

# UNCONSCIONABLE CONDUCT

## An evolving moral judgement

By Julie Clarke



**Statutory unconscionable conduct has been a controversial component of Australia's consumer laws since well before the first provision was introduced in 1986. Nevertheless, it has survived numerous reviews and has expanded beyond its early focus on consumers to provide small business – and, more recently, any business other than a listed company – statutory protection against unconscionable conduct occurring in trade or commerce.**

**W**hile the introduction of the Australian Consumer Law (ACL) has achieved the key benefit of harmonising federal, state and territory unconscionable conduct laws, it has also significantly expanded the range of penalties and remedies open to regulators and persons affected by contraventions of the law and will improve access to local courts and tribunals.

Its introduction did not, however, bring with it any significant change to the substance of the unconscionable conduct laws. The key change was to introduce a clarification to the list of factors a court may consider in the context of business-to-business unconscionable conduct to ensure, in particular, that substantive matters and post-contractual conduct can be considered when assessing whether a contravention has occurred.

More significant change will occur when the Competition and Consumer Legislation Amendment Bill 2011 is passed, interpretative principles are incorporated into the statutory prohibition, and the now redundant distinction between consumer and small business statutory unconscionable conduct is removed through the consolidation of the provision. These are measured and appropriate changes to clarify legislative intent and ensure consistency of application between consumer and business-to-business transactions.

**KEY CONTROVERSIES**

The key controversies surrounding the development of statutory unconscionable conduct laws in Australia have included:

- whether to incorporate statutory protection against unconscionable conduct at all and, if so, whether it should extend beyond consumers to include business-to-business transactions; and
- whether 'unconscionable conduct' should be defined in some way and, if so, how widely that definition should extend.

The first controversy was largely resolved prior to the introduction of the ACL in favour of extending protection to all business, other than publicly listed companies. The


second controversy remains the subject of debate and was not addressed when the ACL was introduced. Recent reviews have, however, rejected proposals to define unconscionable conduct, instead recommending the inclusion of more modest, but nonetheless superior, interpretative principles to ensure that future judicial interpretation of the law is not confined to traditional equitable and common law notions of unconscionability. This recommendation will form part of reforms to the ACL's statutory unconscionable conduct laws proposed for 2011.

This article discusses the changes to unconscionable conduct laws brought about by the ACL, the proposals for further change in 2011/2012, and the debate that has led to these reforms.

**HISTORY**

No statutory prohibition on unconscionable conduct appeared in the original *Trade Practices Act 1974* (TPA). Inclusion of an unconscionable conduct provision was first recommended by the Swanson Committee in 1976,<sup>1</sup> but it was not until 1986 that the first iteration of a statutory prohibition on unconscionable conduct was introduced. Section 52A (later renumbered s51AB) prohibited unconscionable conduct in consumer transactions and provided a list of factors a court could consider when assessing whether or not conduct should be deemed unconscionable for purposes of the provision. >>

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**PAYMENT ON RESOLUTION**

The ACL has achieved the key benefit of harmonising federal, state and territory unconscionable conduct laws and significantly increased the penalties and remedies available to regulators and consumers.

This was supplemented by the introduction of s51AA in 1992, which entrenched into statute the equitable doctrine of unconscionable conduct, which the courts have resolved to mean the equitable doctrine relating to unconscionable dealings involving the taking advantage by one party of a special disability held by another.<sup>2</sup> The primary benefit of the statutory provision is that it extends the range of remedies available to parties affected by unconscionable conduct by giving them access to those available under the Act.

Following recommendations in the Reid Report that small business should have the benefit of specific statutory protection from unconscionable conduct,<sup>3</sup> s51AC was introduced in 1997. Initially, s51AC was limited to small business transactions by means of a transactional limit of \$1 million. This limit rose to \$3 million and then \$10 million before being removed altogether in 2008.

In 1998, the prohibition on unconscionable conduct in relation to financial services was removed from the TPA<sup>4</sup> and now forms part of the *Australian Securities and Investments Commission Act 2001*.<sup>5</sup>

**AUSTRALIAN CONSUMER LAW**

All three statutory prohibitions survived the introduction of the ACL without significant amendment. Sections

51AA, 51AB and 51AC were re-numbered ss20, 21 and 22 respectively and are contained in Part 2-2 of the ACL. References to 'corporation' have been replaced with 'person', so that the ACL as either Commonwealth law (which is still restricted primarily to corporations) or state and territory law (which extends to unincorporated persons as well) now has universal application if certain pre-conditions are met.

The key substantive change brought about by the ACL was the inclusion of a new s22(2)(j). This is designed to clarify the operation of the business unconscionable conduct provision by making clear that substantive matters, such as the terms and conditions of the contract as well as procedural matters, both before and after conclusion of a contract, can be considered relevant when determining if conduct is unconscionable.<sup>6</sup> Section 22(2)(j) provides:

'if there is a contract between the acquirer and the small business supplier for the acquisition of the goods or services:

- (i) the extent to which the acquirer was willing to negotiate the terms and conditions of the contract with the small business supplier; and
- (ii) the terms and conditions of the contract; and
- (iii) the conduct of the acquirer and the small business supplier in complying with the terms and conditions of the contract; and
- (iv) any conduct that the acquirer or the small business supplier engaged in, in connection with their commercial relationship, after they entered into the contract; ...'

However, the more significant change was structural. The statutory prohibitions on unconscionable conduct now apply uniformly at the federal level and throughout the states and territories. As a result of this harmonisation, consumers and small business, in particular, will benefit from greater access to local courts and tribunals when seeking redress for unconscionable conduct. The ACL has been facilitated through application laws in the states and territories and by the repeal of generic unconscionable conduct laws where they existed at those levels. Some states and territories

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have, however, retained industry-specific regimes which incorporate unconscionable conduct provisions, particularly in relation to retail leases. These will operate in parallel with the ACL.

In addition to the substantive and structural changes brought about by the ACL, a broader range of penalties and remedies are now available. Importantly, parties found to have contravened one of the statutory provisions will be subject to civil pecuniary penalties of up to \$1.1 million for bodies corporate or \$220,000 for other persons.<sup>7</sup>

In addition, regulators have a raft of options available, including the power to:

- seek a single order for redress on behalf of non-parties;<sup>8</sup>
- accept undertakings;<sup>9</sup>
- seek orders disqualifying individuals who engage in unconscionable conduct from managing corporations;<sup>10</sup>
- apply to the court for adverse publicity orders;<sup>11</sup>
- issue public warning notices;<sup>12</sup>
- issue substantiation notices;<sup>13</sup> and
- issue infringement notices imposing penalty units of up to 600 penalty units for a listed corporation.

Additionally, private parties or regulators may seek damages,<sup>14</sup> compensation orders,<sup>15</sup> injunctions<sup>16</sup> or other non-punitive orders,<sup>17</sup> which may include, for example, orders for community service.

**REVIEWS AND PROPOSALS FOR FUTURE REFORM**

Concerns about narrow judicial interpretation of ss51AB and 51AC have prompted several reviews of the statutory unconscionable conduct provisions in recent years. The focus has been consideration of whether the Act should include a definition of unconscionable conduct and whether a list of examples should be inserted, which would operate as statutory presumptions of unconscionability.

**A definition of unconscionable conduct**

The proposal for a definition was considered by the Senate Economics Committee in its December 2008 report, 'The need, scope and content of a definition of unconscionable conduct for the purposes of Part IVA of the *Trade Practices Act 1974*'. The committee expressed reservations about the development of a definition and, instead, recommended amending s51AC of the TPA to make clear that prohibited conduct can include the 'terms or progress of a contract'. This recommendation was accepted and was implemented with the insertion of s22(2)(j) of the ACL (above).

**A list of examples**

The proposal for a list of examples was referred by the government to a 'panel of experts', which reported in February 2010, following a period of public consultation.<sup>18</sup> The expert panel rejected inclusion of a list of examples, particularly one that would create presumptions, for several reasons, including that:

- it would be 'a significant regulatory shift to require business to prove their actions were not unconscionable';<sup>19</sup>
- the list may not be sufficiently comprehensive and not address the nuances of particular industries (in this respect,

'what may be unconscionable in one industry may not be unconscionable in another');<sup>20</sup>

- the list would not remain current or be sufficiently flexible to adopt to change in communities understanding and expectation of what is 'unconscionable'; and
- a list would limit judicial development of the provisions (in this respect, the expert panel noted the 'judicial tendency to reading examples as though they limit the scope of the provisions they exemplify').<sup>21</sup>


**Interpretative principles and harmonisation**

The expert panel did, however, recommend that a set of interpretative principles be added to the Act to aid interpretation of the provision. In particular, the principles should recognise that ss51AB and 51AC are intended to go beyond the scope of equitable and common-law doctrines of unconscionability. They also recommended that the government consider 'harmonising or unifying ss51AB and 51AC'.

It concluded:

'...an interpretative statement of principles, improved uniform national guidance on statutory unconscionable conduct, the bringing of further test cases, and harmonised consumer and business provisions, would be meaningful and targeted reforms, which would appropriately be adopted at this time in conjunction with the introduction of the ACL.'<sup>22</sup>

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These recommendations were accepted by government and were first introduced into Parliament in the Competition and Consumer Legislation Amendment Bill 2010. This Bill passed through the House of Representatives and, in June 2010, the Senate Economics Legislation Committee recommended that the Senate pass the bill. Unfortunately, the bill lapsed when the federal election was called, with the result that these amendments did not form part of the ACL when it took full effect on 1 January 2011.

The bill has now been reintroduced as the Competition and Consumer Legislation Amendment Bill 2011 and is in substantially the same terms. If passed, it will give effect to the expert panel's call for the following three interpretative principles:

- that the law is not limited to equitable or common law doctrines of unconscionability;
- that the prohibition applies to systematic conduct or patterns of behaviour and does not require proof that the behaviour resulted in a the disadvantage of any individual; and
- that courts can examine contractual terms and the manner and extent to which the contract is carried out.<sup>23</sup>

The bill also adopts the expert panel's recommendation that ss51AB and 51AC (now ss21 and 22) be consolidated to remove the distinction between business and consumer transactions. The consolidation of these provisions is important to ensure that the interpretation in the consumer and business context remains consistent. As Craig Emerson MP (then Minister for Competition Policy and Consumer Affairs) noted, in his second reading speech for the 2010 Bill, this amendment 'will eliminate the potential that the concept of unconscionable conduct in the two existing provisions could diverge, through a false assumption that the existence of two provisions signals a distinction which does not in fact exist'.<sup>24</sup>

The prohibition will now be contained in s21 and the list of matters the court may have regard to for the purposes of the prohibition will be contained in s22.

### ANALYSIS

Despite an increasing body of case law dealing with statutory unconscionable conduct, a clear definition of the concept of unconscionable conduct remains elusive.<sup>25</sup> Some have suggested that this lack of definition has hindered its development and have expressed disappointment that it has not enjoyed the success of some other provisions, most notably s52 of the TPA (now s18 of the ACL).

This is, however, neither surprising nor disappointing.

While 'misleading conduct' is a relatively well-understood and uncontroversial concept, 'unconscionable conduct' is by its nature ill-defined and dependent for meaning on community standards of morality in business dealings.

Misleading conduct is a readily understood and largely uncontroversial concept. There is wide community acceptance of the right to honesty in relation to promotional materials, such as advertisements, or where specific representations are made in relation to products or services being acquired and supplied. There is also wide support for the view that liability for misrepresentation should exist regardless of the knowledge or intention of the representor.

This is, at least in part, because it is conceptually simple and fair to require a party to ensure that what it says, or implies, is true or to qualify any statements made where it lacks the knowledge needed to avoid conveying a false impression.

Unconscionable conduct, on the other hand, is by its nature ill-defined and dependent for meaning on community standards of morality in business dealings. The full Federal Court observed, in *Hurley v*

*McDonalds Australia Ltd* [1999] FCA 1393 [at 22], that:

'For conduct to be regarded as unconscionable, serious misconduct or something *clearly unfair or unreasonable*, must be demonstrated ... Whatever "unconscionable" means in sections 51AB and 51AC, the term carries the meaning given by the Shorter Oxford English Dictionary, namely, actions *showing no regard for conscience*, or that are *irreconcilable with what is right or reasonable* ... The various synonyms used in relation to the term "unconscionable" import a *pejorative moral judgement* ...' [emphasis in original]

Similarly, in *Attorney General of New South Wales v World Best Holdings Limited & Ors* [2005] NSWCA 261 the court observed, in the context of retail tenancy [at 121] that:

'Unconscionability is a concept which requires a high level of moral obloquy. If it were to be applied as if it were equivalent to what was "fair" or "just", it could transform commercial relationships ... The principle of "unconscionability" would not be a doctrine of occasional application, when the circumstances are highly unethical, it would be transformed into the first and easiest port of call ...'

While it is clear that employing heavy-handed bullying tactics when negotiating contractual terms should attract censure because they are 'clearly unfair or unreasonable' and show 'no regard of conscience', community opinion about whether a stronger party ought to be able to exploit its superior bargaining position to extract more favourable terms is likely to be divided. Commercial dealings in a market economy involve each party seeking to achieve

outcomes that are favourable to themselves; indeed, many of the benefits to be derived from competition, also promoted by the *Competition and Consumer Act 2010*, derive from them doing so.

As a result, *merely* using one's superior bargaining power to secure a favourable agreement is not seen as inherently unfair or unreasonable or lacking in good conscience, but in many instances is to be applauded as a driver of productive and allocative efficiency.

The requirement for moral judgement<sup>26</sup> clearly distinguishes unconscionable conduct from many other consumer protection provisions which neither require nor necessarily infer moral opprobrium. In this respect, Clapperton has observed that unconscionable conduct:

'is a term, necessarily pejorative, which denotes conduct beyond the pale. It carries with it a degree of judicial and societal condemnation of the conduct so labelled.

It would be wrong ... to put people who ... have driven excessively hard bargains in the same basket with the bullies, thugs, and blackmailers who have featured in some of the decided cases.'<sup>27</sup>

The statutory concept of unconscionable conduct therefore necessitates some flexibility, so that it may develop and respond to changes in moral norms, both between industries at any given time and, more generally, as conceptions of business morality justifying judicial condemnation evolve.

The recommendations of the expert panel, to be implemented later this year, strike an appropriate balance between ensuring that judicial interpretation of statutory unconscionable conduct is not curtailed by reference to equitable doctrines, while permitting judicial development and flexibility for a concept inextricably linked to evolving community values of fairness and morality in commercial dealings. ■

This article has been peer-reviewed in line with standard academic practice.

**Notes:** **1** Trade Practices Act Review Committee, Report to the Minister for Small Business and Consumer Affairs (1976) (Swanson Committee Report) para 9.59. **2** Initially it was thought that the concept of unconscionability might extend beyond the general law of unconscionability to undue influence and duress (see French J in *ACCC v CG Berbatis Holdings Pty Ltd* (1999) 95 FCR 292). However, it now seems clear it does not extend that far. **3** House of Representatives Standing Committee on Industry, Science and Technology, *Finding A Balance – Towards Fair Trading in Australia* (1997) (Reid Report). For a full history of the early development of statutory unconscionable conduct in Australia, see Michelle Sharpe and Christine Parker, 'A bang or a whimper? The impact of ACCC unconscionable conduct enforcement' (2007) 15 *TPLJ* 139 at 140-2. **4** *Financial Sector Reform (Consequential Amendments) Act 1998* (Cth). **5** In 1998, consumer protection provisions relating to financial services were transferred to the *Australian Securities and Investments Commission Act 1989* (Cth) (now the *Australian Securities and Investments Commission Act 2001* (Cth)) (*ASIC Act*) to enable the Australian Securities and Investments Commission (ASIC) to provide all regulation in relation to financial services. The *ASIC Act* provides equivalent unconscionable conduct provisions in relation to such financial services, and ASIC's powers are equivalent to those of the ACCC for purposes of unconscionable

conduct. **6** This gave effect to the first recommendation of the Senate Standing Committee on Economics' Report, *Inquiry into the Statutory Definition of Unconscionable Conduct* (3 December 2008) ('Senate Committee Report 2008'). **7** ACL, s224. **8** ACL, Part 5-2, Division 4, Subdivision B. **9** ACL, Part 5-1, Division 1. **10** ACL, s 248. **11** ACL, s247. **12** ACL, Part 5-1, Division 3. **13** ACL, Part 5-1, Division 2. **14** ACL, s236. **15** ACL, Part 5-2, Division 4. **16** ACL, Part 5-2, Division 2. **17** ACL, s246. **18** *Strengthening Statutory Unconscionable Conduct and the Franchising Code of Conduct*, Report to the Hon Dr Craig Emerson MP, (February 2010) ('Expert Panel Report'). **19** *Ibid*, at 24. **20** *Ibid* 25. See, also, Mr Stephen Ridgeway and Mr Dave Poddar, *Proof Committee Hansard*, 9 June 2010, p14 (evidence given as part of the Senate Economics Committee Inquiry into the 2010 Bill). **21** Expert Panel Report, above n18, 17. **22** *Ibid*, 39. **23** These principles will form a new s21(4) of the ACL. **24** House of Representatives, *Hansard*, Thursday 27 May 2010, 4361. **25** See, for example, Peter Strickland, 'Rethinking unconscionable conduct under the *Trade Practices Act*' (2009) 37 *ABLR* 19 at 20. **26** See also, for example, *ACCC v 4WD Systems Pty Ltd* (2003) 59 IPR 435, *Australian Competition & Consumer Commission v Allphones Retail Pty Ltd (No. 2)* [2009] FCA 17 and *Body Bronze International Pty Ltd v Fehcorp Pty Ltd* [2011] VSCA 196. **27** Dale Clapperton, Submission to the Senate Economics Committee Inquiry on the *Definition of Unconscionable Conduct for the Purposes of Part IVA of the Trade Practices Act 1974* (Cth) (17 October 2008).

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