

Via email: economics.sen@aph.gov.au

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

Dear Mr Hawkins,

Inquiry into the statutory definition of Unconscionable Conduct

I have pleasure in enclosing a submission to the Senate Economics Committee in response to its Inquiry into the statutory definition of Unconscionable Conduct.

The submission has been prepared by the Trade Practices Committee of the Business Law Section of the Law Council of Australia. The submission has been endorsed by the Business Law Section. Owing to time constraints, the submission has not been reviewed by the Directors of the Law Council of Australia Limited.

If you have any questions regarding the submission, in the first instance please contact the Committee Chair, Dave Poddar, on [02] 9296 2281 or the Deputy Chair, Stephen Ridgeway, on [03] 9679 3529.

Thank you for giving us the opportunity to comment.

Yours sincerely,

A handwritten signature in black ink, appearing to read "Bill Grant". The signature is written in a cursive style with a large initial "B".

Bill Grant
Secretary-General

28 October 2008

Enc.

Law Council of Australia Trade Practices Committee, Business Law Section

Submission to the Senate Economics Committee's Inquiry into the statutory definition of Unconscionable Conduct

1 Introduction

The Trade Practices Committee, Business Law Section of the Law Council of Australia (**Committee**) would like to thank the Senate Economics Committee for the opportunity to comment on the proposed changes to the statutory definition of unconscionability in the *Trade Practices Act 1974* (Cth) (**the Act**).

The Committee believes that it is unnecessary and undesirable to change the notion of what is “unconscionable” under the Act or to amend sections 51AA, 51AB or 51AC of the Act. In particular, the Committee considers that there is no need to develop a statutory definition of unconscionable conduct to supplement or alter the existing provisions of the Act.

The recent cases on unconscionability, including *Hoy Mobile Pty Ltd v Allphones Retail Pty Ltd (No 2)* (**Hoy Mobile**),¹ demonstrate that the sections of the Act that deal with statutory unconscionability are working as intended. Moreover, the Australian Competition and Consumer Commission has been vigorously investigating and prosecuting cases of unconscionable conduct under the Act.

The Committee’s more detailed comments, in the context of the Senate Economics Committee's Inquiry are set out below.

2 It is not necessary to define “unconscionable” further in Part IVA of the Act

2.1 The present statutory definition of “unconscionability” in Part IVA

The prohibition of unconscionable conduct is contained within Part IVA of the Act. The provisions in Part IVA include the following sections:

- section 51AA, which prohibits unconscionable conduct “within the meaning of the unwritten law”;
- section 51AB, which prohibits unconscionable conduct in certain transactions with individual consumers; and
- section 51AC, which prohibits unconscionable conduct in certain transactions with business consumers.

¹ [2008] FCA 810.

2.2 Unconscionability under section 51AA

Section 51AA expressly ties the statutory prohibition of unconscionable conduct to the common law, as it is considered and derived from time to time by the courts.

The Explanatory Memorandum to section 51AA confirms that the section embodies the equitable concept of unconscionable conduct as recognised at common law and refers expressly to decisions of the High Court in *Blomley v Ryan*² and *Commercial Bank of Australia v Amadio*.³

To attempt to codify a statutory definition of unconscionable conduct would be antithetical to the intention and operation of section 51AA, which expressly refers to the development of the concept of unconscionable conduct over time.

Codification of a definition of unconscionable conduct would not pick up developments in the definition of unconscionable conduct at common law.

The lack of flexibility that would be associated with a codified definition of unconscionable conduct may mean the wider range of remedies that are available for unconscionable conduct under the Act may not be available to all victims of unconscionable conduct.

That may undermine one of the objects of section 51AA, which was to broaden the scope of remedies that are available in relation to unconscionable conduct at common law.⁴

2.3 Unconscionability under sections 51AB and 51AC

Sections 51AB and 51AC of the Act are similar, but not identical, and directed at the protection of consumers and small "business consumers" respectively.

Unlike section 51AA, the term unconscionability in sections 51AB and 51AC is not tied to the common law definition of unconscionability. While sections 51AB and 51AC cover the same type of conduct as is covered by common law unconscionability, the Explanatory Memoranda indicate that the sections may extend to cover *other conduct* that is, in all the circumstances, unconscionable.⁵

By adopting the language of unconscionability, Parliament deliberately steered away from conduct which could amount to a tough or hard bargain struck by commercial and assertive parties. Rather, the unconscionability provisions are directed toward conduct which goes against good conscience and amounts to "unscrupulous trading practices".⁶

² (1956) 99 CLR 362.

³ (1983) 151 CLR 447.

⁴ The Second Reading Speech to the Trade Practices Legislation Amendment Bill 1992 (Hon MJ Duffy, House of Representatives, 3 November 1992).

⁵ See Explanatory Memorandum to the Trade Practices Amendment (Fair Trading) Bill 1997 at page 22.

⁶ See Second Reading Speech to the Trade Practices Revision Bill 1986 (Lionel Bowen, House of Representatives, 19 March 1986)

Both sections 51AB and 51AC set out non-exhaustive lists of factors that the Court may have regard to in determining whether conduct amounts to unconscionable conduct.

The Committee considers these lists to strike an appropriate balance between providing guidance as to the scope of unconscionability under the Act and providing the Courts with flexibility to address each case on its merits.

2.4 Proposals to amend unconscionability provisions

The Committee is aware of proposals to amend the unconscionability provisions in the Act, particularly section 51AC.

The Committee understands that some commentators and State-based Parliamentary Committees have recommended that section 51AC of the Act be amended to:

- include a statutory definition of unconscionable conduct; and/or
- replace the non-exhaustive list of statutory factors in section 51AC(3) and (4) with a statutory list of examples of the types of conduct that would ordinarily give rise to unconscionable conduct.

Proponents argue that these two proposals are intended to address problems currently experienced with section 51AC, including that the provision has failed to provide a clear set of standards of ethical conduct, and that the Courts have adopted an overly onerous interpretation of the concept of “unconscionable” conduct which, in turn, has meant that the provision has little room to operate.

The Committee has made submissions to another Inquiry being conducted by the Senate Economics Committee to not adopt the recommendations of those commentators and State-based Parliamentary Committees. Section 51AC, as it is currently drafted and interpreted, provides a set of clear and high standards of ethical conduct.

Unconscionability is not an express statutory obligation, capable of precise definition, but a norm of conduct of general application - similar to acting “unreasonably” or in “good faith”. It follows that any attempt to define the term - even through the 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.

Set out below is the Committee's position on why it is not necessary to amend either section 51AB or section 51AC to insert a statutory definition of unconscionable conduct, or to replace the currently list of statutory factors with a list of statutory examples.

2.5 Inserting a statutory definition of "unconscionable conduct"

Proponents of change to the existing provisions contend that the insertion of a statutory definition of “unconscionable” conduct would provide clear statutory guidance as to what is meant by the term for the purposes of sections 51AB and 51AC.

They reason that it would provide a benchmark for assessing conduct to determine whether or not it amounts to unconscionable conduct. One commentator has proposed that the following definition of “unconscionable conduct” be inserted in section 51AC in a submission to the Parliament of South Australia’s Economic and Finance Committee’s Inquiry into Franchises:

“For the purposes of this section “unconscionable conduct” includes any action in relation to a contract or to the terms of a contract that is unfair, unreasonable, harsh or oppressive, or is contrary to the concepts of fair dealing, fair-trading, fair play, good faith and good conscience.”

The Committee submits that inserting such a statutory definition of “unconscionable conduct” is unnecessary and undesirable.

Notwithstanding the absence of a statutory definition, the Courts have been able to interpret section 51AB and 51AC so as to provide concrete guidance about what is unconscionable.

There is a developing body of sound Australian jurisprudence in the area which should be allowed to continue to develop without further intervention.

In a recent case of *Hoy Mobile, Rares J referred to Australian Securities and Investments Commission v National Exchange Pty Ltd*,⁷ which considered provisions analogous to section 51AC under the *Australian Securities and Investments Commission Act 2001* (Cth), and held that:

- “[U]nconscionable conduct” has its ordinary and natural interpretation and means doing what should not be done in good conscience’; and
- The Court will focus primarily on the unconscionable conduct of the corporation and determine whether that conduct was contrary to the norm of conscientious behaviour. In *ASIC v National Exchange*, the relevant conduct consisted of a carefully formulated and systematic approach which clearly offended basic notions of good conscience and fair play.

The developing body of jurisprudence requires the Courts to be satisfied that there has been “serious misconduct or something clearly unfair or unreasonable” before a finding of unconscionability under section 51AC may be made.

When considering proposals to insert a definition of unconscionability into the Act, it is worth considering that section 52 of the Act does not contain a definition of misleading and deceptive conduct. Whether particular conduct is misleading or deceptive under section 52 is a question of fact to be determined in the context of the evidence as to the alleged conduct and to the relevant surrounding facts and circumstances. The strength of the generality of the terms of section 52 is illustrated in its broad application as a guiding norm for commercial conduct.

Sections 51AB and 51AC similarly lay down a guiding norm for commercial conduct of general application. The generality of the terms of section 51AC is necessarily part of the strength of the section.

⁷ (2005) 148 FCR 132.

It is, therefore, clear that the current and developing approach of the Courts to the interpretation and application of sections 51AB and 51AC does not require intervention by Parliament.

3 It would not be beneficial to replace the statutory list of factors with a statutory list of examples of unconscionable conduct

An alternative proposal has been made to recast the non-exhaustive list of factors which may be taken into account when consideration is given to whether conduct is unconscionable into examples of conduct that would ordinarily be considered to be “unconscionable”.

Proponents of this proposal contend that the current list of non-mandatory and non-exclusive factors is capable of being disregarded at the Court’s discretion. They consider that recasting the list of factors into examples would provide the Courts with clearer statutory guidance when assessing conduct. In the context of section 51AC, some proponents have suggested that the following examples be inserted in the Act to comprise, in and of themselves, instances of unconscionable conduct:

- the supplier and the business consumer did not have similar strength in bargaining positions;
- the business consumer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the supplier;
- the supplier took advantage of the business consumer’s inability to understand any documents relating to the supply or possible supply of the goods or services;
- the supplier exerted undue influence or pressure on, or used unfair tactics against, the business consumer or a person acting on behalf of the business consumer;
- the supplier’s conduct towards the business consumer was inconsistent with the supplier’s conduct in similar transactions between the supplier and other like business consumers;
- the supplier failed to comply with the requirements of any applicable industry code;
- the supplier unreasonably failed to disclose to the business consumer any intended conduct of the supplier that might affect the interests of the business consumer, or any risks to the business consumer arising from the supplier’s intended conduct;
- the supplier was unwilling to negotiate the terms and conditions of any contract for supply of the goods or services with the business consumer;

- the supplier exercised 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 in a manner that was materially detrimental to the business consumer; and
- the supplier acted in bad faith towards the business consumer.

The Committee submits that amending section 51AC in this way, or amending section 51AB in a similar way, would be unnecessary and undesirable. The non-exhaustive list of factors in the Act provide sufficient statutory guidance to the Courts about what unconscionability entails.

In fact, the current non-exhaustive list of factors in sections 51AB and 51AC give the Courts greater flexibility than would a list of examples, which are highly likely to be confined to specific sets of facts. Further, it would be impossible to describe by way of example all the situations in which conduct might be unconscionable.

Further, the suggested recasting of the list of factors in sub-sections 51AB(2), 51AC(3) and 51AC(4) into examples of unconscionable conduct poses a number of problems. For instance:

- while unequal bargaining power is obviously a relevant factor in deciding if a person has acted unconscionably, unequal bargaining power is common in commercial negotiations and should not, by itself, be the foundation of an allegation of unconscionable conduct;
- it is problematic to suggest that a supplier's unwillingness to negotiate the terms and conditions of any contract with the business consumer is unconscionable in and of itself, even where, for example, the business consumer has obtained legal advice on the terms and conditions of the contract, or the terms and conditions are themselves fair, necessary or reasonable to protect the legitimate interests of the supplier, or the supplier had previously negotiated the terms and conditions and is seeking to renew the existing contract on the same terms and conditions. There is also the potential for tension between this factor and sections 51AC(3)(f) and (4)(f), which touch on consistency of treatment;
- similarly, exercising a right to unilaterally vary an agreement should not, by itself, amount to unconscionable conduct as there may be circumstances in which it will be appropriate to unilaterally vary an agreement.

The examples above are more indicative of "unfairness" and the existence of "unfair terms" than unconscionability. An amendment to the Act to redefine unconscionability to incorporate mere unfairness would be a significant shift away from the definition of unconscionability that has been accepted by the courts.

Removing the Court's ability to consider the factors currently set out in section 51AB and 51AC and replacing it, instead, with a list of example of unconscionable conduct, would make the section unduly prescriptive and unreasonably impinge upon legitimate business conduct.

The Committee also submits that such a proposal to may have the unintended effect of causing the Courts to adopt overly restrictive assessments of conduct in individual cases.

In contrast, the current wording of sections 51AB and 51AC vests substantial discretion in the Courts to make findings based on the individual facts of each case. This discretion is a guided or principled discretion, reducing judicial subjectivity and at the same time allowing flexible decision-making. The guided discretion that the Courts currently enjoy is a necessary part of the strength of section 51AC as it is currently drafted.