

EXECUTIVE OFFICE



**Australian  
Competition &  
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Commission**

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24 October 2008

Mr John Hawkins  
Committee Secretary  
Senate Economics Committee  
Department of the Senate  
PO Box 6100  
Parliament House  
Canberra ACT 2600

*By electronic mail:* [economics.sen@aph.gov.au](mailto:economics.sen@aph.gov.au)

Dear Mr Hawkins

### **Inquiry into unconscionable conduct**

Thank you for your letter dated 26 September 2008 in which you invited the Australian Competition and Consumer Commission (ACCC) to make a submission to the Senate Standing Committee on Economics inquiry into unconscionable conduct. The ACCC will not be making a submission to the Committee on this occasion but offers the following comments.

The ACCC, as the statutory body responsible for enforcement of the Trade Practices Act 1974 (the Act), offers the following comments on the issue of unconscionable conduct.

Unconscionable conduct is addressed by the Act in sections 51AA, 51AB and 51AC within Part IVA. Section 51AA was designed to provide a statutory remedy for unconscionable conduct within the meaning of the unwritten law. Section 51AB extends the equity and common law meaning of unconscionability by providing five additional factors to which the court may have regard in a business to consumer circumstance. Similarly section 51AC was added to the Act to provide additional protection against unconscionable conduct for small businesses in their dealings with larger businesses. Section 51AC also provides a non-exhaustive list of factors to which the court may have account.

These provisions are sufficiently broad to apply to a wide range of circumstances that may occur in the market place. That said, the law is applied very much to the specific facts of particular situations to ensure equitable outcomes. This is in contrast to a more codified approach which might risk limiting the exercise of judicial discretion on the merits of each case.

The courts have generally not provided detailed commentary of unconscionability in a broad sense because it is very difficult to describe, in the abstract, law that relies upon the particular circumstances in which the conduct occurs.

This is a reflection of the fact that it is very difficult in the abstract to define what is unconscionable conduct. This is because what is unconscionable conduct will very much depend on the facts of the particular situation in question.

For example, in commercial lease negotiations a landlord may propose a rental amount on a take it or leave it basis. This conduct will not, in itself, be unconscionable if the prospective tenant has no existing investment or commitment in relation to that site and can simply walk away if they are unhappy with the rent proposed.

However, the conduct may well be unconscionable in circumstances where the tenant has an existing lease on the site and the landlord is demanding a substantial rental increase, having recently encouraged the tenant to invest heavily in the property on the tacit understanding that the lease would be renewed on a reasonable basis.

Thus the same conduct may well be characterized differently depending on the circumstances in which it occurs.

This may explain why the majority of judgments note that they are specific to the fact situation in question and are not to be interpreted as finding unconscionability in a particular circumstance or relationship.

While the form of the current unconscionable conduct provisions thus provides for the useful application of judicial discretion to particular circumstances it does not make for ease of explanation.

That said, the ACCC urges caution in any consideration of a more codified approach to this area of law given the potential for loss of equitable outcomes that might flow from the current framework.

If you have any questions in relation to this letter or in relation to the ACCC's enforcement and education activities in this area, I can be contacted on (02) 6243 1124 should you wish to discuss.

Yours sincerely



Brian Cassidy  
Chief Executive Officer