# Protection against unconscionable business conduct — some possible applications for s 51AC of the Trade Practices Act 1974

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## Introduction

The Small Business Reform Package delivered on 30 September 1997 by Peter Reith, together with other ministers of the Commonwealth Government, sought to provide a better deal for small business. It recognised that small businesses regularly experiences unsatisfactory outcomes in their negotiations with big business.

Yet the changes to the Trade Practices Act 1974 that are designed to deliver that better deal have proven to be controversial. The key provision for business contracts is s 51AC, which came into operation on 1 July 1998.[1] Subsections (1) and (2) set out the core prohibitions as follows:

> (1) A corporation must not, in trade or commerce, in connection with:
> (a) the supply or possible supply of goods or services to a person (other than a listed public company); or
> (b) the acquisition or possible acquisition of goods or services from a person (other than a listed public company);
>
> engage in conduct that is, in all the circumstances, unconscionable.
>
> (2) A person must not, in trade or commerce, in connection with:
> (a) the supply or possible supply of goods or services to a corporation (other than a listed public company); or
> (b) the acquisition or possible acquisition of goods or services from a corporation (other than a listed public company);
>
> engage in conduct that is, in all the circumstances, unconscionable.

These provisions are deceptively simple, however, there is much complexity in the remaining subsections. This article assesses some likely scenarios in which the new provisions will apply and highlights the challenge for compliance.[2] Its core thesis is that the reasoning, if not the rationale of *Lloyd's Bank v Bundy*[3] will form the basis for a new doctrine that precludes

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1 This article does not deal with s 51AB which, while drafted in substantially the same terms, operates in a different business context.

2 This article does not deal with the new industry code compliance provisions. Suffice it here to say that breaches of an industry code are an indicator of unconscionability under subss 51AC(3)(g) and (4)(g). More intriguingly breaches of an *inapplicable* industry code that one business reasonably believed the other business would comply with, also can be taken as an indicator of unconscionability under subss 51AC(3)(h) and (4)(h).

3 [1975] QB 326. Also see *Blomley v Ryan* (1956) 99 CLR 362 at 428 per Kitto J:

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the unnecessary use of superior bargaining power. The new law does not prohibit unfair trading as such, but rather shifts the boundary between abusive bargaining and hard bargaining.[4] The shift will be in favour of businesses who have succumbed to an unfavourable hard bargain in circumstances where a court determines after the event that the party which achieved the better bargain conducted itself unconscionably.

## Theoretical underpinnings of s 51AC and its relationship with Pt V of the Trade Practices Act 1974

The new law creates legal exposures for business beyond the boundaries of liability under s 52. Section 52 recognises that reality does not readily comply with a key underlying assumption of competition theory. The theory of perfect competition assumes that economic choices are based on complete and accurate information and are rational choices. Yet, few choices are fully informed. Section 52 recognises that and seeks to require a fair, minimum standard for information quality so that the benefits of competition can be achieved in an imperfect marketplace.

One of the complaints about s 52 in its early days, and one that this author often hears in the context of new compliance programs, is that s 52 punishes otherwise "normal" business conduct. The same compliant will be levelled against s 51AC, and its consumer protection partner s 51AB. Yet it needs to be understood that the regulation of unconscionable conduct serves a quite different function to the truth in business laws that make up Pt V of the Trade Practices Act 1974.

There will be circumstances in which conduct which is misleading is quite conscionable, and there will be circumstances in which conduct is neither misleading nor deceptive but is unconscionable. Section 51AC — unlike s 52 — therefore is not a truth in business law.

Section 51AC recognises that even when the minimum standards of information quality are met not all business behaviour is conscionable and decent. The theory that appears to be behind s 51AC is that healthy competition also depends upon business decency. But decency is an even the more elusive concept than the truth in business concept that underlies s 52. Decency of course is a subjective behavioural standard.

The reality is that small business often does not have the resources to

(Unconscionability is a doctrine which applies "where one party to a transaction is at a special disadvantage in dealing with the other party . . . [and cannot] . . . preserve his own interests and the other party unconscientiously takes advantage of the opportunity thus placed in his hands.")

4 The private member's Bill proposed by Sen Andrew Murray was an unfair trading law. It was the Trade Practices Amendment (Fair Trading) Bill 1997. It followed the House of Representatives Committee of Industry Science and Technology report entitled *Finding A Balance: Towards Fair Trading in Australia*, AGPS, Canberra 1997 (the Reid Report), and the much earlier work of the Swanson Committee, "Economic Duress and Related Issues. Reform of Trade Practices Law" (1984) 58 *ALJ* 113.

On the other hand, the Taperall Report to the Trade Practices Commission, and the subsequent TPC report to Government entitled *Unconscionable Conduct and the Trade Practices Act: Possible Extension to Cover Commercial Transactions*, July 1991, p 111 recommended against regulating unconscionable conduct in commercial transactions.

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conduct due diligence in relation to complex transactions, and sometimes will not conduct basic checks in relation to relatively straightforward transactions. Often medium and large businesses also take risks on a relatively uninformed basis. Without basic due diligence the business person who sees a deal go sour will look to shift the cost of the bad risk onto someone else. Section 51AC provides a new avenue for doing so where there is evidence of abusive bargaining or other unconscionable business conduct. The following discussion and analysis seeks to highlight some of the complexities and difficulties involved in endeavouring to understand and ultimately compliance with s 51AC.

## Section 51AC expands the scope of unconscionability claims

To understand why s 51AC makes new law, it is necessary to understand how s 51AA operated before s 51AC was added to it. Section 51AA provides as follows:

> 51AA Unconscionable conduct within the meaning of the unwritten law of the States and Territories
>
> (1) A corporation must not, in trade or commerce, engage in conduct that is unconscionable within the meaning of the unwritten law, from time to time, of the States and Territories.
>
> (2) This section does not apply to conduct that is prohibited by section 51AB or 51AC.

Section 51AA was described upon its introduction as a codification of the equitable principles of unconscionable conduct. Next, s 51AA advanced the law of unconscionability from that developed by the equity courts in two ways.

1. It introduced the ACCC into the bargaining equation where unconscionable conduct is alleged so that compliance with the law and not just its violation could be pursued. However, s 51AA did not give the ACCC — nor indeed compliance managers and their lawyers — any guidance as to what compliant conduct would look like. Sections 51AB (which is focussed on consumer transactions rather than business-to-business transactions) and 51AC endeavour to do that.
2. It widened the remedies available to repair the damage caused by unconscionable conduct. The remedies include a declaration (s 163A); injunction (s 80); disclosure of information and publication of corrective advertisements (s 80A); recovery of the amount of loss or damage and prevention or reduction of loss or damage (ss 82, 87); and prohibition of payment or transfer of moneys or other property (s 87A).

But s 51AA was limited to the bounds of the common law, and those bounds were considered by Government to be too narrow to act as an adequate brake on abusive practices. Not everyone will agree that those bounds were too narrow. Conservative commentators perceive statutory unconscionability laws as an inappropriate encroachment upon the certainty and sanctity of contract

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law.[5] Yet, the certainty and sanctity of contract law have not dominated legal thinking about business transactions since 1974. Breach of contract litigation is inevitably accompanied by, and sometimes overwhelmed by, claims of misrepresentation under Pt V of the Trade Practices Act.

The reality is of course that those who do not want their transactions overturned by courts are those with the power to insist upon transactions that are favourable to them in the first place. This of course is the position that the law Lords in England have long upheld. Consider for example the Privy Council Recommendation in *Pao On v Lau Yiu Long*[6] which follows:

> Their Lordships conclusion is that when businessmen are negotiating at arms length it is unnecessary for the achievement of justice, and unhelpful in the development of the law, to invoke such a rule of public policy. . . . It is unnecessary because justice requires that men, who have negotiated at arms length, be held to their bargains unless it can be shown that their consent was vitiated by fraud, mistake or duress.
>
> . . .
>
> It would be strange if conduct less than duress could render a contract void, whereas duress does no more than render a contract voidable.[7]

Clearly those who drafted s 51AC do not share their Lordships' perceptions that adjustments of business transactions by the courts are unhelpful to the development of the law or are inapposite for the achievement of justice. And the type of law that s 51AC reflects has been recommended more than once to the Australian Parliament.[8]

Those who want protection against the sanctity of very bad contracts are those who in business regularly face the choice of doing a bad bargain or not doing business at all. They perceive a need for countervailing power to redress unfair outcomes achieved by the exercise of overwhelming business strength. As Branson J has pointed out in *Burt v Australia and New Zealand Banking Group Ltd*:[9]

> The courts enforce legal rights except in circumstances which are so far out of the ordinary course, so much an enormity and a departure from ordinary standards of conduct, that the position of a person who relies on legal rights should rightly be adjudged unconscionable.[10]

The new s 51AC is designed to provide that countervailing power when ordinary standards of conduct are departed from. Business strength is not illegal, but its abuse will be. There is a real risk that conduct that presently would not be considered abusive but which involves an unnecessary exercise of bargaining power will also be found to be unconscionable.

And s 51AC now brings together the various doctrines that make up the category of unconscionability in relation to business-to-business transactions.

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5 See eg, Baxt and Mahemoff, "Unconscionable Conduct Under the Trade Practices Act — An unfair Response by the Government: a Preliminary View" (1998) 26 ABLR 5 at 7.
6 [1979] 3 WLR 435.
7 Ibid, at 449.
8 Supra n 5.
9 [1994] ATPR (Digest) 46-123.
10 Ibid, at 53,598.

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It sits alongside s 51AB which establishes the companion boundaries for business-to-consumer transactions.[11]

Its utility will however depend heavily on the remedies available for breach, and it is to the issue of remedy that one must next turn.

## The effectiveness of s 51AC will depend upon the compensation available for its breach

It is appropriate now to turn to the compensation provisions of the Trade Practices Act that appear in ss 82 and 87.

Before looking at the remedies in private actions it is important to note that the ACCC is already litigating to achieve deterrence.

The first return date for the first two ACCC test cases under s 51AC have now happened, and some interesting legal turns are expected.

In the first test case, the ACCC sued Leelee Pty Ltd, the landlord of the Adelaide International Food Plaza.[12] The alleged unconscionable conduct involved increasing the rent contrary to the terms of the lease, failing to act to protect the tenant's rights under his lease, and forcing the tenant to charge not less than a particular amount for certain food dishes while allowing his competitors to charge less for their food dishes.

The ACCC also has taken action against Simply No Knead Franchising Pty Ltd in relation to both s 51AC and the Franchising Code of Conduct under s 51AD.

Where will the ACCC strike next?

The ACCC says that:

> Most complaints about commercial transactions have involved:
> - commercial tenancy arrangements;
> - petroleum marketing arrangements;
> - financial institutions dealings with small businesses;
> - loan guarantees;
> - supply agreements;
> - relationships between building contractors and sub-contractors; or
> - franchising"[13]

The ACCC has indicated that it:

> is more likely to take action where the conduct involves significant small business detriment, deterrence of similar conduct is likely, the party complained about has not been diligent in implementing effective compliance systems, and the conduct involves an opportunity to test the law in appropriate circumstances.

In the sphere of private actions, the highest current guidance comes from the case of *Marks v GIO Australia Holdings Ltd*.[14] In that case, the High Court

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11 Section 9 of the Contracts Review Act 1980 (NSW) is in similar terms, although it does not cover arrangements and understandings which have not become "contracts", and so has a narrower scope of operation.

12 Pua Hor Ong, the managing director of Leelee Pty Ltd, was also sued for allegedly aiding or abetting or being knowingly concerned in the breaches.

13 See, ACCC: *Guide to Unconscionable Conduct in Business Transactions*.

14 (1998) 158 ALR 333; 73 ALJR 12; ATPR 41-665; [1998] HCA 69: McHugh, Hayne and Callinan JJ fashioned the remedy in that case as follows at ALJR 21:

rejected tort and contract bases for awarding damages in relation to Trade Practices Act 1974 claims.[15] At least one experienced practitioner has indicated that the decision still seems "to leave scope for losses not traditionally thought to be recoverable under the TPA to be recovered in appropriate cases".[16]

Marks and a number of other home loan borrowers entered into long term loan agreements with GIO. They did so because GIO represented that interest would be charged at a specified base rate plus a margin of 1.25% and that this margin would not be changed during the life of the loan. GIO breached s 52 of the Trade Practices Act 1974 in doing so. In March 1992, GIO wrote to the borrowers to increase the margin from 1.25% to 2.25% with effect from 1 August 1992. GIO allowed them to elect to refinance without penalty. But as of August 1992 the GIO loan at the increased margin was still the best deal in the market place. The borrowers however wanted to keep GIO to the 1.25% margin for the life of the loan as a matter of contract.[17]

The High Court was unable to find a way to give the borrowers any relief at all under either s 82 or s 87 of the Trade Practices Act 1974. The majority of the court determined that the borrowers suffered no loss.

McHugh, Hayne and Callinan JJ in their joint judgment considered that the borrowers did not establish that they were worse off as a result of entering into loan agreements with the GIO. Their Honours declined to consider awarding damages based on expectation loss, that is based upon the increased interest burden. Suggestions that expectation damages could be awarded as in *Demagogue Pty Ltd v Ramensky*[18] were disapproved.

Because GIO allowed the borrowers to elect to refinance without penalty and gave them a costless opportunity to do so, Gummow J concluded that the contravention of s 52 had been compensated for by GIO, and so no damages could be awarded under s 82. Gummow J also would not give relief under s 87 because the "increased contractual liability of the borrowers would be the product of their own exercise of choice, not the taking by GIO of advantage of its misleading or deceptive conduct by insisting upon keeping the borrowers to the terms of their facilities".[19]

Kirby J, who dissented, was of the view that the borrowers were worse off than they had reasonably expected to be and therefore were entitled to

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"Proof of loss or damage (actual or potential) is therefore the gateway to the s 87 remedies. But the identification of loss or damage is important in the operation of s 87 not only for this reason but also because the power to make orders under s 87 is limited to making orders 'if the court considers that the order or orders concerned will compensate . . . in whole or in part for the loss or damage or will prevent or reduce the loss or damage . . .". That is, the court can make orders under s 87 only in so far as those orders will compensate (or will prevent or reduce) the loss or damage that is identified."

15 Gaudron and Gummow JJ accepted that equitable analogies may have a role to play in moulding discretionary relief under s 87 of the TPA: (1998) 73 ALJR 12 at 17 and 34-5, although this seems to have been rejected in the other reasons for judgment (1998) 73 ALJR 12 at 20 per McHugh, Hayne and Callinan JJ, 36, 41-3 per Kirby J (dissenting).

16 Ian E Davidson, "*Marks v GIO Australia Holdings Ltd*: Not Just Marking Time" (1998) 17 *ABR* 69.

17 Only Foster J in the Full Federal Court would have upheld the claim against GIO in contract.

18 (1992) 110 ALR 608.

19 (1998) 73 ALJR 12 at 29 per Gummow J; accord, Gaudron J (1998) 73 ALJR 12 at 16.

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expectation damages. The dissenting reasoning is neatly described by Ian Davidson[20] as follows.

> The dissenting part of Kirby J's judgment was in rejecting the view that there were discretionary arguments why relief should be denied under s 87. The conclusion of Gaudron and Gummow JJ that refusal of relief here was the proper exercise of discretion was rejected as falling "into the trap of analogous reasoning from equitable remedies".[21] The key reason why he would have allowed the appeal seems to have been that otherwise the breach of s 52 here being a serious misrepresentation could occur with the contravenors being able "walk away scot-free".[22] While he appeared attracted to the idea of fixing the margin to that represented, Kirby J would have returned the proceedings to the Full Federal Court to fashion an appropriate order, or if considered necessary or appropriate by the Full Court to return defined matters to retrial "so as to permit the provision to the borrowers of relief under s 87 to be determined free from the supposed shackles of Gates".[23]

The High Court's decision addressed facts which preceded the commencement of s 51AC. When a transaction is unconscionable, often the unconscionability is the dashing of the weaker party's expectations. For example negotiations for a contract can end early in circumstances where the party that is the victim of the termination of negotiations had an expectation that the contract would be concluded and a profitable business would ensue. The party that terminated the negotiations may well offer to pay the expenses and other reliance damages of the victim. That of course will be insufficient compensation. It is arguable that dashed expectations should be compensated by way of expectation damages, something that Kirby J in dissenting and Gummow and Gaudron JJ (though not on the facts in *Marks*) were prepared to consider. The contrary view is that plaintiffs who have not settled a contract have taken no risk or responsibility. Their only loss is the expense involved in trying fruitlessly to make a deal.

Consequently, when explaining the exposure to a corporation that commits breaches of s 51AC, lawyers are on relatively safe ground — although nothing is sacred these days — in advising that the likely downside is to be measured in the form of reliance damages, whatever the reliance damages may amount to in the particular case.

## Design imperfections

Section 51AC contains some design imperfections that will hamper achievement of its goals. Two examples will suffice.

### The $1,000,000 price cap is not always easy to apply

If the price is more than $1,000,000, s 51AC does not protect the small business. It assumes, only partially realistically, that when more than $1,000,000 is at stake small business will retain appropriate advice and will not need protection after the event.

20 Davidson, supra n 16.
21 (1998) 73 ALJR 12 at 43.
22 Ibid.
23 (1998) 73 ALJR 12 at 44.

What amount constitutes the price is not always easy to determine. Consider for example, a long term supply contract for coal, gas or electricity. Is the "price" to be taken as:

- the price per unit, say, of electricity (often a few cents), or
- the price over some time period such as the life of the contract (possibly many millions of dollars), or
- some other amount?

What about ordinary contracts to supply goods by instalments or contracts in which quantum and price variations are anticipated? The determination of price for purpose of establishing the boundaries of s 51AC can prove to be a complex task. That the implementation of the legal price cap will encourage much argument and will only create unnecessary legal costs. The price cap should be rescinded at the earliest opportunity.

## The exclusion of unconscionability claims by only some listed public companies is irrational

If the claimant business is a "listed public company" as that term is defined in the Income Tax Assessment Act 1997, then there is no protection. Section 51AC effectively invokes s 995-1(1) of that Act. Thus, if the claim of unconscionability is by a corporation whose shares are quoted on an approved stock exchange and which satisfies the "20/75" rule,[24] then the unconscionable conduct would not violate s 51AC. That appears to fit with the concept of small business protection, but only until one realises that very large private companies are protected, while small but diversely owned listed public companies are not protected. A transaction between two large private companies could be the subject of a claim under s 51AC.

And, of course, foreign companies are entitled to the protection of s 51AC in most cases, because they will not qualify within this special definition of "listed public company". A changeover to the Corporations Law public company concept plus net assets, turnover and similar economic entity size tests will improve the targeting of the new law.

## **Understanding how s 51AC could apply. Some hypothetical cases[25]**

The following hypotheticals are based on real (yet undecided or settled) cases that squarely raised s 51AC. Names and some other details have been changed to protect the innocent.

24 That is, more than 20 persons between them control, or are able to control, 75% or more of the voting power in the company, more than 20 persons have between them the right to receive for their own benefit 75% of more of any dividends the company may pay, and more than 20 persons have between them the right to receive for their own benefit 75% of more of any distributions of capital of the company.

25 Assume that the threshold requirements, including as to the $1,000,000 limit are met.

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## Leasing shops

### The facts

Daring Developments Ltd designed and built a shopping centre in a fast growing new suburb on the edge of a State capital city. Economic growth slows, shops close and the centre is losing customers. Daring found itself in financial difficulty. Seizing the moment, the Boondocks City Council bought the shopping centre.

Ernie, the real estate agent that Boondocks now retains, makes promises concerning the "Boondocks Supacentre Renewal Program" to Jimmy, the owner of Jimmy's Book Store Pty Ltd. These promises include that:

- the centre will be refurbished so that it attracts the "new middle class",
- a major advertising campaign will be held, and
- new bus routes would be organised to enable customers to come from farther afield.

The lease given to Jimmy contains a "Boondocks Supacentre Centre Renewal Levy" payable from the "commencement date", which is the date the lease is signed. The levy is 20% of the rent, payable until the "Boondocks Supacentre Renewal Program" is declared complete by the lessor.[26]

The lease also doubles the amount of the levy retrospective to the commencement date if the lessee repudiates the lease before the "Boondocks Supacentre Renewal Program" is declared complete by the lessor. This clause is entitled the "Legitimate Interests Protection Clause". Ernie says that it is needed to protect the City Council as the council needs to advertise the names of the shops in the centre, and it does not want to be caught out under those awful false advertising laws.

Jimmy is encouraged to sign the lease and move in straight away so as to be able to take maximum advantage of the "Boondocks Supacentre Renewal Program".

Ernie does not make any promises about when the centre will be refurbished, when the major advertising campaign will be held or when new bus routes will be organised to enable customers to come from farther afield.

He does not explain to Jimmy that the earlier Jimmy's Book Store Pty Ltd moves in, the longer it will have to pay the levy.

In fact, Ernie carefully makes no comments about the lease other than the comment about the need for the "Legitimate Interests Protection Clause".

Ernie makes no comment about the need for Jimmy to get financial or legal advice, as Jimmy looks like he has run book stores before.

Ernie makes no enquiry about Jimmy's prior experience at running stores in shopping centres, since, after all, Jimmy came to him to enquire about the "Supacentre Expansion" advertisement in the local newspaper.

As it happens, the Boondocks City Council did intend to do all the things Ernie promised. It did not know when it would do them, but expect that it planned to do them once every shop was let.

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26 Quite aside from the conscionability of the term as a contractual term, it would seem that the levy might be challenged as an unenforceable "penalty".

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It is now six months later, and apart from Jimmy's Book Store, the only other new store to open since Jimmy saw the local newspaper advertisement is a butcher shop. The butcher shop is doing satisfactory trade, but of course it is located next door to the supermarket at the other end of the centre. And no "Boondocks Supacentre Renewal Program" has started. When Jimmy complained, the council's property manager merely pointed out the lessor's "Legitimate Interests Protection Clause".

Jimmy wants to know if he can sue the City Council under Pts IVA and V of the Trade Practices Act. He also wants to know if he can get his rent back, and make "the bastards" pay his losses since he moved in.

How would you advise Jimmy's Book Store Pty Ltd to proceed?

### The issues

The first point that needs to be made is that the three promises made by Ernie constitute predictions. Not only can action be taken under s 52 of the Trade Practices Act, to the extent that the predictions were likely to mislead or deceive, the burden will be upon Boondocks to adduce evidence that it had reasonable grounds for making the predictions pursuant to s 51A. Boondocks will need to produce evidence that he did indeed intend to do all the things Ernie promised.

There is also scope to proceed under s 51AC.

### The statute provides preferred indicators of unconscionable conduct

At the outset it must be understood that the various criteria in subss 51AC(3) and (4) constitute an incomplete list of criteria upon which a finding of unconscionability can be made. The criteria are not compulsory. Courts may use other criteria and not have regard to the statutory criteria, but it may fairly be anticipated that courts are more likely than not to refer to the statutory criteria when adjudicating claims of unconscionable conduct. However, the statutory criteria can be viewed as providing preferred indicators of unconscionable conduct. The opening words of subs (3) for example provide as follows:

> (3) Without in any way limiting the matters to which the Court may have regard for the purpose of determining whether a corporation or a person (the supplier) has contravened subsection (1) or (2) in connection with the supply or possible supply of goods or services to a person or a corporation (the business consumer), the Court may have regard to [the following factors]

The more of the criteria that are met, the more likely a finding of unconscionability will result. This article now turns to a discussion of the relevant criteria in the context of Jimmy's Book Store Pty Ltd.

### Inequality of bargaining power

There is a clear inequality of bargaining power between Boondocks and Jimmy's Book Store Pty Ltd, which can enliven para (a) of subs (3). Paragraph (a) invites but does not requires the a court to "have regard to the relative strengths of the bargaining positions of the supplier and the business consumer".

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Before addressing the application of the doctrine of inequality of bargaining power, some conventional wisdoms need to be set aside.

There once was a traditional view that once a contract was formed, the law did not inquire into the bargaining process, but contractual imbalance can be so extreme as to result in actual victimisation of a contracting party. Courts of equity protect victims, but a contracting party does not become a victim just because he or she has experienced some contractual imbalance.

In reality, courts of equity do use various ruses to undo extraordinarily bad bargains. Lord Denning's judgment in *Lloyd's Bank v Bundy*[27] is a now famous decision in which the legal fictions were not resorted to, and an extraordinarily bad bargain was set aside using an unconscionability criterion of inequality of bargaining power. The contract was extraordinarily bad. Lord Denning developed a unified theory of unconscionability to create a "single thread" of "inequality of bargaining power"[28] and acknowledged that the court could rule against a party who contracted in its own self-interest unconscious of the distress being caused to the other party.[29] While in England, the *Bundy* decision was explicitly disowned by the House of Lords in *National Westminster Bank v Morgan*,[30] in the Australian context s 51AC breathes new life into Lord Denning's theory.[31] The ACCC may even agree. In its "Guide to Unconscionable Conduct in Business Transactions", the ACCC quite rightly points out in that publication that:

> To establish that unconscionable conduct has occurred within the meaning of the unwritten law the weaker party's disadvantage must be sufficiently evident to the stronger — but it is *not necessary* that the stronger party have *actual knowledge* of the disadvantage. It is enough for the stronger party to be aware, or be in a position where he/she should have been aware, that the disadvantage may exist.

Moreover, there is no reason in principle why the statement of Deane J in *Commercial Bank of Australia Ltd v Amadio*[32] cannot apply to business transactions.[33] His Honour set out the foundation principle as follows.

> Relief against unconscionable dealing is a purely equitable remedy. The concept underlying the jurisdiction to grant the relief is that equity intervenes to prevent the stronger party to an unconscionable dealing acting against equity and good conscience by attempting to enforce, or retain the benefit of, that dealing.[34]

In addition, Deane J explained the application of the principle. Consider the

27 [1975] QB 326. Also see *Blomley v Ryan* (1956) 99 CLR 362 at 428 per Kitto J: (Unconscionability is a doctrine which applies "where one party to a transaction is at a special disadvantage in dealing with the other party . . . [and cannot] . . . preserve his own interests and the other party unconscientiously takes advantage of the opportunity thus placed in his hands.")

28 [1975] QB at 508 at 509. Also see above n 3.

29 Ibid; *Arale v Costain Civil Engineering Ltd* [1976] 1 Lloyds Rep 98 at 102.

30 [1985] AC 686; M Cope, *Duress, Undue Influence and Unconscientious Bargains*, Law Book Co, Sydney, 1985, pp 155-74.

31 The views of the ACCC have however been simply stated as follows.

> Everyone in business knows there is no such thing as a truly level playing field. The Act does, however, fill in some of the holes and clearly draws some of the boundary lines.

32 (1983) 151 CLR 447.

33 *Accord*, ACCC "Guide to Unconscionable Conduct in Business Transactions".

34 (1983) 151 CLR 447 at 480.

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following extracts from His Honour's judgment.

> The jurisdiction of courts of equity to relieve against unconscionable dealing developed from the jurisdiction which the Court of Chancery assumed, at a very early period, to set aside transactions in which expectant heirs had dealt with their expectations without being adequately protected against the pressure put upon them by their poverty (see *O'Rorke v Bolingbroke* (1877) 2 App Cas 814, at 822). The jurisdiction is long established as extending generally to circumstances in which (i) a party to a transaction was under a special disability in dealing with the other party with the consequence that there was an absence of any reasonable degree of equality between them and (ii) that disability was sufficiently evident to the stronger party to make it prima facie unfair or "unconscientious" that he procure, or accept, the weaker party's assent to the impugned transaction in the circumstances in which he procured or accepted it. Where such circumstances are shown to have existed, an onus is cast upon the stronger party to show that the transaction was fair, just and reasonable: "the burthen of shewing the fairness of the transaction is thrown on the person who seeks to obtain the benefit of the contract" (see per Lord Hatherley, *O'Rorke v Bolingbroke* (1877) 2 App Cas, at 823; *Fry v Lane* (1888) 40 Ch D 312, at 322; *Blomley v Ryan* (1956) 99 CLR 362, at 428-9).
>
> The equitable principles relating to relief against unconscionable dealing and the principles relating to undue influence are closely related. The two doctrines are, however, distinct. Undue influence, like common law duress, looks to the quality of the consent or assent of the weaker party (see *Union Bank of Australia Ltd v Whitelaw* (1906) VLR 711, at 720; *Watkins v Combes* (1922) 30 CLR 180, at 193-4; *Morrison v Coast Finance Ltd* (1965) 55 DLR (2d) 710, at 713). Unconscionable dealing looks to the conduct of the stronger party in attempting to enforce, or retain the benefit of, a dealing with a person under a special disability in circumstances where it is not consistent with equity or good conscience that he should do so. The adverse circumstances which may constitute a special disability for the purposes of the principles relating to relief against unconscionable dealing may take a wide variety of forms and are not susceptible to being comprehensively catalogues.[35]
>
> . . .

The weakness of Mr and Mrs Amadio was likened to that of the defendant in *Blomley v Ryan*:

> of whom McTiernan J said (1956) 99 CLR, at 392 "His weakness was of the kind spoken of by Lord Hardwicke" (in *Earl of Chesterfield v Janssen* (1751) 2 Ves Sen, 125, at 155-6 (28 ER 82, at 100) ) "in defining the fraud characterised as taking surreptitious advantage of the weakness, ignorance or necessity of another. The essence of such weakness is that the party is unable to judge for himself".[36]

On that basis, the real question in the hypothetical is whether Jimmy was unable to judge for his company whether the transaction was a sensible one to enter into? And should Ernie have realised that Jimmy was labouring under a disability, if indeed there was such a disability? Can Jimmy be characterised as having a "business disability"? These are novel concepts, and judges may not warm to them, but plaintiffs' lawyers are beginning to raise them.

In *Bundy*, Lord Denning stressed that Mr Bundy was in extreme need, and knowingly consented to a "most improvident bargain". It is doubtful that Jimmy is in extreme need. The other elements of what plaintiff's lawyers will

35 (1983) 151 CLR 447 at 474.
36 (1983) 151 CLR 447 at 476.

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now characterise as "business disability" however appear to be present.[37]

## Unconscionable contract terms

Next, one must assess whether the "Boondocks Supacentre Centre Renewal Levy" or the "Legitimate Interests Protection Clause" or indeed both of them violate para (b) of subs 51AC(3). That paragraph invites a court to take into account "whether, as a result of conduct engaged in by the supplier, the small business consumer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the supplier".

Paragraph (b) is concerned with conditions which are imposed but which are not reasonably necessary for the protection of the legitimate interest of Boondocks. There may will be some reasonable basis for the "Boondocks Supacentre Centre Renewal Levy", but the "Legitimate Interests Protection Clause" is more suspect.

Paragraph (b) raises questions about how an objective standard can be developed for competitive businesses who by virtue of being competitive will consider differing conditions to be necessary and differing interests to be legitimate, often for similar transactions. Penalty clauses are often perfectly acceptable to the parties when the deal is struck, and are attacked only with hindsight. It may fairly be asked whether they should be subject to challenge as being unconscionable so that the wider statutory remedies rather than mere severance at common law might be attracted.[38]

In *George T Collings (Aust) Pty Ltd v H F Stevenson (Aust) Pty Ltd*[39] the fine print in a real estate agency contract appeared to convert a sole agency into a general agency which did not end. Nathan J in the Supreme Court of Victoria considered this to be unconscionable and refused to enforce the agreement at the suit of the agent.

There is a real question about whether the council's property manager considers that Jimmy is in the classic "pain in the neck" trouble maker tenant. Landlords often discriminate against such tenants, and para (f) of subss (3) and (4) make such conduct by landlords relevant unconscionable conduct to be considered by a court. Paragraph (f) requires a court to consider:

> the extent to which the supplier's conduct towards the business consumer was consistent with the supplier's conduct in similar transactions between the supplier and other like business consumers;

The evidence of comparative business conduct is likely to be expensive to harness, and that expense may well deter the very potential plaintiffs that s 51ACV is designed to protect.

## Unconscionable contracting processes

When Jimmy is encouraged to sign the lease and move in straight away so as to be able to take maximum advantage of the "Boondocks Supacentre Renewal Program" the question arises whether Jimmy is being distracted from

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37 Supra n 3.
38 Compare *West v AGC (Advances) Ltd* (1986) 5 NSWLR 610; *AMEV-UDC Finance Ltd v Austin* (1986) 162 CLR 170.
39 [1991] ATPR 41-104.

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focusing his mind upon the risk in doing so particularly under the lessor's "Legitimate Interests Protection Clause". It would be difficult to argue that duress, or undue influence has occurred. No threat has been issued, and despite indications that "the categories are not closed",[40] no duress or undue influence claim should be brought in this case.

Next arises the question whether Boondocks is obligated to conduct due diligence on Jimmy's Bookstore Pty Ltd. Ernie clearly has used inappropriate criteria to size up Jimmy. On the other hand, Jimmy has had the benefit of legal advice, however poor that legal advice might have been.

### Disclosure of business risks

Perhaps the most explosive provision appears in para (i) of subss (3) and (4). Subsection 51AC(3)(i) is designed to protect *buyers* against unreasonable silences in relation to any intended conduct of the supplier. The court is invited to take into account:

> the extent to which the supplier unreasonably failed to disclose to the business consumer:
> (i) any intended conduct of the supplier that might affect the interests of the business consumer; and
> (ii) any risks to the business consumer arising from the supplier's intended conduct (being risks that the supplier should have foreseen would not be apparent to the business consumer)

Subsection 51AC(4)(i) is designed to protect *sellers* against unreasonable silences in relation to any intended conduct of the acquirer. The court is invited to take into account:

> the extent to which the acquirer unreasonably failed to disclose to the small business supplier:
> (i) any intended conduct of the acquirer that might affect the interests of the small business supplier; and
> (ii) any risks to the small business supplier arising from the acquirer's intended conduct (being risks that the acquirer should have foreseen would not be apparent to the small business supplier)

Ernie has stayed silent in circumstances where Jimmy's attention squarely ought to have been drawn to the adverse impact upon a tenant of the "Legitimate Interests Protection Clause" in circumstances where a landlord might delay the various improvements. For Ernie to make the judgment that Jimmy will not need financial or legal advice because he looks like he has run bookstores before, having made no inquiry of Jimmy's prior experience in running stores in shopping centres, clearly is a misjudgement. But is it actionable?

Some guidance can be obtained from the case of *Taylor v Johnson*.[41] In that case Mrs Ivy Johnson (Mrs Johnson) granted an option to Mr Laurence Colin Taylor (Mr Taylor) or his nominee to purchase two adjoining lots of vacant land, each comprising approximately five acres, at McGrath's Hill near

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40 See eg, *Crescendo Management Pty Ltd v Westpac Banking Corporation* (1988) 19 NSWLR 40 per McHugh JA, with whom Samuels and Mahoney JJA agreed.
41 (1983) 151 CLR 422.

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Windsor in New South Wales for a total purchase price of $15,000. Mr Taylor exercised his option, but Mrs Johnson decided not to sell the land because she thought she was going to receive $15,000 per acre rather than $15,000 in total. The evidence was to the effect that, under its then zoning, the value of the subject land was in the vicinity of $50,000 and that its value would have increased to around $195,000 if a proposed rezoning of the land had become effective.

The trial judge found that Mr Taylor was unaware of Mrs Johnson's mistake, but the High Court followed the Court of Appeal and jettisoned that finding. Mason ACJ, Murphy and Deane JJ found:

> Mr Taylor and Mrs Johnson each believed that the other was acting under a mistake or misapprehension, either as to price or value, in agreeing to a sale at the purchase price which he or she believed the other had accepted.[42]

Their Honours accepted an inference that:

> Mr Taylor, by refraining from again mentioning price and by the manner in which he procured the execution by Mrs Johnson of the option, deliberately set out to ensure that Mrs Johnson was not disabused of the mistake or misapprehension under which he believed her to be acting.[43]

Equity will not enable rescission of a contract where the mistake by one party is unknown to the other, unless the party that is seeking rescission can demonstrate unconscionable dealing by the other party.[44]

A majority of the High Court ruled that it was unconscionable for a party who is aware that the other party is mistaken about a fundamental term of their contract to take steps to prevent that mistake being recognised by the other party. Mason ACJ, Murphy and Deane JJ specifically found Mr Taylor:

> deliberately set out to ensure that Mrs Johnson did not become aware that she was being induced to grant the option and, subsequently, to enter into the contract by some material mistake or misapprehension as to its terms or subject matter.[45]

There is no similar deliberacy on the part of Ernie here, but it would appear to clearly follow from para (i) of subs (3) that both Ernie and Boondocks were required to disclose that Boondocks would not proceed with the improvements until the centre was fully tenanted, and that Jimmy's company had a significant financial exposure in the interim.

Every contract involves a risk allocation. Whether it is a matter of asking questions on a proposal form or making disclosures in the context of business to business negotiations, the party more economically able to anticipate the risks and deal with them is duty bound to educate the other party whether through sensible questions or fulsome disclosures. It may be insufficient to

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42 (1983) 151 CLR 422 at 427.

43 (1983) 151 CLR 422 at 428.

44 *Riverlate Properties Ltd v Paul* (1975) Ch 133 at 140: "Is the lessor entitled to rescission of the lease on the mere ground that it made a serious mistake in the drafting of the lease which it put forward and subsequently executed, when (a) the lessee did not share the mistake, (b) the lessee did not know that the document did not give effect to the lessor's intention, and (c) the mistake of the lessor was in no way attributable to anything said or done by the lessee?".

45 (1983) 151 CLR 422 at 433.

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require that the other party obtain independent advice. A duty to educate is clearly implied in the statutory language.

## The insurance analogy

Disclosure of business risks is of course already well regulated in insurance law. Most recently s 21A of the Insurance Contracts Act (1984) has acknowledged the insurer is better acquainted than the insured is with the issues underlying an insurer's decision to take a business risk, that is, to insure against it. It requires the insurer to ask specific questions about the risk being insured. Outside of those questions the business that is buying the insurance is only required to disclose those exceptional circumstances that the businessperson knows or a reasonable person in that businessperson's circumstances could be expected to know is likely to be relevant to the risk being insured.

Historically a fundamental of insurance law was that the business buying the insurance knew the risks of its business, and had to make full disclosure to the insurer who did not know about the risks attendant upon that business. If the disclosure was defective, the insurer could refuse to pay a claim. That is changing. The issue is becoming one of which the contracting party is economically more able to bear risk of nondisclosure. Section 51AC reflects that trend.

## The difference between judicious silence and suppression of essential information

Paragraph (i) creates some specific legal risks. For example:

- How can a businessperson separate out what intended conduct will affect the other party's interests and what will not? There are two sub-risks here. One risk is disclosing wrong information. The other risk is making an incomplete disclosure. The decisions as to how much to disclose, and how much accuracy checking to do, will seldom be easy to make and will usually need to be made quickly. Courts will need to be sensitive to such practical pressures in giving effect to what para (k) describes as "the extent to which the supplier and the business consumer acted in good faith".
- How long will it take to extract from the other party enough information to know what would not be apparent in relation to the business risks of the transaction?
- If there are no prior dealings will there be a willingness to risk losing the deal by spending time asking questions about the level of the other party's risk awareness?
- Can sales of goods "as is" be made where there is an imbalance of knowledge and information about the goods being sold?
- To what extent, in, say, a sale of business can a purchaser be required to make diligent enquiries?
- To what extent is the vendor entitled to know what those enquiries have disclosed so that the vendor can ensure that it has dealt conscionably?

It would certainly seem that Jimmy's company has an arguable case against Boondocks under Pt IVA and possibly Pt V of the Trade Practices Act. On the

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facts, one must have some doubt as to whether there was a duty to speak on the part of Boondocks or Ernie in relation to the progress of leasing the other shops. But even if there is no duty to speak under s 52, there are now statutory criteria that make failure to disclose risks and failure to deal in good faith relevant to determining a violation of s 51AC.

Since Jimmy's Bookstore Pty Ltd wants to undo the transaction and not seek some expectation loss, if successful Jimmy's Bookstore Pty Ltd may well be able to get the rent back. To the extent that the losses since the bookstore moved are reliance losses, those too may well be able to be recovered.

## Buying a business: the bank agency case

### The facts

Maggie Smith used to be the manager of Smalltown Bowling Club. She established the club's bar and restaurant, and the service and food were so good that the bar and restaurant became fantastic money makers for the club. Maggie was like many people in Smalltown. She was angry that all the banks had closed, and townsfolk had to drive two hours to Middletown to bank at the one bank branch left there.

Then she saw an ad placed by Bankers Agency Ltd.

> Train to open a bank agency in your shop. Show us you can grow our business and we'll make you our agent. Success for those who qualify under our rigorous standards.

Maggie applied. Three months later she was called in to the Sydney head office of this rather new bank; certainly Maggie had not dealt with them before. The bank paid her train fares, and paid for a night at the Regent Hotel. She was interviewed by five different people, and made to do a psychometric test. At the end of the second day she was told she was accepted into the program and was to report for training next Monday.

Report she did. Maggie threw herself into the program. She was going to save the town. Her restaurant business, "Bowler's Continental Café Pty Ltd" was going to become: "Bowler's Continental Café Pty Ltd — an agency of the New Bank".

At the beginning of the six week training program Maggie and everyone else there was told they would have to sign a contract, commit $25,000 of their own funds, and put up a bank-backed performance guarantee for $150,000 valid for three years before opening the agency. The necessary papers were made available that day, but they were not to be signed until the participant "graduated" from the training program.

At the end of the training program, the Head of the New Bank's "Rural Agency Division" presented Maggie and everyone else who had finished the program (20 out of 25 starters) with a "Graduation Certificate".

Maggie went back to the hotel, packed her bags, and went back to the bank to collect the papers. When she got there, the head trainer asked to speak with her privately. In his office, he gave her a cheque for her expenses requisition (filled out on New Bank expense reimbursement note paper) and said: "Maggie, the other trainers and I have watched you. You are too enthusiastic. You are not conservative enough in your decision making. We just do not

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think you will fit our bank. We're very sorry. Please return all your papers before you get the train home."

Maggie stormed out of that room, and straight to your office. She says to you: "I want you to make them honour their agreement with me. I can put up the $25,000 and the guarantee, and they know that. They just want to break the deal."

What are Maggie's rights under the Trade Practices Act 1974?

What compensation can she legitimately expect to get?

### The issues

Maggie faces a difficulty that is similar to the difficulty faced by the plaintiffs in *Marks v GIO Australia Holdings Limited*.[46] After her expenses have been fully reimbursed what are her compensable losses under the Trade Practices Act?

Maggie may even have a contract claim if she can show that the documentation was going to be a formalisation of a contract already made, but that is quite unlikely.

There is a real question then as to whether the advertisement was misleading insofar as it indicated that a bank agency could be opened in Maggie's Café once Maggie had demonstrated that she could grow the bank business and pass the rigorous standards. The bank may argue that she did not pass the rigorous standards, in particular the assessment of her conservatism.

But Maggie did graduate, and she had been induced into having the expectation that she had passed all the necessary hurdles and would be appointed an agent for the bank. Indeed she had been given the necessary documentation and had no quarrel with any of its terms. This is perhaps a case to argue for compensation of dashed expectations under s 87. Any other remedy would perpetuate the unconscionable conduct of the bank.

### Inequality of bargaining power

There is clear inequality of bargaining power, and there is nothing Maggie can do to protect her interests against a subjective characterisation of her abilities expressed only *after* she graduated from the program.

The bank has not offered to negotiate. It has simply determined that Maggie will not be a suitable agency owner or manager. Has the bank engaged in unfair tactics? Could Maggie become an agent for another bank? The bank will say that it has done nothing unfair because it has fully reimbursed Maggie. And Maggie was quite prepared to sign the bank's documents unamended.

### Undue influence or pressure or unfair tactics

For example, para (b) of subss (3) and (4) prohibit the use of "undue influence or pressure . . . or any unfair tactics" in a transaction.

Two observations need be made.

1. While the law has long prohibited undue influence, the concept of unfair tactics is new. It can fairly be anticipated that the line between

46 (1998) 158 ALR 333.

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tough tactics and unfair tactics can only be drawn with hindsight, and compliance will be largely "hit and miss".

2. The provision operates even after a deal is sewn up, so that if in the process of resolving performance issues or in compromising a dispute about contractual performance, commercial leverage is exercised, the law could be broken all too easily.

The more important issue is however whether the bank unreasonably failed to disclose to Maggie that:

- it might reject her after she graduated, and
- might not negotiate the terms of her agency with her after graduation.

The bank of course will point to s 51AC(6) which provides that the court shall not have regard to any circumstances that were not reasonably foreseeable at the time of the conduct. But which conduct is this limitation concerned with? There is the advertisement, the interviews and the training programme, and they do form a connected stream of events. As to what courts will find to be foreseeable in a statutory context where common law causation principles do not necessarily apply is still a matter of guesswork.

### The "good faith" criterion

More simply, has the bank simply failed to act in good faith?

There has been some suggestion that Pts IVA and V of the Trade Practices Act:

> quite clearly demand that parties involved in the negotiation of contracts exercise some form of good faith in their dealings.[47]

Were Maggie and the bank engaged in a negotiation? Will big business be able to cease a negotiation where it is clear that the small business it has been negotiating with would suffer a loss if the transaction being negotiated does not proceed? Such a result would firmly distance Australian law from English law. The House of Lords in *Walford v Miles*[48] in 1992 reaffirmed the right to stop negotiating in the absence of any lock-in agreement. As between properly advised commercial negotiators, Australian courts have also exhibited a reluctance to intervene in the negotiation process. However, when the commercial participants are not well-advised, there is no reason to expect judicial restraint. The distinction was well drawn by Kirby P (as he then was) in *Austotel Pty Ltd v Franklins Self-serve Pty Ltd*.[49]

The case of *Interfoto Library Ltd v Stiletto Ltd*[50] addressed this issue in the context of a lockout agreement. It acknowledged the requirement that exists in many civilian systems, that in making and performing a contract each party should act in good faith and deal openly with each other. Bingham LJ clearly recognised that importing such a concept into the common law presented considerable difficulties yet found for the plaintiffs on what can only be seen as unconscionability criteria.

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47 Boge, "Does the Trade Practices Act Impose a Duty to Negotiate in Good Faith" (1998) 6 *TPLJ* 4 at 6.
48 [1992] 2 AC 128.
49 (1989) 16 NSWLR 582 at 586.
50 [1989] 1 QB 433.

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The particular problem arises when lengthy negotiations are undertaken and both parties legitimately expect that some agreement will be reached. To the stronger and larger party, the impact of negotiations ending early and unsuccessfully will be relatively less than the impact upon the weaker and smaller party. If the stronger party knows of a special disability that affects the weaker party, the way in which the stronger party ends the negotiations must take that special disability into account.[51]

In commercial negotiations seldom will a negotiating party operate on the basis that the other side to the negotiations cannot make a judgment as to what is in its own interests to the point where the other side can be taken unfair advantage of simply by virtue of superior bargaining power.

### Disclosure of business risks, and the connection with "good faith"

Yet, as noted above, compliance with s 51AC can require disclosure of those business risks which, when disclosed would discourage the other party from entering into a transaction. The problem most commonly arises in the context of land sales where the vendor does not want to disclose defects to the purchaser. Most vendors, and their real estate agents, operate on the principal of *caveat emptor* — let the buyer beware. A vendor will not disclose defects that will cause the purchaser not to proceed.

Thus it would appear that s 51AC sets out criteria that go beyond the *Amadio* formulation. Section 51AC specifically has incorporated the requirement of good faith in para (k) of subss (3) and (4). It was not entirely clear that the requirement of good faith was incorporated into s 51AA.[52] That issue is now disposed of. No longer can it be said that bargaining which is hard and which does not constitute misleading and deceptive conduct will be legal.[53] Such conduct can still be unconscionable.

### Keeping one's cards up one's sleeve can be illegal

In the first place, para (i) in subss (3) and (4) requires that the intended conduct of the supplier/acquirer be identified, and if it might affect the interests of the business consumer/supplier, the intended conduct must be disclosed. Taken literally, all intended performance under a contract or conduct that could affect the performance of a contract would certainly be the subject-matter of a disclosure. For example, in a supply contract requiring just in time inventory supply the conduct involved in sourcing the goods so they can be supplied is relevant conduct.

In Maggie's case, it may well be argued that when the bank invited Maggie to the training program (if not earlier) the bank should have disclosed to Maggie the bank's intended conduct to subjectively evaluate her performance even after graduation.

### But keeping competitive intelligence up one's sleeve will generally be "reasonable"

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51 *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447; cf *Louth v Diprose* (1992) 175 CLR 621.

52 F Zumbo, "Unconscionability in Commercial Transactions: Exploring the Need for Further Reform Under the Trade Practices Act" (1994) 22 *ABLR* 323.

53 *Poseidon Ltd v Adelaide Petroleum NL* [1992] ATPR 41-164 at 40,227 per Birchett J.

There is a more serious compliance issue here. The way in which a business goes about performing its obligations is usually competitive intelligence. When a business bids on a contract in a competitive situation it will not want to disclose the conduct which enables it to bid at a low price or to promise efficient performance. However, low-cost competitors often take risks in relation to their ability to perform their obligations. They carry low overheads. Which of these risks would not be apparent to their contracting partners? Are these risks which should be foreseen, and would not be apparent to the contracting partners? If so, is it unreasonable to fail to disclose them?

It is easy to identify transactional situations where closing the deal efficiently means not disclosing business risks to the other contracting party. It is more difficult to identify transactional situations where full disclosure will help close the deal. Consequently, it will be difficult to give specific legal guidance to marketing and sales departments, and compliance managers will need to focus on the cultural change issues that are discussed below.

Is disclosure of the risk enough? Sometimes business risks can be notified to the other party and yet it would remain unconscionable to rely upon the contingency having eventuated.[54]

As far is Maggie is concerned, the bank surely should have foreseen that she would not have anticipated the risk of the agency transaction not proceeding once she successfully graduated.

And Maggie seems to fit Gummow and Gaudron JJ's category for compensating lost expectations under s 87 because here the dashed expectations are not the product of Maggie's choice.[55] Still only three out of seven High Court Justices have expressed a willingness to compensate dashed expectations under s 87, not enough for Maggie's lawyers to express a high level of confidence in her prospects of success.

## Buying a business: The case of the brand name clothing goods importer

### The facts

Spectre Sydney Ltd sold its import and distribution business to Shirts Unlimited P/L.

Spectre Sydney Ltd did not however have an agreement giving it rights to the "Spectre" brand, but the MD, Mr Eqinuos had an excellent personal relationship with the American-based international business manager for Spectre Inc.

The week after the sale of the business to Shirts Unlimited P/L, Spectre Inc, the US owner of the brands, sold its brands to Brands Unlimited Inc, a corporation which only distributed through subsidiaries, and never through independents.

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54 Sometimes also disclosures are made by both the buyer and the seller in a transaction. Each tries to influence the other in relation to the structure of the transaction. There may yet be cases in which it is argued by both sides that the other side did not adequately disclose to the business risks that were unfamiliar before the transaction took place. Because s 51AC protects both buyers and sellers, there is no reason why litigation cannot be commenced by both parties to the same transaction.

55 (1998) 73 ALJR 12 at 29-35 per Gummow J; accord, Gaudron J (1998) 73 ALJR 12 at 16.

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Mr Eqinuos had no idea that Spectre Inc and Brands Unlimited Inc were even negotiating, although those negotiations had commenced even before the negotiations between Spectre Sydney Ltd and to Shirts Unlimited P/L.

Without the Spectre brand, the business that Shirts Unlimited P/L had bought was worth half the purchase price, no more.

Shirts Unlimited P/L did not check into the strength of the rights to the brand name from the perspective of the distribution business. It had never entered the so-called top end of the market before. It had always distributed bargain basement shirts from China.

Shirts Unlimited P/L's owner, George Dufus, relied on Mr Eqinuos introducing him to the American-based international business manager, which Mr Eqinuos had promised to do and was quite willing to do despite it now being a worthless exercise. Mr Eqinuos knew that Mr Dufus was not the cleverest fellow he had ever met but had no idea just how little checking-up Mr Dufus and his solicitors really did.

George has now dropped those solicitors, and has come to you and asked if he can get his money back. Can he?

## The issues

In *Des Forges v Wright*[56] Elias J had to apply the New Zealand Fair Trading Act in a case where a vendor omitted to disclose information that affected the value of a distribution business it was selling. The business distributed the "AFFCO/Tenderkit" brands. The owner of the Tenderkit brand sold the brand and the new owner of the brand did not want to continue the distribution arrangement. The brand sale was under negotiation even while the sale of the distribution business was being negotiated, although the vendor did not know this. The purchaser did not check into the strength of the rights to the brand name from the perspective of the distribution business. The court ruled that the vendor did not breach the equivalent of s 52. This was so even though the vendor knew how important, and yet insecure, the continuation of the brand distribution rights were to the value of the business. The purchaser did not appreciate its importance, until after the brand was withdrawn and the income of the business dropped. One can only wonder how such a fact pattern would be analysed under s 51AC.

In the hypothetical there is no obvious inequality of bargaining power as between the two Australian companies. There is nothing obviously improper or unfair in the conduct of Mr Eqinuos. The real focus here is again nondisclosure business risks. Knowing of the inexperience in the particular industry of Shirts Unlimited P/L, is it unconscionable for Mr Eqinuos not to explain the risks involved in not having a written brand-name distribution agreement?

Perhaps Mr Eqinuos should have insisted that Shirts Unlimited P/L obtain independent legal advice and even other advice about the business risks of entering into the transaction. That, however, is not always a solution.

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56 [1996] 2 NZLR 758.

### Insisting the other party obtain independent advice but not following up as to the type of advice or its sufficiency can be dangerous

In *Elders Trustee & Executor Co Ltd v EG Reeves Pty Ltd*[57] Gummow J said that it was "fundamental" that s 52 is not designed to help those "who fail . . . to take reasonable care of their own interests".

- Does the introduction of s 51AC change that in some circumstances, such as where a large corporation recommends to its contracting partner that it should get independent legal and financial advice before entering into a risky transaction, but the advice is not sought?
- Will it be sufficient to recommend to the other party that it obtain independent advice?
  - If so, should the advice be legal, financial or some other advice or some combination?
  - If not, will it be sufficient to ensure that the advice is obtained?[58] Is there some responsibility to check out the quality of the other side's adviser in order to increase the likelihood that important risks are advised on?
- Given the natural and profitable desire of sales staff and marketing managers to stress the positive, to what extent will any corporation want to rein in those natural and profitable desires? The larger the corporation the more it will attract attention, and the greater the pressure to absorb some transaction cost and ensure that business risk disclosure is done properly. After all large corporations often do a greater volume of transactions and therefore more frequently take the risk of violating the law.

## The challenge for legal risk management and compliance programs

### Use non-rule-based precautions, such as integration of concepts of fairness and ethical conduct into the corporate culture

As can be seen from the hypotheticals introduced above, the line between conscionable and unconscionable business transactions will be hard to predict. Yet, it is not permitted to contract out of the Act.

Are there then any precautions a corporation can take against having its deal unwound or the seemingly proper but powerful exercise of contractual rights restrained? The following questions are designed to identify some options.

- Should negotiators and contract signatories (where they are different persons) make representations that they have had the benefit of professional advice (or at least the opportunity to obtain it)?

57 (1987) 78 ALR 193 at 241; contra, *Sutton v A J Thomson Pty Ltd* (1987) 73 ALR 233 at 239-41 per Forster, Woodward and Wilcox JJ.

58 *Gough v Commonwealth Bank of Australia* [1994] ASC 56-270 Kirby P focused in a duty of those with responsibility in relation to others to ensure that independent advice is obtained.

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- Should such representations explicitly declare that they are to be relied upon by the other party in proceeding on the basis that a fair negotiation occurred?
- Should corporate negotiators have to report to their superiors the observations they make about bargaining power and evidence of the other factors listed in subss 51AC(3) and (4) so that senior management must explicitly consider them in approving the entry into the deal or particular action under the contract. (Given today's sensitivities about directors' duties, boards may consider that policies and procedures need to be developed to reduce the risk of violating s 51AC. Compliance managers face some real challenges here.)

Precautions can be taken to reduce the risk of non-compliance with s 51AC. But they are not rule-based precautions. Compliance programs that depend upon checklists and compliance with specific policies will need to be adjusted.

## To achieve compliance with the new law, many a corporate culture will need to change

It is recommended strongly that compliance programs focus upon the integration of concepts of fairness and ethical conduct into the corporate culture. As to the way cultures must adapt, the Australian Standard on Compliance Programs (AS 3806-1998) provides limited practical guidance, with the most practical guidance coming in relation to identifying how training programs should be structured. Clause 3.4.1 says:

> Education and training of personnel in relation to the compliance program should be an ongoing part of the organisation's operations and linked to the corporate training system. It should be practical and readily understood by the target audience. Training can be done by the use of discussions, real world examples, in-house publications, computer-based training and external trainers.
>
> A training program should meet the following minimum criteria:
>
> (a) Examples should be illustrative of the industry, organisation or the sector concerned and the relevant day-to-day work of the target audience.
> (b) Concepts should be expressed in language that the target audience understands, rather than in jargon or technical terms, eg the terminology used in legislation.
> (c) Participatory teaching methods should be used.
>
> The effectiveness of training methods should be evaluated.
>
> Training should form part of the corporate induction program for new staff and be regularly reviewed, reinforced and updated.

One must recognise that the law of unconscionability is not black-letter law, and specific rules for compliance cannot be developed. This should surprise noone. On 30 September 1998, in the *New Deal: Fair Deal* package announced by the then Minister for Workplace Relations and Small Business, the Hon Peter Reith MP, the Government made a commitment to induce behavioural change on the part of big business towards smaller business and to provide small businesses with an adequate means of redress against unconscionable conduct.

The greater the awareness and sensitivity to the unconscionability criteria, the less likely the line between hard bargaining and unconscionable conduct

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will be crossed and, of course, the cost of compliance becomes lower the more the corporate culture considers "across the board maintenance of conscionable business practices to be just plainly part of the way we do business around here".

Nor should the law be seen as precluding aggressive negotiating practices and ordinary business risk taking. Rather, in approving business transactions in which one or more of the unconscionability criteria of s 51AC are apparent, the risk of non-compliance should be explicitly taken into account by corporate decision makers. As part of any good legal risk management program, a decision to take the risk of non-compliance with s 51AC should be one which explicitly weighs the costs and benefits of the transaction by incorporating some provision for the cost of non-compliance.

And if things go wrong, businesses should have a clear policy for efficient dispute resolution in place and functional. The ACCC publication "Benchmarks for dispute avoidance and resolution" is a helpful guide for small businesses on how to avoid disputes and how to handle disputes which do arise.

A hard edged, bottom-line driven corporation will generally have an outcome focus little tempered by legal or other restraints upon business behaviour. To them ends can justify means.

On the other hand, a business environment in which ethics and principles of good corporate citizenship have been embedded into the culture will take into account those restraints as a normal part of business decision-making.

It is not difficult to identify which of these two types of business culture will generate greater compliance with the law. Consequently, the major challenge for compliance with Pt IVA of the Trade Practices Act is one of embedding those values which help generate compliance with the law into the corporate culture.

There are of course economic limitations upon such an approach to compliance. A corporation whose profitability depends upon a large volume of low margin transactions will complete those transactions with a minimum transaction cost. That means careful control of the amount of personal service being given. Time will not be spent on giving a customer service to close a transaction where the same transaction could be done with another customer without spending that time on the customer service aspect. If there are limitations on the amount of customer service being given, there will be limitations on the amount of attention available for assessing the conscionability of the transaction.

On the other hand, a corporation whose profitability depends upon a relatively low volume of high margin transactions will focus on the process by which transactions are closed — that is by which services are given — and adjust to achieve compliance with the new law. A service focused corporation is a corporation that is focusing on the attractiveness of the process as well as of the sold product.

The compliance challenge is clearly easier in the second type of corporation. The new law does not discriminate between the nature of the corporation's transactions.

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## Quantify the costs of breaking the law as much as possible

More sophisticated compliance programs are beginning to provision off-balance sheet for the cost of non-compliance. Risk management programs are creating incentives for complaint practices, and disincentives for ignoring the law. Some programs seek to quantify the value of compliant behaviour in terms of penalties and damages payouts saved. Where risk taking is encouraged, provision is made for the costs of the risk going awry. Once the provision is quantified and the cost of compliance is measured, then the value of compliance can be demonstrated. In provisioning, some probability will have to be assigned to the risk of getting caught and of being forced to participate in, and even losing, a law suit.

Even where a corporation is not into off-balance sheet provisioning for risk management purposes, incentives can be created for compliance. Bonuses can be given for compliant conduct, for leadership in adjusting policies and procedures and seeing to their implementation and for honestly reporting and correcting non-compliant conduct. Failures to report and correct can be disciplined.

As the core of compliance with Pt IVA is developing a corporate culture that values compliance highly, the key will inevitably be to work closely with the Human Resources team, and the better people managers in the corporation. Those better people managers can be the leadership examples of conscionable good business practices.

## In conclusion

The introduction of illustrative categories of unconscionable conduct in subss (3) and (4) will help focus lawyers called upon to advise clients in relation to s 51AC. However, the categories are not closed. They are not even mandatory.

None the less, the new law does sound a warning to those who engage in abusive business conduct, and it does exert some countervailing force on those who take too much advantage of superior bargaining power. As to what however is “too much”, it is much too early to tell. Indeed black-letter guidance simply cannot be given to help achieve compliance. Compliance can be achieved by businesses that focus on their culture and ethical values, that engage in high margin (rather than low margin — high volume) transactions and that are prepared to make explicit the way in which they take on legal risk. For the rest of the business community, it will inevitably be a case of “wait and see”.