SUBMISSION BY
THE PHARMACY GUILD OF AUSTRALIA
TO THE SENATE ECONOMICS COMMITTEE

INQUIRY INTO THE STATUTORY DEFINITION OF UNCONSCIONABLE CONDUCT

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Towards the development of a uniform statutory standard of conduct governing the relationship between large and small business – replacing the unconscionable conduct provisions of the *Trade Practices Act* with the 'harsh and unfair' contract provisions of the *Independent Contractors Act*.

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THE PHARMACY GUILD OF AUSTRALIA

The Guild is a national employers' organisation registered under the *Workplace Relations Act 1996*, which functions as a single legal 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 $8 billion and $200 million in tax revenue, employing some 15,000 salaried pharmacists and 32,000 pharmacy assistants.

Through the Pharmacy Assistant Training Scheme, the Pharmacy Guild provides a significant career path for young Australians, particularly young Australian women.

The Guild's mission is to service the needs of proprietors of independent community pharmacies.

The Guild aims to maintain community pharmacies as the most appropriate primary providers of health care to the community through optimum therapeutic use of medicines, medicine management and related services. A range of services are provided to members including:

(a) to negotiate an ongoing Agreement between the Government and the Guild to facilitate suitable conditions for approved pharmacies to dispense under the Pharmaceutical Benefits Scheme (PBS), including an appropriate level of remuneration;

(b) to maintain close liaison and negotiation with governments, manufacturers, wholesalers and other organisations involved in the health care delivery system;

(c) to implement strategies to enhance the professional role of pharmacists and to assist community pharmacists practising in rural and regional areas of Australia to ensure that the current network of community pharmacies in Australia is maintained; and

(d) to provide economic and management information to community pharmacists to assist them in making their pharmacies more efficient.

EXECUTIVE SUMMARY

Towards the development of a uniform statutory standard of conduct governing the relationship between large and small business – replacing the unconscionable conduct provisions of the *Trade Practices Act* with the 'harsh and unfair' contract provisions of the *Independent Contractors Act*.

It is simply the case that in some circumstances, when small businesses are attempting to supply or purchase goods and services from larger corporations, the party possessing substantial market power will go beyond a 'hard bargain' or 'tough dealing' but act instead in a manner that is objectively unfair.

The Guild is of the view that when a large corporation (such as a landlord of a major shopping complex) takes advantage of an asymmetric relative dependency that it possesses over the smaller trader (such as a pharmacist) to such an extent that 'hard bargaining' becomes objectively unfair, the smaller trader should be able to call into aid remedial legislation.

However, the behaviour identified above does not fall within the concept of 'unconscionable conduct'.

The Guild contends that the protection offered by the unconscionable conduct provisions contained in section 51AC of the *Trade Practices Act* is illusory.

This is because, in particular, by listing matters that a court can 'have regard to' when determining whether particular conduct is 'unconscionable conduct' adds only a minor gloss to the traditionally understood legal term.

This is something which has disappointed the retail sector as many participants were under the impression that the section went much further, however erroneous they may have been in law.

It follows that a further tweaking of the *Trade Practices Act* definition of 'unconscionable conduct' would not assist in dealing with the mischief of misuse of power by large corporations over smaller entities.

The preferable outcome is to create a new statutory concept, and leave 'unconscionable conduct' as an equitable doctrine to be applied as appropriate under the general law.

Instead, section 51AC of the *Trade Practices Act* should utilise the 'harsh and unfair' concept contained in section 12 of the *Independent Contractors Act* 2006.

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 in 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 the purposes of other areas of the law; with

- the Federal Magistrates’ Court and the Federal Court developing a specific expertise in the determination of cases dealing with small business. However, the Australian Government would then have to ensure that the Magistrates’ Court in particular has the expertise and the resources to hear these types of commercial cases promptly.

1) BACKGROUND

1.1 There are around 5000 pharmacies operating in Australia.

1.2 Many of them operate in shopping centres.

1.3 Members of the Guild have found it increasingly difficult to negotiate leases with landlords, when leases come up for renewal.

1.4 Having a degree of security of tenure is important so that reasonable employment security for employees can be provided.

1.5 A lease term must also be of sufficient length so as to be able to amortise all costs of establishment, operation, ongoing investment and trade to normal profitability.

1.6 Many original leases proceed on the basis that there is a high probability that leases will be renewed. Rental structures reflect this. This investment can include the purchase price of the business (or establishment costs), fitout (often fixed to walls) and building the brand value of the business as a business or as an established business trading at the location.

1.7 In the context of pharmacy:

- the cost of stock for pharmacies that must be covered by the pharmacist is generally $1426sqm;

- fitout costs average $1300sqm, with some major landlords requiring specific forms of fitout that can add up to $200sqm. Some also require fitouts to be conducted periodically; and

- other costs such as procurement of a Pharmaceutical Benefits Scheme (PBS) number and other establishment costs average out at $300,000 per pharmacy; because of the practical difficulty in amortising such a loan over the standard length of a retail lease; therefore

- it is common practice that financiers make an assessment of the capacity of the pharmacist as a business operator and will advance loans over a 10-15 year period – well and truly longer than the average retail tenancy.[1]

1.8 It is the experience of the Pharmacy Guild that when renegotiating leases, some landlords make an offer on a ‘take it or leave it basis’ as someone else (unspecified as to use or identity) will take the premises.

1.9 Alternatively, the landlord will seek a rent increase at renewal that is pitched at a level that captures much of the value that has been earned by the tenant, but just low enough that permits the tenant to continue trading – knowing that the tenant, who is bound to cover finance costs and the like – cannot simply walk away.

1.10 To deal with this mischief, state and territory government implemented retail tenancy legislation.

1.11 Retail tenancy legislation is remedial in nature, recognising:

- the clear imbalance of the relative bargaining position of the listed companies operating the larger shopping centres and small business tenants such as pharmacies; and

- the information asymmetry between companies specialising in the leasing of commercial properties and small business operators who may only have to consider leasing issues a couple of times during their business career.

1.12 During the same time period the Australian Parliament passed the *Trade Practices Amendment (Fair Trading) Act 1997*, which inserted into the *Trade Practices Act 1974* section 51AC, which includes the unconscionable conduct provisions the subject of this inquiry.

1.13 This was in response to the then House of Representatives Standing Committee on Industry, Science and Resources report called *Finding a Balance: Towards Fair Trading in Australia*, which noted the inequalities of bargaining power between big and small business.

1.14 Notwithstanding the presence of these suites of remedial legislation, the concern that larger corporations to use their size to gain benefits to the detriment of small business, as noted above by the Guild, continued.

1.15 Accordingly, for this reason (amongst others)

- the previous government commissioned the Productivity Commission to examine the state of the retail tenancy market, which gave rise to the publication of a report called *The Market for Retail Leases in Australia* (**the retail lease inquiry**); and

- the current government commissioned the ACCC to examine the state of the grocery market, which gave rise to the publication of a report called *Report of the ACCC Inquiry Into the Competitiveness of Retail Prices for Standard Groceries* (**the grocery prices inquiry**).

2) THE RETAIL LEASE AND GROCERY PRICE INQUIRIES

The retail lease inquiry

2.1 The Commission received evidence that many of the tensions complained of in 1997 still exist today. As the Commission reported:

> For example, the Franchise Council of Australia (FCA) stated that:
>
> > … monopolies like shopping centres operate with inordinate power knowing the turnover of all tenants and thus knowing what a retailer can afford to pay. They use this knowledge to manipulate the market.
>
> The Council of Small Business of Australia (COSBOA) added concerns over the 'fairness' of the market:
>
> > It is important that market power is not used unconscionably in retail leasing negotiations. The best result would be a fair and more efficient market place for retail tenants and their customers.
>
> Similarly, the Australian National Retailers Association (ANRA) said:
>
> > … it is not just small businesses facing challenges when entering into commercial leases. ANRA's members, many of whom are considered 'anchor tenants', are also experiencing ongoing difficulties when entering into or renegotiating retail tenancy agreements. … In the current environment, retail tenants are forced to accept leases with a range of charges, terms and conditions without being able to assess their impact upon their businesses. Competition and opportunities to negotiate on a level platform do not exist.[2]

2.2 The inquiry also noted that:

> …the majority of concerns heard by the Commission about business conduct were in relation to large shopping centres.
>
> Many of the participants' comments were raised in the context of lease negotiations.
>
> For example, the Australian Retailers Association (ARA) spoke about 'intimidatory behaviour' and 'strong-arm negotiation tactics' at lease negotiation:
>
> > … it really isn't the law but the behaviour and application of the law by the landlords and in particular their employees or agents that is of concern and requiring a code ... intimidatory behaviour and strong-arm negotiation tactics put business ethics out the window when it comes to some retail lease negotiations. I can go on further about some practices during questions. Suffice to say behaviour needs to change and the master-servant culture that exists within some agents needs to change.

Also:

> The question to ask is this: what protection does the retail tenant have of abuse of this enormous power the landlord has within negotiation? What protections are there under current law? What rights do they have? The answer is none. Hence this inquiry and indeed other inquiries over the years. More needs to be done at the end of the lease. Perhaps it simply comes down to an ideal of negotiating in good faith.

COSBOA also commented that:

> … it's a furphy that negotiations for renewal of a lease in a sitting tenant are undertaken in the context of supply and demand for retail space. … It has all to do with what the landlord can get away with and I've seen it too many times to know otherwise. If the landlord can increase the rent, knowing what they know about the lessee's position, it will. 'Can the lessee stay in the same spot and continue to operate? How much rent pain can they bear? Will I lose them? Will they walk away if I push them too hard? Can I push harder? They won't walk away from a relatively new fit-out, will they?'[3]

2.3 One of the principal issues that arose during the inquiry was the concentration of ownership of larger shopping centres.

2.4 The inquiry found that there are 500 separate owners of shopping centres around Australia.

2.5 63% of all retail space is owned by institutional or company investors, 31% by private investors/owner occupiers, with the remainder owned by other companies.

2.6 Six companies or funds own 85% of retail space in Australia's 'super-regional' centres. The Westfield group is the largest. In 2006, it had a financial interest in 44 centres, covering 3.3 million square metres of leasable land and almost 10,000 retail outlets. [4]

2.7 It also found that:

> The retail market operates within the confines of zoning and planning controls.
>
> While such controls can have merit in preserving public amenity and contributing to the cost-effective use of public infrastructure, their application can limit competition and erode the efficient operation of the market for retail tenancies.
>
> **They restrict the number and use of sites, can confer some negotiating power on incumbent landlords and retail tenants, and restrict commercial opportunities of others. Zoning and planning controls can particularly advantage owners that have control over large conglomerations of retail space located some distance from competitors and their tenants. They can also disadvantage businesses that wish to gain access to additional space.**
>
> Where the tenant and landlord are of similar size and there is competitive provision of retail space, there is no evidence of an imbalance in bargaining position (for example,

there are many small landlords and small tenants on retail strips, and large tenants dealing with large landlords).

> **Where there is a large landlord of a centre which is a drawcard to the consuming public, and many small existing and prospective specialty tenants competing for limited retail space, imbalances in negotiating power can exist. Large centre landlords who are able to offer contracts on a 'take it or leave it' basis, provide a clear indication that demand for such retail space has been outstripping supply.[5]** (emphasis added)

2.8 However, the Commission ultimately decided that, whilst acknowledging the presence of individual hard cases, as well the matters raised above, that the market is functioning quite well:

> In the Commission's assessment, the term 'war' is not representative of the balance of evidence provided in this inquiry — a few skirmishes, some lingering resentment, hard bargaining and some disappointments, but not 'war'**. This is not to say, however, that the market is working perfectly. Indeed, the Commission heard evidence of difficult commercial negotiations and cases involving significant personal loss**. Despite this, it appears that some positive improvements have been made to the overall market since the 1997 Reid Committee report.

Grocery prices inquiry

2.9 At the same time there was the grocery prices inquiry which found that, with respect to packaged groceries:

> However, the ACCC has investigated very closely whether the major players have excessive bargaining or buyer power, which enables them to damage Australian supply industries. Coles, Woolworths and Metcash have significant buyer power in packaged groceries. This reflects the limited options available to many manufacturers—they often have no option but to sell through Coles, Woolworths and Metcash. On the other hand, Coles, Woolworths and Metcash often have many alternative options, including importing, providing more shelf space to different products or selling private label products.
>
> The buyer power of Coles, Woolworths and Metcash **may adversely affect individual competitors**.[6] (emphasis added)

2.10 The ACCC found that the grocery market was 'workably competitive'[7], and that there was nothing fundamentally wrong with the grocery chain.

2.11 But this is apparently acceptable:

> Q. Well let's turn to page 432 of your report. You've obtained documents going back to 2002 and they show that rebates have increased in almost 60 per cent of cases and that Woolworths and Coles are taking longer to pay their suppliers. What do you make of that?

A. Ah there's increasingly tougher dealings that are going on as far as Woolworths and Coles are concerned and indeed Metcash in dealing with their suppliers.
Q. Doesn't that say they've got too much power?
A. Ah I think what it says is that we are a major operator and in any industry you have a significant power in dealing with suppliers. That is inevitable. That will always occur. Ah it's going to occur in an economy the size of Australia with 21 million people.
Q. But how can it be workably competitive if they're squeezing those bigger rebates and discounts from suppliers and the gains aren't being passed onto consumers?
A. We need to keep in mind there's a difference between the vertical supply chain and the tough dealings that occur at retailer level and dealing with their suppliers. And the horizontal process, that is the horizontal competition between the independent sector, the Aldis, the Franklins in New South Wales, Coles and Woolworths. That's where the workable competition is occurring. But let's be the first to state that it is not as vigorous a horizontal competition between those retail players as we would otherwise like to see.
Q. When you say it's tough dealing, you had confidential information from small suppliers saying that they would be de-listed, they were threatened with being de-listed, unless they accepted longer terms of settlement or paid a bigger rebate to the major supermarket chains. Isn't that bullying?
A. Ah no what it is is you're simply tough dealing. Look we have this in every industry where we have parties that have got strong market power and let's not just separate the major supermarket chains in this area. Metcash itself has strong market power in dealing with it's suppliers as the almost monopoly supplier to the independent operators. Ah what we have is…
Q. … Pay us more money or wait one, two, maybe three months to get paid, or we'll push your products off the shelf. That's just tough dealing, that's not bullying?
A. That's tough dealing ah in this sense that what they're really saying is we have alternative suppliers that are prepared to supply us. Whether it is extending the terms or it's increasing the rebates or it's getting a lower price, what they're saying is we have alternative suppliers that will supply us, now you meet those competitive terms, in terms of the supply line, otherwise we'll go to those alternative suppliers now.[8] (emphasis added)

3) THE SMALL BUSINESS UNDERSTANDING OF WHAT CONSTITUTES 'UNCONSCIONABLE CONDUCT'

3.1 On a fair reading of the retail tenancy and grocery price inquiries, it is simply the case that in some circumstances, when small businesses are attempting to supply or purchase goods and services from larger corporations, the party possessing substantial market power will go beyond a 'hard bargain' or 'tough dealing' but rather in a manner that is objectively unfair.

3.2 The grocery price inquiry found that one of the technical concepts explored was the relative dependency between large and small traders.

3.3 It found:

> The idea is that a buyer and a seller are in a supply bilateral relationship and the relationship is of substantial financial importance to the seller but of lesser importance to the buyer, this will impart bargaining power on the buyer.
>
> This may occur for two separate but interrelated reasons. First, where there is an unequal relative dependency on the relationship, there is likely to be an asymmetry in the respective consequences should either party walk away from the relationship. If the buyer walks away from negotiations, the consequences for the seller would be significant—whereas the consequences for the buyer of the seller walking away would be less significant. Second, because the consequences for the buyer of walking away are not significant, any threat by the buyer to walk away from negotiations would be a credible threat. The interrelationship of these two factors in the case of a relatively dependent seller and a relatively non-dependent buyer would result (all else being equal) in the buyer having greater bargaining power than the seller.
>
> The effect of asymmetric relative dependency on the relationship is captured in an OECD definition of a retailer having buyer power, which states that a:
>
> … retailer is defined to have buyer power if, in relation to at least one supplier, it can credibly threaten to impose a long term opportunity cost (ie. harmful or withheld benefit) which, were the threat carried out, would be significantly disproportionate to any resulting long term opportunity cost to itself. By disproportionate, we intend a difference in relative rather than absolute opportunity cost.
>
> **The relative bargaining power of buyer and seller will be an important determinant in the outcome of negotiations over the supply price (and other terms) between buyer and seller. Bargaining power in a bilateral bargaining relationship is best described as being exercised by threatening to impose a cost, or to withdraw a benefit, if the other party does not grant a concession—for example, a price discount.**
>
> **Buyer power in this context is the ability of powerful buyers to exercise bilateral bargaining power against less powerful sellers to negotiate more**

favourable price discounts and other favourable terms in these individual supply relationships than would be negotiated in the absence of buyer power.

……

The more outside options that either buyer or seller has, the stronger will its bargaining position be relative to the other party (all other things being equal). If a buyer and seller are negotiating a supply deal and if the buyer's outside options improve or the seller's outside options deteriorate, the consequence in general will be that the buyer will have improved bargaining power and will be able to capture a greater share of the joint net benefit, or joint surplus, arising from the deal between buyer and seller.[9] (emphasis added)

3.4 The Guild believes that this analysis is applicable to the retail tenancy market – the area where Guild members have most difficulty – with the shopping centre landlord being the 'buyer' and the retail tenant the 'seller'.

3.5 The Guild is of the view that when a large corporation (such as a landlord of a major shopping complex) takes advantage of the asymmetric relative dependency that it possesses over the smaller trader (such as a pharmacist) to such an extent that 'hard bargaining' becomes objectively unfair should be grounds to call into aid remedial legislation.

3.6 This would appear to be the general understanding of small business.

3.7 The retail tenancies inquiry found:

> Some 127 complaints of the 244 contacts treated as complaints to the ACCC (that is, about 11 per cent of the total contacts relating to retail tenancy issues) over the five years to 30 June 2007 included an allegation of unconscionable conduct. The primary grounds behind the allegations of unconscionable conduct were:
>
> - excessive rent increases;
> - refusal to renew lease;
> - lessor obstructing sale of business;
> - tenant alleging lessor has broken lease agreement;
> - general unconscionability (a wide range of non-specific conduct);
> - restriction of trade/exclusivity;
> - misrepresentations amounting to unconscionability;
> - harassment by a lessor;
> - threat of legal proceedings;
> - misuse of market power amounting to unconscionable conduct; and
> - forced relocation.[10]

3.8 However, it continued:

> According to the ACCC, while each allegation is closely considered, only a limited number have evidenced a contravention of Section 51AC:

> … the majority of unconscionable conduct allegations received by the ACCC are discontinued because the facts do not indicate that the conduct is unconscionable within the meaning of the TPA. While the ACCC considers that these matters are sometimes due to a misunderstanding among small business complainants of the concept of unconscionability, under the TPA…

3.9 The inquiry sets out what the ACCC considers as unconscionable conduct, being:

> … unconscionable conduct may be found to exist where retail landlords have in all circumstances acted in a harsh and oppressive manner towards their tenants, taking advantage of their stronger position for other than the legitimate business reasons. In other words, unconscionable conduct as interpreted by the courts in Australia is the type of conduct that is so reprehensible that it is against good conscience.[11]

3.10 This would appear to be a correct interpretation of the law, as the following review of the law illustrates.

4) THE UNCONSCIONABLE CONDUCT CONCEPT

4.1 The Guild contends that the protection offered by the unconscionable conduct provisions contained in section 51AC of the *Trade Practices Act* may be regarded as illusory.

4.2 The section lists a number of circumstances that a court may 'have regard to' when considering whether a party is involved in unconscionable conduct.

4.3 Recent cases that have considered the section, such as *Bowen Investments Pty.Ltd v. Tabcorp Holdings Ltd*[12] and *Coggin v. Telstar Finance Company (Queensland) Pty.Ltd*[13] have held that the notion of unconscionability used in the section is wider than that recognised by the common law in Australia.

4.4 However, as the Full Federal Court said in the leading case of *Hurley v. McDonalds Australia Ltd*:

> For conduct to be regarded as unconscionable, serious misconduct or something **clearly unfair or unreasonable**, must be demonstrated - *Cameron v Qantas Airways Ltd* (1994) 55 FCR 147 at 179. **Whatever '*unconscionable*' means in sections 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** - *Qantas Airways Ltd v Cameron* (1996) 66 FCR 246 at 262. The various synonyms used in relation to the term '*unconscionable*' import a **pejorative moral judgment** - *Qantas Airways Ltd v Cameron* (1996) 66 FCR 246 at 283-4 and 298.[14]

4.5 The phrase underlined in this extract suggests merely adding 'non-exhaustive' matters to be considered does not particularly aid courts to determine what it is the Parliament is attempting to achieve with the provision.

4.6 It is also noted that the NSW Court of Appeal has said in *Attorney-General of New South Wales v. World Best Holdings and ors* in relation to NSW legislation similar in construction to section 51AC[15]*:*

> 121 The Ministerial Second Reading speech, quoted above, **indicates a similar concern to distinguish what is unconscionable from what is merely unfair or unjust**. Even if the concept of unconscionability in s62B of the *Retail Leases Act* is not confined by equitable doctrine, as the decisions under s51AC of the *Trade Practices Act* suggest, **restraint in decision-making remains 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 in a manner which the Minister expressly stated was not the intention of the legislation. 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 about a retail lease arises**.
>
> ……

> 123 There is a suggestion that the Tribunal in the present case may have adopted an unacceptably low standard. After setting out its conclusions, the Tribunal found: 'we consider the conduct of WBH to be quite unacceptable ... having regard to normal industry standards and practices' (at [69]). It then proceeded to determine what were called 'the legal issues', including unconscionability, by identifying which of the considerations in s62B(3) of the *Retail Leases Act* were applicable without further analysis of matters of fact and degree that need to be considered when applying a test of unconscionability. **If, as appears likely, a test of 'unacceptable conduct' were adopted, this is a far lower standard than unconscionability**.
>
> 124 The matters to be considered under a retail tenancy claim, turning on the contract and well-established doctrine, were intended by Parliament to continue to have considerable scope**. The Parliament was careful to ensure that the amorphous and ambiguous term, 'unconscionability', did not come to completely override the legal rights and obligations created by the lease relationship. Parliament did not intend that 'unconscionability' claims could be made so readily as to virtually take the place of retail tenancy claims. They needed to meet a high standard of moral obloquy**.[16]

4.7 It follows that section 51AC (and other similar provisions, as applied in state and territory retail tenancy legislation) only adds a minor gloss to the traditional concept of 'unconscionable conduct' – something which has disappointed the retail sector as, however erroneous they may have been in law, many participants were under the impression that the section went much further.

4.8 The retail lease inquiry was correct when it indicated:

> The case history also indicates what actions are not likely to be considered unconscionable by the courts. Christensen and Duncan (2005), on examining the types of lessor conduct that retail lessees claim is unconscionable, concluded that:
>
> > A clear principle emerging from the decisions on s51AA and s51AC is that the use of **superior bargaining power to drive a hard bargain is unlikely of itself to be unconscionable conduct**. (Christensen and Duncan 2005, p. 165)[17] (emphasis added)

4.9 It follows that a further tweaking of the *Trade Practices Act* definition of 'unconscionable conduct' would not assist in dealing with the mischief of misuse of power by large corporations over smaller entities.

4.10 The preferable outcome is to create a new statutory concept, and leave 'unconscionable conduct' as an equitable doctrine to be applied as appropriate under the general law.

4.11 The substitute concept is already used in legislation passed by the Australian Parliament. It is discussed in the next part of this submission.

5) THE ALTERNATIVE CONCEPT – UNFAIR AND HARSH CONTRACTS

5.1 Section 12 of the *Independent Contractors Act 2006* (Cth) (the **ICA**) contains a legislative model which reads as follows:

> **Court may review services contract**
> (1) An application may be made to the Court to review a services contract on either or both of the following grounds:
> (a) the contract is unfair;
> (b) the contract is harsh.
> (2) An application under subsection (1) may be made only by a party to the services contract.
> (3) In reviewing a services contract, the Court must only have regard to:
> (a) the terms of the contract when it was made; and
> (b) to the extent that this Part allows the Court to consider other matters--other matters as existing at the time when the contract was made.
> (4) For the purposes of this Part, ***services contract*** includes a contract to vary a services contract.[18]

5.2 It is a statutory design broader in ambit than 'unconscionable conduct'.

5.3 The ICA provision is based on independent contractors provisions contained in NSW, Queensland and federal industrial relations legislation.[19]

5.4 The Federal Magistrates' Court has considered the first case under the ICA provisions in *Keldote Pty.Ltd v. Riteway Transport Pty.Ltd* (**Riteway**).[20]

5.5 The court noted that the ICA does not define 'unfair'. It applied the ordinary dictionary meaning of the term of unfair, as being:

> 1. not fair; biased or partial; not just or equitable; unjust. 2. Marked by deceptive dishonest practices. (Macquarie Dictionary)

Or

> Not equitable; unjust; not according to the rules, partial (New Shorter Oxford English Dictionary)[21]

5.6 It also noted an applicant submission that, in the Australian Industrial Relations Commission, Munro J found in *Re Tranport Workers Union of Australia*:

> It is both well established and widely recognised that industrial tribunals have avoided rigidity in defining terms such as 'unfair' and harsh'. Those words are not terms of art. They should be understood by a commonsense approach, as words in common usage with no special or technical meaning.[22]

5.7 Drawing from NSW Industrial Commission jurisprudence, the Court found that section 12 should operate in this manner:

> 96. Arising out of the above considerations and drawing on the reasons for judgment of the Full Court of the Industrial Court of New South Wales in *Port Macquarie Golf Club Ltd v Stead* (1996) 64 IR 53, which concerned the then s.275 of the *Industrial Relations Act 1991* (NSW), the following principles would appear to be applicable to considering applications for review under the ICA:
>
> > s.12 directs attention to the particular circumstances of the individual contract concerned. Whether or not a contract is unfair or harsh is a matter to be decided upon examination of the facts of each particular case;
> >
> > unfairness or harshness may arise either from the terms of the contract itself or from the circumstances surrounding its formation. That is to say, it may be substantively unfair or harsh or procedurally unfair or harsh;
> >
> > the test of unfairness involves the commonsense approach characteristic of the ordinary jury member by applying standards providing a proper balance or division of advantage and disadvantage between the parties who have made the contract;

5.8 Should a provision similar to section 12 of the ICA replace the current section 51AC of the *Trade Practices Act* there would be a situation where the law relating to independent contractors would apply to all classes of small business – which only appears logical.

5.9 This uniformity in 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 the purposes of other areas of the law; with

- the Federal Magistrates' Court and the Federal Court developing a specific expertise in the determination of cases dealing with small business. However, if this was to occur, the Australian Government will have to ensure that the Magistrates' Court in particular has the expertise and the resources to hear cases promptly.

ENDNOTES

[1] Source: JR Pharmacy Services – Johnson Rorke Chartered Accountants.

[2] *Productivity Commission Inquiry Report into The Market for Retail Tenancy Leases in Australia* (the **retail lease inquiry**) p.4.

[3] Retail lease inquiry p.203.

[4] Retail lease inquiry p21;24.

[5] Retail lease inquiry pp.xx-xxi.

[6] ACCC *Report of the ACCC Inquiry Into the Competitiveness of Retail Prices for Standard Groceries* (the **grocery prices inquiry**) Grocery prices inquiry p.xx.

[7] A market is 'workably competitive' where (1) there are a considerable number of firms selling closely related products in each market (2) these firms are not colluding and (3) the long run average cost curve for a new firm is not materially higher than for an incumbent firm – see George J Stigler *Extent and Bases of Monopoly* American Economic Review (Papers and Proceedings), 32, 1942 pp.2-3.

[8] Four Corners – transcript of interview with Graham Samuel for the program *The Price We Pay*, broadcast 1 September 2008 http://www.abc.net.au/4corners/content/2008/s2351993.htm accessed 15 September 2008.

[9] Grocery prices inquiry pp.314-5.

[10] Retail lease inquiry pp.196-7.

[11] Retail lease inquiry p.197.

[12] [2007] FCA 708 (18 May 2007). See in particular paragraph 73.

[13] [2006] FCA 191 (10 March 2006). See in particular paragraph 57.

[14] [1999] FCA 128, paragraph 22. Underlining added. Other emphasis in the original.

[15] Section 62B of the *Retail Leases Act 1994* (NSW) is, as far as relevant, drawn identically to section 51AC of the *Trade Practices Act.*

[16] [2005] NSWCA 261. Emphasis added.

[17] Retail lease inquiry p.199.

[18] Section 5 of the *Independent Contractors Act 2006* defines a services contract as a contract for services between an independent contractor and either a constitutional corporation or the Commonwealth.

[19] Section 106 *Industrial Relations Act xxxx* (NSW)*;* section 276 *Industrial Relations Act xxxx* (Qld); section 832 *Workplace Relations Act 2006* (Cth).

[20] FMCA 1167 22 August 2008.

[21] Paragraph 77 of *Riteway.*

[22] (1993) 50 IR 171 at 214.