reasons, a recurring criticism, at least since the Report of the Coombs Royal Commission in 1977, is the tendency of cooperative arrangements to undermine the principle of responsible government. A further

[6] *Attorney-General (NSW) v. World Best Holdings Ltd (2005) 63NSWLR 557*

[7] *Keldote Pty.Ltd v. Riteway Transport Pty.Ltd* FMCA 1167 22 August 2008

> concern is the availability of judicial review in respect of the decisions and actions of these joint authorities.
>
> Certainly, political responsibility must still be taken by each government for both joining and remaining in the cooperative scheme. Some blurring of accountability is an inevitable disadvantage of cooperation – a disadvantage usually outweighed by the advantages of entering this scheme. But greater scrutiny is possible by an enhanced and investigative role for all Commonwealth, State and territory legislatures.[8]

It would be disappointing if either COAG or the relevant Ministerial Council approved a set of interpretative principles without stakeholder input and presented to Parliament as a *fait accompli.*

The Government should establish a clear mechanism that will allow interested stakeholders to make submissions on the nature of the proposed interpretative principles.

Finally, as indicated earlier the Guild was disappointed that the Government placed out of the scope of the Expert Panel's terms of reference the minority senators recommendation contained in the Senate Standing Committee on Economics *Report on the Need and Scope of a Definition of Unconscionable Conduct for the Purposes of Part IVA of the Trade Practices Act 1974* that 'unfair' contract provisions be extended to cover business to business relationships involving small business.

The mechanism referred to above should also consider whether the concept of 'unconscionable conduct' should be replaced with 'unfair conduct' as the threshold permitting small business access to trade practices law relief.

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

[8] Queensland Parliament Scrutiny of Legislation Committee *Alert Digest 12/2008*, 11 November 2008 p.2