

Chapter 3

The unconscionable conduct provisions

3.1 This chapter examines the bill's provisions on 'unconscionable conduct' relating to section 51AC of the *Trade Practices Act (1974)* (TPA). As with the amendments to section 50, these provisions have also been derived from inquiries by this committee and a government process.

Senate Economics Committee inquiry

3.2 In December 2008, this committee tabled its report into the need for a statutory definition of 'unconscionable conduct' in section 51AC of the TPA. The inquiry was established by independent Senator Nick Xenophon.

3.3 The committee recommended in its report that the federal government engage industry participants in an inquiry process to consider whether a clear list of examples and a statement of principles would enhance the 'unconscionable conduct' provisions of the TPA.¹ The committee argued that:

Properly drafted, through the consultative process recommended,...a list of these principles would provide another useful option to clarify section 51AC for the courts and the parties involved...A list of principles would also act as a deterrent to larger businesses in a way that section 51(3) does not.²

The expert panel

3.4 In response, the Minister for Competition Policy and Consumer Affairs, the Hon. Dr Craig Emerson MP, convened an expert panel to consider the issues raised in this committee's inquiry.³ On 27 November 2009, the Minister appointed Professor Bryan Horrigan, Mr David Lieberman and Mr Ray Steinwall to the expert panel. He asked the panel to consider whether a list of examples that all parties agree constitute unconscionable conduct, or a statement of principles concerning unconscionable conduct, should be incorporated into the TPA.

1 Senate Economics Legislation Committee, 'The need , scope and content of a definition of unconscionable conduct for the purposes of Part IVA of the *Trade Practices Act 1974*', December 2008, p. 39.

2 Senate Economics Legislation Committee, 'The need , scope and content of a definition of unconscionable conduct for the purposes of Part IVA of the *Trade Practices Act 1974*', December 2008, p. 38.

3 The Hon. Dr Craig Emerson, 'Expert panel on Franchising', *Media Release*, http://www.franchise.org.au/lib/pdf/media/articles/2009/november/expert_panel_on_franchisin_g.p Professor Bryan Horrigan, Mr David Lieberman and Mr Ray Steinwall have been appointed to the expert panel.df (accessed 10 June 2010).

3.5 The same day, the government released an issues paper prepared by Treasury to canvass stakeholder views of the proposals on unconscionable conduct discussed in this committee's report. The paper was drawn to the attention of key stakeholders in the franchising, retail tenancy, business and academic sectors and was circulated to Commonwealth, state and territory governmental agencies dealing with consumer protection, small business and retail tenancy issues.⁴

3.6 The panel provided the Minister with their report in February 2010. These experts were assisted in their inquiry by Treasury officials and officers from the Department of Innovation, Industry, Science and Research.

Examples and test cases

3.7 The expert panel found that a list of examples will not improve the understanding or implementation of the unconscionable conduct provisions in section 51AC. It gave three reasons. First, examples may create 'a false sense of expectation' in those who read them:

It is easy to imagine small business owners who feel hard done by in their transactions with larger businesses, reading the examples of unconscionable conduct and adopting the view that their specific circumstances match one of them. This could lead many to invest significant resources in terms of time, effort and money in pursuing a case, only to discover that a court, in considering the particular circumstances, finds that the conduct is not unconscionable.⁵

3.8 Second, the panel argued that a list of examples is unlikely to remain current as community expectations change and with them change thereby the understanding and meaning of unconscionability. The panel considered it too legislatively and administratively burdensome for a list of statutory examples to be updated over time.⁶

3.9 The panel's third objection to statutory examples relates to the need to develop interpretation of the provisions. It argued that the mere presence of examples may serve as an indication that parliament has set the general bounds of the provision. The panel observed in its report that:

...many submissions point to a judicial tendency to reading examples as though they limit the scope of the provisions they exemplify. This may be

4 Treasury, Department of Innovation, Industry Science and Research, *Strengthening statutory unconscionable conduct and the Franchising Code of Conduct*, February 2010, Appendix A. http://www.innovation.gov.au/Section/SmallBusiness/Documents/ExpertPanelReportUCC_FC_CFinal100302.pdf (accessed 10 June 2010).

5 Treasury, Department of Innovation, Industry Science and Research, *Strengthening statutory unconscionable conduct and the Franchising Code of Conduct*, February 2010, p. 23.

6 Treasury, Department of Innovation, Industry Science and Research, *Strengthening statutory unconscionable conduct and the Franchising Code of Conduct*, February 2010, p. 26.

particularly the case in lower courts or tribunals, where decision-makers may be reluctant to step outside the bounds of the examples.⁷

Test cases

3.10 This committee recommended in its December 2008 report that the ACCC pursue targeted investigation and funding of test cases into the unconscionable conduct provisions.⁸ While not supporting a list of statutory examples, the expert panel did note the importance of bringing further test cases to develop national guidance on the unconscionable conduct provisions. It considered that these test cases are examples of unconscionable conduct and that 'publicising these cases will bring greater community understanding of the provisions'. The panel also noted that the new provisions arising out of its report would benefit from 'appropriate test cases being brought, and reported through guidance material'.⁹

Interpretive principles

3.11 The expert panel did argue that interpretative principles 'would assist the courts in interpreting the provisions, stakeholders in understanding them and regulators in enforcing them'. In particular, it noted that the principles should recognise that section 51AC is intended to go beyond the scope of the equitable and common law doctrines of unconscionability in section 51AA.¹⁰

3.12 The expert panel explained in its report the nature and purpose of the proposed 'interpretative' principles. It noted that some of the submissions to its inquiry suggested inserting principles that indicate what appropriate behaviour from a business might be, and where there may or may not be strict legal consequences should a business not comply with that behaviour.¹¹ Other submissions noted that principles could serve as a guide to interpretation of the provisions, and may or may not be mandatory considerations.¹² The panel's preference for 'interpretive' principles was based on the objective of:

...assisting the courts and other stakeholders in interpreting the provisions. Principles of business conduct are closer to examples, which the panel has already examined. Guiding principles of interpretation provide an

7 Treasury, Department of Innovation, Industry, Science and Research, *Strengthening statutory unconscionable conduct and the Franchising Code of Conduct*, February 2010, p. 26.

8 Senate Economics Legislation Committee, 'The need, scope and content of a definition of unconscionable conduct for the purposes of Part IVA of the *Trade Practices Act 1974*', December 2008, p. 39.

9 Treasury, Department of Innovation, Industry Science and Research, *Strengthening statutory unconscionable conduct and the Franchising Code of Conduct*, February 2010, p. 36.

10 Treasury, Department of Innovation, Industry Science and Research, *Strengthening statutory unconscionable conduct and the Franchising Code of Conduct*, February 2010, p. ix.

11 Submission by the RTAWA, pp. 2–3.

12 Submission by the Motor Traders Association of Australia, pp. 3–4.

indication of the law's effect without unduly confining the law's development.¹³

3.13 The panel recommended that the following three interpretive principles:

- that the prohibition against unconscionable conduct in the TPA is not limited to the equitable or common law doctrines of unconscionable conduct;
- unconscionable conduct is not limited to the bargaining practices leading to the formation of a contract but can also be apparent in the way a party exercises its rights under a contract or the way in which a party behaves once a contract is made; and
- unconscionable conduct applies to systemic conduct or patterns of behaviour and there is no need to identify a person at a disadvantage in order to attract the prohibition.¹⁴

Provisions of the bill

3.14 The bill adopts all the panel's recommendations concerning unconscionable conduct, including the interpretative provisions. The bill proposes to insert the following words into the Act, which will form section 21(4) of the *Competition and Consumer Act 2010*:

It is the intention of the Parliament that:

- (a) this section is not limited by the unwritten law relating to unconscionable conduct; and
- (b) this section is capable of applying to a system of conduct or pattern of behaviour, whether or not a particular individual is identified as having been disadvantaged by the conduct or behaviour; and
- (c) in considering whether conduct to which a contract relates is unconscionable, a court's consideration of the contract may include consideration of:
 - (i) the terms of the contract and
 - (ii) the manner in which and the extent to which the contract is carried out;

and is not limited to consideration of the circumstances relating to formation of the contract.

13 Treasury, Department of Innovation, Industry, Science and Research, *Strengthening statutory unconscionable conduct and the Franchising Code of Conduct*, February 2010, p. 29.

14 Treasury, Department of Innovation, Industry, Science and Research, *Strengthening statutory unconscionable conduct and the Franchising Code of Conduct*, February 2010, p. ix. http://www.innovation.gov.au/Section/SmallBusiness/Documents/ExpertPanelReportUCC_FC_CFinal100302.pdf (accessed 10 June 2010).

3.15 The bill also consolidates the previous sections 51AB and 51AC of the TPA in order to remove the distinction between business and consumer transactions with regard to unconscionable conduct.¹⁵

Views on the 'unconscionable conduct' provisions

3.16 Treasury acknowledged in its evidence that 'there is obviously some controversy around the scope and nature of unconscionable conduct'. Indeed, this is partly what has prompted the recommendation of the panel to insert interpretative principles and the government's acceptance of this recommendation.¹⁶

3.17 The bill has not resolved this controversy, however. The Shopping Centre Council of Australia, notably, argued in its submission that the bill's provisions create potential for the scope of statutory unconscionability to be expanded beyond the sensible limits that were intended by the parliament in 1998. The Council reiterated its position that:

...there is no evidence that the unconscionable conduct provisions in the present Part IV of the Act are confusing to the courts, or to relevant tribunals; nor to the body given primary responsibility for enforcing these provisions, the Australian Competition and Consumer Commission.¹⁷

3.18 The Australian Chamber of Commerce and Industry also argued that the interpretive principles 'will greatly widen' the ability of courts to interpret those sections relating to unconscionable conduct beyond the original intention of the parliament.¹⁸

3.19 The Motor Trades Association of Australia (MTAA), on the other hand, argued that the principles will not provide the necessary guidance for the courts to identify cases of unconscionable conduct. It noted in its submission that:

For small business operators one of the major difficulties is that 'unconscionable' conduct is a difficult concept to prove. The factors to be listed in the new section 22 of the Competition and Consumer Act are not of themselves determinative of a breach of the unconscionable conduct provision and the courts have found that there must be something more than 'hard bargaining' on the part of the stronger party to sustain a case of

15 This was also recommended by the expert panel. Treasury, Department of Innovation, Industry, Science and Research, *Strengthening statutory unconscionable conduct and the Franchising Code of Conduct*, February 2010, p. 17.

http://www.innovation.gov.au/Section/SmallBusiness/Documents/ExpertPanelReportUCC_FC_CFinal100302.pdf (accessed 10 June 2010).

16 Mr Simon Writer, *Proof Committee Hansard*, 9 June 2010, p. 7.

17 Shopping Centre Council of Australia, *Submission 3*, p. 1. See also Treasury, Department of Innovation, Industry, Science and Research, *Strengthening statutory unconscionable conduct and the Franchising Code of Conduct*, February 2010, p. 20.

18 Australian Chamber of Commerce and Industry, *Submission 3*, p. 1.

unconscionable conduct. Many businesses that operate under contractual arrangements (such as franchise agreements) are in a 'captive' situation and MTAA does not believe that the current law deals effectively with inappropriate behaviour by larger business in such circumstances.¹⁹

3.20 The committee asked Treasury officials whether the interpretive principles will assist the courts to identify 'unconscionable conduct'. Mr Simon Writer responded:

The interpretive principles are designed to give greater clarity about where the courts can go with the provision so that it is clear to the court that it is not bound by the equitable principles around unconscionable conduct that have traditionally been understood to apply. The other principles make it clear that the courts can go to matters that perhaps have been considered previously to be beyond the sorts of things that courts can look at so that it can go beyond procedural unconscionability into issues of substantive unconscionability and can look at cases that involve patterns of behaviour and do not require the ACCC or another regulator—or whoever is bringing the action—to point to particular persons, which has obviously been a big concern in this area, but to these patterns of conduct.²⁰

3.21 The Law Council told the committee that it is important that one of the interpretive principles is to remove the connection from the legal concept of a special disadvantage to the person who is the victim of the unconscionable conduct.²¹ This is consistent with the widely held view that section 51AC of the TPA extends beyond procedural disadvantage to substantive disadvantage.²²

Principles, not examples

3.22 The Law Council commented that the changes to section 51AC are 'appropriate' to provide further safeguards for consumers.²³ Mr Stephen Ridgeway, Deputy Chair of the Law Council, commended the expert panel for their work. In particular, he argued that the panel was correct to focus on principles rather than examples of unconscionable conduct:

...it is far preferable to make the changes that have been made rather than trying to cement examples of particular types of conduct. The concept of unconscionability has been around for a long time in our law, but it has perhaps become fixed in certain principles. What these amendments attempt to do is break some of those connections, which is an appropriate change,

19 Motor Trades Association, *Submission 7*, p. 2.

20 Mr Simon Writer, *Proof Committee Hansard*, 9 June 2010, p. 2.

21 Mr Stephen Ridgeway, *Proof Committee Hansard*, 9 June 2010, p. 14.

22 Senate Economics Legislation Committee, 'The need, scope and content of a definition of unconscionable conduct for the purposes of Part IVA of the *Trade Practices Act 1974*', December 2008, pp. 3–8.

23 Law Council of Australia, *Submission 1*, p. 5.

rather than trying to pick specific examples of conduct that may mislead people about the extent of unconscionability. The principle of equity in our law was designed to be flexible—there is the old saying that the law is that categories of equity are not closed...Some things which are unconscionable in one circumstance may not be in another, and you are really going to limit the application of the concept.²⁴

3.23 Mr Dave Poddar, Chair of the Law Council's Trade Practices Committee, also argued that the panel's approach is sound. He told the committee that while examples are necessarily fact based, principles are preferable 'because they are less likely to tie the law down to particular fact based situations'.²⁵

Wider enforcement

3.24 Treasury also noted in its evidence that the provisions on unconscionable conduct will form part of the new Australian Consumer Law and as such will apply nationally to corporations and to the laws of each of the states and territories. They will be enforceable in Commonwealth and in state and territory courts. Treasury anticipated that regulators and individual claimants would thereby be able to bring actions much more cheaply than they could through the Federal Court.²⁶ It noted that these broader avenues for public enforcement are consistent with the government's in principle acceptance of the expert panel's favour for more test cases on the unconscionable conduct provisions (see paragraph 3.10, above).²⁷

Committee view

3.25 The committee is pleased that the government—acting on the recommendation of the expert panel—is legislating for the inclusion of a list of statutory principles to clarify the unconscionable conduct provisions of the TPA. It believes it is important that the Act state explicitly that these provisions extend beyond the equitable and common law doctrines of unconscionability. To this end, the committee urges the government and the ACCC to heed the advice of the expert panel and pursue test cases to develop national guidance on the new provisions.

Recommendation 1

The committee recommends that the Senate pass the bill.

Senator Annette Hurley

Chair

24 Mr Stephen Ridgeway, *Proof Committee Hansard*, 9 June 2010, p. 14.

25 Mr Dave Poddar, *Proof Committee Hansard*, 9 June 2010, pp. 14–15.

26 Mr Simon Writer, *Proof Committee Hansard*, 9 June 2010, p. 2.

27 Mr Simon Writer, *Proof Committee Hansard*, 9 June 2010, p. 7.

