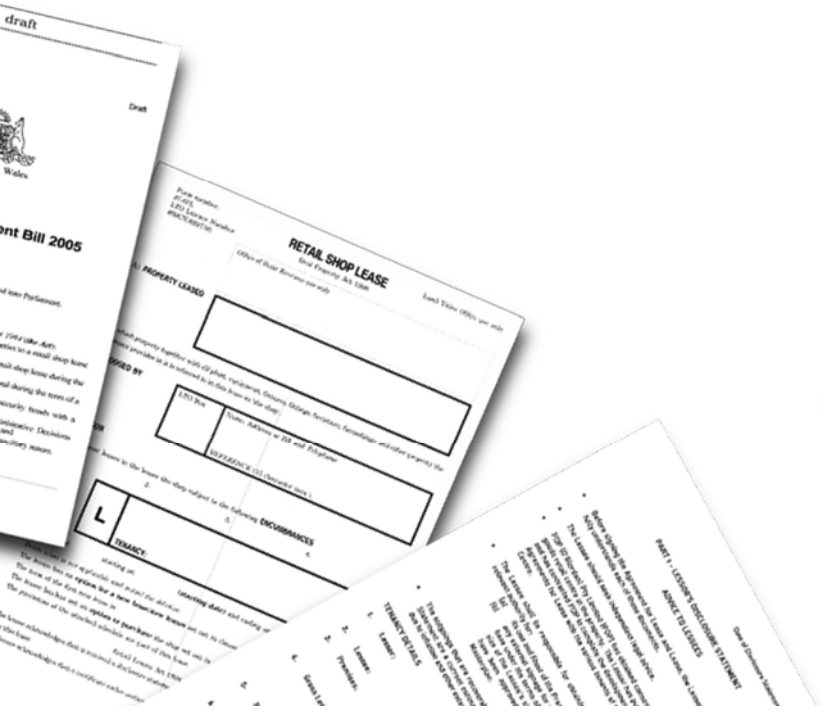
Council of Small Business of Australia

THE NEED TO DEVELOP A CLEAR STATUTORY DEFINITION OF UNCONSCIONABLE CONDUCT FOR THE PURPOSES OF PART IVA OF THE TRADE PRACTICES ACT 1974 AND THE SCOPE AND CONTENT OF SUCH A DEFINITION.

Submission to Senate Economics Committee



Council of Small Business of Australia

SUBMISSION ON THE NEED TO DEVELOP A CLEAR STATUTORY DEFINITION OF UNCONSCIONABLE CONDUCT FOR THE PURPOSES OF PART IVA OF THE TRADE PRACTICES ACT 1974 AND THE SCOPE AND CONTENT OF SUCH DEFINITION FOR THE COUNCIL OF SMALL BUSINESS OF AUSTRALIA

1. INTRODUCTION

The Council of Small Business of Australia ("**COSBOA**") is widely recognised as the peak body of small business organisations, industry groups and individual firms operating at a national level. It represents, through its small business organisations, thousands of individual businesses and retailers and family businesses. Its small business retail organisations operating include:-

(a) Retail Traders and Shopkeepers Association of New South Wales;
(b) National Association of Retailers;
(c) Australian Newsagents Federation;
(d) The Retail Confectionery and Mixed Business Association;
(e) Australian Gift and Homewares Association;
(f) National Independent Retailers Association Inc;
(g) The Pharmacy Guild of Australia;
(h) Australian Toy Association;
(i) Australasian Association of Convenience Stores;
(j) Southern Sydney Retailers Association;
(k) The Retail Confectionery and Mixed Business Association Inc;
(l) National Association of Retail Grocers of Australia;
(m) Australian Booksellers Association.

COSBOA'S interstate affiliates include:-

(a) Lottery Agents Association Victoria;
(b) State Retailers Association of South Australia;
(c) The Retail Traders Association of Tasmania;
(d) Independent Retailers Organisation of West Australia;
(e) Queensland Retail Traders and Shopkeepers Association;
(f) West Australian Independent Grocers Association;
(g) Tasmanian Independent Retailers;
(h) Independent Grocers of Australia Retail Network;
(i) Small Retailers Association of South Australia;

(j) Liquor Stores Association of Victoria.

2. THE PROBLEM

COSBOA submits that the unconscionable conduct provisions of the Trade Practices Act are not working as intended and a clear definition should be given to the Courts to direct them to more accurately reflect Australian society's view on what is unconscionable rather than the strict legal definition than has traditionally been applied in Courts of Equity. In this submission, COSBOA will not rehash or labour the point in submissions already prepared by small business organisations. It submits that the Courts should be directed to take a "common man's" approach according to the facts of the case before the Court with a guidance as to general levels of behaviour expected by the community at large.

3. WHO REALLY KNOWS WHAT IS OR ISN'T UNCONSCIONABLE?

The term unconscionable is not defined nor is any assistance otherwise given for its interpretation in any definition of the Trade Practices Act. Thus, the word "unconscionable", whilst in the general community would appear to mean "unfair" and "against the conscience", it has been strictly interpreted by the Courts and limited to traditional equitable notions. The traditional equitable notion is that an effected person was placed in a "special disadvantage" and that the stronger party took unfair or unconscientious advantage. These principles present almost impossible yardsticks to measure conduct in a purely commercial settings. The term "unconscionable" is nebulous. What is unconscionable to one person can be perfectly acceptable to somebody else. This is despite the judiciary interpreting unconscionable conduct in various different ways. For example, in *Zoneff v Elcom Credit Union Ltd* (1990) 94 ALR 445 [6 ANZ insurances cases 60-961; [1990] ATPR 41-009] Hill J considered its construction to be:-

> "In general terms, it may be said that conduct will be unconscionable where the conduct can be seen in accordance with the ordinary concepts of mankind to be so against conscience that a court should intervene. At the least the conduct should be unfair. It invites comparison with doctrines of equity… where inequality of bargaining power or absence of the ability to bargain freely will be relevant to the

finding that there has been an unfair advantage taken by one person of the other."

In *Qantas Airways Limited v Cameron* [No 3] (1996) 66 FCR 246 [145 ALR 294] Davis J noted that there were a range of possible denotations of the term unconscionable and referred to the Oxford English Dictionary, which said, "Showing no reasonable regard for conscience; irreconcilable with what is right or reasonable". In a further judgement, Lindgren J said that unconscionable conduct was a "pejorative moral judgement". In practice therefore, the various ways of defining what is unconscionable differs in its formulations between "unfair", "harsh", "unjust" and various shades of moral judgements and everything in between which is a subjective test at best. This has lead to confusion and to uncertainty in any litigation dealing with unconscionable conduct. To complicate matters even more, unconscionable conduct has been divided into two species, "procedural" and "substantive". Procedural unconscionability is some injustice involved in a negotiation process and a substantive unconscionability may arise in the contract itself or the consequences of the contract.

COSBOA submits that the judiciary and users of the legal process are crying out for a definition of unconscionable conduct within the modern context. For example, in many commercial retail settings small retail traders lease premises from large corporations or superannuation funds who own the shopping centre. This has led to allegations that many of these large corporations have unconscientiously exploited their superior bargaining position to the detriment of the interests of the lessees. As a result of the continual request by the small business lobby, some States have enacted unconscionable conduct provisions in their retail leasing legislation by drawing down specific retail legislation. That legislation lists matters that the State's Courts and Tribunals should have regard to when hearing unconscionable conduct claims. Unfortunately, in the very few decisions where lessees have sought redress, lessees have generally been unsuccessful.

There is much disagreement within the judiciary as to what might constitute unconscionable conduct and the case of *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty. Limited* (2003) 214 CLR

51, clearly illustrates this point. The conduct of the lessor was found to be unconscionable at the first trial but the decision was reversed by the Full Federal Court. The High Court affirmed the judgement of the Full Court at a later trial. However, COSBOA submits that any reasonable person would say the lessees experienced an element of unequal bargaining power and all the Courts while hearing the case, found this element to be present. This unequal bargaining power however, was not enough, of itself, to make a finding of unconscionable conduct against the lessor. The Court found that it was normal commercial practices in that situation. Gleeson CJ said, "unconscionable conduct does not require parties in contractual negotiations to forfeit their advantages or neglect their own interests… and unconscionable conduct is not to be confused with taking advantage of a superior bargaining position." This was despite Gummow and Hayne JJ conceding that the lessees were in a difficult bargaining position. But it was held that the lessees were not labouring under such a special disadvantage which would have made it unconscionable for the lessor to knowingly dealing with them without knowing of that disadvantage. In other words, the traditional notion of "special disadvantage" defeated the lessee's in their claim.

The difference in interpretation and view of unconscionable conduct within the judiciary is thought by some commentators to be a farce. For example, in New South Wales, the Administrative Decisions Tribunal has the power to hear cases of unconscionable conduct. Since 2002, that Tribunal has heard 29 cases alleging unconscionable conduct. These cases indicate that a finding of unconscionable conduct can only be made if the conduct can be described as "highly unethical" and involves "a high degree of moral obloquy" and unconscionable conduct will not be found simply because conduct is unfair or unjust. This is in accordance with the decision of *Attorney General of New South Wales v World Best Holdings* (2005) 63 NSWLR 557 at 583. This finding by the Court of Appeal in that decision was made despite that Court hearing the matter without the Tribunal's expertise in hearing retail lease cases, in which it would have done so in accordance with s 78 of the Retail Leases Act which says that, "In the interpretation of this Act, a court (and the Tribunal) is to have regard to accepted practices and interpretations within the industry concerning the leasing of retail shops." In other words, the Tribunal specifically found unconscionable conduct because it knew what were the accepted practices of the shopping centre industry, yet this decision

was overturned by a higher Court without regard to the tests applied to the numerous other cases the Tribunal was familiar with. In the 29 cases, unconscionable conduct was found in 5 cases, and of these 2 were overturned on appeal unrelated to the unconscionable conduct claim, 1 matter was transferred to the Supreme Court, unconscionable conduct was withdrawn in 5 cases and unconscionable conduct was held not to be made in 13 cases. In the remaining 6 cases, it was found unnecessary to consider the question of unconscionable conduct. Analysis of the unconscionable conduct claims heard by the Administrative Decisions Tribunal indicate the unconscionable conduct test is onerous and the threshold very high. This is clearly because of the narrow interpretation in accordance with the traditional equitable doctrine. This means the community standard of unconscionable conduct is not operating as intended and there is a disconnect between the community's expectations and the remedies found in the Courts and Tribunals. In this context there are many instances of unfair conduct on the part of landlords where tenants are unable to avail themselves of unconscionable conduct remedies in State legislation due to the onerous test imposed.

Unfortunately the Courts and Tribunals seem reluctant to embrace this area of adjudication and apply reliable provisions and case law to anything other than established equitable principles. It should be noted that the Australian Competition Consumer Commission ("**ACCC**") in its submission to the 2007 Productivity Commission into the Market for Retail Tenancy Leases said it was anticipated that s51AA of the Trade Practices Act 1974 would be of particular use to tenants and franchisees in unequal bargaining positions with their landlords or franchisors. However, it noted that s51AA had not lived up to its expectations due to the Court's limited interpretation in accordance with equitable doctrine. Despite making enforcement of s51AA a priority, the ACCC had not been able to build a single case that would succeed from complaints from retail tenants in shopping centre. Given that neither the State retail leases legislation or s51AA has operated to provide the protection intended, COSBOA submits it is clear there is scope for legislative reform.

4. SUMMARY AND RECOMMENDATION

COSBOA submits there is an enormous gap between the legal fraternity and society's expectations of what is "fair and right" in the business context.

COSBOA submits that guidance for unconscionable conduct in any amendments to the Trade Practices Act could either be through direct definition of what is unconscionable conduct in the modern context so that Courts are not tied to the traditional notion, or effective use of the Minister's new second reading speech (if any amendments were to be introduced into Parliament) to incorporate concepts such as "against good conscience", "unreasonable behaviour", "unfair and inequitable", "harsh and oppressive" or displays of "lack of good faith" and "unjust enrichment". Use of a new definition or the Minister's second reading speech will direct the Courts to apply a wider range of community standards more in keeping with community expectations and the wishes of Parliament.

5. CONTACT

Should the committee require any further information regarding this submission or to speak to the author please contact:-

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