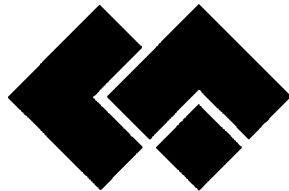


LAW COUNCIL OF AUSTRALIA



Law Council
OF AUSTRALIA

**Submission prepared by the Trade Practices
Committee
Business Law Section**

Review of the Trade Practices Act

**Supplementary Submission –
Unconscionable Conduct and Unfair
Contract Terms**

October 2002

1. Unconscionable Conduct and Unfair Contract Terms

The Dawson Committee has also asked the Trade Practices Committee of the Law Council of Australia's Business Law Section (the Committee) to express its view on the submissions made by the Fair Trading Coalition (**FT Coalition**) and the Australian Consumers Association (**ACA**). The FT Coalition's recommendations are essentially that s51AC of the Act be amended to include a number of per se offences, relating in part to specific types of contract terms. The ACA's recommendations are that regulatory intervention should occur to deal with the increasing use of onerous or unjust contract terms in contracts which affect consumers (including business consumers).

The Committee's view is that amendment to s51AC would be premature at this stage. The provision is relatively new, having only been introduced in 1998, and the operation of all of the statutory prohibitions on unconscionable conduct is still very much developing. Both s51AA and 51AC have been considered in a number of recent Federal Court cases,¹ one of which (relating to s51AA) is currently on appeal to the High Court.²

Further, the Committee is concerned that as the unconscionable conduct provisions do not fall squarely within the Dawson Committee's terms of reference, relevant stakeholders have not had adequate opportunity to consider the ramifications of the proposed amendments or contribute to the debate.

1.1 FT Coalition Submission

The FT Coalition recommend that s51AC should be amended to add as per se offences:

- unilateral variation of contract or associated documents;
- the termination of contracts by one party without just cause or due process;
- the bringing into existence of documents or policies after the signing of the contract which are then binding and which can also be used to vary the original agreement or contract; and
- the presentation of 'take it or leave it' contracts or agreements.

Further, the FT Coalition recommended that misuse of market power should be listed as one of the matters for consideration under s51AC.

(a) Per se prohibition of specific forms of conduct

The Committee is particularly concerned by the FT Coalition's proposal to prohibit per se all 'take it or leave it' contracts. This would appear to prohibit outright all standard form contracts. The Committee acknowledges that there is greater scope for unconscionable conduct to arise in the context of standard form contracts than in contracts where the terms are individually negotiated between the parties. However, as Trebilcock has pointed out,

¹ Including *ACCC v CG Berbatis Holdings* [2001] FCA 757, *ACCC v Samton Holdings Pty Ltd* [2002] FCA 62, *GPG (Australia Trading) Pty Ltd v GIO Australia Holdings* [2001] FCA 1761.

² The ACCC was granted leave to appeal the full Federal Court decision in *ACCC v CG Berbatis Holdings* [2001] FCA 757 on 31 May 2002.

they facilitate a dramatic reduction in transaction costs, and may be vulnerable to change under consumer pressure.³

The Committee considers that the strength of s51AC is that it applies to 'conduct' that is unconscionable, and is able to cover both substantive and procedural unfairness. As a result, it is flexible enough to consider whether a specific contractual term is, in all the circumstances, unconscionable. The per se prohibition of specific contractual terms (or entire contracts) would impose restraints on business which would not necessarily be to the benefit of consumers in all circumstances, or indeed, prevent their being treated unconscionably. In the Committee's view, the current approach, which lists types of conduct likely to indicate unconscionable conduct as matters for consideration by the Court in 'all the circumstances', should be retained.

(b) Inclusion of misuse of market power as a matter for consideration

One of the reasons that the Reid Committee recommended the introduction of s51AC was that s46 was seen to be beyond the reach of small business.⁴ As a result, the factors for consideration under s51AC(3) and (4) already include matters which would also indicate a misuse of market power.⁵ In the Committee's view, specific reference to 'misuse of market power' as a matter for consideration under s51AC(3) and (4) would be superfluous.

1.2 ACA Submission

The ACA has submitted that s51AC is insufficient, and that harsh and unfair contract terms need to be addressed more directly, and in a way that facilitates action by the ACCC at a general or systemic level. It has submitted that a new Part entitled "Unfair Terms" should be inserted into the Act, modelled on the UK Unfair Terms in Consumer Contracts Regulations (1999) (*the UK Regulations*).

(a) The UK Regulations: background

Importantly, the UK Regulations only apply to standard terms (that is, terms that have not been individually negotiated) in consumer transactions.⁶ Terms that are not covered by the UK Regulations include:

- core terms, that is terms which set the price and terms which define the product being acquired or supplied;
- terms which reflect the law;
- specially negotiated terms;
- terms in business to business agreements;
- terms in sales by private individuals; and

3 Michael J. Trebilcock, *The limits of freedom of contract*, Cambridge, Mass, Harvard University Press, 1993, at 119

⁴ In particular, it focussed on the position of small business retailers as against that of shopping centre owners, who might not be in a position of substantial market power.

⁵ See Philip Tucker, "Too much Concern Too Soon? Rationalising the Elements of Section 51AC of the Trade Practices Act" (2001) 17 JCL 120 at 146

⁶ "Consumer" is defined in cl 3(1) as an individual who is not acting for the purposes of his or her business or profession.

- terms in non-consumer contracts such as employment contracts, agreements dealing with succession rights, family law, etc.

For the purposes of the UK Regulations, a contractual term is regarded as unfair if:

*“contrary to the requirements of good faith, it causes a significant imbalance in the parties’ rights and obligations, to the detriment of the consumer.”*⁷

Unfair terms are not binding on the consumer, however, the contract will continue to bind the parties if it is capable of continuing in existence without the unfair term.⁸

For the individual consumer, the UK Regulations mean that if a business refuses to accept that a term is unfair, the consumer can ask for the help of the court. In addition, the Director General of Fair Trading (and other qualifying bodies listed in the Regulations) has enforcement powers under the UK Regulations. Although the Director General of Fair Trading cannot take up consumers’ individual cases for them, it is under a positive duty to consider complaints in relation to unfair terms, and to provide reasons for taking or declining to take action.⁹ Ultimately however, only the courts can finally decide whether a term is or is not unfair.

In practice, the Office of Fair Trading issues information and advice concerning the operation of the UK Regulations. This includes guidance arranged according to categories of unfair term listed in Schedule 2 to the UK Regulations, using examples of unfair terms from cases it has considered and providing examples of how those terms have been amended. While these do not have statutory force or effect, they are indicative of the approach the Office of Fair Trading is likely to take with respect to standard form contract terms which are notified to it.

(b) Incorporation of UK Regulations

In the Committee’s view, s51AC has not been given sufficient opportunity to operate and build up precedent to decide that it is necessary to supplement it with additional provisions based on the UK Regulations. Further, as the UK Regulations only relate to consumer contracts, the Committee would be reluctant to see these sorts of provisions extended to business transactions.

Moreover, implementation of provisions like the UK Regulations would involve a major shift in the operation of the Act, and would have implications for a wide range of parties, both business and community based. In addition, it would have enormous implications for the ACCC (and ASIC) in terms of funding and staffing. It should be noted that the Office of Fair Trading has an Unfair Contract Terms Unit whose staff deal solely with complaints relating to the UK Regulations, and input is required from the Legal Advisers to the Director General who assist the Unfair Contract Terms Unit in their dealings with companies which are the subject of consumer complaints.

⁷ UK Regulations, cl 5(1)

⁸ UK Regulations, cl 8(1) and 8(2)

⁹ UK Regulations, cl 10

The Committee is concerned that as the proposed amendments do not fall squarely within the scope of the Dawson Committee's terms of reference, relevant stakeholders have not had the opportunity to contribute to the debate.

1.3 Access to the courts and dispute resolution procedures

The Committee does recognise that there are problems with access regarding the current provisions. Although the ACCC have received specific funding to be used to bring proceedings under s51AC,¹⁰ and they have in fact done so successfully on two occasions,¹¹ there is a good argument that it needs to be easier for private parties to initiate proceedings. The ACCC, quite correctly, only initiates proceedings in matters with broad community impact. This means that unconscionable conduct that only affects individuals or small segments of the community, is unlikely to become the subject of an ACCC action.

Better access to courts and other dispute resolution processes is needed to ensure that the unconscionable conduct provisions are, in practical terms, able to protect the interests of these individuals and groups and, moreover, able to be applied in a wide range of cases. In the Committee's view, while ss51AA-AC clearly need to build up greater precedent to operate effectively, this may be achieved quite quickly. Hence, as stated earlier, it should be worth waiting to see if this is effective.

As Carter and Harland have pointed out, there is scope within the Act to enable injunctions to be sought to restrain unconscionable conduct by a corporation in general, and not just in relation to a specific party.¹² Injunctions can be sought pursuant to s80 by the Minister, the ACCC or 'any other person'. Further, in New South Wales, the *Contracts Review Act NSW (1980)* provides a mechanism for review of unfair contract terms, and empowers the Courts to grant general orders, prescribing the terms on which a person may enter into contracts of a specified class where 'a person has embarked, or is likely to embark, on a course of conduct leading to the formation of unjust contracts'. Indeed, in *Minister for Consumer Affairs v WW Vallack Real Estate Pty Ltd*,¹³ this provision was used to allow the Court to order that a real estate agent not use a particular term in its standard form agency contract with vendor clients in the future.

1.4 Recommendation

Ultimately, the Committee considers that determination of whether a corporation's conduct is unconscionable should remain with the Courts. The Committee's view is that the Dawson Committee should not recommend the introduction of outright bans on specific types of unfair contractual terms in the unconscionable conduct provisions, nor should misuse of market power be listed as one of the matters for consideration under s51AC.

The Committee has no objection, in principle, to greater attention being paid to unfair standard contract terms in dealings between businesses and consumers, however in the

¹⁰ Refer to ACCC Media Release, "ACCC acts against landlord for alleged unconscionable conduct", 4 February 1999.

¹¹ *ACCC v Leelee Pty Ltd* (2000) ATPR 41-742, and *ACCC v Simply No Knead (Franchising) Pty Ltd* 178 ALR 304

¹² JW Carter and DJ Harland, "Contract Law in Australia", Butterworths, 2002, at 549

¹³ (1986) ASC 55-478

Committee's view, the current unconscionable conduct provisions have been given inadequate opportunity to achieve this end. The proposal by the ACA to incorporate provisions along the lines of the UK Regulations into the Act would have far reaching consequences, and would need to be considered by a range of interested parties. If the Dawson Committee considers that a review of s51AC or Part IVA is necessary, this should be the subject of a separate inquiry, perhaps in 12 months time, to give the Courts adequate opportunity to clarify the existing provisions, and to give all interested parties adequate opportunity to contribute.