



## Consumer Law Reform Additional Paper – October 2010

### Unconscionability

1. The Ministry of Consumer Affairs released the discussion document “Consumer Law Reform” in June 2010. The discussion paper included a section which discussed the case law principle of unconscionability as it has been applied in New Zealand, and the extension of that principle under the Trade Practices Act (refer pages 54 – 58)<sup>1</sup>. The question was posed 17: “Is it appropriate to include a prohibition on unconscionable conduct in the Fair Trading Act, along the lines of the Australian Trade Practices Act and the Australian Consumer Law?”
2. This paper provides further information on the application of the unconscionable conduct provisions in the Australian Trade Practices Act 1974, with the objective of informing the decision of whether or not equivalent provisions should be added to the Fair Trading Act 1986 in New Zealand. This paper should be read in conjunction with the discussion paper which sets out a summary of the principles of unconscionability from the New Zealand Courts.

#### Overview of Comments in Submissions

3. Most of the submissions on the Consumer Law Reform discussion paper opposed the introduction of Australian-based unconscionable conduct provisions in the Fair Trading Act. The arguments from business and legal submitters included,
  - unconscionability is an emotive and uncertain term
  - existing case law includes the equitable remedy of unconscionability, and this provides sufficient protection for vulnerable consumers
  - adding unconscionable conduct provisions in legislation would compromise freedom of contract
  - there is no evidence of the need for the protection that the provision would provide
  - credit contracts are already covered by the oppression provisions in the Credit Contracts and Consumer Finance Act 2003 (which include a reference to unconscionable), and there is no need for any other protection apart from that already provided in respect of credit contracts under that Act
  - the existing misrepresentation provisions of the Fair Trading Act are sufficient to protect consumers (and small businesses)
  - harmonisation with Australia is not a sufficient reason for making a change in New Zealand law
  - enforcement has been difficult, and there is no clear benefit from the unconscionable conduct provisions in Australia
  - it is unclear how unconscionable conduct provisions would fit with unfair contract terms in the Fair Trading Act.

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<sup>1</sup> Similar provisions are also included in sections 12CB and 12CC of the Australian Securities and Investments Commission Act 2001.

4. Some of the submissions were in favour of introducing unconscionable conduct provisions in the Fair Trading Act. Other consumer-oriented submitters thought the complexity of the concept of unconscionable conduct limited its usefulness as a consumer protection initiative, and they were attracted to the idea of avoiding that complexity by extending the concept of “oppression” from the Credit Contracts and Consumer Finance Act to other contracts apart from credit contracts.
5. Generally the submissions that discussed including unconscionable conduct provisions in the Fair Trading Act did not add any additional information to that included in the relatively brief comments on unconscionability in the discussion paper.

### **How have the Australian Unconscionable Conduct Provisions been working in practice?**

6. There are three reasonably recent official reports which are relevant to the statutory unconscionability provisions in the Trade Practices Act that have been published in Australia,
  - *The need, scope and content of a definition of unconscionable conduct for the purposes of Part IVA of the Trade Practices Act 1974*, Senate Standing Committee on Economics (December 2008)
  - *The nature and application of unconscionability regulation – Can statutory unconscionable conduct be further clarified in practice?* Treasury Issues Paper (November 2009)
  - *Strengthening statutory unconscionable conduct and the Franchising Code of Conduct*, Treasury Report to the Hon Dr Craig Emerson (February 2010)
7. These papers analyse the existing unconscionable conduct provisions in the Australian Trade Practices Act, and their effectiveness in providing remedies for consumers and small businesses which are treated unfairly when they contract with suppliers. The consensus is that the provisions have been helpful, but there are differing views on the extent to which the provisions might be improved.
8. One view is that the relatively conservative approach of the Courts in Australia to the unconscionable conduct provisions in the Trade Practices Act has been appropriate and prudent, and that the case law is gradually evolving in the right direction. A more critical view is that the Courts need more explicit direction in the legislation requiring them to deliver fair outcomes through applying the principles of unconscionability in deserving cases. The principal concern about how the Courts in Australia have applied the unconscionable conduct provisions in the Trade Practices Act is that they have tended to limit themselves to considering unconscionability as a procedural or pre-contractual issue, rather than as being a basis for reviewing the substantive outcomes of transactions.
9. The underlying case law principle of unconscionability focuses on the circumstances and conduct of the parties as a contract is being formed, and whether a more powerful party is taking advantage of the vulnerability of a weaker party. The case law principle does not involve an assessment of the outcome of the contract – in most cases the outcome will be harsh, but that is not in itself conclusive, or even relevant. The case law principle also requires the party making out a claim of unconscionability to demonstrate a “special disadvantage”

that is personally inherent to them (e.g. not speaking English, or some incapacity making the person particularly vulnerable), rather than a commercial or “situational” disadvantage. Under the case law, it is practically impossible for a small business to claim the benefit of an unconscionability defence.

10. The legislation in Australia has been drafted to extend the case law principles; downplaying the need for a weaker party to be in a vulnerable position, and directing the Courts to consider the substantive outcomes before them. The relevant provisions in the Trade Practices Act include lists of matters the Courts are required to have regard to in determining whether conduct is unconscionable in relation to consumers (section 51AB) and small businesses (section 51AC).
11. In the last five years, the Australian Courts have been more accepting of the proposition that “unconscionable conduct” under sections 51AB and 51AC has extended the case law concept of unconscionability. There has been a degree of uncertainty in reaching this point, and there is still judicial reluctance in Australia to move from emphasising procedural unconscionability towards focusing on the substantive outcomes of transactions.
12. The suggestions to address this reluctance when the issue was considered in Australia over the last couple of years included inserting examples in the legislation that expressly refer to substantively unconscionable outcomes rather than just procedural unconscionability, and the “examples” could be expressed as being binding on the Courts. Another suggestion was to abandon the use of the term “unconscionable” altogether, and to instead refer to “unfairness”. This suggestion was also made in the submissions on the discussion paper on Consumer Law Reform by some community law centres.<sup>2</sup>
13. The approach agreed in Australia for the purposes of the new Australian Consumer Law has been relatively restrained. Policy-makers accepted the argument that the Courts need more time to develop case law in the area, especially in relation to the unconscionable conduct provision designed to protect “small businesses” in section 51AC. They decided any radical change would be counter-productive at this time, but that adding a reference for the Courts to consider the “terms and progress” of contracts, as well as the circumstances of their formation, would provide a clear signal to the Courts that they are expected to consider substantive unconscionability, as well as the more conventional procedural unconscionability.<sup>3</sup>
14. The issue for New Zealand is whether it would be useful to include unconscionable conduct remedies in the Fair Trading Act at all. The distinctions between procedural and substantive unconscionability and the effectiveness of the statutory remedies in Australia are only marginally relevant in New Zealand. Statutory unconscionability in New Zealand is limited to one of the elements of “oppression” under the Credit Contracts and Consumer Finance Act 2003. Under the case law-based concept of unconscionability in New Zealand, the cause of action is a defence rather than a positive remedy, and it is limited to procedural (or pre-contractual) unconscionable conduct by suppliers to vulnerable consumers.

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<sup>2</sup> Submissions from Nelson Bays Community Law Centre and Southland Community Law Centre.

<sup>3</sup> The Australian Consumer Law passed in July 2010 re-enacted the existing Trade Practices Act provisions on unconscionability. The Bill adding the reference to the potential unconscionability of the “terms and progress” of contracts has not yet been passed, and will need to be re-introduced to the Commonwealth Parliament following the recent election in Australia.

15. Any judgement on the usefulness of a possible statutory remedy for unconscionable conduct depends on its effectiveness, and there is useful evidence from Australia on the enforcement actions taken by the Australian Competition and Consumer Commission (ACCC). The Australian Treasury report from February 2010 includes an appendix that usefully summarises the enforcement actions by the ACCC. The summary lists 15 successful prosecutions under the consumer protection provision (section 51AB), as well as one unsuccessful prosecution, two cases that were settled, and four cases that were resolved with court enforceable undertakings. In relation to the small business protection provision (section 51AC), there were 13 successful prosecutions, two unsuccessful prosecutions, three cases that were settled, and three cases that were resolved with court enforceable undertakings.<sup>4</sup>
16. These examples provide an empirical basis to assess whether the unconscionable conduct provisions in the Australian Trade Practices Act have been worthwhile, or whether they represent an unnecessary or undesirable intrusion on suppliers' freedom of contract. The summary is reproduced as the Schedule to this paper.
17. The conclusions that can be taken from the examples referred to in the Schedule include,
  - Most of the cases could not have been prosecuted by the Commerce Commission in New Zealand under the Fair Trading Act as it currently stands.
  - Some of the cases involved misrepresentations and unconscionable conduct, and the Commerce Commission could have prosecuted those cases in New Zealand under the equivalent misrepresentation provisions in the Fair Trading Act. The two causes of action may have overlapped, but the unconscionable conduct was often different from the suppliers' misrepresentations, so the two causes of action were not the same.
  - Whether the suppliers in these cases ought to have been protected by the principles of *caveat emptor* or freedom of contract is a value judgement, but the conduct of the defendants in the cases taken by the ACCC seems to have been unethical, and it was appropriate that remedies and sanctions were available for their unconscionable conduct.
  - The credit-related cases involved charging potential borrowers for making inquiries, which would not be covered by the CCCFA in New Zealand because the loans were not actually made.
  - The door-to-door sales situations would not have been covered under the New Zealand Door to Door Sales Act, because it only applies to credit sales. Modernised door to door and direct sale legislation would still only provide a cooling off period and a right to terminate a purchase, which is not as effective a remedy as available for unconscionable conduct.
  - The existing case law defence of unconscionability would not have provided a remedy for any of the consumers or small businesses on whose behalf the ACCC took enforcement action under the Trade Practices Act. The Trade

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<sup>4</sup> The cases resolved with court enforceable undertakings include *ACCC v Allphones*, which was counted as current litigation when the schedule was prepared, but which was settled in April 2010.

Practices Act provided *remedies* for individual complainants and markets generally, while the case law principle of unconscionability that currently applies in New Zealand only provides a *defence*.

- Unconscionability is not strictly an “offence” under the Australian Consumer Law (or the previous Trade Practices Act), but the remedies available in the cases referred to included injunctions (which in some cases were effectively banning orders) and damages. These are more effective than the more narrowly focussed injunctions, cancelling sales and providing for refunds, which would have been the main case law remedies.<sup>5</sup>
- The remedies tend to be systemic, applying to all the activities in the market by the particular suppliers, rather than being limited to addressing the position of individual consumers. A number of the cases concerned multiple consumers incurring relatively minor losses where the consumers would have had no incentive to take individual action, but where the collective losses were nevertheless significant.
- Very few of the parties on whose behalf the ACCC took enforcement action would have had the case law defence of unconscionability available to them if they had sought to make the argument, because the case law principle of unconscionability requires a level of vulnerability and disadvantage which the parties would not generally have been able to meet.
- The cases generally concerned the conduct of the suppliers, rather than the particular terms of their contracts (which may also be unfair). Some of the cases could have been taken under unfair contract terms provisions if they had been available, but they have only recently been added to the Australian Consumer Law. It is likely that the ACCC will add unfair contract terms as an extra cause of action in future prosecutions for unconscionable conduct (and misrepresentation).
- Generally there does not seem to have been very much uncertainty as to the meaning of unconscionability for the purposes of the Trade Practices Act. The three unsuccessful cases would be seen as miscalculations on the part of the ACCC, but the facts in the summary suggest the decisions could easily have been in favour of the ACCC.
- Most of the commercial cases (under section 51AC) concern franchises and leases, and franchisees and lessees in New Zealand have no equivalent protection under the Fair Trading Act.
- It is possible that some of the business practices challenged by the ACCC are specific to Australia (e.g. taking advantage of people in Aboriginal communities), but generally it would not be surprising if the same sorts of business practices occurred in New Zealand.

18. Whether the suppliers in these cases ought to have been subject to enforcement action by a regulator is largely an ethical question. The guiding principles for consumer law policy concern consumer confidence and well being, having

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<sup>5</sup> Persons engaged in unconscionable conduct under the Australian Consumer Law will now be liable for civil pecuniary penalties of up to \$1.1 million for companies and compensation orders in cases brought by the ACCC, as well as civil damages in claims brought by affected parties. Injunctions and court enforceable undertakings remain important remedial options for the Courts.

consumers' reasonable expectations met, providing access to redress, and encouraging suppliers and consumers to trade fairly (and, possibly, in good faith). Holding suppliers to account for conduct which qualifies as being unconscionable seems to be consistent with these principles.

19. The alternative view is that suppliers should be free to take advantage of the commercial opportunities available to them, and as long as they are not making actual misrepresentations or behaving in a way which is misleading and deceptive as those terms are applied for the purposes of the Fair Trading Act then the law should not interfere with their activities. If suppliers behave in ways that consumers or other customers disapprove of, then competition will constrain and regulate that behaviour over time.
20. This view is held in relation to consumer contracts and small business contracts, but it tends to be more strongly held in relation to small business contracts. The argument is that small businesses take their own commercial risk when they decide to enter into transactions such as leases in malls or franchise agreements, and they are free to take their own legal advice. According to this view, the principles of confidence, meeting reasonable expectations, redress and fairness are not relevant to small businesses when they contract with their suppliers.
21. The examples of the cases where the ACCC has taken enforcement action in Australia show that there is a degree of market failure, and that competition has not been sufficient to regulate supplier behaviour in every instance. If the unconscionable conduct provisions had not been in the Trade Practices Act the ACCC could not have taken enforcement action in most of these cases. The Commerce Commission could not have taken enforcement action in respect of most of these cases if they had occurred in New Zealand.
22. In the absence of legal protection, consumers and small businesses bear the cost and risk themselves when they encounter suppliers who deal with them unconscionably. Essentially, there is a transfer in value and wealth from consumers and small businesses in favour of suppliers engaged in unconscionable conduct.
23. The cost benefit analysis from a policy point of view involves considering whether the cost to suppliers of being held to account for their own conduct which qualifies as unconscionable, and the cost of suppliers modifying their conduct to avoid potential liability, is justified by the value of the redress and protection available to consumers. It is not realistic to expect dollar values to be attached to those costs or benefits.
24. One view is that it does not seem to be principled or reasonable to deny consumers a remedy and to permit suppliers to engage in unfair or unconscionable conduct so suppliers can avoid the costs of conducting themselves in ways which are not unconscionable.
25. The contrary view is that most suppliers do not engage in unconscionable conduct, and empowering consumers and small businesses to complain about suppliers which are acting reasonably or ethically will add unnecessary cost and risk to those suppliers. A variation on this view is that the meaning of unconscionability is so vague and uncertain that suppliers which consider they are acting reasonably and ethically may nevertheless be found to have acted unconscionably.

26. These arguments do not seem to be supported by the cases taken by the ACCC in Australia, because the conduct of the suppliers in those cases does seem to have been unreasonable and unethical. The uncertainty of the meaning of unconscionability seems to have been to the benefit of the suppliers in the unsuccessful cases taken by the ACCC, although the cost and bad publicity in successfully defending such a claim is likely to have been very significant to the parties. That cost is probably not a sufficient reason to not provide the remedy at all, and would probably be comprehensively outweighed by the benefits delivered to consumers and small businesses through the other successful enforcement actions taken by the ACCC.
27. The difference between consumers and small businesses in this context is that there may be a greater onus on small businesses to look after their own interests when they are confronted with unconscionable conduct by a supplier, and that small businesses are better able to carry the costs of being dealt with unconscionably than individual consumers.
28. The Australian case examples suggest these distinctions are not valid in fact or in principle, which is why the Australian unconscionable conduct provisions have been extended to provide protection from unconscionable conduct for small businesses. It may be that the circumstances that arose in the cases prosecuted by the ACCC would not have arisen in New Zealand, and that the remedy is therefore unnecessary here. However this does not seem very likely.
29. Another view is that the small businesses on behalf of which the ACCC took enforcement action should either have looked after their own interests more effectively, or should properly bear the costs of being dealt with by lessor or franchisors as they were. This is fundamentally an ethical judgement.

## **Conclusion**

30. This paper has been prepared following consideration of the submissions received on the Consumer Law Reform discussion paper. It provides a more detailed discussion on the application of the unconscionable conduct provisions in the Trade Practices Act, and considers the criticisms of the unconscionable conduct remedy from the submissions in this context.
31. It seems unsatisfactory that there is generally no equivalent remedy available in New Zealand for consumers or small businesses that have the protection of sections 51AB and 51AC of the Trade Practices Act in Australia. The key policy issue is whether the benefits available to consumers and small businesses from a remedy against unconscionable conduct by their suppliers would justify the cost to those suppliers of not being able to engage in conduct that would qualify as being unconscionable, and of having to modify their conduct to avoid potential liability.
32. A secondary issue is whether small businesses should be protected from unconscionable conduct by their suppliers, or whether they should be expected to look after their own interests and bear the costs accordingly.
33. A more general issue is whether the unconscionable conduct provisions in the Trade Practices Act would be effective in extending the strictures of the case law principles of unconscionability, or whether the Courts in New Zealand would take a restrictive approach that would limit the effectiveness of the remedy. Policy-makers in Australia decided that, despite the reluctance of the Courts to extend the case law principles of unconscionability, the more recent case law is more positive and worth persisting with. Presumably the New Zealand Courts would be

guided by the Australian case law if similar provisions were adopted in New Zealand, and the latest drafting in Australia makes it much clearer that the Courts are expected to consider substantive unconscionability, as well as the more traditional procedural unconscionability.

## **Recommendations**

34. We conclude that the analysis above supports the recommendations that:
  - Unconscionable conduct provisions based on the Trade Practices Act should be added to the Fair Trading Act; and
  - The provisions should include protections for small businesses which are subject to unconscionable conduct.
  
35. We would welcome any feedback on this paper, including information on the prevalence of conduct that would qualify as unconscionable in New Zealand under a statutory scheme, and comments on the cost benefit judgements that will need to be made. Please contact us on 04 462 4273 (Anita Manga) or at [consumerlawreform@mca.govt.nz](mailto:consumerlawreform@mca.govt.nz) or Ministry of Consumer Affairs, PO Box 1473, Wellington.



## SCHEDULE

### AUSTRALIAN COMPETITION AND CONSUMER COMMISSION ENFORCEMENT OF UNCONSCIONABLE CONDUCT UNDER THE TRADE PRACTICES ACT

A brief account of the ACCC's activity in enforcing statutory unconscionable conduct is extracted here to illustrate the extent and diversity of that activity. This information was compiled by the ACCC and provided to the panel at the panel's request.<sup>6</sup>

#### Section 51AB enforcement [*consumer cases*]

The ACCC has litigated 18 cases in relation to section 51AB. Of these, six were resolved in fully contested hearings, and the ACCC was successful in five of those matters. Of the remaining 12 matters, ten were settled by consent declarations and the remaining two were settled without declarations. The ACCC has accepted section 87B undertakings [*court enforceable undertakings*] in five section 51AB matters where the undertakings were accepted without court proceedings being instituted.

#### Successful litigation

##### *Collings Construction Co Pty Ltd, Venture Industries Pty Ltd (1996)*

The case related to consumers entering design and construction contracts with Collings on an 'all inclusive' basis, then being passed to Venture for construction, where they would be liable for more costs. Damages in excess of \$1 million were awarded to the seven named families.

##### *CDRC's Financial Network (1998)*

CDRC's Financial Network, a Victorian business, was alleged to have misled vulnerable consumers by way of advertisements nationally in local newspapers advising that cash loans can be obtained utilising a \$5 per minute 1902 live information number. Consent orders were made restraining Cedrick Desmond Collinson or any legal entity with which he is associated from engaging in such conduct in the future.

##### *HRJ Financial Services Pty Ltd (2000)*

The ACCC alleged that HRJ's advertising represented that personal loans were available to callers from the operator of a 1900 phone call, which actually only provided advice on how to secure a loan. The calls to the 1900 number were expensive. The ACCC was concerned that the advertising was aimed at pensioners, bankrupts and people with bad credit. Settlement was negotiated with the liquidator of HRJ that provided for refunds to consumers.

Federal Court consent orders were granted for injunctions against HRJ and the bankrupt directors, Rowland Thomas and Helen Lewis.

##### *Black on White Pty Ltd (Australian Early Childhood College) (2001)*

The ACCC obtained Federal Court orders declaring Black on White Pty Ltd had engaged in unconscionable conduct by signing students up to contracts without disclosing the onerous nature of some contract clauses.

##### *Moore Talk Communication (2001)*

Unconscionable, misleading and deceptive conduct in the promotion of mobile phone and access plan packages led to consent orders being issued by the Federal Court, Brisbane, and a court enforceable undertaking being provided by Moore Talk.

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<sup>6</sup> The panel responsible for the Report on *Strengthening statutory unconscionable conduct and the Franchising Code of Conduct* consisted of Professor Bryan Horrigan, Mr David Lieberman and Mr Ray Steinwall.

*Inthebigcity.com Ltd (2001)*

Advertisements appeared in APN Newspapers between July 2000 and April 2001 promoting an employment service offered by Inthebigcity.com Pty Ltd, where callers to a 1900 premium rate telephone service (at \$2.48 per minute) would be guaranteed work, and be entitled to discounts on accommodation and removal costs. There were no guarantees of employment or discounts available. Court orders by consent included injunctions and undertakings providing for payment of refunds to affected consumers and corrective advertising.

*Axxess Australia Ltd, Benchmark Sales Pty Ltd (2002)*

Door to door and telemarketing sales companies 'slammed' consumers (transferred their telephone service without authorisation). The ACCC alleged the companies illegally obtained signatures and verbal authorities from consumers through a range of methods. The companies admitted they had breached the TPA, and undertook to review their trade practices compliance procedures and adopt industry codes of practice. The companies were also, ordered to contribute \$60,000 to a fund established by the ACCC to raise awareness of consumer rights concerning phone services, while injunctions restraining the companies from engaging in misleading and deceptive conduct were also issued.

*Solutions Software/Acepark (2002)*

The court found that Robert James Price misled consumers and, in one instance, acted unconscionably in connection with the marketing and sale of horse race betting software in Australia and New Zealand. The court's findings included that, contrary to what purchasers were told, the program was a gambling program (and not an investment program), did not have a strike rate of success of between 70 and 95 per cent, and there were no reasonable grounds for representing that purchasers could expect to earn income or profit using the program.

*Free2AiR (2002)*

The court declared the conduct of Free2AiR to be misleading and deceptive (supplying internet services subject to terms and conditions not disclosed to consumers before they subscribed), unconscionable (threatening to disconnect customers if they questioned the imposition of an administration fee, carrying out unauthorised credit card deductions) and to constitute harassment and coercion (threatening to disconnect, and referring to a debt collection agency). Orders also included injunctions and costs.

*Dodo Internet Pty Ltd (2003)*

The court declared Dodo to have engaged in unconscionable conduct by failing to check the accuracy of dial-in telephone numbers provided to consumers, failing to fairly and properly investigate customer complaints, refusing to deal or negotiate with complainants, and seeking to rely on unlawful exclusion clauses. Orders included requiring Dodo to pay compensation to some consumers, and inform its customers of the findings and injunctions.

*Esanda Finance Corporation (2003)*

Esanda consented to declarations it had acted unconscionably (through debt collectors and tow truck operators) in the repossession of a car, including through agents entering a home by jumping a gate, not stopping re-possession in the face of a physical confrontation, and repeated attendance at consumer's home and work. Esanda was restrained from similar conduct in the future, required to change some processes, and paid compensation to the customer and the ACCC's costs.

*Lux Pty Ltd (2004)*

Unconscionable conduct took place in connection with the door-to-door sale of a \$900 vacuum cleaner to a vulnerable consumer. The court found that the sales agent should have recognised the woman

was substantially illiterate, unable to understand commercial matters in any depth, and was unlikely to be able to make a worthwhile judgement about whether the purchase was in her best interests. The court considered the meeting at the woman's home was 'irreconcilable with what was right or reasonable'.

*Raymon Keshow (National Maths Academy) (2005)*

A promoter of educational materials was found to have acted unconscionably in dealings with indigenous communities in remote areas, particularly in relation to signing consumers up to automatic deductions. One of the consumers was unemployed, spoke English as a second language, lived in relative poverty and had more than \$10,000 deducted from her bank account without receiving any of the promised materials. She also had little or no experience in business dealings. The court banned Mr Keshow from entering indigenous communities in the Northern Territory to conduct business, and from receiving automatic payments for goods or services without full disclosure of their effect.

*The Rana System (NuEra) (2007)*

NuEra Health Pty Ltd and Mr Paul Rana were found to have engaged in unconscionable conduct against highly vulnerable consumers when signing them up to pay for alternative cancer treatments. The conduct was described as 'being of the most reprehensible kind, revealing a cynical and heartless exploitation'.

*Craftmatic Australia (2009)*

The ACCC alleged that Craftmatic had acted unconscionably against senior citizens in the door-to-door sale of beds, by taking advantage of the commercial inexperience of elderly and housebound consumers through high pressure sales tactics. Craftmatic agreed to court declarations and injunctions.

The declarations specified that Craftmatic's method of promotion and sale consisted of steps designed, scripted and conducted to unduly influence potential customers and to create and take advantage of an unequal bargaining position.

The consent orders also identified that Craftmatic's methods were intended to take advantage of certain characteristics of the target market; that is, the perceived politeness, commercial inexperience, health concerns, and susceptibility to high pressure and misleading sales tactics, of older persons in their homes.

**Litigation settled without declarations**

*Domaine Homes (2001)*

The ACCC instituted proceedings against Domaine and several others in relation to Domaine's implementation of the GST in 2000, in particular the promotion of its 'Guaranteed Fixed Price' contracts in 1999 and subsequent charging of additional GST on those contracts. This was a representative action on behalf of seven Domaine customers seeking refunds and compensation, plus injunctions requiring Domaine to refund the remaining customers the GST they had paid.

Domaine provided the court with undertakings (without admitting liability) to refund 260 home buyers a total of approximately \$1.9 million of GST payments plus interest.

*Fox Symes & Associates (2005)*

The ACCC alleged that Fox Symes had acted unconscionably in its dealings with some consumers, in particular regarding representations about the effect of a debt agreement on a consumer's credit rating, the amount of fees payable for a service and the nature and effect of documents provided by Fox Symes. The undertaking provided to the court – without admission - included an agreement not to make certain statements about debt agreements, use best endeavours to inform consumers of the ramifications of entering a debt agreement, explain documents, and bring fees to the attention of consumers.

## **Unsuccessful litigation**

### *Radio Rentals (2005)*

The ACCC alleged that Radio Rentals acted unconscionably in its dealings with an intellectually disabled man, resulting in his entering 15 rental agreements and two loan agreements with Radio Rentals and three rental agreements with another store. The court found that Radio Rentals had not acted unconscionably, but noted that the case highlighted the peculiar vulnerability of persons who are unable to conserve their own interests but who do not put people with whom they deal on notice of their incapacities.

## **Section 87B undertakings [*court enforceable undertakings*]**

### *Lyscard and Family Educational Publishers (1995)*

Both parties gave undertakings concerning unconscionable and misleading and deceptive conduct in relation to Collier Encyclopaedias and false representations that a free gift accompanied purchase. They undertook not to engage in unconscionable, misleading or deceptive conduct in the sale of books in Australia in future, to reimburse consumers, and to establish a trade practices compliance program (to be monitored with regular reports provided to the Commission).

### *Acepark (1999)*

Acepark sold a computer software betting or investment program to the public, and had operated under different names. The ACCC's view was that Acepark has contravened sections 51AB, 52, 53(c), 53(d), and 59(1) of the TPA. Acepark undertook to cease legal actions for recovery of payment against various customers and release them from any further claims, to refund payments made by these customers to Acepark, to compensate them for proven losses, and set up a structured complaints handling system.

### *OneTel (1999)*

OneTel provided undertakings in response to ACCC concerns about their reliance on variation clauses to vary its mobile phone customer contracts in breach of the TPA, including section 51AB. OneTel undertook to amend its contract, not to vary existing customer contracts, provide refunds, complete a TPA compliance program and sign up to an industry code.

### *OneTel (1999)*

The ACCC commenced an investigation into complaints about the promotion of OneTel's 'Switch' product. OneTel, through its agents, had been promoting this product by means of door-to-door sales since April 2000 and outbound telemarketing since May 2000. The complaints concerned transfers to OneTel made without the consumer's consent or informed consent.

As a result of its investigations, the ACCC formed the view that OneTel's agents and those agents' representatives had breached Part IVA and V of the Act and that OneTel was liable for their conduct. Specifically, the ACCC concluded that between April 2000 and October 2000, the representatives had induced transfers without the consent or informed consent of the consumers concerned.

## **Section 51AC enforcement [*small business cases*]**

The ACCC has litigated 19 cases in relation to section 51AC. Of these, nine were settled by way of consent declarations that the parties had contravened section 51AC, three were settled without consent declarations, five were determined by the court and two have yet to be determined by the court. Of the five determined by the court, the ACCC was successful in three matters and unsuccessful in two. The ACCC has accepted section 87B undertakings in two section 51AC matters where the undertakings were accepted without court proceedings being instituted.

## **Current litigation**

### *ACCC v Seal-A-Fridge Pty Ltd (2010)*

In July 2008, the ACCC commenced proceedings against Seal-A-Fridge, alleging unconscionable conduct towards its franchisees by effectively withholding consent to the transfer of franchises by: the imposition of terms in the proposed replacement franchise agreements which were significantly more onerous than in the franchise agreements then in use; and unilaterally increasing the fees associated with the national Seal-A-Fridge telephone number contrary to the franchise agreements. It is also alleged that Seal-A-Fridge breached the Franchising Code. The ACCC was seeking a range of orders, including declarations, injunctions and costs.

[*The Federal Court, Brisbane found in favour of the ACCC in June 2010.*]

### *ACCC v Allphones Retail Pty Ltd & Ors (2010)*

In March 2008, the ACCC instituted proceedings against Allphones in relation to: alleged unconscionable conduct in the form of failing to disclose or pay certain income to franchisees; implementing policies targeting certain classes of franchisees; and threatening or engaging in a pattern of harsh conduct against franchisees. It is also alleged Allphones failed to comply with the Franchising Code and engaged in misleading or deceptive conduct towards franchisees.

[*The case was settled in April 2010, with Allphones agreeing to pay \$3 million in damages, to be split among 55 franchisees.*]

## **Successful litigation**

### *Simply No-Knead (Franchising) Pty Ltd (2000)*

It was alleged that Simply No-Knead had engaged in unconscionable conduct in its behaviour towards franchisees. Simply No-Knead had threatened to withhold obligatory disclosure documents unless each franchisee gave written consent to renew the agreement, and also competed directly with the franchisees in a way that was calculated to harm their business.

### *Leelee Ltd (2000)*

The ACCC brought action against a lessor of food stalls in an international food hall in Adelaide. The court declared, by consent, that Leelee engaged in unconscionable conduct by:

- consenting to, or giving approval for, another tenant to infringe on the exclusive menu entitlements conferred by Leelee on one of its tenants; and
- specifying the price at which the tenant sold its dishes in a manner which unfairly discriminated against, or inhibited, the tenant's ability to determine the prices at which its dishes were sold in competition with another tenant.

### *Daewoo Australia Pty Ltd (2002)*

The court declared that Daewoo Australia engaged in unconscionable and misleading conduct in connection with the 1998 appointment of Porter Crane Imports Pty Ltd as its Queensland dealer of excavators and wheel loaders. The court found that Daewoo Australia, by entering into the agreement with Porter Crane having failed to disclose its actual intentions, engaged in misleading and unconscionable conduct in breach of sections 52 and 51AC of the TPA.

### *Suffolke Parke Pty Ltd (2002)*

Suffolke Parke leased out premises to D&I Shannon Pty Ltd, a franchisee. Part of the leased premises was a separate shop, which Shannon had been permitted to sublet on previous occasions. After

disputes between Suffolke Parke and Shannon, Suffolke Park refused to allow Shannon to sublet the shop. This was allegedly in reprisal for complaints arising from actions taken by Shannon and other franchisees concerning the conduct of the director of Suffolke Parke as a director of the master franchisee for South Australia.

The court issued consent orders that the franchisor, Suffolke Parke Pty Ltd had acted unconscionably toward its tenant.

*Cheap as Chips Pty Ltd (2003)*

Franchisees alleged that Cheap as Chips (CAC) terminated franchise agreements and imposed new and unreasonable conditions and threatened to suspend franchisees from work or cancel franchises when imposing these conditions. It was also alleged that CAC contravened the Franchising Code in inducing a franchisee not to associate with other franchisees, and not following the dispute resolution or termination procedures set out in the Code.

The court declared, by consent, that CAC engaged in unconscionable conduct in relation to a number of forms of conduct, including threatening to terminate franchisees rather than negotiating disputes.

*Avanti Investments Pty Ltd (2003)*

The ACCC alleged that Avanti Investments engaged in unconscionable conduct when it entered into agreements with farmers to lease land, and over time made the farmers sign new agreements that significantly reduced the amount of water available, whilst representing to the farmers that the new agreements were the same as the original agreements. The ACCC pursued this case because the farmers appeared to have been exploited by Avanti due to their lack of education, English language skills and inexperience in commercial dealings.

The court declared that Avanti had engaged in unconscionable conduct and made various misrepresentations to the lessees in contravention of the TPA.

*Arnolds Ribs and Pizza (Australia) Pty Ltd (2004)*

The ACCC alleged that the Arnolds Ribs and Pizza franchisor had engaged in misleading, deceptive or unconscionable conduct in promotion of its franchised fast food business in breach of sections 52, 59(2) and 51AC of the Act.

The court declared, by consent, that the Arnolds franchisor had engaged in unconscionable conduct.

*Australian Industries Group Pty Ltd (2005)*

The ACCC alleged that AIG: published an advertisement for employment, when the position related to a business opportunity; breached the Franchising Code in relation to the 'licence agreements' it made with installers and the dealership; made false representations to prospective licensees about the potential profitability of the business; and acted unconscionably towards the installers.

The court declared by consent that AIG had engaged in unconscionable conduct, breached the Franchising Code and made false representations about the profitability of the businesses in breach of the TPA.

*Brambles Australia Ltd (Cleanaway) (2006)*

The ACCC alleged that Cleanaway engaged in misleading, deceptive and unconscionable conduct in relation to the circumstances in which it entered into contracts with customers.

The court declared that Cleanaway engaged in unconscionable conduct in contravention of section 51AC of the TPA in that the conduct occurred in circumstances where unfair tactics were used, and where Cleanaway did not act in good faith.

*Dataline.net.au Pty Ltd (2006)*

The Federal Court declared that Dataline.net.au Pty Ltd engaged in unconscionable and misleading and deceptive conduct in connection with the supply of internet related services to small businesses and consumers throughout Australia. The court held that Dataline had engaged in unconscionable conduct in not permitting small ISPs to obtain legal advice before signing their contracts with Dataline, and threatening the ISPs with disconnection if they did not agree to sign further agreements with Dataline.

*Dukemaster Pty Ltd (2009)*

The ACCC alleged Dukemaster, a landlord of retail outlets engaged in unconscionable conduct in breach of the TPA by taking unfair advantage of its stronger bargaining position, exerting undue pressure and using unfair tactics against four tenants in connection with their leases. The court found that Dukemaster had engaged in unconscionable conduct.

*Australialink Pty Ltd (2009)*

The ACCC alleged that Australialink engaged in misleading or deceptive conduct and unconscionable conduct, in breach of sections 52 and 51AC of the TPA, in relation to false billing for an online business directory.

The court declared that Australialink acted unconscionably towards businesses by intentionally misrepresenting that it had instituted, or was in the process of instituting, court proceedings against those businesses that had been invoiced for the directory listing but had not paid.

**Litigation settled without declarations**

*Moore Talk Communications Pty Ltd (2001)*

Moore Talk Communications contacted consumers and asked them to participate in a survey. When the survey was completed the consumers were advised that they would be entered into a draw to win a free mobile phone. The consumers were then advised that they had been successful, and a fax was sent detailing the specifications of the phone, the free inclusions and listing a number of access plans. Moore Talk failed to fax the reverse side of the application, which contained the terms and conditions, and a condition of receiving the phone was to join an access plan.

The ACCC was of the view that this conduct contravened sections 52, 53(g), 51AB and of the TPA. The court granted a number of injunctions by consent against the company.

*Kwik Fix International Pty Ltd (2003)*

This matter involved allegations of unconscionable conduct, misleading or deceptive conduct, false or misleading representations and contraventions of an industry code with respect to the sale of a franchise and the course of the business relationship thereafter. The matter was settled on the basis of no declarations against Kwik Fix but the company would provide limited relief to the complainant.

*Westfield Shopping Centre Management Co. (Qld) Pty Limited (2004)*

The ACCC began proceedings against Westfield alleging misleading or deceptive conduct and unconscionable conduct in breach of the TPA.

In particular, the ACCC alleged that Westfield acted unconscionably by making it a condition of the settlement of private litigation that former tenants would sign a deed of release containing a clause releasing Westfield from liability. Amongst other things, the clause required the former tenants not to commence or continue any action (including any administrative or governmental investigation against Westfield) in connection with the subject matter of their private litigation.

Westfield provided an undertaking to the Federal Court addressing the ACCC's concerns that a condition sought through its solicitors from the former tenants during settlement of private litigation between Westfield and those tenants may have contravened section 51AC.

### **Unsuccessful litigation**

#### *Oceana Commercial Pty Ltd & Ors (including the Commonwealth Bank of Australia) (2004)*

This case involved a number of allegations of misleading and deceptive conduct related to the marketing of investment properties on the Gold Coast, made against Oceana Commercial Pty Ltd and several other respondents including subsidiary companies and company owners. One aspect of this case was the allegation that the Commonwealth Bank had acted unconscionably in that it agreed to loans despite being aware that the fair market values of units being sold were far less than the values being touted by the sales staff and the actual sale prices.

The court found that the Bank had not acted contrary to good conscience in failing to warn the complainants that they had contracted to purchase a unit at a price far above its market value.

#### *4WD Systems Australia Pty Ltd (2005)*

The ACCC alleged that 4WD Systems engaged in unconscionable conduct in refusing to deliver stock ordered by franchisees, supplying poor quality or damaged stock to franchisees, refusing to provide refunds for these products, refusing to provide copies of the franchise agreement, refusing to provide disclosure documents, refusing to negotiate with franchisees in relation to the franchise agreements and competing directly with the franchisee.

The court held that this conduct was not unconscionable, even if all the allegations are considered cumulatively. The court held that section 51AC is not a general 'catch all' provision, and what is necessary is to show that the conduct was so unacceptable that it could properly be described as unconscionable.

### **Section 87B undertakings**

#### *Scotty's Premium Pet Foods Franchising Pty Ltd*

The ACCC was concerned with Scotty's behaviour in issuing notices of breach to franchisees and threatening franchisees with termination. This behaviour may fall under the factors found in paragraphs 51AC(3)(a), (b) and (g).

#### *Medibank Private Limited (2001)*

The ACCC was concerned with Medibank's behaviour in imposing a unilateral variation clause into a Hospital Purchaser Provider Agreement. The ACCC was also concerned with Medibank's behaviour in delaying negotiations. Behaviour may fall under the factors found in paragraphs 51AC(3)(a), (d), (f), (i), (j) and (k).