# Unconscionable conduct and codes of conduct

**Editor: Frank Zumbo**

## COMMERCIAL UNCONSCIONABILITY AND RETAIL TENANCIES: A STATE AND TERRITORY PERSPECTIVE

After a decade of debate, it is perhaps not surprising that the issue of how best to deal with allegations of unconscionable conduct in retail tenancies still remains unresolved. While of course there has been the enactment of s 51AC of the *Trade Practices Act 1974* (Cth) (the Act) and a number of equivalent State and Territory initiatives, it is readily apparent that these State and Territory initiatives are not exact replicas of s 51AC. Indeed, a review of these initiatives reveals clear differences between the provisions. Such differences are particularly noteworthy for not only pointing to an ongoing debate as to the appropriate wording of a statutory provision dealing with unconscionable conduct within retail tenancies, but also adding another level of complexity to the debate. Thus, irrespective of whether or not the differences are justifiable, such differences do raise the question of whether a new attempt should be made to bring about uniformity in State and Territory provisions dealing with unconscionable conduct.

In turn, the question also arises as to whether or not uniformity in State and Territory provisions dealing with unconscionable conduct is sufficient to address the broader concerns that landlords and tenants may have regarding the fairness or otherwise of clauses of a retail lease. This broader question is no doubt related to the growing realization that existing State and Territory provisions dealing with unconscionable conduct are limited by the judicial tendency to give them a procedural unconscionability bias with little ability for tenants to bring actions based solely on the alleged substantive unfairness of a clause of a retail lease.[1] In short, it would appear that unless a landlord or tenant can establish some judicially recognized form of procedural unconscionability, the tenant is generally unable to rely on s 51AC or its State and Territory equivalents to challenge a clause of a retail lease that goes beyond what is reasonably necessary to protect the legitimate interests of the party seeking to rely on the term.

Within this context, it is opportune to not only consider the scope and operation of existing State and Territory provisions dealing with unconscionable conduct but also to explore the question of whether or not there is a need for a new regulatory model for dealing with allegedly unfair clauses in a retail lease. In doing so, this report will begin by considering the operation of the New South Wales provision as a case study of how s 51AC may be drawn down by a State or Territory. Having considered the operation of the New South Wales provision the report will move to consider a number of significant differences between the various State and Territory legislative provisions dealing with unconscionable conduct within a retail context. Importantly, such differences relate to the *application* of the State and Territory based provisions and the factors that can be taken into account when dealing with claims under those provisions. Finally, the report will consider future directions in dealing with allegedly unethical conduct within a retail tenancy context as well as allegedly unfair clauses in retail leases.

### THE NEW SOUTH WALES EXPERIENCE: A CASE STUDY IN THE DRAWING DOWN OF SECTION 51AC

While the enactment of s 51AC of the Act was intended to lead the way in the enactment of a new statutory notion of unconscionable conduct, there emerged an expectation that the States and Territories would replicate or "draw down" the section into their retail tenancy legislation with a view to not only overcoming any constitutional limitations of s 51AC, but also allowing landlords and tenants access to State and Territory based dispute resolution processes and Tribunals.[2] One State to

[1] See Zumbo F, "Dealing with Unfair Terms in Consumer Contracts: Is Australia Falling Behind?" (2005) 13 TPLJ 70.

[2] See generally comments made in Department of Industry, Tourism and Resources, *New Deal: Fair Deal – The Federal*

 

draw down s 51AC was New South Wales. This drawing down was achieved through amendments[3] to the *Retail Leases Act 1994* (NSW) which came into effect on 12 October 2001. Those amendments gave the New South Wales Administrative Decisions Tribunal (the Tribunal) the power to consider allegations of unconscionable conduct within New South Wales retail tenancies. That power – based on the statutory notion of unconscionable commercial conduct found in s 51AC and now adopted in s 62B of the *Retail Leases Act* – enables the Tribunal to have regard to whether or not the alleged conduct is, all the circumstances, unconscionable.

## APPLICATION OF SECTION 62B

While s 62B applies to a retail shop lease covered by the *Retail Leases Act* and entered into after that Act's commencement, the provision also applies to retail shop leases entered into before that Act commenced, provided that those leases would have been covered by that Act if they had been entered into after its commencement. This extended application of s 62B is dependent on whether the lease is of a type that, had it been entered into after the commencement of the *Retail Leases Act*, it would not have been excluded by the operation of s 6 of that Act.[4] Once it is determined that the lease is one to which s 62B applies, it becomes necessary to establish that the conduct has occurred on or after the 12 October 2001, since s 62B does not apply to conduct occurring before that date. Where the conduct occurs on or after 12 October 2001, and is in connection to a retail shop lease to which s 62B applies, the relevant party suffering loss or damage by reason of unconscionable conduct can invoke the jurisdiction of the Tribunal.

## SCOPE OF SECTION 62B

Like s 51AC, s 62B prohibits conduct that is in all the circumstances unconscionable. The reference to "all the circumstances" emphasises that the conduct is to be judged by reference to its context, rather than by reference to the more limited equitable notions of unconscionability. While no doubt a person within the equitable doctrine of unconscionability would have the benefit of provisions such as ss 51AC and 62B, it is clear that a wider range of conduct is intended to face scrutiny under both these sections. With this in mind, s 62B prohibits both a lessor[5] and lessee[6] from engaging in unconscionable conduct in connection with a retail shop lease.[7] Like s 51AC, a list of matters that the Tribunal may take into consideration in assessing allegations of unconscionable conduct under the provision has also been provided, namely:

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*Government's Fair Trading Statement – Giving Small Business a Fair Go* (1997), http://www.industry.gov.au/assets/documents/itrinternet/OSB_fairtrading_sept_1997.pdf viewed August 2006.

[3] See *Retail Leases Amendment Act 1998* (NSW).

[4] *Retail Leases Amendment Act 1998* (NSW), s 6 provides:

(1) This Act does not apply to any of the following leases of retail shops:
  (a) (Repealed)
  (b) leases for a term of 25 years or more (with the term of a lease taken to include any term for which the lease may be extended or renewed at the option of the lessee),
  (c) leases entered into before the commencement of this section,
  (d) leases entered into under an option granted or agreement made before the commencement of this section,
  (e) any other lease of a class or description prescribed by the regulations as exempt from this Act.

(2) This Act does not apply to any lease referred to in this section that is assigned to another person after the commencement of this section.

Note: Part 9A provides for certain exemptions regarding Sydney (Kingsford-Smith) Airport.

[5] Under s 3 of the *Retail Leases Act 1994* (NSW), a lessor is defined as the person who grants or proposes to grant the right to occupy a retail shop under a retail shop lease, and includes a sublessor and a lessor's or sublessor's heirs, executors, administrators and assigns.

[6] Under s 3 of the *Retail Leases Act 1994* (NSW), a lessee is defined as the person who has the right to occupy a retail shop under a retail shop lease, and includes a sublessee and a lessee's or sublessee's heirs, executors, administrators and assigns.

[7] Under s 3 of the *Retail Leases Act 1994* (NSW), a retail shop lease is defined to mean any agreement under which a person grants or agrees to grant to another person for value a right of occupation of premises for the purpose of the use of the premises as a retail shop: (a) whether or not the right is a right of exclusive occupation, and (b) whether the agreement is express or implied, and (c) whether the agreement is oral or in writing, or partly oral and partly in writing.

(a) the relative strengths of the bargaining positions of the lessor and the lessee, and
(b) whether, as a result of conduct engaged in by the lessor, the lessee was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the lessor, and
(c) whether the lessee was able to understand any documents relating to the lease, and
(d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the lessee or a person acting on behalf of the lessee by the lessor or a person acting on behalf of the lessor in relation to the lease, and
(e) the amount for which, and the circumstances under which, the lessee could have acquired an identical or equivalent lease from a person other than the lessor, and
(f) the extent to which the lessor's conduct towards the lessee was consistent with the lessor's conduct in similar transactions between the lessor and other like lessees, and
(g) the requirements of any applicable industry code, and
(h) the requirements of any other industry code, if the lessee acted on the reasonable belief that the lessor would comply with that code, and
(i) the extent to which the lessor unreasonably failed to disclose to the lessee:
  (i) any intended conduct of the lessor that might affect the interests of the lessee, and
  (ii) any risks to the lessee arising from the lessor's intended conduct (being risks that the lessor should have foreseen would not be apparent to the lessee), and
(j) the extent to which the lessor was willing to negotiate the terms and conditions of any lease with the lessee, and
(k) the extent to which the lessor and the lessee acted in good faith.

Under s 62B(4), a comparable set of matters applies in relation to a lessee and may be considered by the Tribunal for the purpose of determining whether a lessee has contravened s 62B(2).

As for the nature of the conduct that will be considered unconscionable under the new s 62B, it is useful to refer to the decision in *ACCC v Simply No-Knead (Franchising) Pty Ltd* (2000) 104 FCR 253; [2000] FCA 1365. While this was a case in which allegations of unconscionable conduct were established within a franchising context, the comments by Sundberg J in the case provide insight in relation to commercial unconscionability cases generally. In particular, his Honour pointed (at 270) to an overwhelming case of unreasonable, unfair, bullying and thuggish behaviour by the franchisor in relation to each franchisee as establishing unconscionable conduct in contravention of s 51AC(1). This behaviour included competing with the franchisees; refusing to supply products for (on at least two occasions) contrived reasons or unless certain conditions were met; omitting the franchisees' names from brochures advertising the product range, while providing contact details for the franchisor; refusal to negotiate on or discuss issues of concern to the franchisees; and the hostile and pugnacious manner in which the franchisor generally behaved towards to the franchisees, were all factors suggestive of unconscionable conduct in the circumstances.[8]

## CONDUCT NOT TO BE CONSIDERED UNCONSCIONABLE

Two actions are identified as types of conduct not in themselves to be taken as constituting unconscionable conduct for the purposes of s 62B of the *Retail Leases Act*. These are outlined in s 62B(5) and (6):

(5) A person is not to be taken for the purposes of this section to engage in unconscionable conduct in connection with a retail shop lease by reason only that the first-mentioned person institutes legal proceedings in relation to that lease or refers to arbitration a dispute or claim in relation to that lease.
(6) A person is not to be taken for the purposes of this section to engage in unconscionable conduct in connection with a retail shop lease by reason only that the first-mentioned person fails to renew the lease or issue a new lease.

In addition to these two provisos, s 62B(7) provides that the Tribunal is not to have regard to circumstances not reasonably foreseeable at the time of the alleged breach of conduct engaged in before the provision's commencement.

[8] *ACCC v Simply No-Knead (Franchising) Pty Ltd* (2000) 104 FCR 253 at 267-269; [2000] FCA 1365.

 

The distinction between circumstances existing and conduct occurring before the provision's commencement has been an issue considered with respect to s 51AC. Significantly, the issue arose in a s 51AC case brought by the Australian Competition and Consumer Commission (ACCC) within a retail tenancy context. In that case – *ACCC v Leelee Pty Ltd* [2000] ATPR 41-742; [1999] FCA 1121 – Mansfield J made the following remarks regarding the distinction between circumstances and conduct for the purposes of s 51AC (at 40,603):

> in determining whether an alleged contravention of s 51AC(1) of the Act has occurred, the Court cannot take into account conduct on the part of the alleged contravener, using the term "conduct" in the wide sense in which it is defined in s 4(2) of the Act. It follows, in my judgment, that the applicant ought not be permitted to make allegations of conduct on the part of the respondents prior to 1 July 1998 in the statement of claim.
>
> That does not indicate where the borderline between "circumstances" and "conduct" lies. Yet, borderline there must be. There may clearly be matters relevant to an alleged contravention of s 51AC(1) of the Act which do not involve any conduct on the part of the alleged contravener, and which arose before 1 July 1998. Where they provide the context in which an alleged contravention is sought to be proved, there is nothing to indicate that those matters might not be alleged and proved. There may also be matters which involve some act done or transaction entered into by an alleged contravener prior to 1 July 1998 which provide the content in which the alleged contravention occurred. Such matters may well be "circumstances" under s 51AC(6)(b). An illustration in the present claim may be Leelee's lease of the premises, and its underlease of the stall to the Choongs. Another illustration may be the fact of Mr Ong's directorship of Leelee. Although, in a sense, each of those matters involves conduct because Leelee had to act to accept the lease and grant the underlease, and Mr Ong had to give his consent to be a director of Leelee, I do not think that that is the sort of conduct to which s 51AC(6)(b) refers. That is because the definition of conduct, and of engaging in conduct, in s 4(2) of the Act, although widely expressed, serves the purpose of identifying behaviour which may relate in some way to a potential contravention of a provision of the Act. In the present matter, the fact of the underlease (for example) is not related in that way to the alleged infringement but provides the setting in which the alleged infringement occurred.

At its simplest, his Honour's comments would suggest that a party seeking to rely on s 62B can allege and prove matters (such as the existence of a lease) that provide the setting for an alleged breach of the provision, but cannot introduce evidence pointing to an alleged breach before 12 October 2001.

## THE ROLE OF NEW SOUTH WALES ADMINISTRATIVE DECISIONS TRIBUNAL

The New South Wales Administrative Decisions Tribunal is given jurisdiction under the *Retail Leases Act* to hear a "unconscionable conduct claim".[9] Where a victim of unconscionable conduct prohibited by s 62B suffers loss or damage by reason of that conduct, s 62B(8) allows that person to make a claim for that loss or damage through the Tribunal:

> (8) A lessor or lessee, or former lessor or lessee, who suffers loss or damage by reason of unconscionable conduct of another person that is in contravention of this section may recover the amount of the loss or damage by lodging a claim against the other person under section 71A.

The lodging of an unconscionable conduct claim is dealt with under s 71A of the Act:

> 71A Lodging of unconscionable conduct claims with Tribunal
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> (1) A lessor or lessee, or former lessor or lessee, under a retail shop lease or former retail shop lease may lodge an unconscionable conduct claim with the Tribunal for determination of the claim.
>
> (2) A claim may not be lodged more than 3 years after the alleged unconscionable conduct occurred.
>
> (3) In this section:
>
> *lessor* or *lessee* under a retail shop lease or former retail shop lease includes a person who is a guarantor or covenantor under a lease or former lease.

This three-year limitation period can be extended by the Tribunal under s 71B(2) and (3) of the *Retail*

[9] Under s 70 of the *Retail Leases Act 1994* (NSW), an "unconscionable conduct claim" is defined to mean a claim for relief under s 62B.

*Leases Act*:

71B Lodging of claims after 3 years

…

(2) An unconscionable conduct claim may be lodged more than 3 years but no later than 6 years after the alleged unconscionable conduct occurred, if the Tribunal orders that the claim may be lodged with the Tribunal.

(3) The Tribunal may make an order under this section:

(a) on application by the party or former party concerned, and

(b) after hearing such of the persons likely to be affected by the application as it sees fit, and

(c) if the applicant satisfies the Tribunal that it is just and reasonable to make the order.

The Tribunal's powers in relation to unconscionable conduct claims are outlined in s 72AA of the *Retail Leases Act*. Essentially, the Tribunal is empowered to make orders in relation to the payment or non-payment of money and to make such ancillary orders as are needed to give effect to those orders.

Under s 73 the Tribunal is restricted to making orders up to a total value of $400,000. Where the loss or damage suffered is greater than that amount, consideration may need to be given to commencing, where possible, actions under s 51AC of the Act where no monetary limit applies to damages recoverable from conduct covered by s 51AC.[10]

Finally, matters involving an unconscionable conduct claim can be transferred to the New South Wales Supreme Court under s 76A of the *Retail Leases Act*. Overall, therefore, it is readily apparent that s 62B of the *Retail Leases Act* enables allegations of unconscionable conduct within New South Wales retail tenancies to be dealt with in a forum perceived to be more accessible to landlords and tenants than is a judicial forum such as the Federal Court in s 51AC matters. Clearly, this access to a timely and low cost dispute resolution process has been a key motivation behind giving a State-based tribunal like the New South Wales Administrative Decisions Tribunal jurisdiction over unconscionable commercial conduct claims.

## STATE AND TERRITORY PROVISIONS DEALING WITH UNCONSCIONABLE CONDUCT: KEY DIFFERENCES

Turning to the other State and Territory provisions dealing with unconscionable conduct within retail tenancies, it is readily apparent that not only are there some important differences between these State and Territory provisions, but that these provisions are in a number of respects substantively different to s 51AC. Indeed, apart from being modified to fit a retail tenancy context, a number of State and Territory provisions have gone further than s 51AC. For example, the Australian Capital Territory and Tasmania provisions have included the term "harsh" in describing the conduct covered by the provision. In the case of the Australian Capital Territory's provision, the term "harsh" has been joined by the term "oppressive." Thus, s 22 of the *Leases (Commercial and Retail) Act 2001* (ACT) provides:

Prohibited conduct in dealings

(1) A party to a lease, or a party to negotiations for a proposed lease, must not, in dealings with another party to the lease or negotiations, engage in conduct that is unconscionable or harsh and oppressive.

In the Tasmanian case, the expression "harsh" is joined by the expression "unjust." Significantly, Tasmania is unique in dealing with retail tenancy issues with a code of conduct prescribed under the *Fair Trading Act 1990* (Tas).[11] Clause 3(1) of the *Tasmanian Code of Practice for Retail Tenancies* provides that:

A person must not engage in conduct that is harsh, unjust or unconscionable.

In short, while Queensland,[12] Victoria[13] and the Northern Territory[14] have joined New South Wales and s 51AC in prohibiting conduct that is, in all the circumstances, unconscionable, the

[10] However, an important proviso to the operation of s 51AC of the *Trade Practices Act 1974* (Cth) relates to the supply or acquisition of goods or services needing to be one of less than $3 million: see s 51AC(9) and (10).

[11] See *Fair Trading (Code of Practice for Retail Tenancies) Regulations 1998* (Tas).

[12] See *Retail Shop Leases Act 1994* (Qld), s 46A(1) and (2).

[13] See *Retail Leases Act 2003* (Vic), ss 77(1), 78(1).

 

Australian Capital Territory and Tasmania have used additional concepts such as "harsh," "oppressive", or "unjust" in drafting their provisions.

Importantly, the Australian Capital Territory and Tasmania have also gone further in identifying specific forms of conduct caught by their prohibitions. For example, s 22(3) of the *Leases (Commercial and Retail) Act 2001* (ACT) states that:

> (3) Without limiting subsection (1), a lessor is taken to have engaged in harsh and oppressive conduct if:
>
> (a) the lessor discriminates against a tenant because the tenant is a member of, or intends to become a member of, an association to represent or protect the interests of tenants, or intends to form such an association; or
>
> (b) the lessor's conduct has the effect of preventing a tenant from forming or joining, or compelling a tenant to form or join, an association to represent or protect the interests of tenants.

Similarly, cl 3(2) of the Tasmanian code of conduct states:

> (2) Without limiting the generality of subclause (1), unconscionable conduct may include the threat by a property owner:
>
> (a) to subsidise a competitor to the tenant in nearby premises; or
>
> (b) not to renew a lease unless the tenant:
>
> (i) agrees to a proposal of the property owner; or
>
> (ii) is prepared to pay a rental in excess of the market value rent.

While not going to the extent of the Australian Capital Territory or Tasmania in identifying specific forms of conduct covered by the prohibition, Victoria has included new matters that its Tribunal can take into account in determining if there has been a breach of its prohibition:

> (l) the extent to which the landlord was not reasonably willing to negotiate the rent under the lease; and
>
> (m) the extent to which the landlord unreasonably used information about the turnover of the tenant's or a previous tenant's business to negotiate the rent; and
>
> (n) the extent to which the landlord required the tenant to incur unreasonable fit out costs.[15]

The addition of these new matters in the Victorian legislation needs to be balanced to some degree against Victoria's insertion of a further example of conduct not to be taken as unconscionable under the legislation. Thus, while the Victorian legislation, like the New South Wales and Queensland legislation,[16] provides that the bringing of legal proceedings, the referral of the matter to arbitration, or a failure to renew a lease is not to be taken as unconscionable under the legislation, Victoria adds a new example:

> 79 Certain conduct is not unconscionable
>
> A person is not to be taken for the purposes of section 77 or 78 to engage in unconscionable conduct in connection with a retail premises lease merely because:
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> …
>
> (c) the person does not agree to having an independent valuation of current market rent carried out.

Interestingly, apart from the addition of a new type of conduct, there is slight variation in the equivalent provisions to s 79 of the Victorian legislation. For example, Victoria goes further on the referral of a dispute to arbitration and includes conciliation, mediation or some other form of alternative dispute resolution, while the Australian Capital Territory provision does not include reference to either a referral of a dispute to arbitration, or to a failure to renew or issue a new lease[17] and the Northern Territory provision does not include a referral of a dispute to arbitration.[18]

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[14] See *Business Tenancies (Fair Dealings) Act 2003* (NT), ss 79(1), 80(1).

[15] See *Retail Leases Act 2003* (Vic), s 77(2). Under s 78(2) of the *Retail Leases Act 2003* (Vic), a comparable set of these additional matters may also be taken into account in considering the conduct of tenants.

[16] See s 62B(5)(6) of the *Retail Leases Act 1994* (NSW); s 46A(3) of the *Retail Shop Leases Act 1994* (Qld).

[17] See *Leases (Commercial and Retail) Act 2001* (ACT), s 22(4).

[18] See *Business Tenancies (Fair Dealings) Act 2003* (NT), s 81.

Overall, it is evident that, while there are similarities in both policy and substance between the various State and Territory provisions and s 51AC, there are clear differences between them. With such differences, it is hardly surprising that there has been ongoing debate regarding not only how far these statutory provisions go in promoting a new standard of ethical conduct within retail tenancies, but how best to promote uniformity in this standard across jurisdictions. In turn, this debate raises issues such the need for a definition of the expression "unconscionable conduct," the ways uniformity can best be attained and whether or not these statutory provisions adequately deal with allegedly unfair clauses in retail leases.

## STATE AND TERRITORY PROVISIONS DEALING WITH UNCONSCIONABLE CONDUCT: A QUESTION OF DEFINITION

A review of the background to the enactment of s 51AC of the Act reveals that there was some debate regarding the use of the expression "unconscionable conduct". Indeed, in a report handed down by the House of Representatives Standing Committee on Industry, Science and Technology, *Finding a Balance: Towards Fair Trading in Australia*,[19] the Committee recommended that a new provision be inserted in the Act to prohibit "conduct that is, in all the circumstances, unfair". In doing so, the report expressed some reservations in using the expression "unconscionable conduct" in any new statutory standard. For example, the report noted that employing the word "unconscionable" in the statutory standard would retain in the Act the legal history associated with that word and this would lead to a tension between that history and the legislative intention to broaden the equitable doctrine of unconscionability.[20] Clearly, the report saw the enactment of a broader prohibition against unfair business conduct as a key element in promoting better business conduct in the retail tenancy area and, accordingly, took the view that a new concept was needed.[21]

In responding to the Committee's recommendation, however, the federal government decided against the use of the word "unfair", instead preferring the expression "unconscionable conduct" in drafting s 51AC.[22] While no doubt intending that the statutory concept of unconscionable conduct would have a wider operation than the equitable doctrine, the use of the expression unconscionable conduct in the proposed s 51AC clearly carried the risk that the courts would take a cautious approach to the statutory concept, particularly given their well-established views on the very limited scope of the equitable doctrine of unconscionability. Significantly, the risk of such a cautious approach being taken was increased by the omission of a definition of the expression "unconscionable conduct" as used in s 51AC. While the inclusion of a non-exhaustive list of factors that the courts could have regard to in dealing with claims under s 51AC was intended to provide some guidance to the courts, the failure to include a definition of unconscionable conduct meant that the scope of the new statutory concept was essentially left to the courts to decide. In turn, this carried the risk of an ongoing debate as to how far the statutory concept extended in promoting ethical conduct in business transactions.

Needless to say, such possible risks extend to any State and Territory provisions modeled on s 51AC. Indeed, with the States and Territories having decided to draw down s 51AC into their retail tenancy legislation, the risk of a cautious judicial approach, as well as a possible debate as to the intended reach of s 51AC, would extend to these State or Territory equivalents. In such circumstances, there would be merit in developing a clear definition of the concept of unconscionable conduct as used in s 51AC. This would promote a consistent understanding of the scope and nature of commercial unconscionability across Australia at a time when more jurisdictions are proposing to draw down s 51AC.[23] In short, while drawing down the provisions of s 51AC within retail tenancy legislation enables landlords and tenants to access the dispute resolution mechanisms within that jurisdiction's

[19] Standing Committee on Industry, Science and Technology, *Finding a Balance: Towards Fair Trading in Australia*, Report (1997) p 181, http://www.aph.gov.au/house/committee/isr/Fairtrad/report/CHAP6.PDF.

[20] Standing Committee on Industry, Science and Technology, n 19, p 178.

[21] Standing Committee on Industry, Science and Technology, n 19, p 179.

[22] See generally Department of Industry, Tourism and Resources, *New Deal: Fair Deal*, n 2.

[23] See, eg *Retail Shops and Fair Trading Legislation Amendment Bill 2005* (WA).

 

retail tenancy legislation, it is readily apparent that, if s 51AC was drawn down in all jurisdictions having retail tenancy legislation, the proliferation of such unconscionability provisions would carry the real risk of varying notions of commercial unconscionability emerging across jurisdictions. In view of this danger, it becomes critical for there to be clear understanding of types of conduct covered by s 51AC, and this would be greatly assisted by a plain English definition of what is meant by the expression "unconscionable conduct."

In this regard, the possibility of inserting such a plain English definition in relation to the proposed Western Australian equivalent of s 51AC has recently been raised by the Hon Anthony Fels during the Second Reading Speech of the *Retail Shops and Fair Trading Legislation Amendment Bill 2005* (WA). In doing so, the following definition has been proposed:

> "unconscionable conduct" includes any action in relation to a contract or to the terms of a contract that is unfair, unreasonable, harsh or oppressive, or is contrary to the concepts of fair dealing, fair-trading, fair play, good faith and good conscience.[24]

The proposed definition is intended to be non-exhaustive and its plain English drafting is clearly aimed at promoting a better understanding of the intended broad operation of provisions like s 51AC and its State and Territory equivalents. Importantly, the expression draws on concepts that have been recommended or are already in use in other legislation dealing with unethical conduct within a commercial context. For example, as discussed above, the word "unfair" was originally proposed as the central concept in what was to become s 51AC.[25] The word "unfair" has also been used to describe the types of contracts that the Industrial Relations Commission of New South Wales has had power to vary or set aside under s 106 of the *Industrial Relations Act 1996* (NSW). Similarly, such words as "harsh" and "oppressive" are, as noted above, already used in s 22 of the *Leases (Commercial and Retail) Act 2001* (ACT). By relying on concepts already in use or which are capable of being readily understood by those covered by s 51AC or its State and Territory equivalents, the proposed definition would not only assist in promoting consistency in the way that the statutory concept of "unconscionable conduct" is interpreted by courts and tribunals across Australia, but it would also be in keeping with the intended broad scope of the statutory concept. Such consistency is particularly valuable in an environment where there has been a proliferation of statutory provisions against unconscionable conduct.

## STATE AND TERRITORY PROVISIONS DEALING WITH UNCONSCIONABLE CONDUCT: THE NEED FOR UNIFORMITY

On the issue of proliferation of unconscionability provisions within retail tenancy legislation, it is clear that this is a reflection of the multitude of retail tenancy legislation that exists around Australia. With the different State and Territory jurisdictions having enacted their own retail tenancy legislation, there has always been the risk of inconsistency across jurisdictions. Such inconsistencies raise compliance costs for the industry, particularly landlords and retailers operating nationally, and prompt debate as to the whether or not uniform retail tenancy legislation or a code should be enacted.

Importantly, in its report *Finding a Balance: Towards Fair Trading in Australia*, the House of Representatives Standing Committee on Industry, Science and Technology recommended a uniform retail tenancy code as another key element in promoting better business conduct in the retail tenancy area.[26] Indeed, the Committee noted that, since many of the major stakeholders in the retail tenancy area – property owners, property managers, retail chains, and franchise chains – operate on a national basis, they would benefit from consistency in legislative provisions.[27] Given the clear advantages associated with uniformity, it may be appropriate to explore the possibility of a developing a Model Law or Code that individual jurisdictions could adopt or apply.

[24] See Parliament of Western Australia, Legislative Council, *Debates* (9 May 2006) p 2291.

[25] Standing Committee on Industry, Science and Technology, n 19, p 181.

[26] Standing Committee on Industry, Science and Technology, n 19, p 25.

[27] Standing Committee on Industry, Science and Technology, n 19, p 24.

## CREATING A NEW ETHICAL NORM OF CONDUCT: PROHIBITING UNCONSCIONABLE CONDUCT WITHIN TRADE OR COMMERCE GENERALLY

From the above discussion, it is evident that a significant limitation on the application of the State- and Territory-based provisions dealing with unconscionable conduct within retail tenancies exists, ie that the alleged conduct must be in connection with a retail lease. In seeking to use these provisions, there must be a sufficient link between the alleged conduct and a retail lease. Similarly, in seeking to use s 51AC, the conduct must not only be in trade or commerce, but there must also be a sufficient link between the conduct and the supply or acquisition, possible supply or acquisition of goods or services. Unlike s 52 which establishes a norm of conduct within trade or commerce generally, s 51AC and State- and Territory-based provisions have been expressly linked to the supply or acquisition of goods or services and retail leases respectively. Given the intended wider operation of provisions like s 51AC and equivalent State- and Territory-based provisions, there may be considerable merit in enacting prohibitions against unconscionable conduct within trade or commerce generally in both the *Trade Practices Act* and State and Territory *Fair Trading Acts*.

In short, it may be time to consider whether or not there should be a prohibition in both the *Trade Practices Act* and the State and Territory *Fair Trading Acts* against unconscionable commercial conduct within trade or commerce generally, rather than provisions like the current s 51AC which require a link with the supply or acquisition of goods or services, or State- and Territory-based provisions that require a link with retail tenancies. Significantly, a prohibition against unconscionable commercial conduct in trade or commerce generally would bring such provisions as s 51AC into line with s 52 and ensure their development as a general ethical norm of conduct within commercial dealings. In turn, that would lead to a rationalisation of the three unconscionability provisions currently found in the *Trade Practices Act*, bring State and Territory *Fair Trading Acts* into line with the *Trade Practices Act* in the area of unconscionable conduct, and remove the need for industry-specific prohibitions against unconscionable commercial conduct.

## NEW DIRECTIONS IN DEALING WITH ALLEGEDLY UNFAIR TERMS IN RETAIL LEASES

Finally, the issue arises as to whether or not s 51AC and its State and Territory equivalents allow the courts and retail tenancy tribunals to consider claims based solely on the alleged unfairness of a term of a retail lease. In this regard, it is important to note the comments of the Full Federal Court in *Hurley v McDonald's Australia Ltd* [2000] ATPR 41-741 at 40,585-40,586; [1999] FCA 1728 that something more is required than merely pointing to the terms of the contract:

> 24 No allegation of unconscionable conduct is made in … relation to the making of the alleged contracts between McDonalds, on the one hand, and the Applicant and the group members, on the other. The allegation is simply that it would be unconscionable for McDonalds to rely on the terms of such contracts.
>
> …
>
> 29 There is no allegation of any circumstance that renders reliance upon the terms of the contracts unconscionable. For example, it might be that, having regard to particular circumstances it would be unconscionable for one party to insist upon the strict enforcement of the terms of a contract. One such circumstance might be that an obligation under a contract arises as a result of a mistake by one party. The mistake is an additional circumstance that might render strict reliance upon the terms of the contract unconscionable. Mere reliance on the terms of a contract cannot, without something more, constitute unconscionable conduct.
>
> …
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> 31 Before sections 51AA, 51AB or 51AC will be applicable, there must be some circumstance other than the mere terms of the contract itself that would render reliance on the terms of the contract "unfair" or "unreasonable" or "immoral" or "wrong".

From such comments it would appear that the courts have taken the view that the terms of a contract cannot, on their own, form the basis of an action under s 51AC.

With this in mind, it may be time to adopt a new regulatory framework that specifically targets allegedly unfair *terms* in retail leases. Such a framework would allow the courts or retail tenancy tribunals to consider claims based solely on the alleged unfairness of a term in a retail lease. Such a

 

new regulatory framework could be based on the existing United Kingdom and Victorian models dealing with unfair terms in consumer contracts.[28] Importantly, the new regulatory framework would provide a more targeted and effective mechanism for dealing directly with unfair terms in retail leases than is currently provided by either the equitable doctrine of unconscionability or s 51AC and its State and Territory equivalents.

## CONCLUDING REMARKS

While the enactment of s 51AC and its State and Territory retail tenancy equivalents has introduced a broader notion of unconscionable conduct than the judicially developed equitable doctrine of unconscionability, the full reach of the statutory notion remains unclear and, in this regard, it may be useful for a statutory definition to be inserted. Clearly, such a definition would not be an exhaustive one, but rather could be drafted in a plain English manner as a way of putting beyond doubt that the statutory notion is a broad one and that it is in no way restricted by any judicial preconceptions flowing from the equitable doctrine. The insertion of such a definition could be an important element in educating those involved in the retail tenancy area about the new standard of ethical conduct that s 51AC and its State and Territory equivalents are seeking to promote. The inclusion of a statutory definition of the expression unconscionable conduct could be part of an overall strategy in which a uniform retail tenancy code or legislative scheme is implemented and supplemented by a new regulatory framework for dealing solely with allegedly unfair terms in retail leases.

*Frank Zumbo*
*Associate Professor, University of New South Wales, School of Business Law and Taxation*

[28] See *Unfair Terms in Consumer Contracts Regulations 1999* (UK); *Fair Trading Act 1999* (Vic), Pt 2B. For a discussion on the operation of these models see Zumbo, n 1; Zumbo F, "Dealing with Unfair Terms in Consumer Contracts: The search for a new regulatory model" (2005) 13 TPLJ 194.