

Franchise Council of Australia

Submission to Senate Economics committee.

Inquiry into Statutory Definition of Unconscionable Conduct

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The Franchise Council of Australia is the peak body representing participants in the \$130 billion Australian franchising sector. The FCA is the only national body to represent all of the major groups involved in franchising – franchisors, franchisees and supplier/service providers. The franchising sector employs more than 600,000 people across the nation and is responsible for generating the majority of earnings in the small business sector.

The FCA believes the current provisions regarding unconscionable conduct are adequate and functioning well. The ACCC is an effective regulator active in policing the current provisions, and with a good understanding of the type of conduct which merits scrutiny. The FCA sees no need to redefine the provisions. Further, it believes that any attempt to do so in legislation is likely to lead to detrimental outcomes in the franchising sector, notably increased uncertainty and unnecessary additional cost. Franchisors and franchisees are small businesses, and are keen to ensure that further opportunities are not created for disputation.

The FCA has made submission to the current inquiry into the Franchising Code of Conduct being conducted by the Joint House Corporations and Financial Services committee. A copy is attached. In providing a copy, we draw your attention to the sections of the submission relating to s.51AC of the TPA and the concept of implied good faith and the more specific issue of the proposed insertion of a 'good faith negotiations' clause in the Franchising Code of Conduct. We do so because we believe they are relevant to the question of definition of unconscionable conduct, and the FCA's views on the topics addressed in the Corporations Committee submission are consistent with our view in relation to the specific issue being addressed in the Senate inquiry into definition of unconscionable conduct.

- The FCA firmly believes that any move to write a good faith clause into the Franchising Code of conduct would have immediate negative effects on the stability of the franchising sector, casting doubt on the status of thousands of existing franchise agreements. Similarly, the FCA regards any attempt to redefine the unconscionable conduct provisions of s.51AC as likely to create doubt and uncertainty in an area of law in which there is precedent and no lack of clarity in the eyes of the courts and the primary policing body, the ACCC.

The ACCC defines unconscionable conduct in its guide 'Do you supply goods or services to retail chains? (Sep. 2001)'. It defines unconscionable conduct as being unreasonable, acting harshly, being oppressive, lacking good faith, bullying or being thuggish. The ACCC has stated publicly that it sees no need for a change to legislation in this area (note it also argues

against the introduction of a 'good faith negotiations' clause into the Franchising Code of Conduct in its submission to the current Corporations Committee inquiry into franchising). In describing his attitude to the concepts of 'good faith negotiations' and unconscionable conduct, the Chairman of the ACCC has stated publicly that he can have difficulty in defining what constitutes 'good faith negotiations', but he has no difficulty recognising unconscionable conduct when he sees it.

Recent cases indicate s. 51AC is working well. *Hoy Mobile Pty Ltd v Allphones Retail Pty Ltd* and *ACCC v Simply No Knead* demonstrate the section's practical applicability and the ACCC's willingness to prosecute. The ACCC has achieved considerable success in relation to unconscionable conduct in franchising. The only area where the ACCC has been less successful has been in retail leasing, but concerns in this area relate more to abuse of market power and poor industry conduct. Some recent public commentary urging more specific definition of unconscionable conduct fails to note the inherent risks; ie that such initiatives could reduce a court's flexibility to assess unconscionable conduct at the same time as impinging on business freedom to contract.

In its submission to the Corporations Committee inquiry into franchising, the Law Council of Australia stated that the incorporation of a broad definition of unconscionability, as suggested by some commentators, would have damaging implications for franchising and other industries.

The Law Council submission also warned against prescriptive legislative intervention at a time when case history is growing satisfactorily. "There is a developing body of sound jurisprudence in the area which should be allowed to continue to develop without further intervention," it said.

The FCA agrees with the Law Council view that the proposed use of examples to define unconscionable conduct is undesirable. It also agrees with the Law Council assertion that unequal bargaining power should not be a basis for unconscionable conduct.

The Law Society states: "Unconscionability is not an expressed statutory obligation, capable of precise definition, but a norm of conduct of general application, similarly to acting unreasonably or in good faith. It follows that any attempt to define the term – even through a use of examples – will lead to significant problems, including the loss of flexibility in interpretation of the provision as circumstances inevitably change and the loss of guidance on the norm provided by established legal precedent." The FCA agrees.

The franchise sector is highly regulated, with the Franchising Code of Conduct underpinning a strong legislative framework. The cornerstone of that framework is the franchise agreement. The Code supplements the contractual process between business owners by providing for pre-contractual disclosure, supported by a process that is intended to ensure prospective franchisees obtain legal and business advice prior to signing. The disclosure document is comprehensive, and the whole process is aimed at ensuring a prospective franchisee makes an informed business decision. The insertion of a new definition of unconscionable conduct could easily upset this process.

The FCA considers the right of business owners to contract freely to be fundamental and critical to the franchise relationship. The FCA supports the Code and the current statutory prohibition in relation to misleading or deceptive conduct, as they support the contractual framework. The FCA considers that the courts have correctly interpreted unconscionable

conduct in decided cases to date, and there is now significant legal certainty. Any new definition would not add certainty or clarity, but rather would be used to endeavour to broaden the current state of the law. This would create uncertainty where none currently exists, and would broaden the application of the law when there is no justification for doing so.