

Statutory unconscionable conduct

1. The Author's Expertise

I am a senior lecturer in law at the University of Adelaide. Additionally, I am practicing barrister. Also I am a member of the Law Council of Australia and am on business law committee and am on the subcommittee on the Trade Practices Act (the TPA). I have written numerous articles, contributed a dozen chapters in various books and have written three books, the most recent entitled *Remedies under the Trade Practices Act* (published by Oxford University Press). My next book is due out next year and I'm currently researching a book concerned with unconscionable conduct under the TPA. Last year I spoke at the conference on the Trade Practices Act about unconscionable conduct under the TPA. My fellow speaker in this session was William Kovacic, the current chairman of the US Federal Trade Commission. This year at another conference on the TPA, a fellow speaker was his Honour Robert French, the current chief justice of the High Court. Finally, I'm the title editor of two volumes on Equity in the Laws of Australia. From these positions I have valuable insights to successful reform the unconscionable provisions of the TPA. I should stress that this submission is being written in my personal capacity.

2. A Need to Reform Part IVA

Basically Part IVA of the TPA works, it just does not work as well as it should work. Therefore, it should not simply be abolished, it needs to be revised and reformed to achieve its full potential. It is essential to highlight the core problem with Part IVA (the unconscionability part of the TPA) to correctly reform the part.

3. The core problem of the existing prohibition on unconscionable conduct

Traditionally, unconscionable conduct has been primarily governed by an area of law called Equity (this concept will be called Equitable unconscionable conduct). With the introduction of Part IVA of the Trade Practices Act (TPA) prohibiting unconscionable conduct there has been transference of the concept of Equitable unconscionable conduct. As Equitable unconscionable conduct is quite a limited concept, this transference has been a huge problem for the operation of Part IVA. There is a real need for a clear prohibition on statutory unconscionable conduct.

4. Does This Clear Prohibition on Statutory Unconscionable Conduct Need to Set Out Precisely What is Prohibited?

It would not be surprising if there is a vocal demand for a detailed definition of statutory unconscionable conduct, clearly listing what is prohibited. The essential danger with a detailed, exhaustive definition is that conduct that should be prohibited, is not caught. And if there is one thing that law proves again and again, is that novel fact situation will arise. Further, a detailed, exhaustive definition has the danger of becoming out-of-date. What is considered as unconscionable by the community today will mostly change in the future. Unconscionable conduct is not a fixed static concept. It changes. This would suggest that a very general prohibition on unconscionable conduct is needed.

5. Guidance for Statutory Unconscionable Conduct

However, there will be a demand for guidance with this general prohibition. This guidance will be provided in two direct ways. The first direct guide would be by indicating that statutory unconscionable conduct includes, but is not limited to, Equitable unconscionable conduct.

Secondly, guidance would be provided by enunciating a non-exhaustive list of what would indicate statutory unconscionable conduct. For various reasons this is a copy of the list provided in s51AC(3).

6. Indirect Guidance, Efficiency and Links with the Past.

The two forms of direct guidance come with “baggage”. Lots of caselaw has examined aspects of Equitable unconscionable conduct. This knowledge provides an extremely useful resource for statutory unconscionable conduct. The second form of direct guidance has its own body of caselaw, which can be utilized to guide statutory unconscionable conduct. These two bodies provide indirect guidance to a fuller understanding of statutory unconscionable conduct. Further, as resources that have been developed and paid for in the past, they are extremely efficient forms of guidance. Also, they provide a link with the past, so practitioners do not feel that they are adrift with an entirely new concept.

6. Draft of the New Part IVA Prohibition

Prohibition on Statutory unconscionable conduct

- (1) A corporation must not, in trade or commerce, engage in conduct that is unconscionable (*statutory unconscionable conduct*).
- (2) Statutory unconscionable conduct includes, but is, in absolutely no way, not limited to, unconscionable conduct within the meaning of the unwritten law, from time to time, of the States and Territories.
- (3) Some non-exhaustive examples of statutory unconscionable conduct are provided. Without in any way limiting the matters to which the Court may have regard for the purpose of determining whether a corporation or a person (the *supplier*) has contravened subsection (1) in connection with the supply or possible supply of goods or services to a person or a corporation (the *business consumer*), the Court may have regard to:
 - (a) the relative strengths of the bargaining positions of the supplier and the business consumer; and
 - (b) whether, as a result of conduct engaged in by the supplier, the business consumer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the supplier; and

(c) whether the business consumer was able to understand any documents relating to the supply or possible supply of the goods or services; and

(d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the business consumer or a person acting on behalf of the business consumer by the supplier or a person acting on behalf of the supplier in relation to the supply or possible supply of the goods or services; and

(e) the amount for which, and the circumstances under which, the business consumer could have acquired identical or equivalent goods or services from a person other than the supplier; and

(f) the extent to which the supplier's conduct towards the business consumer was consistent with the supplier's conduct in similar transactions between the supplier and other like business consumers; and

(g) the requirements of any applicable industry code; and

(h) the requirements of any other industry code, if the business consumer acted on the reasonable belief that the supplier would comply with that code; and

(i) the extent to which the supplier unreasonably failed to disclose to the business consumer:

(i) any intended conduct of the supplier that might affect the interests of the business consumer; and

(ii) any risks to the business consumer arising from the supplier's intended conduct (being risks that the supplier should have foreseen would not be apparent to the business consumer); and

(j) the extent to which the supplier was willing to negotiate the terms and conditions of any contract for supply of the goods or services with the business consumer; and

(k) whether the supplier has a contractual right to vary unilaterally a term or condition of a contract between the supplier and the business consumer for the supply of the goods or services; and

(l) the extent to which the supplier and the business consumer acted in good faith.

7. Conclusion

The present Part IVA of the TPA does an adequate job. But by sensible revision and reform, its performance can be vastly improved. With a

straightforward prohibition on statutory unconscionable conduct the huge advantage of simplicity is maintained. Cost efficient guidance for the prohibition is provided by including

i Equitable unconscionable conduct and

ii a list of factors provided in the present s51AC(3)

as being part of statutory unconscionable conduct.