
Policy developments

The following article, prepared by David Johnson, of the Commission's Legal Unit, outlines the new provision in the Trade Practices Act prohibiting unconscionable conduct in relation to business transactions.

Unconscionable conduct under s. 51AC

On 30 September 1997, in the New Deal: Fair Deal package announced by the Minister for Workplace Relations and Small Business, the Hon Peter Reith MP, the Government made a commitment to induce behavioural change on the part of big business toward smaller business, and to provide small businesses with an adequate means of redress against unconscionable conduct.

In line with this commitment, the *Trade Practices Amendment (Fair Trading) Act 1998* was assented to on 22 April 1998 and came into operation on 1 July 1998. That Act inserted s. 51AC into the Trade Practices Act.

This new provision is intended to increase the substantive legal remedies available to small business subject to unconscionable conduct. It prohibits unconscionable conduct, by a corporation or a person, in connection with the supply or acquisition of goods or services in trade or commerce.

Intent of s. 51AC

By enacting the amending legislation the Government has accepted the principle that small businesses are entitled to a level of protection against unconscionable conduct that has been available to consumers since 1986. Accordingly, the new provision mirrors the legal rights available to consumers in s. 51AB and incorporates a range of additional matters, thus extending the common law doctrine of

unconscionability expressed in s. 51AA, which deals with commercial transactions.

Noticeable differences between s. 51AC and the other unconscionable conduct provisions of the Act (ss 51AA and 51AB) are that s. 51AC:

- also prohibits unconscionable conduct by a person;
- also prohibits unconscionable conduct in the acquisition or possible acquisition of goods and services;
- sets a monetary threshold of \$1 million which the supply or acquisition of goods or services must not exceed; and
- is not applicable to a listed public company.

Section 51AC also differs from s. 51AB in that it is not limited to goods or services of a kind ordinarily acquired for personal, domestic or household use or consumption or those not acquired either for resupply or for the purpose of using them up or transforming them in trade or commerce.

Scope of s. 51AC

'Unconscionable conduct' is not defined in the Act and s. 51AC has not yet been tested in a court. Nevertheless, for conduct to fall within s. 51AC, one party must take advantage of another party to obtain or maintain a benefit, **when in all the circumstances it is against good conscience** to do so. This is an extremely broad proposition and necessarily so. There can be no precisely defined limits to the doctrine of unconscionability. Each case depends upon its particular facts and the criteria to be applied will depend upon all the circumstances.

However, s. 51AC does not extend so far as to protect a party from a transaction that is merely unfair or unreasonable. Unconscionable conduct is concerned with an inability to protect one's interests, not simply an inability to get what one wants.

Section 51AC enumerates 11 factors to which a court **may** have regard in determining whether particular conduct is unconscionable. When determining what amounts to unconscionable conduct the courts may or may not have regard to a factor when exercising their discretion and are free to consider other factors that are not listed. The mere presence of a factor is not enough to establish liability under s. 51AC. Further, if the courts do have regard to any of the factors, it is unlikely that satisfying any one factor in itself would be sufficient to amount to a breach of s. 51AC. It is even possible to envisage conduct that may satisfy a number of factors and not amount to unconscionable conduct as proscribed by s. 51AC.

The first five factors are the same as those listed in s. 51AB. The other six introduce a range of new commercial circumstances. Briefly, the factors are:

- the relative bargaining strengths of the parties;
- whether, as a result of the stronger party's conduct, the other party was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the stronger party;
- the small business' degree of understanding of any documents;
- whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the small business in relation to the supply or possible supply of the goods or services;
- the amount for which, and the circumstances under which, the small business could have acquired or supplied identical or equivalent goods or services from another person;
- the extent to which the stronger party's conduct toward the small business was consistent with its conduct in similar transactions with other small businesses;
- the requirements of any applicable industry code, or any other code if the small business acted in the reasonable belief that the stronger party would comply with that code;
- the extent to which the stronger party unreasonably failed to disclose to the small business:

- any intended conduct that might affect the interests of the small business; and
- any risks to the small business arising from the stronger party's intended conduct (being risks that the stronger party should have foreseen would not be apparent to the small business);
- the extent to which the stronger party was willing to negotiate the terms and conditions of any contract for supply or acquisition of the goods or services with the small business; and
- the extent to which each party acted in good faith.

Remedies

The unconscionable conduct provisions in the Act are in addition to and do not affect an individual's right to seek redress under common law. Actions under s. 51AC must be commenced within two years of the contravention. Remedies available to a party taking its own action under s. 51AC include injunctions, damages where loss or damage is suffered by the actions of another, compensation, declaring a contract void in whole or in part, varying a contract or arrangement, refusal to enforce all or part of a contract, a refund of money or return of property, repairing or providing parts for goods, requiring services to be performed again, and executing an instrument that varies or terminates an interest creating or transferring an interest in land. The Commission can take either administrative action (such as enforceable undertakings) or court action. In addition to the remedies available to a private litigant, the Commission can seek orders for corrective advertising or orders to prevent the dissipation of property or money.

Commission action

The Government has specifically provided the Commission with funds to initiate legal proceedings in actions based upon alleged contraventions of s. 51AC for the purpose, among others, of establishing legal precedent under s. 51AC on matters of specific relevance to small business.

Consistent with that direction, the Commission will continue to select matters for investigation

and possible legal proceedings in relation to potential contraventions of s. 51AC based on its current selection criteria. In addition to the opportunity to test the law, the Commission will have regard to whether or not the conduct involves:

- an apparent blatant disregard of the law;
- significant small business detriment;
- the potential to have a worthwhile educative or deterrent effect;
- a situation where the party complained about has not been diligent in implementing effective compliance systems; or
- a significant new market, such as one arising from economic or technological change.

It is important for businesses to seek professional advice about how s. 51AC may apply to their particular circumstances. The relevance of any of the issues discussed above may vary with the circumstances.

(See Guidance and information, New publications).