

# Landlords and Tenants Behaving Badly? The Application of Unconscionable and Unfair Conduct to Commercial Leases in Australia and the United Kingdom

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*This paper compares the approach of Australia and the United Kingdom to the use of unconscionable conduct principles in the area of commercial leasing. The objectives are to trace the process by which unconscionable conduct principles came to be included in the Australian retail tenancies legislation, examine the subsequent case-law in order to assess the difficulties in applying the principles to retail leases and determine the impact of the provisions on the attitude of the parties to the negotiation. The article will then discuss the approach adopted in the United Kingdom to unconscionable and unfair bargains in the area of retail leasing.*

COMMERCIAL tenancy legislation in Australia and the United Kingdom differ on a variety of levels. Since 1984, Australia has legislated heavily in the area of retail leases granted to smaller business tenants.<sup>1</sup> Although this legislation varies across the States and Territories, it has a number of similar characteristics. Not only does it prescribe certain lease terms within the contract and outlaw others, it also attempts to control the process by which leases are negotiated by the imposition of information and disclosure requirements. Another important part of the legislation provides for low cost mediation in order to attempt to resolve disputes before they involve expensive court hearings.

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1. Leases (Commercial and Retail) Act 2001(ACT); Retail Leases Act 1994 (NSW); Business Tenancies (Fair Dealings) Act 2003 (NT); Retail Shop Leases Act 1994 (Qld); Retail and Commercial Leases Act 1995 (SA); Fair Trading (Code of Practice for Retail Tenancies) Regulations 1998(Tas); Retail Leases Act 2003 (Vic); Commercial Tenancy (Retail Shops) Agreements Act 1985 (WA).

This legislation is augmented by provisions relating to unconscionable conduct originating in the Trade Practices Act 1974 (Cth) ('TPA'). In 1998, section 51AC was inserted into the TPA in order to extend the unconscionable conduct provisions of Part IV of that Act<sup>2</sup> to small business transactions.<sup>3</sup> Commentators were divided on the scope of section 51AC,<sup>4</sup> although most anticipated that the provision would have a significant impact on retail leasing.<sup>5</sup> Such an expectation was encouraged by the incorporation into, or 'drawing down', of provisions equivalent to section 51AC into State and Territory retail tenancy legislation, thus enabling matters involving unconscionable conduct to be heard in State and Territory retail leasing tribunals.<sup>6</sup>

However, despite the availability of these unconscionability provisions, allegations of harsh or unfair conduct within landlord-tenant relationships, particularly those where the premises are in large suburban shopping centres, persist. In response to such concerns there have been numerous governmental inquiries focussing on this issue.<sup>7</sup> Indeed, as recently as June 2007, the Commonwealth government announced a Productivity Commission inquiry into the market for retail leases.<sup>8</sup> Several submissions received at the time of writing focus on the perceived failure of the

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2. Unconscionable conduct is addressed in Part IVA of the Trade Practices Act 1974 (Cth) ('TPA').
  3. Pursuant to ss 51AC(9) and (10), a reference in s 51AC to, respectively, the supply or possible supply of goods or services or to the acquisition or possible acquisition of goods or services does not include a reference to such supply or acquisition which exceeds \$3,000,000. Amendments before the Commonwealth parliament at the time of writing are likely to increase this sum to \$10,000,000 Trade Practices Legislation Amendment Bill (No. 1) 2007.
  4. SA Christensen & WD Duncan, 'Section 51AC of the Trade Practices Act 1974: An Exocet in Retail Leasing' (1999) 27 ABLR 280; P Tucker, 'Too Much Concern Too Soon? Rationalising the Elements of s 51AC of the Trade Practices Act' (2001) 17 JCL 120. P Tucker, 'Unconscionability: The Hegemony of the Narrow Doctrine under the Trade Practices Act' (2003) 11 TPLJ 78; B Horrigan, 'The Expansion of Fairness-based Business Regulation – Unconscionability, Good Faith and the Law's Informed Conscience' (2004) 32 ABLR 159
  5. Ibid, although particularly note the comments in P Tucker, 'Too Much Concern Too Soon? Rationalising the Elements of s 51AC of the Trade Practices Act' (2001) 17 JCL 120. For more recent discussion of s 51AC's application, see L Browne, 'The Impact of s 51AC of the Trade Practices Act 1974 (Cth) on Commercial Certainty' (2004) 28 MULR 589; S Christensen & W Duncan, 'Unconscionability in Commercial Leasing – Distinguishing a Hard Bargain from Unfair Tactics?' (2005) 13 CCLJ 158; E Webb, 'Ten Years On – A (Reid) Report Card on Retail Leasing' (2006) 13 APLJ 240.
  6. The draw down was initially delayed by Constitutional difficulties. The Trade Practices Amendment Act 2001 (Cth) resolved this matter of concern. The amendments cleared the way for the State and Territory legislatures to pass amendments to their retail tenancy legislation which extends the jurisdiction of the retail tenancy tribunals to consider matters involving unconscionable conduct.
  7. Shopping Centre Council of Australia, *Submission to the Productivity Commission Inquiry* (Jul 2007) 37: 'Since the Reid Report in 1997 there have been 13 successive retail tenancy reviews around Australia: in Victoria, Queensland, NSW, WA, ACT, Northern Territory, Victoria, (again), Tasmania, WA (again), NSW (again), Queensland (again), NSW (again), and Victoria (this time a drafting review).'
  8. Treasurer and Minister for Small Business and Tourism, *Productivity Commission to Examine the Market for Retail Tenancy Leases*, Media Release (19 Jun 2007).

unconscionability provisions to make inroads into allegations of improper landlord behaviour.<sup>9</sup>

The approach in the United Kingdom is very different. Legislation does exist which gives occupational tenants of retail, office and industrial property an extensive right to renew the lease and the process by which the lease is renewed is statutorily controlled. However, there is no attempt to legislate in respect of specific parts of the market such as retail or small business. There is little or no control over lease terms, and there are no mandatory information or disclosure requirements. Relief against unconscionable bargains is only available in very limited areas and these do not include lease contracts. The general law governing unreasonable restraint of trade does not apply to leases. Furthermore, although the Law Commission has recently recommended that the Unfair Terms in Consumer Contracts Regulations 1999 be extended to small businesses, it has suggested that this should not cover land contracts.

This article aims to compare the approach of Australia and the United Kingdom in the use of unconscionable conduct principles in the area of commercial leasing in the small business sector. The objectives are to trace the process by which unconscionable conduct principles came to be included in the Australian retail tenancies legislation, examine the subsequent case-law in order to assess the difficulties in applying the principles to retail lease cases and draw some preliminary conclusions as to the effectiveness of the Australian provisions in influencing commercial landlord and tenant negotiations. The article will then discuss the approach adopted in the United Kingdom to unconscionable and unfair bargains, consider the current attitude to its applicability to business leases and consider whether small business tenants in the United Kingdom could benefit from the adoption of a regime similar to that in Australia.

## THE INTRODUCTION OF UNCONSCIONABLE CONDUCT PRINCIPLES INTO RETAIL LEASING IN AUSTRALIA

Unlike the United Kingdom, in Australia general equitable relief from the consequences of unconscionable conduct is not limited to specific areas. Furthermore, it is given potentially wider application by statute. The medium for this statutory jurisdiction has been the TPA. The possibility of inserting a section into the TPA addressing unconscionable conduct in commercial and consumer transactions was first mooted as early as 1976;<sup>10</sup> however, section 52A, limited to consumer transactions, was not introduced until 1986.<sup>11</sup> In 1992, section 51AA, a

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9. See <[www.pc.gov.au](http://www.pc.gov.au)>. It is anticipated that the final report will be released on 21 December 2007.

10. Trade Practices Act Review Committee ('Swanson Committee'), *Report to the Minister of Business and Consumer Affairs* (Canberra, Aug 1976) [9.96]–[9.97].

11. Section 52A, inserted by Act No 17, 1986. Section 52A was renumbered s 51AB by Trade Practices (Amendment) Act 1992 (Cth), Act No 222, 1992.

provision prohibiting unconscionable conduct within the meaning of the unwritten law of the States and Territories, was inserted into the TPA.<sup>12</sup> It was envisaged that the provision would address unconscionable conduct in commercial transactions.<sup>13</sup> However, complaints continued to be made to the Australian Competition and Consumer Commission ('ACCC') and the State and Territory Fair Trading agencies regarding unconscionable conduct in small business transactions, particularly in the areas of franchises and retail leasing.<sup>14</sup>

In 1997, the House of Representatives Standing Committee on Industry, Science and Technology ('Reid Committee') concluded that section 51AA had been unsuccessful in addressing allegedly harsh business practices which affected many small businesses.<sup>15</sup> The Reid Committee's report, *Finding a Balance: Towards Fair Trading in Australia* ('Reid Report'), therefore recommended that section 51AA be repealed and replaced with a new provision that proscribed 'unfair' conduct in commercial transactions.<sup>16</sup> To assist in interpretation, the provision was to have contained a non-exhaustive list of factors to which the court could have regard for the purposes of determining whether a corporation has engaged in unfair conduct.<sup>17</sup> The Reid Committee made a conscious decision to utilise the term 'unfair' rather than 'unconscionable' as it was of the view that retaining the term 'unconscionable' would not provide a sufficiently clear signal to the courts that a concept broader than the traditional equitable doctrine was intended.<sup>18</sup> Using 'unconscionable', a term with a well established legal meaning, could, in the view of the Committee, result in the recognition of and association with the term being retained thus creating a 'tension between that precedent and the legislative intention'.<sup>19</sup> After considering

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12. Trade Practices (Amendment) Act 1992 (Cth), Act No 222, 1992.

13. Section 52A was renumbered s 51AB. Consumer transactions, covered by s 51AB, were expressly stated to not be in the ambit of s 51AA; see s 51AA(2.) Since 1998, this section also includes s 51AC.

14. In particular, refer to the House of Representatives Standing Committee on Industry, Science and Technology, *Finding a Balance – Towards Fair Trading In Australia* (Canberra, May 1997) ('Reid Report') ch 1.

15. At this stage, most decided cases were demonstrating an adherence to the equitable doctrine of unconscionable dealing. Therefore, it was necessary for plaintiffs to establish a special disadvantage and that the lessor had unconscionably taken advantage of the lessee's special disadvantage. As it is difficult to establish these elements in a commercial context there had been few successful actions under s 51AA at the time of the Reid Report. *Willshire-Smith v Votino Bros Pty Ltd* (Unreported, FCA, Lee J, 3 Nov 1994); *Swift v Westpac Banking Corporation* (1995) ATPR 41-401; *Leitch v Natwest Australia Bank Ltd* (1995) ATPR (Digest) 46-153; *Australian Consolidated Investments Ltd v England* (1995) 183 LSJS 408; *ACCC v Chats House Investments Pty Ltd* (1996) 22 ACSR 539 (Branson J); *Venning v Suburban Taxi Service Pty Ltd* (1996) ATPR 41-468. For a general discussion of the pre-Reid Report position, see F Zumbo, 'Unconscionability within a Commercial Setting: An Australian Perspective' (1995) 3 TPLJ 183.

16. See generally, Reid Report, above n 14, [6.7]–[6.22].

17. *Ibid* 181, Recommendation 6.1.

18. *Ibid* 178

19. *Ibid* 178–79.

several examples where a 'fairness' standard had been utilised elsewhere, the Reid Committee formed the view that such a standard regulating conduct in commercial transactions could be a workable option.<sup>20</sup>

The Commonwealth government response to the Reid Report<sup>21</sup> concurred with most of the Reid Committee's recommendations relating to unfair conduct in matters involving small business. However, the government decided to retain an unconscionability standard rather than adopt an unfairness criterion when determining whether business conduct offended the TPA. This decision was made –

in order to build on the existing body of case-law which has worked with respect to consumer protection provisions of the Act, and which will provide greater certainty to small businesses in assessing their legal rights and remedies.<sup>22</sup>

In the government's view, this approach would allow the courts to draw on the bank of precedent already formulated on the meaning and scope of unconscionable conduct. Section 51AC, prohibiting unconscionable conduct in commercial transactions involving less than \$3 million,<sup>23</sup> was subsequently introduced into Part IV of the TPA.<sup>24</sup>

The draw-down of section 51AC into State and Territory retail tenancy legislation has occurred in most Australian jurisdictions.<sup>25</sup> Although the provisions are generally consistent, there are some differences. Except for the specific focus on retail leasing transactions, the provisions in Queensland, New South Wales and the Northern Territory adhere to the provisions of section 51AC. The legislation in the ACT and Tasmania seems to have a slightly wider ambit, referring to, respectively, 'unconscionable or harsh and oppressive' conduct and 'harsh, unjust or

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20. Ibid 167.

21. *New Deal Fair Deal Statement* (30 Sep 1997).

22. Ibid, per the Hon Peter Reith.

23. Legislation is presently before the Commonwealth parliament which will see the threshold applicable to s 51AC rise to \$10 million: Trade Practices Legislation Amendment Bill (No. 1) 2007.

24. Section 51AC was inserted into the TPA on 1 July 1998. The provision extended the unconscionable conduct provisions of the TPA to encompass small business transactions: Trade Practices Amendment (Fair Trading) Bill, Act No 36, 1998. Defined as commercial transactions involving the supply or possible supply (s 51AC(1)(a)) or the acquisition or possible acquisition (s 51AC(1)(b)) of goods or services to or from a person (other than a listed public company) the price of which does not exceed \$3 million. Note that amendments presently before the Commonwealth Parliament will increase this amount to \$10 million: Trade Practices Legislation Amendment Bill (No.1) 2007.

25. Leases (Commercial and Retail) Act 2001(ACT) s 22; Retail Leases Act 1994 (NSW) s 62B; Business Tenancies (Fair Dealings) Act 2003 (NT) ss 79, 80; Retail Shop Leases Act 1994 (Qld) ss 46A(1)–(2), 46B; Fair Trading (Code of Practice for Retail Tenancies) Regulations 1998 (Tas) cl 3(1)–(2); Retail Leases Act 2003 (Vic) ss 77(1)–(2), 78(1)–(2); Commercial Tenancy (Retail Shops) Agreements Act 1985 (WA) ss 15C, 15D.

unconscionable' conduct. The Victorian, ACT and Western Australian legislation include some differing factors to which the court may refer when determining whether conduct is unconscionable. To date, South Australia has not adopted a specific unconscionability provision, although prohibitions exist regarding 'vexatious' behaviour and threats in relation to lease extension and renewal.<sup>26</sup>

## THE CURRENT ROLE OF UNCONSCIONABLE CONDUCT IN RETAIL LEASING IN AUSTRALIA

Although differing to varying extents throughout the States and Territories, Australian retail leasing legislation is extremely comprehensive and provides a detailed framework for the regulation of retail leasing transactions. However, despite the existence and the scale of legislative intervention in the regulation of retail leasing in Australia, has the plight of retail lessees actually improved since the Reid Report? Certainly, the proactive approach of the State and Territory retail leasing tribunals, particularly in relation to cost-effective and efficient dispute resolution, is seen to have the confidence of landlords, tenants and their legal representatives.<sup>27</sup> Also, on the face of it at least, the legislation makes the rights and responsibilities of the parties throughout a retail leasing relationship unambiguous.

However, while the legislative and administrative structures have been of considerable benefit, the legislation remains, to some extent, deficient. A significant example is the law in relation to the rights, or lack thereof, of a sitting tenant at the end of a lease. Also, in some cases, the facts may not evince a contravention of one or more provisions but, overall, there is a course of conduct which has the effect of undermining a tenant's interests and livelihood. Examples include the predicament of tenants who must move or find their lease terminated due to a relocation or break clause or where a landlord interferes in a tenant's attempt to sell their business.<sup>28</sup> While the legislation may, on its face, have been complied with, the lessor's peripheral activities and/or the existence of an ulterior motive, may, arguably, tip the matter into the realm of unconscionable conduct. Similarly, a series of contraventions may seem insignificant when examined individually but, if viewed in combination, they

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26. For example, in Victoria s 77(2) refers to the list of factors taken from s 51AC and also includes: '(l) the extent to which the landlord was not reasonably willing to negotiate the rent under the lease; and (m) the extent to which the landlord unreasonably used information about the turnover of the tenant's or a previous tenant's business to negotiate the rent; and (n) the extent to which the landlord required the tenant to incur unreasonable fit out costs.' WA has adopted an identical provision in s 15C'. In the ACT 'good faith' is omitted and a criteria to act honestly is included s 22(2)(i). With regard to South Australia, see Retail and Commercial Leases Act 1995 (SA) ss 20M and 75. For a comprehensive discussion of the differences between the provisions, see F Zumbo, 'Commercial Unconscionability and Retail Tenancies: A State and Territory Perspective' (2006) 14 TPLJ 165.

27. M Sharpe & C Parker, *The ACCC Compliance and Enforcement Project: Assessment of the Impact of ACCC Regulatory Enforcement Action in Unconscionable Conduct Cases*, Working Paper (Nov 2006).

28. Examples of such cases will be discussed below.

may establish a harsh, oppressive course of dealing.<sup>29</sup> Therefore, there must be an avenue for such conduct to be addressed. It is vital that a workable unconscionable conduct provision remains in the legislation and its limits are tested.

## WHAT DOES UNCONSCIONABLE CONDUCT IN A RETAIL TENANCY CONTEXT ENCOMPASS?

A major issue in relation to the unconscionability provisions in the TPA and State and Territory retail leasing legislation is whether those provisions address the problems they seek to alleviate. It is fair to say that, to date, section 51AC and its analogues have generally not been subjected to robust interpretation.<sup>30</sup> Also, it remains to be seen whether the restrained approach which has been generally adopted in relation to section 51AA may impact on any subsequent interpretations of section 51AC. This traditional perception of unconscionability, particularly a procedural bias, seems to permeate many judgments and is likely to impact on the interpretation of the State and Territory provisions.<sup>31</sup> This article will now discuss the interpretation of the unconscionability provisions, starting with the potential impact of section 51AA on the interpretation on section 51AC, and examine several decisions which involve section 51AC and its equivalent provisions.

### Section 51AA

Unconscionability for the purposes of section 51AA has generally been interpreted narrowly.<sup>32</sup> The provision has been litigated in relation to several retail leasing matters,<sup>33</sup> including two Western Australian cases, *ACCC v CG Berbatis Holdings Pty Ltd* ('*Berbatis*'),<sup>34</sup> which reached the High Court, and the Full Federal Court decision in *ACCC v Samton Holdings Pty Ltd* ('*Samton*').<sup>35</sup>

In both cases, counsel for the ACCC focused on a 'narrow' view of unconscionable conduct consistent with the equitable doctrine of unconscionable dealing.<sup>36</sup> Thus,

29. For example, the course of conduct in the franchising decision *ACCC v Simply No-Knead (Franchising) Pty Ltd* (2000) 178 ALR 304. Naturally, this will depend on the circumstances of the case. In comparison, in *Old Papas Franchise Systems Pty Ltd v Camisa Nominees Pty Ltd* [2003] WASCA 11, the course of conduct appeared to suggest unconscionability but each separate activity had, in the court's view, a justifiable rationale.

30. See generally, L Browne, 'The Impact of s 51AC of the Trade Practices Act 1974 (Cth) on Commercial Certainty' (2004) 28 MULR 20.

31. Zumbo, above n 26.

32. P Tucker, 'Unconscionability: The Hegemony of the Narrow Doctrine under the Trade Practices Act' (2003) 11 TPLJ 78; R Bigwood, '*ACC v Berbatis Pty Ltd*: Curbing Unconscionability: Berbatis in the High Court of Australia' (2004) 28 MULR 203; N Dean, '*ACCC v Berbatis Holdings*' (2004) 26 Syd LR 255.

33. *Lolly Pops (Harbourside) Pty Ltd v Werncog Pty Ltd* [1998] NSWSC 294.

34. (2003) 214 CLR 51.

35. (2002) 189 ALR 76.

36. According to the 'narrow view', s 51AA is merely a restatement of the doctrine of unconscionable dealing with the conferral of the remedies available under the TPA. This



the courts in *Berbatis* and *Samton* were, arguably, relieved of an obligation to consider a wider view of section 51AA. The majority judgments exhibit a constrained interpretation of conduct which will be held to be unconscionable in a commercial context. For example, regarding the circumstances of the tenant vis-à-vis the landlord in *Berbatis*, Gleeson CJ stated:

A person is not in a position of relevant disadvantage, constitutional, situational, or otherwise, simply because of inequality of bargaining power. Many, perhaps even most, contracts are made between parties of unequal bargaining power, and good conscience does not require parties to contractual negotiations to forfeit their advantages, or neglect their own interests.<sup>37</sup>

The Chief Justice continued:

Unconscientious exploitation of another's inability, or diminished ability, to conserve his or her own interests is not to be confused with taking advantage of a superior bargaining position. There may be cases where both elements are involved, but, in such cases, it is the first, not the second, element that is of legal consequence. It is neither the purpose nor the effect of section 51AA to treat people generally, when they deal with others in a stronger position, as though they were all expectant heirs in the nineteenth century, dealing with a usurer.<sup>38</sup>

If courts and tribunals were to adopt a similar approach to section 51AC, it is doubtful that section 51AC and its equivalents would have any impact except in the most extreme circumstances of harsh business conduct.

## Section 51AC

However, it is debateable whether close adherence to section 51AA should necessarily follow. During the Second Reading of the Bill introducing section 51AC, the Minister clearly stated that its application was intended to be broader than the equitable doctrine of unconscionability and section 51AA.<sup>39</sup> In some cases, this view has been readily accepted by the courts.<sup>40</sup> However, the important issue is how

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view would appear to have the most academic and judicial support: see P Tucker, 'Unconscionability: The Hegemony of the Narrow Doctrine under the Trade Practices Act' (2003) 11 TPLJ 78. On the other hand, some interpretations have centred on a wider view which would include within the scope of s 51AA all equitable doctrines which may be referred to pursuant to the concept of unconscionability. For example, note the views of French J at first instance in *Berbatis* (2000) 96 FCR 491. The widest view, which would seem unlikely to be adopted, can be expressed as unconscionability at large: See R Buckley, 'Unconscionability Amok or Two Readily Distinguishable Cases?' (1998) 26 ABLR 323.

37. *Berbatis*, above n 34, 64.

38. *Ibid.*

39. Trade Practices Amendment (Fair Trading) Bill 1997 (Cth); *Hansard*, 30 Sep 1997, 8800.

40. *Simply No-Knead*, above n 29; *Hurley v McDonalds Australia Limited* (2000) ATPR 41-741; *Automasters Australia Pty Ltd v Bruness Pty Ltd* (2003) ATPR (Digest) 46-229; *ACCC v Leelee Pty Ltd* [1999] FCA 1121.



much wider is the scope of section 51AC? It is generally accepted that the interpretation of section 51AC has been approached with caution<sup>41</sup> and the provision's application will not extend to 'merely' harsh or unfair conduct.<sup>42</sup> A recent statement in the New South Wales Court of Appeal is instructive. In *Attorney-General of New South Wales v World Best Holdings Ltd*,<sup>43</sup> Spigelman CJ observed:

The Ministerial Second Reading speech<sup>44</sup> ... indicates a similar concern to distinguish what is unconscionable from what is merely unfair or unjust. Even if the concept of unconscionability in section 62B of the Retail Leases Act is not confined by equitable doctrine, as the decisions under section 51AC of the Trade Practices Act (Cth) suggest, restraint in decision-making remains appropriate. 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 in a manner which the Minister expressly stated was not the intention of the legislation. 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 when any dispute about a retail lease arises.<sup>45</sup>

Nevertheless, the question of the degree to which the courts will be prepared to extend the traditional restraints of unconscionable conduct in commercial transactions remains unresolved.

Few decisions have identified a contravention of section 51AC. This is despite a Ministerial direction instructing the ACCC to initiate proceedings for the purpose of establishing legal precedent under section 51AC on matters of specific relevance to small business.<sup>46</sup> To date, *ACCC v Simply No-Knead (Franchising) Pty Ltd* ('*Simply No-Knead*'),<sup>47</sup> *Automasters Australia Pty Ltd v Bruness Pty Ltd* ('*Automasters*'),<sup>48</sup> *Coggin v Telstar Finance Company (Q) Pty Ltd* ('*Coggin*'),<sup>49</sup> and, recently, *ACCC v Dataline.net.au Pty Ltd*.<sup>50</sup> are the only court decisions where section 51AC actions

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41. Zumbo, above n 26, 171.

42. Christensen & Duncan, above n 5. For a recent Tribunal decision which distinguished between unconscionability and unfairness for the purposes of s 62B of the Retail Lease Act 1995 (NSW), see *Armstrong Jones Management Pty Ltd v Saies-Bond & Associates Pty Ltd* [2006] NSWADT 323.

43. (2005) 63 NSWLR 557.

44. Note that this reference is to the second reading speech relevant to the 'draw down' of s 51AC into the Retail Leases Act 1995(NSW).

45. *World Best Holdings*, above n 43, 583 (Spigelman CJ, with whom Tobias JA agreed) (footnote added).

46. Minister for Customs and Consumer Affairs, *Ministerial Direction* (Canberra, 28 Aug 1998). Preference was to be given to initiating proceedings as representative proceedings on behalf of small business.

47. *Simply No-Knead*, above n 29.

48. Above n 40.

49. [2006] FCA 191.

50. [2006] FCA 1427.

have been successful.<sup>51</sup> None of the cases involved retail leasing although it appears that, had the matter progressed, the conduct in *ACCC v Leelee Pty Ltd* ('Leelee'),<sup>52</sup> a case involving, inter alia, a landlord's conduct in relation to the assignment of a sub-lease, would have been regarded as unconscionable. Many more matters have tried, and failed, to establish unconscionable conduct under section 51AC. While it has been recognised that many such instances have involved harsh or unfair conduct, the circumstances have not been found to be sufficiently dire to be held to be unconscionable.<sup>53</sup>

In the retail leasing tribunals there have been few decisions where the landlord has been found to have engaged in unconscionable conduct.<sup>54</sup> It should be noted too that several cases have been determined on other issues, thus making it unnecessary to decide on the question of unconscionable conduct. Other cases have merely discussed the provisions at interlocutory level. Thus, although it may have been determined that there was a triable issue with regard to unconscionable conduct, no final determination was made.<sup>55</sup>

At this stage it is useful to consider some of the court and tribunal proceedings where sections 51AA and 51AC or their equivalent provisions have been discussed, or where there has been relevant dialogue regarding circumstances which may influence a decision involving unconscionable conduct and retail leasing. These cases will be classified under the following categories: pre-contractual negotiations, security of tenure (including the sitting tenant and assignment), options, sale of a business, rental, tenancy mix (including exclusivity clauses), redevelopment and

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51. The *Simply No-Knead* and *Automasters* cases involved franchises. *Coggin* involved the conduct of a finance company which took security over the plaintiff's boat to finance the purchase, by a third party, of a franchise. The respondents in *Dataline* contravened s 51AC by preventing or dissuading its customers from obtaining independent advice with respect to the terms of a contract for the supply of internet-related services. It was held the terms had the potential for adverse consequences for the customer and the conduct was a misuse of the corporation's bargaining power.

52. *Leelee*, above n 40.

53. Eg. *Garry Rogers Motors (Aust) Pty Ltd v Subaru (Aust) Pty Ltd* [1999] ATPR 41-703; *Automasters*, above n 40; *ACCC v Oceana Commercial Pty Ltd* (2004) 139 FCR 316; *Poulet Frais Pty Ltd v Silver Fox Co Pty Ltd* (2005) 220 ALR 211; *Pacific National (ACT) Ltd v Queensland Rail Ltd* (2006) ATPR (Digest) 46-268. Refer again to the cases discussed in Christensen & Duncan, above n 5.

54. See *Worsfold v de Goede* [2002] NSWADT 273; *Sarker v Worlds Best Holdings Ltd (No 2)* [2004] NSWADT 15; *Irresistible Frocks Pty Ltd v Sparbec & Roche* [2003] NSWADT 241. But note many more allegations of unconscionable conduct have been unsuccessful: *ACCC v 4WD Systems Pty Ltd* (2003) 200 ALR 491; *Hoppers Crossing Club v Tattersalls Gaming Pty Ltd* [2005] VSC 114; *Old Papas Franchise Systems*, above n 29; *Ali v Hassim* [2002] VCAT 274; Christensen & Duncan, *ibid*.

55. *Sofisplay Pty Ltd v Perpetual Trustees (WA) Pty Ltd* [2002] NSWSC 1059; *Foodco Management Pty Ltd v Go My Travel Pty Ltd* [2002] 2 QdR 249; *Castle Mall Fine Foods Pty Ltd v Queensland Investment Corporation* [2003] NSWADT 207. Note the comments by Molloy GB in this respect in *Spuds Surf Chatswood Pty Ltd v PT Limited* [2007] NSWADT 130, [6].

termination. Although there are a myriad of other potential scenarios where conduct in retail leasing may be unconscionable, the circumstances listed were matters of concern for the Reid Committee and would appear to remain particularly problematic.

## ENTRY INTO A LEASE

Pre-lease negotiations should be examined by reference to circumstances where, firstly, the parties are entering into a lease with each other for the first time and, secondly, where those parties have previously shared a landlord/tenant relationship.

In the first situation, a prospective lessee may find it difficult, but it seems not impossible,<sup>56</sup> to establish that conduct occurring in the negotiating process, particularly where there has not been any previous course of dealing between the parties, was unconscionable. This is because negotiations are traditionally regarded as involving well resourced and informed commercial parties bargaining at arm's length. There is an expectation that such a process may be 'tough' and, indeed, at times lack 'general commercial decency'.<sup>57</sup> Although section 51AC(3)(a) permits an examination of the respective bargaining strengths of the parties, it is unlikely that a difference in bargaining power, even a considerable one, could, without more, lead to a finding of unconscionable conduct.<sup>58</sup> However, this is not to say that other considerations in section 51AC(3) may not be relevant to the negotiation process.

## Misrepresentation

A discussion involving negotiations should commence with misrepresentation. Clearly, section 52 of the TPA and its equivalent provisions are the first logical port of call in order to address such conduct. However, this is not to say that misrepresentation will not be a relevant factor to consider in relation to unconscionable conduct. Recently, in *Armstrong-Jones Management Pty Ltd v Saies-Bond & Associates Pty Ltd*,<sup>59</sup> an inaugural lessee in a newly established shopping centre claimed that the lessor had engaged in misleading or deceptive conduct, and unconscionable conduct, regarding certain conduct in the negotiation stage and the initial period of the lease. The lessor's agent represented that Harvey Norman, a high profile retailer, had leased premises in the centre. In fact, it was a related corporation, which did not have the same degree of public recognition as Harvey Norman, which was to have a presence in the centre. In the Tribunal's view, this representation was not only false or misleading,<sup>60</sup> but also involved 'unfair

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56. *Armstrong Jones Management Pty Ltd v Saies-Bond & Associates Pty Ltd* [2006] NSWADT 323.

57. *Australian Property Buyers Pty Ltd v Kowalski* [2006] VCAT 24.

58. Recall the comments of Gleeson CJ in *Berbatis*, above n 34.

59. [2006] NSWADT 323

60. Thus contravening Retail Leases Act 1994 (NSW) s 10.

tactics', within the meaning of section 62B(3)(d) RLA, an equivalent provision to section 51AC(3)(d).<sup>61</sup> It would seem that other misrepresentations which involve persuasion or pressure on the tenant to enter into a lease, for example, statements that another person is anxious to lease the premises<sup>62</sup> could, in appropriate circumstances, also be regarded as an unfair tactic. It would seem that misrepresentations could also attract scrutiny through sections 51AC(3)(i) and (k) and their equivalents.<sup>63</sup>

## The course of negotiations

In circumstances involving section 51AA, it has been held that suddenly breaking off negotiations was not, in the circumstances, unconscionable.<sup>64</sup> However, this is not to say that such conduct can never be regarded as unconscionable; section 51AC and its equivalents may represent a different approach and any ultimate conclusion will depend on the degree of egregiousness in the circumstances of the particular case. For example, in Queensland, the relevant tribunal has held that a lessor who pressured the lessee into agreeing to a new lease by placing a 'For Lease' sign on the premises, and subsequently encouraged the lessee to believe there was a concluded agreement where, in fact, the lessors were pursuing another tenant, and subsequently leased the premises to that tenant, had engaged in unconscionable conduct.<sup>65</sup> In reaching this conclusion, the Tribunal referred to the equivalent provisions to sections 51AC(a),(d),(i), (j) and (k).<sup>66</sup>

Negotiations between parties in an existing relationship may involve relocation, rent review and the renewal of a lease for a sitting tenant. The comments above would also be relevant to such negotiations. These matters will be discussed in separate sections of this article.

## Documentation

Several recent Tribunal decisions have also considered whether a binding agreement for lease was in existence<sup>67</sup> and the circumstances when the Tribunal could compel the execution of a lease.<sup>68</sup> Although on the particular facts it was unnecessary to

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61. This case is presently the subject of an appeal.

62. *Samaha v Corbett Court Pty Ltd* (2006) NSWSC 1441; *Ragi Pty Ltd v Kiwi Munchies Pty Ltd* [2007] NSWADT 108.

63. Although compare the recent decision in *Omoso Holdings Pty Ltd v Capsanis* [2007] NSWADT 124, regarding the representations as to the permitted use of premises.

64. *G&E Avakoumides Pty Ltd v Commonwealth Funds Management Ltd* [2004] NSWSC 711.

65. *Gilmore v Hing, Chun, Leung & Ng* (Unreported, Queensland Dispute No. 94/03).

66. Retail Shop Leases Act 1994 (Qld) s 46B(1). See also *Perhauz v SAF Properties Pty Ltd* [2007] NSWADT 122.

67. *G & E Avakoumides Pty Limited v Commonwealth Funds Management Ltd* [2004] NSWSC 711. Note this case was decided pursuant to s 51AA.

68. *Helou v Bong Bong Pty Limited (No 2)* [2006] NSWADT 162.

decide, some decisions mooted the circumstances where the refusal to enter into a formal lease could be unconscionable.<sup>69</sup> On the other hand, it has been held not to be unconscionable to threaten legal action to finalise leasing documentation.<sup>70</sup>

## Good faith in negotiation

Although such a discussion is beyond the scope of this paper, the development of principles of good faith is likely to impact on retail leasing in both the negotiation and performance stages of a transaction. Sections 51AC(3)(k) and (4)(k) invite the court to refer to the good faith of the parties when considering whether conduct is unconscionable. Thus, it is likely that, while altruism appears unnecessary in the bargaining process, an injection of good faith principles, including a consideration of the reasonable expectations of the parties, could undermine the traditional negotiating stances adopted<sup>71</sup> in the performance of contracts, including franchises<sup>72</sup> and leases.

## SECURITY OF TENURE

### Sitting tenant

With the exception of preferential rights in South Australia<sup>73</sup> and the Australian Capital Territory,<sup>74</sup> retail leasing legislation is of little assistance to a sitting tenant. In fact, some unconscionable conduct provisions specifically state that a person is not to be taken to engage in unconscionable conduct in connection with a retail premises lease merely because that person fails to renew the lease or enter into a new lease.<sup>75</sup>

Although there are procedural requirements in place in several jurisdictions,<sup>76</sup> in the absence of a validly exercised option, the sitting tenant does not have a contractual

69. *Perhauz*, above n 66; *Randi Wixs Pty Ltd v Pokana Pty Ltd (No 2)* [2003] NSWADT 4; *De Luca v Scuccimarra* [2007] NSWADT 63.

70. *Laserbem Pty Ltd v Gainsville Investments Pty Ltd* [2004] VSC 62.

71. E Webb, 'The Scope of the Implied Duty of Good Faith: Lessons from Commercial and Retail Leasing Cases' (2001) 9 APLJ 1.

72. *Meridian Retail Pty Ltd v Australian Unity Retail Network Pty Ltd* [2006] VSC 223.

73. Retail and Commercial Leases Act 1995 (SA) s 20D.

74. Leases (Commercial and Retail) Act 2001 (ACT) s 108. This provision applies to leases entered into on or after 1 July 2002.

75. Retail Leases Act 1994 (NSW) s 62B(6); Business Tenancies (Fair Dealing) Act 2003 (NT) s 81(b); Retail Shop Leases Act 1994 (Qld) s 46A(3)(c); Retail Leases Act 2003 (Vic) s 79(b); Commercial Tenancy (Retail Shops) Agreements Act 1985 (WA) s 51E(b).

76. Retail Leases Act 1994 (NSW) s 44(1); Retail and Commercial Leases Act 1995 (SA) s 20J; Retail Leases Act 2003 (Vic) s 64(2). Note this requirement does not apply in circumstances where the lease contains a right of renewal or the tenant has preferential rights. Under Retail and Commercial Leases Act 1995 (SA) ss 20J(a)–(b) and the Business Tenancies (Fair Dealings) Act 2003 (NT) s 60, a retail tenant must be provided with a

or statutory right to a new term.<sup>77</sup> In what, if any, circumstances may the refusal to grant a new lease to a sitting tenant be regarded as unconscionable?

Any discussion involving sitting tenants should commence with reference to *Berbatis*. Although the case concerned section 51AA, the decision may be illustrative of how similar circumstances may be interpreted under section 51AC and its equivalents. CG Berbatis (Holdings) Pty Ltd owned a suburban shopping centre. There was a dispute with a number of tenants in relation to outgoing, including the proprietors of the centre's fish-and-chip shop, the Roberts. The Roberts wanted to sell their business but, as the lease was nearing expiration, a purchaser would not proceed with a purchase of the business unless a new lease was granted. In the absence of an option to renew, the lessor agreed to grant the new lease only if the Roberts discontinued all their claims against it. The majority of the High Court held that, despite their predicament, the Roberts were not under a special disadvantage,<sup>78</sup> and that the lessor had not engaged in unconscionable conduct simply because it offered to grant the new lease, which the lessor was not under any obligation to do, on terms which were unfavourable to the lessee.

At Tribunal level, a similar conclusion was reached in relation to a provision equivalent to section 51AA.<sup>79</sup> In *Humphries & Cooke Ltd v Essendon Airport Limited*,<sup>80</sup> a sitting tenant, which had been in occupation for a considerable time and had invested its own funds to build an aircraft hangar on the demised premises, was presented with a rental increase of 340 per cent for a new lease. The lessees claimed, inter alia, that the lessor's conduct in demanding such a rental increase was unconscionable. In an echo of *Berbatis*, the lessee's contentions failed. It was held that since the lessee did not have any contractual entitlement to a new lease, the lessee could not complain if the lessor only agreed to grant a new lease upon terms which the lessee found unacceptable.<sup>81</sup> Therefore, it seems that even the imposition

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minimum of six months and no longer than 12 months notification prior to the expiration of a lease whether a new lease will be offered and the terms and conditions of the new lease. In the Fair Trading (Code of Practice for Retail Tenancies) Regulations 1998 (Tas) cl 29(2), this time stipulation is not less than three months before expiry of the lease; while the Leases (Commercial and Retail) Act 2001 (ACT) s 107 stipulates that such notification must be made no more than six months and no less than three months prior to the expiry of the lease. The Commercial Tenancy (Retail Shops) Agreements Act Amendment Act 1998 (WA) s 13B(1) places the onus on the tenant to commence the renewal process.

77. A lessor cannot be compelled to enter into a lease. This is even the case where a lessor's conduct may not reflect 'general commercial decency': *Australian Property Buyers v Kowalski*, above n 57.

78. Pursuant to the equitable doctrine.

79. Fair Trading Act 1999 (Vic) s 7. There was an issue whether the premises should be regarded as retail premises. Provisions of the retail tenancy legislation were considered but not in relation to unconscionable conduct. The provisions of s 8, which are akin to s 51AB, were not applicable as the provision of services were not of a domestic, personal or household use.

80. [2001] VCAT 2439.

81. *Ibid* [18].

of an extremely onerous term or terms as a condition of renewal is unlikely to offend section 51AA and its equivalent provisions. This is the case even if the condition results in some inconvenience or financial detriment to the lessee.<sup>82</sup>

So far as the writers are aware, there has not been a decision which considers section 51AC and its analogues and the predicament of a sitting tenant. It seems that when a court or tribunal is faced with such a dilemma it will have to choose between a *Berbatis* approach where the freedom of the lessor to deal with its property, and impose such conditions as it sees fit, is paramount, or whether, and to what extent, this approach will be tempered by a consideration of the elements of section 51AC. Depending on the circumstances, it is arguable that ss 51AC(3)(a), (b), (d), (f), (i), (j) and (k) would impact upon a decision regarding a sitting tenant.

For example, it is likely that there will be a difference in the relative bargaining strengths of the landlord and tenant (section 51AC(3)(a)). In order to obtain a new lease, a sitting tenant may feel compelled to agree to terms which, arguably, may not be reasonably necessary to protect the legitimate interests of the landlord (section 51AC(3)(b)). The imposition of an unfair term, for example the obligation to cease legal proceedings against the lessor, may be regarded as the use of an unfair tactic (section 51AC(3)(d)). Also, a sitting tenant may be treated differently to other tenants whose leases are renewed or are renewed without, or with less onerous, conditions (section 51AC(3)(f)). The adoption of a 'take it or leave it' attitude to negotiation, as well as an undisclosed opportunity for the lessor to lease to another tenant, could attract scrutiny under section 51AC(3)(i) and (ii). Similarly, a reluctance to negotiate could trigger consideration of section 51AC(j). An ulterior motive or malevolent intent may indicate a lack of good faith (section 51AC(3)(k)). However, even in the presence of these or other factors, whether these considerations will outweigh views such as those expressed in *Berbatis*<sup>83</sup> remains to be seen.

## CONSENT TO ASSIGNMENT

Tenants often want to assign their lease to another party, usually because of the proposed sale of a business. Despite provisions in leases and retail tenancy legislation which state that a lessor cannot refuse an assignment unless there are reasonable grounds,<sup>84</sup> there are often disputes in relation to what is, in fact, reasonable. Accordingly, in the light of the introduction of section 51AC and its equivalents, it must now be considered whether a refusal to consent to assignment can be found to be unconscionable.

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82. For example, the cost of constructing the hangar, the Roberts' loss of any settlement regarding the outgoings claim, and the \$70 000 payment as the 'price' of exercising the option.

83. Above n 34.

84. Conveyancing Act 1919 (NSW) s 133B(1)(a); Property Law Act 1974 (Qld) s 121(1)(a); Property Law Act 1958(Vic) s 144(1); Property Law Act 1969 (WA) s 80(1).



Again, there is little authority; however, some decisions involving section 51AA can be used to analogue. Recently, in *Foong Nominees Pty Ltd v Han Investments Pty Ltd*,<sup>85</sup> the District Court of Western Australia considered circumstances where a lessee, Han Investments Pty Ltd (Han), refused to consent to an assignment of a licence to operate a Chinese restaurant by Foong Nominees Pty Ltd (Foong) unless Foong agreed to forfeit a \$50 000 security bond to cover outstanding, albeit, disputed, licence fees.<sup>86</sup> It was alleged, inter alia, that in refusing to consent to the assignment, Han had engaged in unconscionable conduct pursuant to section 51AA.

The case demonstrates a similar approach to *Berbatis* in that a term unpalatable to a lessee was imposed as the 'price' of agreeing to the assignment. It was held that Mrs Foong's health,<sup>87</sup> a factor argued to support the allegation of unconscionability, had not affected her ability to judge what was in her best commercial interests.<sup>88</sup> Also, the court concluded that Han had not taken unconscionable advantage of any alleged disadvantage.<sup>89</sup> In summary, the court held that Han was entirely within its rights to refuse consent to the assignment given the arrears.<sup>90</sup>

Would a similar finding result from an application of section 51AC? It seems at least arguable that a malevolent refusal to consent to an assignment would infringe section 51AC and its equivalents. The decision in *Leelee*<sup>91</sup> specifically discussed the elements of section 51AC in such a circumstance. Although the statements of Mansfield J were obiter, and the matter was determined prior to the decisions in *Berbatis*<sup>92</sup> and *Samton*,<sup>93</sup> the decision remains pertinent to a discussion of how section 51AC may impact on such a scenario. In that case, tenants were coming to the end of their lease and wanted the under-lessee to allow them to transfer the lease to a purchaser of the business. The under-lessee refused to do so relying on the provisions of the lease which stated that at the end of the term the tenant had to hand over the premises and remove all fixtures and fittings.

The ACCC claimed that, to insist on the performance of that covenant where the tenants might otherwise have had the opportunity to sell that plant and equipment in situ to a new tenant, was unconscionable. Mansfield J was of the view that such insistence, in the circumstances, was capricious and directed solely towards causing

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85. [2006] WADC 87.

86. Ibid [137]

87. Ibid. If her health was such a concern, Mrs Foong could have chosen not to exercise the option and quit the premises after the first licence expired. Instead, she took the commercially sensible approach and opted to renew.

88. Ibid [152].

89. Although Han was aware of the medical condition, the court was of the view that it was unaware of its exact nature.

90. The mutual release clause provided a mechanism for the payment of the arrears which, given Mrs Foong's financial position, may not have been repaid.

91. Above n 40.

92. Above n 34.

93. Above n 35.

loss to the tenants. It would seem to follow that the failure to permit an assignment in similar circumstances could amount to unconscionable conduct. In *Leelee* the applicant asserted, and Mansfield J agreed, that section 51AC(3)(b), compliance with conditions not reasonably necessary for the protection of the parties legitimate interests and section 51AC(3)(k), the good faith of the parties, were of particular relevance.

In *Castle Mall Fine Foods Pty Ltd v Queensland Investment Corporation*,<sup>94</sup> an interlocutory application, a lessor refused a lessee's request for consent to assignment unless the assignee agreed to limit its operations to the use stipulated in the lease. The lessee had expanded its coffee shop business beyond the stipulated use to include the sale of take away food; a development which, until the request to assign was made, was not challenged by the lessor. As the take-away food component was significant to the profitability of the business, the lessees claimed that the lessor was unreasonably withholding consent,<sup>95</sup> and had engaged in unconscionable conduct. The Tribunal held that consent had been unreasonably withheld and it was therefore unnecessary to determine the unconscionable conduct issue. However, in the Tribunal's view, there was a triable issue in relation to the unconscionable conduct claim.<sup>96</sup>

Therefore, it would seem that so long as a refusal to consent to assignment was reasonable in the circumstances, a lessor is entitled to rely on their legal rights in this respect.<sup>97</sup> However, dicta in *Leelee* suggests that an ulterior motive or a malevolent purpose which was behind the refusal could sustain an allegation of unconscionable conduct.<sup>98</sup> Similarly, the discussion in *Castle Fine Foods*, although there was no final decision made on this point, suggests that a lessor cannot use a lessee's request to assign the lease as an opportunity to reclaim rights they had earlier forgone.

## OPTIONS

Most retail leases in Australian shopping centres do not contain options. However, in circumstances where an option is contained in a lease, certain pre-conditions to the exercise of the option will be stipulated and the lessee must comply with these conditions. The next consideration is, when such conditions are not satisfied, the

94. *Castle Mall Fine Foods*, above n 55.

95. And was therefore in breach of the Retail Lease Act 1995 (NSW) s 39(1).

96. *Castle Mall Fine Foods*, above n 55, [65]: 'it is not desirable for a lessor to use the context of a possible sale of the business and assignment of the lease as the forum within which to agitate the desirability of clawing back trading activities that it may see as going beyond the original permitted use, and see as interfering with the mix that it is trying to achieve in the centre.'

97. Eg, *Harbourside Catering Pty Limited v TMG Developments Pty Ltd* [2005] NSWADT 238.

98. Section 51AC(3)(k) – the lessor would be demonstrating a lack of good faith.

refusal by a landlord to permit the exercise of an option could be held to be unconscionable?

Clearly, when the failure to satisfy the pre-conditions is the fault of the lessee it may be difficult to contend that the lessor was behaving unconscionably in refusing to permit the exercise of the option, at least under section 51AA. For example, Samton saw a lessee fail to exercise an option within the time stipulated in the lease. The lessor agreed to grant a new lease on condition that the lessee paid the landlord \$70 000.<sup>99</sup> The Full Court noted that in the absence of any obligation to renew the lease, the lessors were within their rights to impose the condition.<sup>100</sup>

In relation to section 51AC and its equivalent provisions, *Yao v Cambooya Properties Pty Ltd* ('Yao')<sup>101</sup> and *Awad v Bucasia Pty Ltd* ('Awad')<sup>102</sup> are instructive. Both cases involved circumstances where, despite the lessee giving oral notification of an intention to exercise an option, the lessee failed to comply with formal requirements in the lease requiring written notice.<sup>103</sup> Allegations of unconscionable conduct were unsuccessful in both cases. However, what if the failure to comply was outside the lessee's control or, in fact, involved the lessor?

In *Yao*, the Tribunal acknowledged that circumstances akin to those resulting in relief against forfeiture, for example where a lessor deliberately avoids the lessee's legitimate attempts to rectify a situation,<sup>104</sup> could be relevant to a consideration of unconscionable conduct. In so doing, it was also recognised that another instance which could justify relief was where a lessor took advantage of a small mistake on the part of the tenant that resulted in an unconscionable windfall to the landlord.<sup>105</sup> It seems an effort by a lessor to frustrate the exercise of an option could, in the appropriate circumstances, be regarded as unconscionable.<sup>106</sup>

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99. Therefore, again, the landlord agreed to the lessee's request but only on unpalatable conditions. Although Carr J acknowledged at first instance that the lessor had 'struck a very hard bargain', the lessee was not held to be at a special disadvantage: *ACCC v Samton Holdings Pty Ltd* [2000] FCA 1725, [99]. On appeal, the Full Court upheld Carr J's ultimate decision; however, disagreed with the conclusion that the lessee was at a special disadvantage.

100. *Stanton*, above n 35.

101. [2004] NSWADT 55.

102. [2003] NSWADT 247.

103. In *Yao*, the Centre Manager was of the view that the lessee may not provide the formal notification. However, instead of specifically advising him to do so, the Centre Manager told the lessee to seek legal advice.

104. Refer to *Old Papas Franchise Systems*, above n 29.

105. The Tribunal were less indulgent in the *Awad* decision. The Tribunal dismissed the lessee's allegations that it had been unable to serve the notice on the lessor because the lessor had not provided details of an address for service. In these circumstances, it was held that the failure to deliver the notice was due to the negligence of the lessee: see *Leads Plus Pty Ltd v Kowho Intercontinental Pty Ltd* [2000] NSWSC 459.

106. *Powell and Mugridge v Tengold Pty Ltd* Dispute No 0102/2004.

## RENTAL

### Rent Review

Not surprisingly, rent review, both during the term of a lease and especially when negotiating a new term, is an extremely contentious issue. One of the most trenchant criticisms made on behalf of lessees in Australia is the secrecy associated with rentals charged by lessors in shopping centres. Unlike the United Kingdom, where such information is more readily accessible, rentals paid by tenants in the Australian context are often the subject of secrecy clauses.<sup>107</sup> Information as to the amount of rental actually paid for particular premises is difficult to obtain, and such figures may be ‘skewed’ by inducements which are not obvious on the face of the lease. Thus, it is difficult to assess what is an appropriate rental for particular premises. To compound the problem, lease provisions often necessitate that the lessee provides turnover figures to the lessor. While landlords claim that this practice enhances their knowledge of the profitability of the individual businesses in the centre and assists in planning and administration, lessee interests commonly assert that this information is used to maximize rental increases.<sup>108</sup>

When a lease is at an end, the problem is compounded. Where a sitting tenant wants to continue their business in the existing premises, some landlords impose very high, arguably unjustified, rental increases. As the tenant is effectively ‘captive’, they must pay the new rent as the ‘price’ of remaining in the premises.

Again, there appears to be a conflict between the rights of a lessor to lease premises to whomever, and on whatever terms they desire, and the ‘rights’ of a lessee to continue their business. Also, as stated clearly in *Berbatis*, the lessor is not under any obligation to grant a new lease to a particular lessee. Therefore, it would appear unlikely that a bare refusal to do so would be regarded as being unconscionable. In relation to section 51AA and its equivalents, on the authority of *Berbatis*,<sup>109</sup> an increase, even a considerable increase, in rental will not be found to be unconscionable.

Large rental increases could, at least arguably, attract scrutiny under section 51AC(3)(a) – inequality of bargaining power.<sup>110</sup> Section 51AC(3)(b) allows the court to examine whether, as a result of the conduct engaged in by the supplier, the business consumer was required to comply with conditions which were not

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107. This issue was the subject of some discussion before the Senate Economics Committee, although the Committee refused to recommend a curb on such clauses as, in the Committee’s view, it would undermine the traditional secrecy of the bargaining process.

108. For an informative discussion of the issues surrounding rental in retail tenancy matters, see generally Queensland Lease Consultants Pty Ltd, Submission to the Productivity Commission’s 2007 inquiry.

109. Above n 80.

110. Although the comments in *Berbatis*, above n 34, should be recalled in this circumstance.

reasonably necessary for the protection of the legitimate interests of the supplier. A very high increase in rental for a new term may not be regarded as reasonably necessary, especially when other, similar premises are paying less and where, if the premises are not eventually leased to the sitting tenant, they are leased at a lower price to another retailer. Similarly, it could be alleged that such conduct amounts to the use of an unfair tactic pursuant to section 51AC(3)(d). Arguably, sections 51AC(e) (comparisons with other similar premises), 51AC(f) (different conduct in negotiations with other tenants), 51AC(i) (non-disclosure of pertinent issues) and 51AC(k) (good faith) could be scrutinised in these circumstances.<sup>111</sup>

Again, it will be interesting to see whether the courts and tribunals adopt a *Berbatis* approach. If so, a finding of unconscionable conduct would seem a remote prospect as lessors would be regarded as free to lease their properties on whatever terms they choose. This likelihood has been recognised by lessee interests who have continued to lobby for a lease register<sup>112</sup> so that rentals payable for retail premises are made freely available and permit a realistic assessment of rental payable for particular premises. Although a lease register exists in some states,<sup>113</sup> the prospect of a national leasing register is getting closer.<sup>114</sup> On the other hand, an interpretation of section 51AC and its equivalents which takes into account the legitimate interests and objectives of lessees and potential lessees<sup>115</sup> is likely to lead to a different conclusion.

### Recalculation of rental due to unforeseen circumstances

Another instance where an allegation of unconscionable conduct may arise is where a party refuses to renegotiate rental in circumstances of economic downturn. In *Barbcraft Pty Ltd v Geobel Pty Ltd*,<sup>116</sup> the parties had been in a landlord tenant relationship for many years. The rental was not calculated to the market and, the lessor alleged, the tenant was paying less rental than they otherwise would be. When the lessee refused to negotiate a change to the rent review formula to provide

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111. Although it has been noted that the mere failure to reveal information about the rental paid by other tenants does not demonstrate bad faith on the part of the lessor. *Choi v Trust Co of Australia Ltd* [2000] VCAT 1867.

112. The 2001 Victorian inquiry into retail tenancy suggested that the transparency issue could be overcome by the registration of retail leases so the provisions in the lease are on the public record or through the supply of a rental schedule to prospective and sitting tenants: Office of Regulation Reform, Department of State and Regional Development, *Retail Tenancies Legislation*, Discussion Paper (Oct 2001) 39. However, it was noted that such an initiative may be constrained through the operation of the Privacy Amendment (Private Sector) Act 2000 (Cth): at 40. This prospect was recognised by the Senate Economics Committee *Inquiry into the Effectiveness of the Trade Practices Act 1974 in Protecting Small Business* (Canberra, Mar 2004).

113. For example, in New South Wales.

114. Several retailer submissions to the 2007 Productivity Commission inquiry have raised this issue.

115. *Penhauz*, above n 66.

116. [2003] VCAT 1700.

reference to market rent, the lessor claimed the refusal to negotiate was unconscionable. This contention failed. It was held that the rent review formula was not unconscionable when the lease was entered into; it had been utilised for many years without contention and the lessees were entitled to continue to rely on it. The decision suggests that, had the roles been reversed and a lessee was seeking a change in the method of calculation of rental due to a downturn in economic conditions, a refusal by a landlord to negotiate may be similarly permissible.

Finally, there has been limited success in attempts to resist liability under personal guarantees in relation to unpaid rental.<sup>117</sup>

## SALE OF A BUSINESS

Unconscionable conduct has been established in at least one instance where a landlord was found to have interfered in the sale of a lessee's business. In *Worsfold v de Goede*,<sup>118</sup> the Tribunal considered several allegations made by a lessee that their landlord had contravened the New South Wales retail leasing legislation, including the unconscionability provision.<sup>119</sup> The lessees wanted to sell their business and the landlord learnt that the lessees had commenced negotiations with a prospective purchaser. The lessor approached the prospective purchaser and proposed that he deal directly with the lessor rather than the lessee. It was found that the lessor had then entered into an agreement with the prospective purchaser which permitted the latter to lease the premises once the lessee had vacated. The lessee was then sent a notice of eviction.<sup>120</sup> The Tribunal concluded that the lessor had not acted in good faith, used unfair tactics, and had acted unconscionably.<sup>121</sup>

Similar reasoning was utilised in *Walls Gifts and Tobacco Pty Ltd v Warringah Mall Pty Ltd*,<sup>122</sup> although in that case the lessee was eventually unsuccessful. The lessee was negotiating to sell his tobacconist business. After negotiations with another tobacconist had broken down, the lessor's agent approached the other tobacconist directly about leasing other premises in the centre. The Tribunal held that the conduct was not unconscionable as the approach was only made after the negotiations had failed.

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117. This is the case even in unusual circumstances; for example, the liquidation of the original tenant: *Terris Nominees Pty Ltd v New Rochelle Nominees Pty Ltd* (2003) VCAT 1051. See also *Heatherway Pty Ltd v Dykes & Wildie (No. 1)* [2006] NSWADT 354; upheld on appeal *Heatherway Pty Ltd v Dykes & Wildie (No. 2)* [2007] NSWADT 196.

118. Above n 54.

119. Retail leases Act 1995 (NSW) s 62B.

120. The grounds listed for the eviction were found by the Tribunal to be without any factual basis.

121. *Worsfold v de Goede*, above n 54, [24]. See too *Spuds Surf Chatswood Pty Ltd v Pty Limited* [2007] NSWADT 130.

122. [2003] NSWADT 161.

*Walls Gifts*<sup>123</sup> establishes, not surprisingly, that a lessor may pursue a potential purchaser when it is clear that negotiations between the existing lessees and the purchaser have broken down. However, as can be seen in *Worsfold v de Goede*,<sup>124</sup> a malevolent agenda directed at undermining a viable, potential sale is likely to result in a finding of unconscionable conduct.

## TENANCY MIX

Shopping centres aim to provide customers with a variety of different types of businesses. However, the issue of tenancy mix can be contentious. While a centre may be able to sustain more than one outlet for a particular type of business, too many of the same type of business will undermine profitability. Although this is rare, in some cases lessees may negotiate an exclusivity provision to protect their business from competition from other similar businesses. It appears that a landlord's failure to comply with an exclusivity provision may be regarded as unconscionable conduct. This also seems to be the case where a lessor goes into competition with an existing business in the centre.

### Exclusivity

In *Foodco Management Pty Ltd v Go My Travel Pty Ltd*,<sup>125</sup> the lessee alleged that the lessor had contravened section 51AC of the TPA. The lessor knew that the lessee's business, a specialty muffin shop, sold a narrow range of products and would be vulnerable to competition from a like business. The lease contained a clause that provided that the lessor would not lease premises in the building to another 'specialty muffin shop'. The lessor then leased a shop to a business that competed substantially with the lessees. The lessee contended that, by leasing the premises to such a competitor, the landlord's conduct was unconscionable.<sup>126</sup> The court refused to grant the lessors application for summary judgment, finding that the plaintiff's case could not be described as having 'no real prospect' of success.<sup>127</sup> The court concluded that both claims were triable issues. In relation to exclusivity, the decision in *Sarker v World Best Holdings Ltd*,<sup>128</sup> discussed below under the heading 'Termination', is also instructive.

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123. Ibid.

124. *Worsfold v de Goede*, above n 54.

125. [2002] 2 Qd R 249.

126. The lessor rejected the allegations and claimed that the competitor did not operate a 'specialty muffin shop' business. However, the lessee's allegation of unconscionable conduct did not rely on a breach of the exclusivity clause. The plaintiff proceeded on the basis that it would not be necessary to prove a breach of the exclusivity clause in order to establish a s 51AC contravention.

127. *Foodco Management Pty Ltd v Go My Travel Pty Ltd* [2002] 2 Qd R 249, [15].

128. Above n 54.



## Competition

In *Softplay Pty Ltd v Perpetual Trustees ('Softplay')*,<sup>129</sup> the court granted an interlocutory injunction restraining the owners of three shopping centres from installing a children's play area in the centre's common areas. The shopping centre owners were intending that these facilities would be used by the patrons of the shopping centre free of charge. The applicant, *Softplay*, operated play centres for commercial gain in the three shopping centres. One of the claims brought by the applicant was that the defendant lessor had engaged in unconscionable conduct.<sup>130</sup> The court granted an injunction finding that the installation of the free play centres by the lessors would pose<sup>131</sup> an appreciable threat to the lessees business.<sup>132</sup> It must be remembered, however, that this was an interlocutory application where it was merely decided that there was a serious issue to be tried and that the balance of convenience was in favour of granting an injunction. Whether or not the conduct of the lessors would fall ultimately within the scope of section 51AC, or any equivalent provision, was not resolved by this case.

## DISRUPTION OF TRADING

### Redevelopment

Leases invariably contain provisions giving the lessor the right to relocate a tenant or terminate the lease where the centre is undergoing repairs or renovations.<sup>131</sup> Such clauses can see tenants compelled to move to less desirable locations within the centre and experience conditions, for example interference with access, which may see a dramatic decline in business.<sup>134</sup> Often, short term leases may be imposed upon tenants during periods of renovation. In the case of a major renovation the lessee may lose their premises completely.<sup>135</sup>

Pursuant to retail leasing legislation,<sup>136</sup> compensation for such relocation is payable. However, anecdotal evidence suggests that lessees are reluctant to seek compensation for fear of retribution from lessors whether in the form of subsequent relocations or other matters associated with the lease.<sup>137</sup>

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129. *Softplay*, above n 55.

130. Thus contravening s 62B of the Retail Leases Act 1994 (NSW). This is a provision that largely resembles s 51AC of the TPA.

131. See too *Bischof v Wernog Pty Ltd* [2004] NSWADT 24.

132. *Softplay*, above n 55, [31].

133. Problems discussed in the Reid Report, above n 14, [2.27].

134. Similar complaints have been made regarding casual leasing and the erection of kiosks outside premises. This will be discussed below.

135. *Lolly Pops (Harborside) Pty Ltd v Wernog Pty Ltd* [1998] NSWSC 304.

136. Eg, Retail Shop Leases Act 1994 (Qld) s 43(1).

137. Interviews with author: JK, NK, CT, BP (23–24 Apr 2006); CT, PT, CL (16 Jun 2006); TW, PC (5–6 Nov 2006).

Generally, the legislative provisions which deal specifically with this issue require a 'genuine' redevelopment proposal. If the proposal is not genuine the redevelopment cannot proceed.<sup>138</sup> In such circumstances, it is also relevant to consider whether conduct involving the disingenuous exercise of a relocation or a break clause could be unconscionable.

In *Blackler v Felpure Pty Ltd*,<sup>139</sup> Bryson J held that a lessor's use of a break clause for the underlying purpose of occupying the redeveloped premises itself was a genuine proposal and did not offend principles of good faith.<sup>140</sup> In comparison, in the Tribunal decision of *Eddie Azzi Australia Pty Limited v Citadin Pty Ltd*,<sup>141</sup> utilising a break clause in order to install another, seemingly more desirable tenant, was held not to be a genuine proposal. The matter seems to have been determined recently in *Skiwing Pty Ltd v Trust Company of Australia (trading as Stockland Property Management) Pty Ltd*,<sup>142</sup> in which it was held that a proposal will still be regarded as 'genuine' although the lessor is planning to relet the premises to itself<sup>143</sup> or to another commercial party.<sup>144</sup>

The interrelationship between such provisions and the unconscionability provisions is potentially contentious. Although a proposal may be 'genuine',<sup>145</sup> an ulterior motive may also exist. In a commercial transaction, a party is expected to pursue their own interests. Therefore, so long as the proposal to redevelop is genuine, the fact that a lessor plans to relet the premises to itself or another tenant is unlikely to be held to be unconscionable. However, where there is a malevolent purpose behind such activity, and this purpose is the dominant purpose behind the exercise of the clause, it would seem to be at least arguable that there could be a contravention of unconscionability provisions. Authority suggests that where there is a malevolent intent behind the course of action, conduct may be regarded as unconscionable. In *ACCC v Leelee Pty Ltd*,<sup>146</sup> the motives of the lessor were found to be malevolent and were symptomatic of a lengthy course of ill feeling between the parties. As a result the under-lessee was found to be lacking good faith. Similarly, in *Simply No-Knead*,<sup>147</sup> the conduct of a franchisor was aimed at terminating franchisees' businesses for a malevolent purpose. It would therefore appear that the use of a break clause to remove or relocate a tenant in pursuit of a malevolent agenda may

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138. Eg Retail Lease Act 1995 (NSW) ss 34–35.

139. [1999] NSWSC 958.

140. Although the case focusses on a discussion of good faith rather than unconscionable conduct, the decision is relevant to this discussion as one of the factors which a court can consider when determining whether conduct is unconscionable for the purposes of s 51AC is the good faith of the parties.

141. [2001] NSWADT 79.

142. [2006] NSWCA 276. See also *Cohen v SPB Developments Pty Ltd* [2006] WADC 186.

143. *Blackler v Felpure*, above n 139.

144. *Skiwing*, above n 142; but compare *Eddie Azzi Australia v Citadin*, above n 141.

145. *Cohen v SPB Developments Pty Ltd* [2006] WADC 186.

146. Above n 40.

147. Above n 29.

suggest the use of unfair tactics (section 51AC(3)(d)) and/or a lack of good faith (section 51AC(3)(k)).

## Casual leasing

Another form of disruption of a lessee's business may occur through the introduction of casual leasing and/or the erection of kiosks within shopping malls. This issue has become the subject of considerable contention between landlords and tenants in latter years.<sup>148</sup> Lessors seek to maximize the profitability of their centres; it is therefore clearly advantageous to lease as much of the floor area of the premises to paying tenants, permanent or otherwise. On the other hand, such activities are likely to impact on the customer flow, and therefore the turnover, of tenants through access issues, diversion of customers and the supply of competing products. As discussed above, the issue of impeded access is the subject of legislative intervention. Arguably, the deliberate placement of a competitor directly adjacent to or in front of an existing tenant may draw a court's attention to sections 51AC(3)(a), (b), (d), (f), (i)(i), (ii) and (k). This issue has recently been recognised through the ACCC's authorisation of a Casual Mall Licencing Code of Practice.<sup>149</sup> Under the code, limited restrictions are imposed in relation to the placement of casual mall licensees in close proximity to existing tenants which deal in competing products.<sup>150</sup> The impact, or otherwise, of this voluntary code remains to be seen.

## Repair

There have been contentions that a lessor's failure to repair,<sup>151</sup> or disclose the need for repairs,<sup>152</sup> could result in a finding of unconscionable conduct. Generally, the courts have been reluctant to find that, in the absence of an express duty under the lease, a lessor's failure to repair is unconscionable.<sup>153</sup>

## TERMINATION

Inappropriate termination of an agreement could potentially offend section 51AC and its analogues. In two of the cases where section 51AC was successfully established, franchisors sought to end the relationship with their respective

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148. EA Webb, 'Casual Leasing: A Coordinated Approach?' (2003) 10 APLJ 64.

149. G Samuel, 'ACCC Authorises Casual Mall Licensing Code of Practice', *Media Release*, 30 Aug 2007

150. Where such restrictions are found to apply, casual mall licensees are provided with a number of alternatives, including locating in a different area of the centre: *ibid*.

151. *Ali v Hazim* [2003] NSWADT 247.

152. *Mega Byte Baby Pty Ltd v WJH Pty Ltd (Retail Tenancies)* [2005] VCAT 1391.

153. For a comprehensive discussion of the obligations of lessors and lessees in this situation, see W Duncan & S Christensen, 'Exemptions from a Tenants Express Obligation to Repair: Is the Landlord Responsible by Implication?' (2004) 9 Deakin L Rev 621.

franchisees in circumstances where the franchisors were aware there was no clear legal justification to do so. In relation to retail leasing, some courts and tribunals have considered circumstances where lessors have purported to terminate leases. In summary, the cases indicate that franchisors, and for the purposes of this article, lessors, who validly exercise a right to terminate a lease will not, without more, be held to have engaged in unconscionable conduct.<sup>154</sup> However, where termination of a lease is, in the circumstances, unreasonable, or, it seems, is motivated by an inappropriate agenda, an allegation of unconscionable conduct may succeed.

*Auomasters*<sup>155</sup> involved the alleged unlawful termination of a franchise agreement. The court found that the franchisor's conduct demonstrated an element of oppression which was 'referable to a conscious determination to bring the franchise agreement to an end'.<sup>156</sup> On the facts there was no sufficient justification for Automasters to terminate the franchise agreement and, in the circumstances, Automasters had acted capriciously and unreasonably. *Simply No-Knead*<sup>157</sup> also involved a purported termination by a franchisor. In summary, the franchisor's conduct was aimed at making life so difficult for the franchisees that they would terminate or not renew their franchises. The case involved several instances of unconscionable behavior, which were summarised by Sundberg J as 'an overwhelming case of unreasonable, unfair, bullying and thuggish behaviour in relation to each franchisee that amounts to unconscionable conduct by SNK for the purposes of section 51AC(1)'.<sup>158</sup>

In relation to retail leasing, a lessor's conduct was found to be unconscionable in *Sarker v World Best Holdings Ltd*.<sup>159</sup> In that case, the lessor granted the lessee the exclusive right to operate an Indian grocery store in the shopping centre. The lessor then proceeded to lease a shop in the same centre to the applicant who was granted the exclusive right to operate an Asian grocery store. Faced with the problem of having granted exclusive rights to two businesses which dealt in the same or similar products, the lessor tried to terminate the applicant's lease. The lessor purported to rely on minor breaches of the applicant's obligations regarding a bank guarantee and fitout to justify the termination.

The Tribunal held that the lessee's breaches did not amount to repudiation. On the facts, the breaches were not significant and, after the lessor made the mistake in allowing the overlap, it sought to rely on whatever legal argument it could to solve

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154. For example, a case where s 51AC was held not to be contravened through a termination included *4WD Systems and Hoppers Crossing Club Limited v Tattersalls Gaming Pty Ltd* [2005] VSC 114. In relation to a tribunal decision, see *Campbell v Astill* [2004] NSWADT 277.

155. Above n 40.

156. *Ibid* [396].

157. Above n 29.

158. *Ibid* 320. For a discussion as to the duty of good faith in the termination of a franchise, see *Meridian Retail Pty Ltd v Australian Unity Retail Network Pty Ltd* (2006) VSC 223.

159. Above n 54.

its own error.<sup>160</sup> The Tribunal found that the lessor acted in a way that was not reasonably necessary to protect their own interest by seeking to terminate the plaintiff's lease without warning; used unfair tactics by not giving notice of all of their concerns relating to the breaches of the terms of the lease; and acted in bad faith.<sup>161</sup>

*Old Papa's Franchise Systems v Camisa Nominees Pty Ltd* is also instructive.<sup>162</sup> The case involved the purported termination of the lease on an iconic coffee shop on the Fremantle Café Strip. The lessees were trying to prevent the termination of their lease due to several alleged breaches. The lessee commenced actions seeking, inter alia, relief against forfeiture. The lessee also claimed that the lessors had engaged in unconscionable conduct pursuant to sections 51AC and 51AA. In summary, the lessee claimed that by looking at the lessor's conduct, the lessor revealed an ulterior motive; to harm Old Papa's and bring about the termination of the lease.

The lessees listed several instances of the lessor's conduct which, when looked at in combination, were said to support this contention.<sup>163</sup> The lessees were unsuccessful at first instance. On appeal, the Full Court<sup>164</sup> held that the evidence before the court foreclosed a finding that the lessors were actuated by a desire to harm the lessee and terminate the lease or otherwise engage in unconscionable conduct under sections 51AC or 51AA of the TPA. Although, in combination, the instances of alleged conduct appeared to suggest some form of oppressive agenda on the landlord's part, in the Full Court's view, each could be explained and could not, in the circumstances, be regarded as amounting to unconscionable conduct.<sup>165</sup>

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160. Ibid [68].

161. Ibid [86]. This decision of the NSW Administrative Decisions Tribunal was later set aside by the NSW Supreme Court on the grounds that the Tribunal was improperly constituted at the time of the decision. The decision is still useful, however, because it indicates what kind of conduct is likely to be found unconscionable for the purposes of s 51AC of the TPA and 62B of the Retail Leases Act. See also *Irresistable Frocks v Sparbac and Roche* [2003] NSWADT 241.

162. Above n 29.

163. In summary, the lessor had refused to give consent for a liquor licence and proposed renovations to the premises. The lessor also refused to consent to the assignment of the lease to a corporation related to the original lessee. There had been a history of legal activity between the parties and certain actions by the lessors, on the face of it at least, seemed provocative. For example, a substantial rental increase (almost 100%) had been imposed after a rent review. Further, the lessor had erected scaffolding around the building which, the lessee claimed, was left there for an unnecessarily long time thus disrupting trading.

164. With whom Murray and Parker JJ agreed.

165. In relation to the refusal to permit the building renovations, the lessor had taken heed of the heritage listing of the premises and the associated issues regarding structural alterations. The liquor licence was intimately involved with the renovation proposal in that the consent to the liquor licence application was linked with the works said to be necessary to obtain that licence. There was a lack of specificity on the lessee's part regarding the works and the lessor's solicitors had repeatedly, without success, requested the lessee appellant to identify the necessary works.

Commenting on whether the conduct would be regarded as unconscionable, McLure J referred to statements in *Hurley v McDonald's Australia Ltd*,<sup>166</sup> where it was noted that for conduct to be regarded as unconscionable, serious misconduct or something clearly unfair or unreasonable, must be demonstrated.<sup>167</sup> In applying this standard to the facts of the case, McLure J<sup>168</sup> noted that the lessor had not engaged in such conduct and that the lessor's actions had to be seen in the light of the uncooperative and adversarial nature of much of the dealings between the parties and their solicitors.

Finally, action taken in the course of termination, for example, the inappropriate use of a default notice,<sup>169</sup> a 'lock-out'<sup>170</sup> and/or the confiscation of the lessee's goods,<sup>171</sup> could potentially be regarded as unconscionable. Arguably, all may involve an 'unfair tactic' (section 51AC(3)(d)), different treatment to other lessees in a like situation (section 51AC(3)(f)), a failure to disclose intended conduct that might affect the lessee's interests (section 51AC(3)(i)(i)), a failure to disclose risks that might arise from the lessor's intended conduct (section 51AC(3)(i)(ii)), and a lack of good faith (section 51AC(3)(k)). A threat to take such a course of action would also seem, in appropriate circumstances, to be regarded as unconscionable.<sup>172</sup> Although, to date, a finding of unconscionable conduct has not been made, the recent Tribunal decision of *Parallel Lines International Pty Ltd v Video-Drama Pty Ltd*,<sup>173</sup> where a lock-out was held to be the result of a mistake, left open the availability of an

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In the circumstances, the rent increase was regarded as a commercial ambit claim, and it was clear that if the proposed sum was not satisfactory there was a process for the formulation of market rent involving both parties. The scaffolding was erected firstly to inspect an area which it was necessary to repair, a process which was legitimately delayed due to bad weather and other works related issues. There were, in the courts view, reasonable explanations for other conduct listed by the lessee. For example, the alleged lack of information being brought about by communication breakdowns because the lessee had failed to inform the lessor of which entity was, in reality running the business.

166. [1999] FCA 1728. McLure J noted that as the trial Judge did not expressly deal with or address all of the matters the subject of the grounds of appeal. It should be noted that the grounds of appeal raise in clearer terms than the appellant's pleading the allegation that the respondents' conduct was for the collateral purpose or motive of harming the lessee and terminating the Lease.
167. Ibid [22]. 'For conduct to be regarded as unconscionable, serious misconduct or something clearly unfair or unreasonable, must be demonstrated: 'Whatever 'unconscionable' means in ss 51AB and AC, 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 judgment'.
168. Agreeing with the Trial Judge.
169. *Odour Elimination Services Pty Ltd v Duxberry Nominees Pty Ltd* [2006] WADC 12.
170. *Parallel Lines International Pty Ltd v Video-Drama Pty Ltd* [2007] NSWADT 84; and on appeal [2007] NSWADTAPT 160.
171. *Kiwi Munchies Pty Ltd v Nikolitis (Retail Tenancies)* [2006] VCAT 929.
172. *Laserbem Pty Ltd v Gainsville Investments Pty Ltd* [2004] VSC 62.
173. Above n 170.

allegation of unconscionable conduct where the lock-out was effected malevolently or without due cause.<sup>174</sup>

Yet again there is the conflict between an unhindered exercise of the lessor's legitimate rights and the considerations of section 51AC and its equivalents. While on the authority of cases such as *Hurley* the bare exercise of a lessor's strict legal rights, without more, is unlikely to amount to unconscionable conduct,<sup>175</sup> a consideration of factors such as the use of 'unfair' tactics or a consideration of good faith seems to provide a licence for the court or tribunal to look beyond the bare terms and examine factors such as motive. In summary, the termination of a lease in circumstances where there is malevolent purpose or an ulterior motive may potentially amount to unconscionable conduct. This is the case even where there have been some breaches on the part of the lessee.<sup>176</sup> However, all the circumstances of the case must be examined and any malevolent purpose may be outweighed by legitimate considerations.<sup>177</sup>

## CONCLUSIONS ON THE EFFECTIVENESS OF THE UNCONSCIONABLE CONDUCT PROVISIONS

While the instances of conduct discussed above may seem, in some circumstances, to be harsh, the cases to date which have discussed section 51AC and its equivalents indicate the difficulty in 'scaling the bar' of unconscionability. It seems that conduct must be malevolent and overt; even then it may not be sufficiently egregious. Other, less extreme types of conduct, despite being singled out by the Reid Committee as warranting legislative intervention would seemingly fall short of the standard imposed by many interpretations of section 51AC and its equivalents.<sup>178</sup>

No doubt, on one view, a narrow interpretation of section 51AC is inherently desirable; a sensible and balanced interpretation which prohibits the direst examples of commercial misconduct without creating uncertainty and anarchy in small business dealings. However, section 51AC was intended to provide an avenue for relief to parties who suffer loss through dubious behavior in a small business relationship. If the term unconscionable in section 51AC is constrained, for example, in the same way as the term has been limited in section 51AA, the scope and potential of section 51AC, and the recommendations of the Reid Report, may be rendered largely ineffective.

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174. See too *Armstrong Jones Management Pty Ltd v Saies-Bond & Associates Pty Ltd* [2006] NSWADT 323, where the tenants alleged, unsuccessfully, that the lessor's conduct was unconscionable because it was being treated differently to other tenants in similar dire financial straits.

175. Christensen & Duncan, above n 5, 171.

176. *Sarker v World's Best Holdings*, above n 54.

177. *Australian Property Buyers v Kowalski*, above n 57.

178. For example, note the many cases listed in Christensen & Duncan, above n 5, where conduct, although harsh and arguably unfair, was found not to be unconscionable.



Section 51AC was inserted into the TPA over nine years ago. The equivalent provisions in retail tenancy, and in some cases, fair trading, legislation have been operational for up to five years. Unfortunately, despite the anticipation surrounding the provision's introduction, there remains considerable doubt as to the scope and efficacy of the section. A crucial impediment is the lack of binding judicial interpretation of section 51AC.<sup>179</sup> It is uncertain why this is the case. On some views, the effective dispute resolution processes of the state and territory retail leasing tribunals are a major factor. Similarly, a willingness to settle matters, rather than litigate, can be observed.<sup>180</sup> It has been claimed that the 'problems' thought to be existing in the industry were not, and are still not, as prominent as originally thought.<sup>181</sup> Another possibility is that a heightened awareness of the provisions of the TPA and a raised consciousness amongst lessors and lessees for the need to comply with the TPA has resulted in an improvement of practices within the industry so that problems of the past are not arising to the same extent. However, some lessee interests claim that the unconscionability 'test' in a business context is too onerous and that it is simply 'not worth' the economic and personal cost of litigation.<sup>182</sup> Several submissions<sup>183</sup> made to the Dawson Committee,<sup>184</sup> the Senate Economics References Committee,<sup>185</sup> and most recently to the Productivity Commission,<sup>186</sup> demonstrate that unfair and arguably unconscionable practices are still occurring today.

Recent survey work conducted by one of the authors is illuminating in this respect. As part of a wider study into Retail Leases Legislation in Australia using Victoria as the main case study, Crosby carried out a set of semi-structured interviews with a combination of government, property professionals and representatives of landlords

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179. Trade Practices Committee, Business Law Section, Law Council of Australia, Submission to the Senate Economic References Committee Inquiry into whether the Trade Practices Act 1974 Adequately Protects Small Businesses from Anti-Competitive or Unfair Conduct (...date...) 30.

180. For example, the recent ACCC action against Westfield.

181. For example, note the views of the Shopping Centre Council of Australia.

182. Western Australian Retailers Association Inc, Submission to the Productivity Commission, (Jul 2007) 5: 'Our submission includes many examples of where the legal process has broken down. Small business people have tried and tried the court systems over and over again and essentially, come-up not only achieving nothing of value but financially gutted and emotionally traumatized by the their experiences.' Similarly, the Australian Retailers Association's submission noted: 'For a retailer to attempt to argue a case of unconscionable conduct the cost and time is prohibitive and the chance of success based on unconscionable conduct is small': at 25.

183. Fair Trading Coalition, Submission to the Senate Economics References Committee Inquiry into the Effectiveness of the Trade Practices Act 1974 in Protecting Small Business (Aug 2003)

184. For example, the Fair trading Coalition and Australian retailers Association. Although the submissions were made, the Dawson Committee was of the view that the contentions regarding s 51AA were outside the Committee's terms of reference.

185. Senate Economics References Committee, above n 112, 34.

186. For example, several submissions to the Productivity Commission (Jul 2007): [www.pc.gov.au/inquiry/retailtenancies/subs/sublist.html](http://www.pc.gov.au/inquiry/retailtenancies/subs/sublist.html); eg, Western Australian Retailers Association Inc, Australian Retailers Association, Queensland Lease Management.

and tenants.<sup>187</sup> In total, 28 individual interviews were carried out in early March and April 2006 with 36 interviewees (a number of firms and organisations fielded two or more individuals). The interviewees included nine lawyer representatives of professional law firms and 16 representatives of letting agency practices and property valuers, operating for both landlords and tenants. Two representatives of the Retailers' organisations for Victoria and New South Wales and a representative of the Australian Council for Shopping Centres were interviewed along with a major shopping centre owner, a major financial institution and a major retailer. Government interviewees included the government official responsible for organising the drafting of the 2003 Victorian legislation, the Small Business Commissioner and two representatives of his office who organise the mediation of disputes under the legislation and the Valuer-General for the State of Victoria. In addition, a meeting with the Commercial Leases Committee of the Law Institute of Victoria was arranged to discuss the issues and the researcher also spoke and invited questions at two continuing professional development seminars, one for valuers arranged by the Australian Property Institute and the other for lawyers arranged by Legalwise, a law CPD institute.

The majority of professional interviewees were of the opinion that the drawing down of the unconscionable conduct provisions into the retail leases legislation has increased the feeling that an action for unconscionable conduct against a major landlord was a significant deterrent to any temptation to behave very robustly against a tenant. Being cited by the Victorian Small Business Commissioner ('VSBC') for a minor or even quite major offence against the Act did not have the same brand image damage attached to it as a citing for unconscionable conduct. The fact that landlords are wary of the unconscionable conduct issue is illustrated by Croft who suggests that before the latest Victorian Retail Leases Act was enacted in 2003, there was no sanction for landlords not giving a disclosure statement. Landlords started to ignore the requirement as they feared it might be used as evidence in unconscionable conduct proceedings.<sup>188</sup>

There are a number of reasons why a tenant might not want to take out an action of unconscionable conduct against a landlord. The annual report of the VSBC in 2005 does introduce a point of concern about parties not wishing to formalise disputes as they feel that the other party may be able to retaliate in the future. This point was also discussed in a number of interviews where property professionals had found tenants reluctant to take a dispute too far in case the landlord retaliated by refusing to renew at lease expiry. The lack of a right to renew leaves tenants vulnerable to this sort of behaviour. This is because the unconscionable conduct provisions may not

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187. N Crosby, *An Evaluation of the Policy Implications for the UK Approach to Small Business Tenant Legislation in Australia*, Research Report (University of Reading, 2006): <[www.rdg.ac.uk/rep/ausleaserpt.pdf](http://www.rdg.ac.uk/rep/ausleaserpt.pdf)>.

188. C Croft, 'Disclosure Obligations and the Abolition of the "Dog Depot" Decision' (Paper presented at the Retail Leases Conference, Leo Cussen Institute, Melbourne, Mar 2006).

protect the tenant as section 79 of the Retail Leases Act (Vic) specifically states that a refusal to renew the lease is not unconscionable conduct.

If these concerns are real, the SBC could monitor the situation given more resources. Section 25 of the Retail Leases Act 2003 (Vic) requires notification of leases and therefore all kinds of lease data on terms and conditions could be collected, including lease expiry dates. Lease expiry outcomes could then be monitored, especially those subject to a dispute of any kind in the existing lease. Tenants' fears that they will be discriminated against at lease expiry if they are subject to a dispute within the lease could be assessed from empirical data on outcomes as opposed to the present anecdotal comments. Anecdotal evidence is often drawn from extreme positions.

It could also be argued that lessees are reluctant to commence actions against landlords for unconscionable conduct because of the high costs associated with litigation. This reticence was noted by the Reid Committee.<sup>189</sup> Although the Commonwealth government went some way towards addressing this problem by providing additional funding to the ACCC to run test cases involving retail leasing matters, resources will only extend to a limited number of matters.<sup>190</sup>

## UNFAIRNESS IN AUSTRALIAN RETAIL LEASES

In its 2004 report, *The Effectiveness of the Trade Practices Act 1974 in Protecting Small Business*, the Senate Economics References Committee reconsidered the question of whether a law proscribing unfair conduct should be inserted into the TPA. Although the Committee ultimately decided against recommending the inclusion of such a provision it was noted that although the TPA uses 'the legally familiar term 'unconscionable', the mischief which the Act seeks to address seems closer to unfair conduct'.<sup>191</sup>

In Australia, the prospect of a provision prohibiting unfair conduct in commercial transactions is fraught with negativity. Two main arguments emerge against the prospect. Firstly, it is contended that the meaning of the term 'unfair' is too contentious and that a provision prohibiting unfair conduct will result in the courts making 'value laden judgments' which are likely to be applied inconsistently.<sup>192</sup> The other argument against an unfairness provision is its perceived potential to interfere with traditional notions of freedom of contract such that parties will be uncertain whether commercial contracts are enforceable.<sup>193</sup>

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189. Reid Report, above n 14, 158

190. *Hansard*, House of Representatives, 30 Sep 1997, 8800.

191. Senate Economics References Committee, above n 112, 35. Indeed, the Committee noted that if the current s 51AC 'seeks to proscribe unfair conduct, it remains reasonable to consider why it should not simply say so.'

192. Reid Report, above n 14, 168

193. *Ibid* 167. Such concerns were also discussed in Senate Economics References Committee Report, above n 112, 5. However the Committee rejected the proposition that an unfair

However, it has recently been noted that Australian courts have considerable experience with interpreting, and giving meaning to, 'general concepts'<sup>194</sup> such as reasonableness, unconscionability, good faith and, indeed, unfairness. Unfairness is not an unfamiliar concept in Australian law and has been the subject of judicial consideration pursuant to section 106 of the Industrial Relations Act 1996 (NSW).<sup>195</sup> 'Unjust', which is arguably synonymous with unfair, has often been examined in the context of the Contracts Review Act 1980 (NSW)<sup>196</sup> and the Uniform Consumer Credit Code.<sup>197</sup> Although it should be stressed that the interpretation of this legislation, to date, has focussed on procedural matters,<sup>198</sup> its presence does not seem to have seen an increase in litigation nor is there evidence of inconsistent, subjective decision making.

This article will now consider, if there was to be an extension to unfairness in Australian retail leasing transactions, what the form and scope of the provision would be. Given the recent introduction of unfair contract provisions into the Fair Trading Act (1999) (Vic), and the likely inclusion of such provisions in other state legislation,<sup>199</sup> an appropriate course may be an extension of such provisions to encompass retail leasing and other small business transactions.

Unlike the United Kingdom, unfair contracts legislation is a relatively recent development in Australian law. Indeed, the proposal did not gain traction until developments in Victoria which led to the introduction of Part 2B (Unfair Contract Terms in Consumer Contracts) into the Fair Trading Act 1999 (Vic). Section 32W defines an unfair term in a consumer contract for the purposes of Part 2B. A term is unfair if, contrary to the requirements of good faith and in all the circumstances, it

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conduct provision should replace s 51AC concluding that the term 'unfair' was unworkably ambiguous, and would lead to widespread uncertainty.

194. J Dietrich, 'Giving Content to General Concepts' [2005] MULR 6. Dietrich defines 'general concepts' as 'those legal notions or ideas that are necessarily described in broad and abstract terms'. See also F Zumbo, 'Dealing with Unfair Terms in Consumer Contracts: Is Australia Falling Behind?' (2005) 13 TPLJ 70; N Howell, 'Catching up with Consumer Realities: The Need for Legislation Prohibiting Unfair Terms in Consumer Contracts' (2006) 34 ABLR 447.
195. NSW legislation also refers to unfair contracts in the IRA. While this provision refers to unfair contracts in a business/industrial context, discussions of the provision are useful in terms of unfair terms generally. Section 105 defines unfair contract to mean (inter alia) a contract: (a) that is unfair, harsh or unconscionable, or (b) that is against the public interest.
196. The CRA states that a court can grant relief in relation to a consumer contract if it finds the contract or a provision of the contract to have been unjust in the circumstances relating to the contract at the time it was made (s 7). The definition of unjust refers to the terms unconscionable, harsh or oppressive (s 4). The CRA lists matters the court must consider in determining if the contract or a term is unjust (s 9(1)).
197. Section 70.
198. T Carlin, 'The Contracts Review Act 1980(NSW): 20 Years On' (2001) 23 Syd L Rev 15, 129; Howell, above n 194, 451.
199. NSW, Qld and WA.

causes a significant imbalance in the parties' rights and obligations arising under the contract to the detriment of the consumer.

The provision applies only to consumer transactions. Like the dialogue in the United Kingdom prior to the introduction of the unfair contract terms legislation, there was debate as to whether the provisions should extend to small business transactions.<sup>200</sup> However, seemingly inevitably, the legislation was limited to consumer transactions. Section 32X provides examples of contract terms which could contravene the provisions. In determining whether a term of a consumer contract is unfair, a court or the tribunal may take into account, among other matters, whether the term was individually negotiated, whether the term is a prescribed unfair term and whether the term has the object or effect listed in sections 32X(a)-(m).<sup>201</sup> An unfair term in a consumer contract<sup>202</sup> and a prescribed unfair term in a standard form contract are void.<sup>203</sup> The contract will continue to bind the parties if it is capable of existing without the unfair term or the prescribed unfair term.<sup>204</sup>

If these provisions were to apply to retail leases it would need to be considered whether the particular lease was individually negotiated or was a standard form lease. The latter is almost invariably the case. It is recognised that certain terms in retail leases tend to disadvantage a lessee. Indeed, when the Australian Retailers Association proposed a retail leasing code of conduct, several provisions, including

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200. E Start, Policy Development Officer, Federation of Small Businesses, Workshop on Unfair Commercial Practices (22–23 Jan 2003) Session 3: Unfair Competition and Consumer Protection; Standing Committee of Officials of Consumer Affairs Unfair Contract Terms Working Party, *Unfair Contract Terms*, Discussion Paper (Jan 2004) ch 5: 'Possible Inclusion of Business to Business Contracts'.

201. (a) permitting the supplier but not the consumer to avoid or limit performance of the contract;  
 (b) permitting the supplier but not the consumer to terminate the contract;  
 (c) penalising the consumer but not the supplier for a breach or termination of the contract;  
 (d) permitting the supplier but not the consumer to vary the terms of the contract;  
 (e) permitting the supplier but not the consumer to renew or not renew the contract;  
 (f) permitting the supplier to determine the price without the right of the consumer to terminate the contract;  
 (g) permitting the supplier unilaterally to vary the characteristics of the goods or services to be supplied under the contract;  
 (h) permitting the supplier unilaterally to determine whether the contract had been breached or to interpret its meaning;  
 (i) limiting the supplier's vicarious liability for its agents;  
 (j) permitting the supplier to assign the contract to the consumer's detriment without the consumer's consent;  
 (k) limiting the consumer's right to sue the supplier;  
 (l) limiting the evidence the consumer can lead in proceedings on the contract;  
 (m) imposing the evidential burden on the consumer in proceedings on the contract.

202. Section 32Y(1).

203. Section 32Y(2).

204. Section 32Y(3).

relocation clauses, were identified as being appropriate for a model clause to be developed. Although the larger retail lessors still tend to utilise their own leases, in several states and territories, model clauses have been drafted and are available for use. It seems it would be a relatively easy task to identify terms in standard form leases which were regarded as unfair. Also, several of the provisions of sections 32X(a)-(m) appear to be relevant to retail leasing transactions.

It would now be useful to examine some common problematic scenarios in retail leasing and assess whether unfair contracts legislation would assist where unconscionability has seemingly failed. At the outset, it should be noted that, although in some cases unfair contract legislation may assist, in most cases tenants complain of landlord behavior. Concerns are in the context of the landlord's conduct not the terms of the contract. Indeed, on the face of it, lease terms, which for the most part must conform to the relevant retail leasing legislation, may appear quite benign. However, it is often the conduct surrounding or associated with the leasing transaction that is oppressive. Therefore, the scope of section 32X will be a consideration in determining how effective unfair contract legislation would be in a retail leasing environment.

The allegedly unfair contract term must cause a significant imbalance in the parties' rights.<sup>205</sup> The circumstances when the term will create the requisite imbalance and detriment should be considered. The unfair contract terms provisions invite an examination of 'the requirements of good faith' and 'in all the circumstances'. A definition of good faith remains elusive but it is clear that, in a business context, altruism is not required. It is generally accepted that good faith refers to principles of honesty and fair dealing in the contractual process.<sup>206</sup>

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205. Feasibly, parties could be on equal terms with regard to advice, resources and business acumen but the term of the contract results in a significant imbalance which is ultimately detrimental. The provisions do not require any disadvantage to afflict the affected party as in the case of the equitable doctrine of unconscionable dealing.

206. RS Summers, "'Good Faith" in General Contract Law and the Sales Provisions of the Uniform Commercial Code' (1968) 54 Virginia L Rev 195. In *Far Horizons Pty Ltd v McDonalds Australia Ltd* 2000 VSC 310, Byrne J, in the context of a franchise agreement noted: 'I do not see myself at liberty to depart from the considerable body of authority in the country which has followed the decision of the New South Wales Court of Appeal in *Renard Constructions (ME) Pty Ltd v Minister for Public Works*. I proceed, therefore, on the basis that there is to be implied in a franchise agreement a term of good faith and fair dealing which obliges each party to exercise the powers conferred upon it by the agreement in good faith or reasonably, and not capriciously or for some extraneous purpose. Such a term is a legal incident of a contract.' In *Garry Rogers Motors (Aust) Pty Ltd v Subaru (Aust) Pty Ltd* (1999) ATPR 41-703, Finkelstein J noted that where such a duty of good faith term may properly be implied it would not prohibit actions designed to promote the party's legitimate interests, although it would require a party not to act capriciously. See also *Central Exchange Ltd v Anaconda Nickel Ltd* (2002) 26 WAR 33; *Eso Australia Resources Pty Ltd v Southern Pacific Petroleum NL* (rec & man apptd) [2004] VSC 477.

A pertinent issue is the extent to which surrounding circumstances can be examined to determine whether a contract term is unfair. Arguably, 'in all the circumstances' could be limited to a bare commercial context. It is unlikely that merely exercising a term in a business context,<sup>207</sup> without more, could amount to unfairness. On the other hand, a wider view could see 'in all the circumstances' encapsulate the state of affairs surrounding the lessor and lessee. This would also seem to include matters involving the centre itself and could even extend to the state of the market. An important consideration is whether it is possible that 'in all the circumstances' could extend to a mental element. Therefore, if a lessor had an ulterior motive or some malevolent intent, this could be taken into account in examining all the circumstances. Such a mental element would certainly seem to undermine principles of good faith, a pivotal consideration when determining whether the term is unfair.

In the few cases involving the provisions to date, an expansive view seems to be adopted.<sup>208</sup> Therefore, although there is a reference to term - the ability to consider the exercise of the clause in all the circumstances may bring the unfair contract terms provisions closer in practical operation to an unfair conduct provision. Such a development would be useful in a retail tenancy context as 'unfair' does not seem to be as difficult a hurdle to overcome as 'unconscionable'.

At this stage we should briefly revisit the leasing scenarios discussed above in the context of unfair terms.

## Negotiations

In relation to pre-contractual negotiations, a potential contract may be regarded as unfair. Even if a contract is eventually concluded, the provisions may still apply. Also, a lessee may be required to state that they have not relied on any warranties unless such warranties are recorded in the documentation and executed. If, in fact, there had been such representations, being compelled to deny them, or to be unable to rely on them if necessary, is arguably unfair.

## Sitting tenant

As in the case of unconscionability, the meaning of unfairness in a business context will be a major consideration. Could the exercise of a lessor's right to choose whether they want to lease their premises to a particular tenant or not ever be regarded as unfair? Put another way, is it 'unfair' for a lessor to refuse to grant a further term unless the sitting tenant agrees to a large rental increase or a condition that the lessee must abandon legal proceedings against the lessor? On one level, the response

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207. *Hurley v McDonalds Australia Pty Ltd*, above n 166.

208. *Director of Consumer Affairs v AAPT Ltd (Civil Claims)* [2006] VCAT 1493.



may be 'yes'. However, examined in a commercial context, it could be just as easily regarded as part of the cut and thrust of business dealings.

If this hurdle could be overcome, arguably, such a term could contravene sections 32X(a), (b) and (e). Section 32X(a) permits the supplier (lessor) but not the consumer (lessee) to avoid or limit performance of the contract. In this case, it would seem that performance or otherwise of the proposed contract is solely dependent on the lessor. Section 32X(b) permits the supplier (lessor) but not the consumer (lessee) to terminate the contract while sub-section (e) permits the supplier (lessor) but not the consumer (lessee) to renew or not renew the contract.

### Assignment and options

On the face of it, a standard clause involving consent to assignment would not seem to be unfair. If there is a focus on the term itself and if 'in all the circumstances' was limited to the commercial context of the transaction, the fact that most terms in retail leases must conform with provisions of the relevant retail leasing legislation would seem to undermine the prospect of a term being found to be unfair. Therefore, problems associated with the refusal of consent to assignment, for example an ulterior motive or malevolent purpose, may not be addressed. Thus, it will be crucial to determine to what extent unfair contracts legislation will permit an examination of the conduct behind the term. The existence of a malevolent purpose would undermine the requirements of good faith, even, it would seem, in a commercial context. Provisions of section 32X which would appear to be relevant here include sections 32X(a),(b),(e) and (h).<sup>209</sup> These comments would seem equally applicable to standard option clauses.

### Rental

In *Barbcraft Pty Ltd v Geobel Pty Ltd*,<sup>210</sup> the essence of the unconscionability alleged against the tenants was that they refused to renegotiate the rent fixing arrangements under the lease when changes in circumstances made it fair to do so, or put another way, unfair not to do so.<sup>211</sup> The lessor's counsel relied on *Starkey v Mitchforce Pty Ltd*,<sup>212</sup> a decision under section 106 of the Industrial Relations Act 1996 (NSW), where an applicant had successfully argued that a rental provision in a hotel lease was 'in its terms unfair, harsh and unconscionable'.<sup>213</sup> However, such

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209. Note the provisions of s 32X(j) which permit the supplier to assign the contract to the consumer's detriment without the consumer's consent.

210. [2003] VCAT 1700.

211. *Ibid* [38].

212. [2000] NSWIR Comm 216 and on appeal to Full Bench in *Mitchforce Pty Ltd v Starkey* [2002] NSWIR Comm 85.

213. It should be noted, however, that this decision was the subject of an appeal to the NSW Court of Appeal. The appeal was successful because, in the view of the Court of Appeal, the

a result requires some degree of caution in an unfair contract terms context. A rental provision, particularly involving the amount of rental to be paid, is pivotal and if such a term was found to be unfair and thus void, the lease may be unable to remain on foot.

### Various termination clauses

One of the most contentious issues in discussions of unconscionable conduct and, indeed, good faith, has been the exercise of break clauses and the requirement for a genuine proposal to be in existence. Such clauses are regulated by retail tenancy legislation so it is unlikely that, on its face, it would be unfair. If 'in all the circumstances' permits an examination of the rationale behind the proposal, in what circumstances may unfairness result?

The recent decision in *Skiwing Pty Ltd v Trust Company of Australia (trading as Stockland Property Management)*<sup>214</sup> sought to reconcile conflicting court and tribunal decisions.<sup>215</sup> It determined that the mere pursuit of a lessor's own commercial interests, for example leasing the property themselves or leasing it to another, more desirable tenant, would not undermine the notion of a genuine proposal.<sup>216</sup> However, as discussed above, where there is a malevolent intent behind the exercise of a break clause, it would seem that the circumstances in which the clause was exercised offended principles of good faith and may therefore be held to be unfair.<sup>217</sup>

In the context of unfair contract terms, sections 32X(a),(b) and (k) could be applicable to break clauses. If 'in all the circumstances' extends to an ulterior motive, the decision to exercise a break clause for a genuine proposal, even if this involves the pursuit of the lessor's commercial interests, for example, leasing the redeveloped property to a more desirable tenant, will not offend the requirements of good faith.<sup>218</sup> However, if the clause was exercised in a fashion which was not genuine, arguably the term would be unfair as, in all the circumstances, it did not meet the requirements of good faith.

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reach of s 106 did not extend to leasing transactions: *Mitchforce Pty Ltd v Industrial Relations Commission* [2003] NSWCA 151.

214. Above n 142.

215. Refer to the discussion above regarding redevelopment, particularly *Blackler v Felpure*, above n 139; *Eddie Azzi Australia v Citadin*, above n 141.

216. *Skiwing*, above n 142, [225] the Court agreed with Bryson J's interpretation in *Blackler v Felpure Pty Ltd*, above n 139, and noted: 'Bryson J stated that the lessor may use the power conferred by the section to terminate the lease 'with a view to its own advantage'. This of itself does not prevent a proposal for demolition from being 'genuine'.'

217. *Cohen v SPB Developments Pty Ltd* [2006] WADC 186, [50] (Commissioner Schoombe): 'On the basis of the above authorities it seems to me that there is considerable scope for the plaintiff to argue that if the defendants did not reasonably require vacant possession of the property at the time that the redevelopment notice was issued or at the time when it expired that the defendants acted in breach of the implied term of good faith.'

218. Recall *Blackler v Felpure*, above n 139; *Skiwing*, above n 142.

Relocation clauses may seem fair on their face although, arguably, a lack of power on the lessees part to influence relocation decisions and may offend sections 32X(a),(b)(e)(f)(g) and/or (k). However, again it is likely to be conduct, rather than contract terms, that requires remedy. Similar comments would apply to a termination clause which may potentially offend sections 32X(a)(b)(c)(d) and/or (h). Therefore, the scope of the unfair contracts provisions, and the preparedness of the courts interpreting them, to examine surrounding circumstances would be the key to any effective use of unfair contracts legislation.

A final point should be made. The consequences of a term being found to be unfair is that it is void. If any of the clauses discussed above were found, in the circumstances to be unfair, the consequences could be dire. The lease could be left with a pivotal clause which could not be enforced. Similarly, if the contract cannot be performed without that clause, the lease may have to be terminated thus undermining the aspirations of both lessor and lessee.

Although the extension of unfair contracts legislation to retail leases may have some impact, especially in the case of conditions placed on a sitting tenant and on rental provisions, the reality is that it is unfair conduct which, for the most part, should really be addressed. It remains to be seen how far the latest Productivity Commission inquiry will be prepared to venture down this contentious road.

## THE POSITION IN THE UNITED KINGDOM

### Background and context

The situation in the United Kingdom appears to be quite unlike that in Australia. There has never been the widespread criticism of landlord behaviour as occurred in the evidence put before the Reid Committee. This is not to suggest that United Kingdom landlords behave perfectly but rather that they operate in a very different context and in one that tends to militate against unfair practices.

The adverse comments in Australia have largely been aimed at landlords of retail property and the most obvious point to make is that the retail market in the United Kingdom is far more diverse. There is not the same concentration of premises in shopping centres (although this is increasing) and the ownership of shopping centres is spread amongst a far greater number and range of landowners. This means that, rather than being in a dominant position and being able to dictate terms to prospective tenants who have few alternative locations, the owners of United Kingdom shopping centres need to compete for tenants. This in itself tends to encourage them to develop a positive image.

There have nevertheless been criticisms of United Kingdom landlords and these have induced a response from government. It was as a result of a long period of

sustained pressure both before and after the second world war from tenants who complained of undue pressure at the expiry of their leases that a statutory right of renewal was given to all tenants who occupied premises for the purposes of their business. Part II of the Landlord and Tenant Act 1954 (UK) in its original form was noteworthy for extending to all types and sizes of business tenant and for being mandatory – there was originally no contracting out of its protection. Its range of operation has, if anything, grown (it was expanded to encompass on-licensed premises in 1989) but contracting out is now permitted and this practice has become more widespread, especially for shorter leases of non-retail property. Despite this, a statutory right of renewal is enjoyed by most retail tenants, large and small, and this offers significant protection from unacceptable landlord behaviour at the end of the contractual term. Since this statutory right of renewal is not dependent on any minimum period of occupation it is also a benefit that can be passed on to an assignee, however late on in the lease this takes place. In this way, tenants retain a very real economic interest in their premises.

In the early 1990s an influential report,<sup>219</sup> coupled with a rise in the number of tenants' complaints to their MPs arising from the effects of the property recession, prompted government to investigate commercial leasing practices. The criticisms being levelled were rarely about unfair practices as such but rather at the way in which lease provisions had become heavily standardised and landlord-orientated. Thus, the pressure was on to abolish original tenant liability and upward only rent reviews and to introduce more flexibility on lease length. Over the years since then significant progress has been made on these issues. Original tenant liability has gone,<sup>220</sup> and lease lengths have shortened and become more diverse.<sup>221</sup> Only the upward only rent review has proved impervious to change and, even here, its impact had lessened due to shorter lease lengths.<sup>222</sup>

One area where concern has, if anything, increased is that relating to the lack of property awareness shown by small business tenants. Research has shown that, as a group, very small business tenants are less likely than their larger counterparts to take property advice and often take their leases on the first terms offered; even where they do negotiate terms this rarely extends beyond the level of rent.<sup>223</sup> They show little awareness of what their lease terms are. Despite considerable efforts at information dissemination – notably by means of voluntary codes of practice – there has been little real progress on this front. Whilst there is no evidence that landlords are deliberately taking advantage of such tenants there remains serious concern that these tenants are not necessarily taking property on terms most suitable to their needs.

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219. J Burton, *Retail Rents: Fair and Free Market* (Adam Smith Institute, 1992).

220. As a result of the Landlord and Tenant (Covenants) Act 1995.

221. See Office of the Deputy Prime Minister ('ODPM'), *Monitoring the 2002 Code of Practice for Commercial Leases* (Mar 2005).

222. *Ibid.*

223. *Ibid.*

The one sector in the United Kingdom where there is evidence of unfair practices by landlords relates to leases of pubs granted by ‘pubcos’.<sup>224</sup> These leases are often granted to individuals with no previous experience of the licensed trade and there is clear evidence of poor negotiating practices and the inclusion of unfair terms in leases.<sup>225</sup> The most common cause of complaint – the beer tie – has eventually been found not to fall foul of European competition rules,<sup>226</sup> but has certainly been found to be of no positive benefit to tenants.<sup>227</sup> The flood of litigation on the beer tie issue has shown that there have been many unattractive practices in this sector although it does seem clear that the better operators have now cleaned up their act.

It would, therefore, appear that in the United Kingdom there has not been the same pressing need to address unfair practices as has been the case in Australia. That said, there is evidence that small business tenants generally are vulnerable to the imposition of unsuitable lease terms and there is often a very fine line to be drawn between unsuitability and unfairness. It is therefore pertinent to consider the extent to which English law is equipped to offer protection in this regard.<sup>228</sup>

### Unconscionability and unfairness in English law

Unlike in Australia, in the United Kingdom the equitable principles of unconscionability have never been generally extended to commercial contracts,<sup>229</sup> but have largely remained confined to their traditional areas, notably penalties, forfeitures and mortgages. In modern times the view has been that it is for Parliament, through legislation, to correct any inequality of bargaining power.<sup>230</sup> This statutory intervention has occurred in two particular areas: credit agreements (the Consumer Credit Act 1974 (UK)) and consumer contracts (Unfair Terms in Consumer Contracts Regulations 1999 (‘UTCCR’)). Generally speaking, this legislation has no application to business leases although the latter is playing an important role in residential tenancies (which are covered by the UTCCR). However, the Law Commission has recently considered whether the UTCCR should be extended so as to benefit businesses, a move that could be highly relevant to business tenants.<sup>231</sup>

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224. Companies created following the requirement that the large brewing companies dispose of a significant proportion of their tied public houses. The top six pubcos own 40% of the pubs in the UK. They either lease their pubs to tenants or operate managed pubs.

225. Pub Companies House of Commons Trade and Industry Committee (HC 128–1, 21 Dec 2004).

226. *Inntrepreneur Pub Company v Crehan* [2007] 1 AC 333.

227. Pub Companies House of Commons Trade and Industry Committee, above n 225, [129].

228. See S Bright, ‘Protecting the Small Business Tenant’ [2006] 70 Conv 137.

229. Its role is so narrowly confined that it can rarely be relied upon. One party must be at a serious disadvantage, this must then be exploited by the other side in a morally reprehensible manner and the resulting transaction must not merely be harsh or improvident but overreaching and oppressive: see *Alec Lobb (Garages) Ltd v Total Oil (Greta Britain) Ltd* [1983] 1 WLR 87.

230. See *National Westminster Bank Plc v Morgan* [1985] AC 686, 708.

231. Law Commission, *Unfair Terms in Consumer Contracts*, Report No 292 (2005).

Following extensive consultation the Law Commission has recommended that a re-formulated UTCCR type scheme should be extended so as to benefit small businesses (defined as employing no more than nine employees).<sup>232</sup> The protection given would be to allow the small business to challenge non-core<sup>233</sup> standard form terms<sup>234</sup> as being unfair or unreasonable. Any term (including a core term) could be regarded as unfair or unreasonable simply because it is not expressed in plain or intelligible language.<sup>235</sup> Once clearly expressed, the fairness and reasonableness of a non-core term would be judged according to either (or both) its substance and effect or the circumstances prevailing at the time the contract was entered into.<sup>236</sup> There would be statutory guidelines on factors to be taken into account (including the knowledge and understanding of the party adversely affected by the term and the relative bargaining strengths of the parties).<sup>237</sup> There would also be included in the legislation an Indicative List of terms that are likely to be regarded as unfair.<sup>238</sup>

Legislation in this form would offer significant protection against the inclusion in leases to small businesses of unfair or unreasonable terms. It would prompt a drafting revolution since the present approach to wording of business leases would often fail a plain or intelligible language test.<sup>239</sup> If the Office of Fair Trading were to adopt a similar stance on the terms of business leases as has been adopted towards residential leases,<sup>240</sup> some known areas of concern<sup>241</sup> would be tackled. In particular, absolute prohibitions on assignment and subletting would be frowned upon,<sup>242</sup> as would any over-long periods of notice for the operation of tenant breaks.<sup>243</sup> It is also likely that upward only rent reviews<sup>244</sup> and the imposition of automatic authorised guarantee agreements<sup>245</sup> would be subject to very close scrutiny.

However, the Law Commission has proposed that contracts for the disposal of an interest in land should be excluded (along with certain other types of contract) as being a specialised contract in respect of which it is usual to take legal advice.<sup>246</sup> While it is fair to say that many tenants in the United Kingdom do take legal advice

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232. Ibid [2.35]–[2.36].

233. I.e. terms other than those defining the subject matter of the contract or the price: see *ibid* [3.56].

234. A term that has been proposed by the other side as one of its standard terms and which has not been altered in favour of the small business by subsequent negotiations: *ibid* [5.78].

235. Law Commission, above n 231, [3.102].

236. *Ibid* [3.101].

237. *Ibid* [3.105].

238. *Ibid* [5.84].

239. Office of Fair Trading, *Guidance on Unfair Terms in Consumer Contracts*, OFT 356 (2005) [5.1] – [5.13].

240. *Ibid*.

241. As identified in ODPM, above n 221.

242. Office of Fair Trading, above n 239, [4.22] – [4.28].

243. *Ibid* [3.74] – [3.76].

244. *Ibid* [3.101] – [3.103].

245. *Ibid* [4.12] – [4.13].

246. Law Commission, above n 231, [5.76].

before signing a lease, those that do not are more likely to be very small businesses. Furthermore, even where legal advice is taken, this is often at the stage where the terms have already been agreed (without any property advice) and where the lawyer is usually being pressed, by both sides, to settle the documentation as quickly as possible.<sup>247</sup> Research carried out with regard to pub tenants shows a very similar pattern, with 40 per cent of tenants failing to take legal advice before signing their agreements.<sup>248</sup> There is, therefore, a very strong case for suggesting that the exclusion of land contracts should be re-considered.

## CONCLUSIONS

The United Kingdom has not generally seen the same problems over positively poor landlord behaviour as occur in Australia. The pub sector certainly has had its difficulties but, as that sector has diversified, the position does seem to be improving. While the English law on unconscionable bargains is less well developed than that in Australia, there appears to be no pressing need for it to become so, at least in the context of business leases. Furthermore, as the Australian experience shows, the hurdles set for the application of these principles appear to be set too high to offer real relief.

There is, however, a real issue in the United Kingdom over the awareness of small business tenants and while there is no strong evidence that landlords take seriously unfair advantage of such tenants there are clear indications that these tenants do not always obtain leases on the best available terms. Addressing this problem by the use of voluntary codes has had little impact at the small end of the United Kingdom market. The United Kingdom government remains committed to improving the situation and there seems little doubt that useful lessons can be learned from the way in which Australia has imposed disclosure requirements. Furthermore, extending the unfair contract terms regime to leases granted to small businesses would help to eradicate some of the problems that have been identified. Apart from helping to eliminate some undesirable terms, it would also drive forward the use of plain and intelligible lease drafting. This, again, would help those tenants who, experience shows, will always continue to shun professional advice.

In relation to Australia, for section 51AC to impact upon the more oppressive examples of the landlord/tenant relationships it must be regarded as a real deterrent to engaging in unconscionable practices. It seems this will only occur if the provisions are interpreted by the courts and tribunals in a manner that reflects the intention behind the legislation rather than being restrained by traditional interpretations. If this does not occur the legislature should be prepared to amend the legislation. The courts, tribunals and indeed the ACCC should be prepared to address the

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247. See ODPM, above 221.

248. Pub Companies House of Commons Trade and Industry Committee, above n 225, [107].



unconscionability issue and provide clear guidelines as to what is likely to be regarded as unconscionable conduct in a retail leasing context. Also, lessees must be able to feel confident that, if they decide to proceed with a retail tenancy claim, there is some prospect of success and they will not be unduly disadvantaged in any further dealings with their landlord. At present, the high bar ostensibly set by the unconscionability standard seems to be acting as a deterrent to tenants commencing actions.<sup>249</sup> As Crosby has noted,<sup>250</sup> unless relations with a landlord have irrevocably broken down, tenants are reluctant to commence actions, particularly in relation to unconscionable conduct, for fear of retaliation. Finally, although it is often asserted that an extension of unfair contract terms legislation may be appropriate, it seems unlikely that such a development would make much difference. The issue often is the conduct associated with the dealings between the lessor and lessee rather than the terms of the lease itself.

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249. E Webb, Interviews with JK 26 Apr 2006; CT 27 Apr 2006; CT & DJ 29 Apr 2007.

250. Crosby, above n 187.