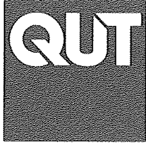

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Committee Secretary
Senate Economics Committee
Department of the Senate

By email to economics.sen@aph.gov.au

17 October 2008

Re: Definition of unconscionable conduct for the purposes of Part IVA of the *Trade Practices Act 1974* (Cth).

Dear Sir or Madam,

I am pleased to make this submission to the Committee's inquiry into the need for a clear statutory definition of unconscionable conduct for the purposes of Part IVA of the *Trade Practices Act 1974* (Cth) ('TPA'). I would be pleased to provide the Committee with any further assistance it may require.

Section 51AA

Section 51AA of the TPA was inserted by the *Trade Practices Legislation Amendment Bill 1992* (Cth) ('TPLAB'). It provides that

> A corporation must not, in trade or commerce, engage in conduct that is unconscionable within the meaning of the unwritten law, from time to time, of the States and Territories.

The Explanatory Memorandum to the TPLAB states (at [41]) that

> [51AA] embodies the equitable concept of unconscionable conduct as recognised by the High Court in *Blomley v Ryan* (1956) 99 CLR 362 and *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447. In *Amadio*, Mason J (as he then was) discussed the principles of unconscionable conduct:
>
>> "... relief on the ground of 'unconscionable conduct' is usually taken to refer to the class of case in which a party makes unconscientious use of his superior position or bargaining power to the detriment of a party who suffers from some special disability or is placed in some special situation of disadvantage" (at p 461)

In the second reading speech for the TPLAB, the Attorney-General said that

> Unconscionability is a well understood *equitable doctrine*, the meaning of which has been discussed by the High Court in recent times. It involves a party who suffers from some special disability or is placed in some special situation of disadvantage

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> and an 'unconscionable' taking advantage of that disability or disadvantage by another.[1] [emphasis added]

These extracts suggest that the intent of Parliament in enacting s 51AA was that it was to apply to conduct which was unconscionable in the sense described in *Amadio*, requiring:

- A relationship that places one party at a special disadvantage vis-à-vis the other;
- Knowledge of that special disadvantage in the stronger party; and
- Unconscientious exploitation by the stronger party of the weaker party's disadvantage.

However, the wording of s 51AA is not phrased consistently with this expressed legislative objective.[2] The literal words of the section – what is unconscionable within the unwritten law – potentially go beyond the *Amadio* doctrine.[3] Other equitable doctrines that require identification of unconscionable conduct in a sense known to the unwritten law, including estoppel, duress, unilateral mistake, and the law of penalties, arguably fall within s 51AA. In *ACCC v C G Berbatis Holdings Pty Ltd*, French J said (obiter dicta):

> There is no rule of equity which prohibits unconscionable conduct. Rather there are remedies available to relieve against or prevent such conduct in certain classes of case. The Act, however, creates a prohibition. What then does it prohibit? It prohibits conduct in respect of which a judge in equity would have been prepared to grant relief. The imposition of the prohibition precedes any actual or notional judicial decision. The judge deciding a case under s 51AA will be asking himself or herself whether he or she would have been prepared to grant relief at equity on the basis of an assessment of the conduct in question as unconscionable.[4]

This argument was criticised by Gyles J in a later case.[5] When the High Court considered s 51AA in *ACCC v CG Berbatis*, Gummow and Hayne JJ noted the differing viewpoints expressed by Gyles J and French J, but found it unnecessary to decide the point.[6]

In a recent case in the NSW Supreme Court, a company was found to have contravened s 51AA because a construction contract contained a clause providing for a high rate of interest in default of payment, which was held to be a penalty and thereby unconscionable.[7]

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[1] House of Representatives Hansard, 3 November 1992, page 2408.
[2] G E Dal Pont & D R C Chambers, *Equity and Trusts in Australia* (3rd ed, 2004) at p 278.
[3] G E Dal Pont & D R C Chambers, *Equity and Trusts in Australia* (4th ed, 2007) at p 286.
[4] *Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd* (2000) 96 FCR 491 at [42]. This decision was subsequently reversed by the High Court, who unfortunately did not express a concluded view on this point.
[5] GPG (Australia Trading) Pty Ltd v GIO Australia Holdings Ltd (2001) 117 FCR 23 at 77.
[6] Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd (2003) 214 CLR 51 at 74.
[7] *Katherine Pty Ltd v The CCD Group Pty Ltd* [2008] NSWSC 131. However, McDougall J reached the conclusion that the imposition of the penalty clause contravened s 51AA by virtue of its inherent unconscionability, without any reference to authorities considering the scope of s 51AA.

Cogent arguments against a broad interpretation of s 51AA have been advanced by Dal Pont and Chambers,[8] and Tucker.[9]

Without expressing a view on what the scope of s 51AA *should* be, there is a degree of uncertainty as to what the scope currently *is*, and it seems likely that the interpretation given to the section by the courts extends further than the intent of Parliament as disclosed in the relevant extrinsic materials. If for no other reason, it would seem desirable to clarify the intended scope of s 51AA on that basis alone.

Section 51AB and 51AC

'Unconscionable' is not defined in the TPA. It has been described as a rule embodying a 'broad and undefined legal standard', the application of which to the facts leaves scope for 'evaluative and purposive judgments.'[10]

The core concept of 'unconscionable' in ss 51AB and 51AC is given a broader meaning than it so far has under the unwritten law. This is because a number of the statutory factors listed in ss 51AB(2) and 51AC(3) go beyond those that have traditionally been considered in equity and because it extends to 'possible' supply as well as to actual supply.[11]

The meaning of 'conduct that is … unconscionable' for the purpose of s 51AB has been considered in a number of cases. One of the more often quoted opinions is that of the Full Court of the Federal Court in *Hurley v McDonald's Australia Ltd*,[12] which cites with approval earlier judgments of the Federal Court and Full Court of the Federal Court in the *Cameron v Qantas Airways* cases:[13]

> For conduct to be regarded as unconscionable, serious misconduct or something **clearly unfair or unreasonable**, must be demonstrated. Whatever 'unconscionable' means in ss 51AB and 51AC, the term carries the meaning given by the Shorter Oxford English Dictionary, namely, actions **showing no regard for conscience**, or that are **irreconcilable with what is right or reasonable**. The various synonyms used in relation to the term 'unconscionable' import a **pejorative moral judgment**.[14] [emphasis in original, internal citations omitted]

This passage from *Hurley v McDonalds* has become the leading authority on the meaning of unconscionable conduct in the context of ss 51AB and 51AC of the TPA, notwithstanding that the Full Court themselves said that

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[8] G E Dal Pont & D R C Chambers, *Equity and Trusts in Australia* (4th ed, 2007) at p 286-7.
[9] Phillip Tucker, 'Unconscionability: The hegemony of the narrow doctrine under the Trade Practices Act' (2003) 11 *Trade Practices Law Journal* 78.
[10] Justice R S French, "Dolores Umbridge and policy as legal magic" (2008) 82 *Australian Law Journal* 322 at 330.
[11] See *ACCC v Berbatis (No 2)* (1999) 96 FCR 491; *Dai v Telstra (2000)* 171 ALR 348; *ACCC v Simply No-Knead (Franchising) Pty Ltd* (2000) ATPR 41-790; and *ACCC v Radio Rentals Ltd* (2005) 146 FCR 292.
[12] (2000) ATPR ¶41-741 at 40,585
[13] *Cameron v Qantas Airways Ltd (1994) 55 FCR 147*; *Qantas Airways Ltd v Cameron* (1996) 66 FCR 246.
[14] *Hurley v McDonald's Australia Ltd* (2000) ATPR ¶41-741 at 40,585, [1999] FCA 1728 at [22].

> in the circumstances in which the question comes before this Full Court, it is unnecessary, and indeed undesirable, to attempt an exhaustive definition of the concept of 'unconscionable conduct' as used in sections 51AB and 51AC.[15]

Similarly, Lindgren J sitting on the Full Court in *Qantas Airways v Cameron* said that

> [t]his is not an appropriate case in which to enunciate all possible denotations of the term 'unconscionable' as it is used in ss 51AA and 51AB of the [TPA].[16]

It may be the case that, as Deane J noted in *Commonwealth v Verwayen*, that 'the notion of unconscionability is better described than defined',[17] a point of view endorsed by Beaumont J in the first-instance judgment in *Cameron*.[18]

Notwithstanding that unconscionability is not defined for the purposes of ss 51AB and 51AC, and that appeal courts have thus far declined to exhaustively define the term, it is nonetheless possible to derive substantial guidance from the decided cases and the relevant statutory factors.

The meaning of 'unconscionable' in ss 51AB and 51AC has been treated as the same in both sections. Sunberg J noted in the *Simply No-Knead* case that:

> The s 51AB(2) factors do not so clearly suggest, as do the s 51AC(3) factors, that unconscionability in s 51AB is a more ample concept than the unwritten law's unconscionability. Nevertheless, as with s 51AC(3), s 51AB(2) does not limit the factors the Court may consider. It would be curious if 'unconscionable' in the two provisions had different meanings - in s 51AB the same as in s 51AA and in s 51AC a wider meaning. The Full Court in *Hurley* seems to have assumed the word had the same meaning in both sections.[19]

Without going into gratuitous detail, a reading of the decided cases in which courts have found contraventions of ss 51AB or 51AC reveals a veritable laundry-list of pejorative terms and judicial denunciations of the impugned conduct, including:

- Acting 'capriciously and unreasonably', and that the conduct complained of 'was serious, unfair and oppressive and showed no regard for conscience.'[20]

- Behaviour described as 'deceitful', 'bullying', 'oppressive' and 'vindictive', with calculated fraud and a 'deliberate and significant departure from honest dealing.'[21]

- 'Intimidating and belligerent' correspondence, and an 'overwhelming case of unreasonable, unfair, bullying and thuggish behaviour'[22]

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[15] *Hurley v McDonald's Australia Ltd* (2000) ATPR ¶41-741 at 40,585, [1999] FCA 1728 at [21].
[16] *Qantas Airways Ltd v Cameron* (1996) 66 FCR 246 at 262.
[17] *Commonwealth v Verwayen* (1990) 170 CLR 394 at 440.
[18] *Cameron v Qantas Airways Ltd* (1994) 55 FCR 147 at 180.
[19] *Australian Competition and Consumer Commission v Simply No-Knead (Franchising) Pty Ltd* (2000) 104 FCR 253 at [35].
[20] *Auto Masters Australia Pty Ltd v Bruness Pty Ltd* (2003) ATPR (Digest) ¶46-229 at [393], [399].
[21] *Hoy Mobile Pty Ltd v Allphones Retail Pty Ltd (No 2)* [2008] FCA 810 at, e.g., [405]-[409].
[22] *Australian Competition and Consumer Commission v Simply No-Knead (Franchising) Pty Ltd* (2000) 104 FCR 253 at [51].

That many of the cases in which contraventions of ss 51AB and 51AC have been found have involved conduct of an egregious nature does not mean that the scope of those sections is limited to such extreme cases.[23]

For example, the Full Court of the Federal Court of Australia considered a provision of the ASIC Act analogous to s 51AC in *ASIC v National Exchange*. That case involved a company who sent mass mail-outs to individuals known to be share holders in certain companies, offering to acquire those shares at a price significantly below their current market value. The Full Court said that:

> "Unconscionable conduct", on its ordinary and natural interpretation, means doing what should not be done in good conscience. In a case where the discrepancy in price and value is great, as in the present case, and the conduct is systematically and directly focused on vulnerable but unnamed members, some of whom who can be expected to accept the offers, such conduct can reasonably be described as being against good conscience. The targeted offerees in this case could reasonably be expected to include persons who are unacquainted with share values, inexperienced in trading their interests, lacking in commercial experience and some of whom act inadvertently and are elderly.[24]

Sections 51AB and 51AC been criticised as requiring extreme conduct to be demonstrated, and legislative reforms suggested to lower what is perceived as an excessively high barrier to establishing a contravention of these sections.[25]

In *Attorney General (NSW) v World Best Holdings Ltd*, when considering a prohibition against unconscionable conduct in State legislation, Spigelman CJ said:

> Over recent decades legislatures have authorised courts to rearrange the legal rights of persons on the basis of vague general standards which are clearly capable of misuse unless their application is carefully confined. Unconscionability is one such standard.
>
> ... restraint in decision-making [is] appropriate. Unconscionability is a concept which requires a high level of moral obloquy. If it were to be applied as if it were equivalent to what was 'fair' or 'just', it could transform commercial relationships ... The principle of 'unconscionability' would not be a doctrine of occasional application, when the circumstances are highly unethical, it would be transformed into the first and easiest port of call when any dispute ... arises.[26]

I respectfully endorse the point of view expressed by the Chief Justice in this case.

Unconscionability, whether the equitable doctrine or its statutory counterparts, is not a cure-all and should not be used as a general purpose solution for commercial conduct which is merely perceived as wrongful. The decided cases have as an underlying theme the exploitation of a position of substantial vulnerability. One commentator observed in 1998 that 'unconscionable conduct [in s 51AC] is concerned with an inability to protect one's interests, not simply an inability to get

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[23] See, e.g. *Australian Competition and Consumer Commission v Dataline.net.au Pty Ltd* (2006) 236 ALR 665; *Boral Framework v Action Makers* (2003) ATPR ¶41-953

[24] *Australian Securities and Investments Commission v National Exchange Pty Ltd* (2005) 148 FCR 132 at [33]. The Full Court found that this conduct was unconscionable within the meaning of s 12CC of the *ASIC Act* but that it did not contravene that section based on other grounds.

[25] See, e.g. Frank Zumbo, 'Promoting ethical business conduct: The case for reforming section 51AC' (2008) 16 *Trade Practices Law Journal* 132.

[26] *Attorney General (NSW) v World Best Holdings Ltd* (2005) 63 NSWLR 557 at [119], [121].

what one wants.'[27] I submit this is a more appropriate focus for Pt IVA than conduct perceived merely as a very bad deal or hard bargain.

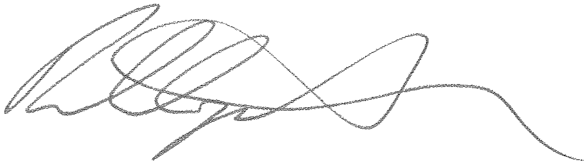
A statutory definition of 'unconscionable conduct' with the effect of lowering the threshold would also remove a large amount of the flexibility which the courts currently enjoy to appropriately define the scope of the term. The existing prohibitions could be compared to s 52 of the TPA, prohibiting conduct which is 'misleading or deceptive', but without defining those terms. This may have the effect that the scope of 'unconscionable conduct' cannot be changed in the future without legislative intervention, which may not necessarily be desirable.

Further, 'unconscionable conduct' is a term, necessarily pejorative, which denotes conduct beyond the pale. It carries with it a degree of judicial and societal condemnation of the conduct so labelled. It would be wrong, in my view, to put people who, for example, have driven excessively hard bargains in the same basket with the bullies, thugs, and blackmailers who have featured in some of the decided cases. It would also lessen the deterrent effect of potentially being labelled as a person who had engaged in unconscionable conduct.

Conclusion

Although unconscionable conduct is not defined in Pt IVA of the TPA, the meaning given by the courts in the context of ss 51AB and 51AC is reasonably clear and, in my view, appropriately focussed. A statutory definition is, in my respectful submission, unnecessary and would probably be counterproductive, if not harmful.

The scope of s 51AA is somewhat less clear and the interpretation given by the courts arguably departs from that intended by Parliament. Although I take no position on what the scope of the section *should* be, clarification may be desirable.



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[27] Johnson, 'Policy developments: Unconscionable conduct under s 51AC' (1998) 17 *ACCC Journal* 11; cited in G E Dal Pont & D R C Chambers, *Equity and Trusts in Australia* (4th ed, 2007) at p 291.