

# Unconscionable conduct and the Trade Practices Act



The following is a commentary by Leela Underwood on the article by Commissioner Sitesh Bhojani entitled 'Unconscionable conduct — new boundaries for commercial dealings', which appeared in ACCC Journal No. 19,

February 1999. Leela works in the Competition and Regulatory Group at Gilbert and Tobin, Sydney. At the time this article was written she was working as a trade practices lawyer with Freehill Hollingdale and Page, Melbourne. The views expressed in this article are those of the author only.

## Introduction

As is well known, the doctrine of unconscionable conduct existed well before any of the provisions of the *Trade Practices Act 1974* were enacted. In fact, the courts have long been concerned to protect those at a special disadvantage or special disability from deliberate or reckless exploitation at the hands of a stronger party.

It is therefore questionable to what extent the statutory intervention has been necessary given that the courts still have the power to deal with unconscionable conduct outside of the statutory provisions. Whatever the reasoning behind the need for these provisions, it would appear that they have been enacted to encourage the courts to extend the circumstances in which unconscionable conduct may be found.

Since 1974 the *Trade Practices Act* has been used as an important tool to protect consumer

and business interests and has been looked upon as the principal consumer protection legislation.

In October 1985, in an attempt to provide greater protection to consumers, the then Attorney-General, the Hon. Lionel Bowen MP, presented the *Trade Practices Amendment Act 1985* to Parliament which proposed the insertion of s. 52A into Part V of the *Trade Practices Act*. Section 52A contains a general prohibition on unconscionable conduct in relation to consumer transactions and was incorporated into the *Trade Practices Act* in 1986.

Two further series of amendments have been made (under two different Governments) to extend the reach of the unconscionable conduct provisions of the *Trade Practices Act*.

In his article 'Unconscionable conduct — new boundaries for commercial dealings',<sup>1</sup> Commissioner Bhojani provided an overview of the 1993 amendment to the *Trade Practices Act*, which resulted in the insertion of Part IVA (and s. 51AA, which deals with unconscionable conduct in commercial transactions)<sup>2</sup> into the *Trade Practices Act*.<sup>3</sup>

It would seem that this amendment was not seen as offering sufficient protection to small business because, after considerable debate, in 1998 Part IVA of the *Trade Practices Act* was amended yet again. This time, as a result of the *Trade Practices Amendment (Fair Trading) Act 1998*, which came into force on 1 July 1998, s. 51AC, aimed at protecting small business from unconscionable business conduct, was inserted into the *Trade Practices Act*. In addition, Part IVB (and s. 51AD), dealing with industry codes of conduct, was also inserted into the Act.

This article comments on some of the problems which surround s. 51AC of the *Trade Practices Act*.

## Section 51AC — an extension of the common law doctrine of unconscionability?

### Greater protection for small business ... or greater uncertainty?

The Explanatory Memorandum to the Trade Practices Amendment (Fair Trading) Act 1997 makes it clear that the purpose and intent of s. 51AC was to cover small business.

Commissioner Bhojani states that s. 51AC:

will prohibit the stronger party exploiting its bargaining advantage to impose contractual terms, or engage in conduct, that is in all the circumstances unconscionable ...<sup>4</sup>

However, such conduct is already prohibited under the common law and, given that the Trade Practices Act does not define 'unconscionable conduct', it will still be necessary to take into account the established judicial interpretation of the term 'unconscionable' in determining whether particular conduct contravenes s. 51AC.

Commissioner Bhojani refers in his article to the Second Reading Speech for the Trade Practices Amendment (Fair Trading) Act 1998, in which the Hon. Peter Reith MP, Minister for Workplace Relations and Small Business, stated that the expression 'unconscionable conduct' has been used in s. 51AC to:

build on the existing body of case law ... which will provide greater certainty to small businesses in assessing their legal rights and remedies.<sup>5</sup>

However, at the present time, for reasons which will be discussed below, such is not the case. In practice the section has given rise to a great deal of uncertainty. Indeed, it is interesting to note that only a few weeks after the section came into effect the Commonwealth Government issued a Ministerial Direction to the ACCC directing it to run a test case, as soon as practicable, for the purpose of establishing legal precedent under s. 51AC.<sup>6</sup> In addition the Commonwealth Government has allocated separate funding to the ACCC for the specific purpose of running such a test case.

### Matters the court may consider — how will they apply?

In his article Commissioner Bhojani states that s. 51AC includes a 'shopping list' of matters which the court can take into account in determining whether or not there is a contravention of the Trade Practices Act.<sup>7</sup> This 'shopping list' is set out in sub-ss 51AC(3) and (4), which state that among the matters which the court may consider are the following.

#### ■ Consistent conduct

That is, whether a supplier's conduct in dealing with a customer was consistent with its conduct in similar transactions with other customers.

#### ■ Compliance with industry codes

In other words, whether the requirements of any applicable industry code with which the customer reasonably expected the supplier would comply, have been complied with.

#### ■ Disclosure of any risks

Namely, whether the supplier disclosed to the customer any intended conduct which might affect its customer's interests, and any risks arising from its intended conduct which the supplier should have foreseen and would not have been apparent to the customer.

#### ■ Use of standard terms and conditions

That is, the extent to which the supplier was willing to negotiate special terms or conditions with the customer.

#### ■ Acting in good faith

That is, whether the parties acted 'in good faith'.

At the present time it is not clear how these matters will be applied or what weight will be given to each factor. Indeed, given the inclusion of the phrase 'in all the circumstances' in s. 51AC(3), it seems unclear why these matters have been listed at all, or what purpose they serve, other than perhaps to encourage a 'watering down' of the circumstances in which unconscionable conduct may be found. By way of example, the factors listed in sub-ss 51AC(3) and (4) relate more to business conduct which is 'unfair' than to conduct which is 'unconscionable' and which would require the presence of some special disadvantage or disability.