

# REFORMING UNCONSCIONABILITY

By Lynden Griggs

Consumer law, for so long marginalised as a separate category within commercial law, now rightly occupies its own space. With the rise in people's disposable income and the change in Western societies from a producer-based economy to one that is consumer-driven, developments in consumer law since the Second World War have been extensive and far-reaching.

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**A**s part of this evolution, statutory unconscionability now plays a critical role. With its introduction in the *Trade Practices Act 1974* – mirrored in legislation such as the *Australian Securities and Investments Commission Act 2001* and the *Fair Trading Acts* of some of the states and territories – its importance is undeniable. However, this progression has been piecemeal, and a radical and fundamental re-evaluation of how unconscionability should be incorporated into consumer law is now overdue.

Despite the stated intent of parliamentary reformers,<sup>1</sup> the legislation designed to protect the vulnerable and disadvantaged in our society does not currently work in a just and timely manner. What follows is a proposal for improving the operation of unconscionability.

## THE GENESIS OF UNCONSCIONABILITY

'At what point in the consumer transaction should the law intervene, rather than merely empower the consumer?' is arguably the central question in consumer law. With much of the law based on disclosure as the panacea for consumer ills,<sup>2</sup> statutory intervention generally comes only after lengthy consideration that inevitably includes

a degree of political compromise. Unconscionability has been no different. Its genesis in common law and equitable principles derives from notions of duress, undue influence and misrepresentation – factors that ultimately led to the *Commonwealth Bank of Australia Ltd v Amadio*<sup>3</sup> decision. In this case, the court set aside a guarantee given by elderly Italian immigrants in respect of their son's business due to several circumstances, the most relevant being that the bank was aware of the parents' reliance on the adult child, the absence of any independent legal advice and their lack of English language skills. The decision was rightly seen as a watershed in Australia's evolution of unconscionability. It was now doctrinally established and successfully accepted by the highest court as a ground on which an arguably consensual transaction could be set aside.

However, it was not to be done without parameters. The plaintiffs were required to establish that they were at a special disadvantage in relation to the stronger party, and that the stronger party – with knowledge of this disadvantage – took advantage of the situation. Many grounds have since been accepted as leading to special disadvantage, including, age, illness, poverty, inexperience or lack of education.<sup>4</sup>

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**UNCONSCIONABILITY LEGISLATION IN AUSTRALIA**

Following *Amadio*, statutory reforms were introduced to offer the remedial advantages of the *Trade Practices Act 1974*, and to define a standard based on an objective notion of fairness. These principles are today enshrined in ss51AA – 51AC of the *Trade Practices Act 1974*, and in many other statutes.<sup>5</sup>

Unconscionability in Australia	
<p><b>Section 51AA</b> – the unwritten law</p> <p>Section 12CA, <i>Australian Securities and Investments Commission Act 2001</i> (ASIC Act)</p> <p>Section 7, <i>Fair Trading Act</i> (Vic) (FTA) (the FTA legislation extends its operation between the corporate entity to persons)</p>	<p>The following elements are needed:</p> <ul style="list-style-type: none"> <li>• A corporation;</li> <li>• In trade or commerce;</li> <li>• Engaging in conduct that is unconscionable within the meaning of the unwritten law, from time to time, of the states and territories.</li> </ul>
<p><b>Section 51AB</b> – a specific provision for consumer transactions</p> <p>Section 12CB, <i>ASIC Act</i></p> <p>Sections 39 (Qld), 43 (NSW), 8 (Vic), 13 (ACT), 15 (Tas), 57 (SA), 11 (WA), 43 (NT) (FTA of each jurisdiction)</p>	<p>The following elements are needed:</p> <ul style="list-style-type: none"> <li>• A corporation;</li> <li>• In trade or commerce;</li> <li>• In connection with the supply or possible supply of goods or services to a person;</li> <li>• Engaging in conduct that is, in all the circumstances, unconscionable.</li> </ul>
<p><b>Section 51AC</b> – small business transactions and unconscionability</p> <p>Section 12CC <i>ASIC Act</i></p> <p>Sections 8A (Vic), 13 (ACT), 15A (Tas), 11A (WA), (FTA of each respective jurisdiction)</p>	<p>The following elements are needed:</p> <ul style="list-style-type: none"> <li>• A corporation;</li> <li>• In trade or commerce;</li> <li>• In connection with the supply or possible supply of goods or services to a person (other than a listed public company); or the acquisition of possible acquisition of goods or services from a person (other than a listed public company);</li> <li>• Engaging in conduct that is, in all the circumstances, unconscionable.</li> </ul>

**INTERPRETATION OF THE ACTS**

Despite the potential offered by this legislation, its scope was quickly circumscribed by the High Court. In *ACCC v CG Berbatis Holdings Pty Ltd*,<sup>6</sup> the Court was asked to intervene in a dispute between a landlord and a tenant. The tenants wanted to sell their business, partly because of their daughter's illness. As a going concern, the business had considerable value, but as the lease was near expiry, with no option to renew, the landlord indicated that it would provide a new lease only if the tenants discontinued an action they were bringing against the landlord. This unrelated action concerned outgoings levied by the landlord against the tenants in the shopping mall. At first instance, French J held that the owners of the shopping mall had engaged in unconscionable conduct. The tenants were in a situational disadvantage because of their daughter's health, and they needed to sell the business quickly so that they could look after her.

This decision was reversed on appeal to the Full Federal Court,<sup>7</sup> with the High Court upholding the reversal.<sup>8</sup> The conduct of the property-owner did not contravene s51AA of the legislation. In defining unconscionability, the High Court's approach was anything but consistent. Whereas Gleeson CJ considered a narrow interpretation to be appropriate ('narrow' in the sense that the statutory formulation merely restated the doctrine of unconscionable dealing, as established in cases such as *Amadio*), Gummow, Hayne and Callinan JJ considered that the matter need not be resolved in this appeal, while Kirby J's preference was for the view established at first instance by the now High Court Chief Justice, French J. The other critical aspect of the High Court's judgment was its rejection, apart from Kirby J, of the applicability of situational, as against constitutional, disadvantage in unconscionability actions. Kirby J was prepared to accept that unconscionability included situational disadvantage deriving from some particular characteristics between the parties. By comparison to situational disadvantage, constitutional disadvantage stems from an inherent weakness, such as age, illiteracy, lack of education or poverty. In contrast to Kirby J, Gummow and Hayne JJ were dismissive of the idea of situational disadvantage determining unconscionability, with Gleeson CJ arguing against too robust an application of the doctrine.<sup>9</sup>

**Legislatively prescribed factors to be considered**

The decision of *Berbatis*, based as it is on s51AA, prefers a narrow understanding and meaning of unconscionability. Nevertheless, s51AB definitely applies more broadly, with curial recognition that it is not to be confined to common law or equitable notions of unconscionability.<sup>10</sup> Indeed, the court is expressly required to consider a non-exhaustive list of factors in determining whether there has been unconscionability in the context of a consumer transaction. These factors include:<sup>11</sup>

- the relative strengths of the parties' bargaining positions;
- whether there has been compliance with conditions not reasonably necessary for the protection of legitimate interests;

The fact that the meaning of unconscionability remains fundamentally unclear has bedevilled litigation in this area.

- the extent of understanding of the documents;
- whether there has been any undue influence, undue pressure or unfair tactics by the supplying corporation; and
- the equivalent terms and conditions imposed by other entities.

Breaches of this provision have tended to be very straightforward, such as in *ACCC v Lux Pty Ltd*.<sup>12</sup> In this case, the consumer had been pressured to buy a vacuum cleaner in circumstances where the salesperson would have been aware that she was substantially illiterate and without any capacity to understand the financial implications of the purchase. As noted by the Nicholson J:<sup>13</sup>

'[H]e was on notice that [the consumer] was illiterate and unable to understand commercial matters in any depth. She was alone without the assistance of even her husband. While it is clear that she was not deprived of an independent and voluntary will, it must have been apparent to him that she was not able to make a worthwhile judgement as to what was in her best interests in the circumstances.'

#### Application to small business

The final weapon in the statutory unconscionability armoury, s51AC, prohibits unconscionable conduct in small business transactions (the current financial limit being \$10 million), with the factors cited in respect of s51AB relevant, together with these additional matters:

- the extent to which the supplier's conduct was consistent with like consumers;
- the requirements of any industry code;
- the extent to which the supplier failed to unreasonably disclose any risks to the business consumer;
- the extent to which the business consumer was willing to negotiate;
- the capacity of the supplier to unilaterally vary a term or condition; and, most significantly
- the extent to which the supplier and business consumer acted in good faith.

As with the other sections, the interpretation of s51AC, while offering much promise, has largely failed to deliver any substantial or significant gains. As summarised by Sharpe and Parker,<sup>14</sup> of the 30 cases commenced under s51AC by

the middle of 2004, litigation success for the regulator had occurred in only three cases (with one being only partial). Six cases were still continuing, with the remainder settled in some way.<sup>15</sup>

#### REFORMING STATUTORY UNCONSCIONABILITY

One factor appears to have bedevilled litigation on the unconscionability provisions. With the lack of published legal success on the meaning of unconscionability, the parameters of what is meant by this term are still fundamentally unclear. Many practitioners and academics would view the interpretation favoured by the legal system as conservative and stemming from a premise of curial non-interference in the contracting process. With this lack of success in the legal arena, the ACCC has, arguably, been unable to effectively educate and inculcate within the community a more progressive understanding of what unconscionability in the context of the consumer and business transaction actually means.<sup>16</sup> As Zumbo states<sup>17</sup> (in the context of small business unconscionability):

'[T]he judicial interpretation of s51AC has fallen short of the parliamentary intention behind the section. Indeed, while s51AC was clearly intended to broaden the concept of unconscionability beyond the narrow equitable doctrine, it is readily apparent that the courts have required a very high standard of "unconscionability" under s51AC and, in interpreting the section, have maintained >>



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the procedural unconscionability bias of the equitable doctrine, rather than being ready to directly target substantive unconscionability.<sup>7</sup>

**PROPOSED REFORMS**

However, before reform can be entertained, we must disregard our inherent bias in favour of knowledge based on precedent, and ask (if the consumer protection slate were clear) what values should inform statutory codification? Perhaps the first principle, and one that should inform all others, is that consumer protection must operate to protect the vulnerable and disadvantaged. Given that our society prioritises economy over community, providing legislative protection for disadvantaged groups is fundamental. Second, the law needs to recognise that while it resolves disputes between two warring parties, its message is a precedent that will guide future litigation. Interventionist reform has costs, and these should be both transparent and calculated: there is both a need for economic efficiency and an understanding of the distributive changes brought by reform. If the financial imperatives exceed the monetary benefits, reform should be countenanced only if it works to protect the vulnerable or disadvantaged. With these values in mind, what reforms are possible in this area?

1. Is there any major reason for common law and equitable unconscionability provisions to continue to operate in parallel with a number of context-specific statutory provisions? If the objective is to ensure that persons transact with each other in an ethical manner and in accordance with community expectations, little seems to be served by the continued division. Statutory prohibition of unconscionable conduct in all transactions would not only dramatically simplify this area but, combined with a broad definition of what is unconscionable, would serve to revitalise this area of the law.
2. In developing this statutory form of unconscionability, the regulator should be funded to provide specific examples of what would be considered to breach the legislation, as well as the opportunity to pursue appropriate test cases to formulate the law. The limitations that were evident in litigation such as the Radio Rentals case should be disallowed.<sup>18</sup>
3. The evolving law on good faith should form part of this new, expanded unconscionability doctrine.<sup>19</sup>
4. Included with, or sitting alongside the statutory formulation of unconscionability, should be a legislative direction for the regulator to examine unfair contracts –

With the right political will and leadership, unconscionability could become as important a weapon in protecting consumers as misleading and deceptive conduct.

both at the procedural and substantive level. With the Productivity Commission<sup>20</sup> recently recommending the introduction of such legislation, the time is opportune to consider the integration (or at the least the introduction) of this type of legislation. The Commission indicated that the legislation on unfair contracts should be built around the following guidelines:

- A term will be unfair when, contrary to the requirements of good faith, it causes a significant imbalance in the parties' rights and obligations.
- Material detriment would need to be shown by a consumer.
- It would relate only to standard form agreements.
- It would exclude the upfront price of the good or service.
- It would necessitate that all the circumstances of the contract be considered, including the broader interests of consumers.

While this proposal could be criticised as being unduly conservative (particularly in its after-the-fact requirement of material detriment, and its applicability only to the standard form), considering these factors in the context of a new unconscionability doctrine would both promote a more transparent and ethical transaction process, and ensure that private legal obligations are substantively fair. It is also not without parallel, given that the 2007 amendments to s51AC<sup>21</sup> permitted an examination in the context of unconscionability of terms or conditions that unilaterally allow the variation of such a contract.

5. The limitations that presently restrict the use of class actions in Australia should be removed, together with those preventing private consumer advocate organisations from running class action style litigation.

**CONCLUSION**

Unconscionability has not has the same impact on consumer law as did the introduction of the prohibition against misleading and deceptive conduct.<sup>22</sup> With a new federal government, and the states' desire to commit to a generic national system of consumer law, the opportunity for unconscionability to become the twin peak alongside misleading and deceptive conduct in the geography of consumer protection has never been greater. However, the decision needs the political will and leadership to achieve its potential. To date, statutory unconscionability has sadly not only routinely been a potential champion, but is threatening to become the veteran that never fulfilled its promise. Drastic

action is needed. The old must be cast adrift, and a new generic provision of unconscionability adopted. This would apply to all transactions, with the regulator adequately funded and the appropriate drafting to ensure that the conservatism of the legal bench is ameliorated. Action falling short of this leaves the very considerable risk that, a decade from now, unconscionability will form nothing more than an interesting but relatively powerless sideline to the historical doctrines that formed and informed freedom of contract, and which still limit access to justice. ■

**Notes:** **1** See Federal Parliament Senate Economics Committee Report, *The need, scope and content of a definition of unconscionable conduct for the purposes of Part IVA of the Trade Practices Act 1974*. Chapter 5, Commonwealth of Australia, 3 December 2008. **2** For example, disclosure in respect of financial services forms a central plank in meeting consumer protection objectives. See Chapters 6CA and 7 of the *Corporations Act 2001*. **3** *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447. **4** As noted in *ACCC v CG Berbatis (Holdings) Pty Ltd* (2003) 214 CLR 51; *ACCC v Samton Holdings Pty Ltd* [2002] ATPR 41-858, 44736. **5** In addition to the legislation cited in the table, unconscionability or equivalent provisions feature in legislation governing unfair contracts (for example, Part 2B *Fair Trading Act 1999* (Vic), *Industrial Relations Act 1996* (NSW), *Contracts Review Act 1980* (NSW), *Uniform Credit Code* of each state and territory). Much of the legislation concerning retail tenancies also incorporates an unconscionability provision. **6** *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd* [2000] FCA 1376. **7** *CG Berbatis Holdings Pty Ltd v Australian Competition and Consumer Commission* [2001] FCA

757. **8** (2003) 214 CLR 51. **9** For a comprehensive discussion of the *Berbatis* decision, see R Bigwood, 'Curbing Unconscionability: Berbatis in the High Court of Australia', [2004] *MULR* 6. **10** *ACCC v Radio Rentals Ltd* [2005] ATPR 42-077. **11** See s51AB(2) of the *Trade Practices Act 1974*. **12** [2004] FCA 926. **13** [2004] FCA 926, [112]. **14** M Sharpe and C Parker, 'A Bang or A Whimper? The Impact of ACCC Unconscionable Conduct Enforcement', (2007) 15 *TPLJ*, 139, 144. **15** One of these settlements included punitive orders; enforceable undertakings were also given in a number of instances. The ACCC had been unsuccessful in one instance; above n14, 144-5. **16** *Ibid*, 158-62. **17** F Zumbo, 'Promoting Ethical Business Conduct: The Case for Reforming Section 51AC', (2008) 16 *TPLJ*, 132. **18** *ACCC v Radio Rentals* (2005) 146 FCR 292. In this matter, the ACCC argued that the respondent should have been aware that the consumer was schizophrenic, had an intellectual disability, and lived in a low socio-economic suburb. This argument could not proceed, as these matters had not been pleaded by the ACCC – yet Finn J recognised that the result might have been different had this been the case. See the discussion by Sharpe and Parker, above n14, 156. **19** Contrast the comments by Zumbo, above n17, 136, who considers that an alternative to an expansive view of unconscionability would be to enact a statutory duty of good faith, with the criteria based on the decision of Gordon J in *Jobern Pty Ltd v BreakFree Resorts (Victoria) Pty Ltd* (2008) ACR 90-269. **20** Productivity Commission, *Review of Australia's Consumer Policy Framework*, Final Report, Canberra, 2008, Chapter 7. **21** *Trade Practices Legislation Amendment Act (No. 1) 2007*. **22** See s52, *Trade Practices Act 1974*.

**Lynden Griggs** is a Senior Lecturer in the Faculty of Law, University of Tasmania. **PHONE** (03) 6226 7573  
**EMAIL** lynden.griggs@utas.edu.au

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