Motor Trades Association of Australia

Submission to the Inquiry into the Statutory Definition of Unconscionable Conduct

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1. INTRODUCTION

1.1 OVERVIEW OF THE MOTOR TRADES ASSOCIATION OF AUSTRALIA (MTAA)

MTAA is the peak national representative organisation for the retail, service and repair sector of the Australian automotive industry. The Association represents the interests, at the national level, of over 100,000 retail motor trade businesses with a combined turnover of over $160 billion and which employ over 308,000 people. The Association is a federation of the various state and territory motor trades associations, as well as the Service Station Association (SSA) and the Australian Automobile Dealers Association (AADA). MTAA also has a number of Affiliated Trade Associations (ATAs), which represent particular sub-sectors of the retail motor trades ranging from motor vehicle body repair to automotive parts recycling. All of the ATAs are composed of the relevant sections of each of the MTAA Member bodies and are represented, at a national level, by MTAA.

The Association's affairs are directed by a Board on which each of MTAA's Member bodies is represented. The role of the Association is to:

- raise awareness in the community of the retail motor trades' significant contribution to the Australian economy;
- convey and promote to governments the interests of the retail motor trades;
- promote improved working relationships and practices with the motor trades' unions;
- on behalf of the Members of the Association, provide information about the trades to governments, the public and the trades' employees;
- work with governments to plan the future of the retail motor trades and their role in the economy and other areas of national planning;
- extensively enhance training and to develop work opportunities within the trades in co-operation with education and training authorities, the unions and government generally; and
- promote and enhance the reputation of the trades with its customers and the general public.

1.2 MTAA'S INTEREST IN THE INQUIRY

MTAA, as the peak national representative organisation for businesses in the retail motor trades, has an extensive history of involvement in Trade Practices Act (TPA) matters. Given the nature of the Association's membership, which is comprised of predominately small-medium sized businesses, MTAA considers it essential that an environment exists whereby fair and equitable competition is supported and encouraged.

A central element in ensuring the protection of small business and thus, an environment fostering fair and equitable competition, is Part IVA of the *Trade Practices Act 1974* which deals with unconscionable conduct. Given that Section 51AC covers unconscionable conduct in business transactions, this is the most applicable provision for small business. MTAA has long considered that there needed to be a remedy against harsh, unfair and unconscionable behaviour. The introduction into the Act in 1998 of s51AC was generally welcomed by small business; however the principle of unconscionable conduct itself has been notoriously difficult to establish. It is for this reason that the Association considers this Inquiry to be of significant importance to small business. Establishing a clear and appropriate statutory definition of unconscionable conduct would provide a solid basis from which unconscionablity could be proven; resulting, in turn, the Association

believes in behaviour change by larger, more dominant parties and the creation of a fairer and more competitive business environment for all market participants.

2. UNCONSCIONABLE CONDUCT

2.1 Unconscionable Conduct and Small Business

In MTAA's experience, many retail motor traders are 'captive' of another party. Many retail motor traders are franchisees and others, in their businesses, rely to a significant extent on a larger party to acquire their services. In those circumstances the retail motor traders require for the continuation of their business, an agreement with a larger party (for example with a franchisor). Without such an agreement in place, the retail motor trader would often not have a business to operate. Those retail motor traders are therefore economically 'captive' of the larger (or stronger) business.

In such circumstances the smaller party has little in the way of bargaining power; and that is often even more so where contracts are standard form contracts (such as franchise agreements). This often leaves the weaker/smaller party of the transaction in a vulnerable position, particularly in relation to the 'signing' of new or renewed agreements.

While mandatory codes such as the Franchising Code of Conduct and the OilCode and to a lesser extent the voluntary Motor Vehicle Insurance and Repair Industry Code of Conduct provide for pre-contractual disclosure by the larger party and in certain circumstances on-going disclosure of material changes, the introduction of the codes has not to any significant extent addressed small business concerns about unconscionable conduct. However those codes tend, within the limitations that MTAA believes exist with the concept of 'unconscionable conduct' to be focussed on procedural unconscionability; they do not address the issue of substantive unconscionability (that is the behaviour that might be engaged in during the course of a contract).

The introduction of s51AC (see below) to the Trade Practices Act was welcomed by small business. Section 51AC 'expanded' upon the already existing section in the Act dealing with unconscionability (s51AA) which simply applied the doctrine of unconscionability as it applied in the unwritten laws of the states and territories. Section 51AC includes a (non-exhaustive) list of factors that the courts could take into consideration in assessing whether conduct had in all circumstances been unconscionable. Those factors are set out in section 51AC(3)(a) to (k) and 51AC(4)(a) to (k). In the relatively limited consideration by the courts of s51AC, it has been made clear that conduct which is inconsistent with one or more of those factors does not of itself mean that there has been a breach of the section. The courts have also made it clear that mere 'hard-bargaining' is not, again, of itself unconscionable.

As a result there has been very few cases where the courts have found that a party has engaged in unconscionable conduct. MTAA acknowledges that there have been a number of matters alleging breaches of s51AC which have been settled by consent orders. However such settlements give little in the way of judicial interpretation as to the scope of the provision. The consideration by this Committee of a statutory definition of unconscionable conduct is therefore most welcome.

In MTAA's view behaviour by parties with the power in a commercial relationship which results in weaker parties accepting contracts which are provided to them on a take it or leave it basis and which include terms providing for unilateral variation by the stronger party, for termination by the stronger parties where there has been no breach by the more vulnerable party and other similarly oppressive terms should surely be proscribed. It is true that contracts provided on a take or leave it

basis and with oppressive terms are entered in to by retail motor traders. The difficulty is that without the existence of a contract, the more vulnerable party has no business (or faces a substantial decline in its business activity) and the stronger party knows that.

The introduction of the Franchising Code of Conduct and the amendment of the Trade Practices Act to include s51AC were intended to change behaviour. To a limited extent that has happened in franchising but some of the more damaging behaviour continues and s51AC with its 'unconscionability' hurdle has so far failed to provide relief against that behaviour. In MTAA's view one way in which that could be addressed is for the Act to be amended to include a definition of unconscionable conduct in the terms recommended in section 3 of this submission.

It is important when considering how unconscionable conduct might be defined that the particular circumstances of captive entities and those in vulnerable situations are considered.

2.2 UNCONSCIONABLE CONDUCT AND ITS INTERPRETATION IN OTHER JURISDICTIONS

The introduction of s51AC was primarily a result of the then Government's response to the House of Representatives Standing Committee on Industry, Science and Technology's Inquiry into Fair Trading in May 1997. MTAA made a substantial submission to the Inquiry and noted that s51AA did not and could not provide adequate redress for small business against harsh or unfair business behaviour by large corporations. The Government of the day ultimately in part accepted that position and introduced s51AC to the Trade Practices Act. In introducing s51AC, the then Government did not quite adopt the words that had been proposed by the Committee; the Committee had recommended that the Act be amended to incorporate a new provision proscribing 'unfair' conduct in commercial transactions. In its legislation the Government used, instead, the term 'unconscionable conduct'.

As the Association understands matters, 'unconscionable conduct' has been traditionally established at common law only when a party to a transaction suffers from a special disability and is placed in some special situation of disadvantage in dealing with another party and that that disadvantage is known to the other party. In the leading Australian case on unconscionability, *Commercial Bank of Australia v Amadio* (1983), the High Court made it clear that the mere disparity in bargaining power between two parties to a contract would not be considered a special disability. The High Court stated that the disabling condition or circumstance must be one which seriously affects the ability of the innocent party to make a judgement without regard as to his own best interests when the other party knows or ought to know of the existence of that condition or circumstance and of its effect on the innocent party.

The problem with the application of the current common law interpretation of unconscionability by the courts, is that it does not capture conduct that could otherwise be considered unconscionable under s51AC. More often than not, parties to a business transaction would not fall under the category of having a special disability or being unable to make judgements in their own best interests. One could reasonably assume that the majority of business people are, in fact, of sound mind and indeed more than capable of acting in their own best interest. It is these very factors, however, that preclude such parties from proving that another party has acted unconscionably and that they have thus taken advantage of the weaker party to the transaction. This, therefore, makes it extremely difficult for a party to obtain redress under s51AC in situations where 'unfair' and 'harsh' conduct may have taken place and would otherwise be considered unconscionable conduct, if not for the restrictive common law interpretation and indeed the lack of a clear statutory definition of unconscionable behaviour.

It should be noted, however, that the terms 'unfair', 'harsh' and 'unconscionable' are already used interchangeably in a number of pieces of legislation at the state level; for example the *Industrial Relations Act 1996* (NSW) s105 defines 'unfair contracts' between businesses as contracts that are 'unfair, harsh or unconscionable' and s106 proscribes such contracts. The *Victorian Fair Trading Act 1999* proscribes unfair practices in consumer contracts and Section 32W considers that '*a term in a consumer contract is to be regarded as unfair if, contrary to the requirements of good faith and in all the circumstances, it causes a significant imbalance in the parties' rights and obligations arising under the contract to the detriment of the consumer'*. The concept of 'unfair' contracts has also been established in international jurisdictions such as the United Kingdom's *Consumer Protection from Unfair Trading Regulations 2008*.

The NSW *Industrial Relations Act 1996* provides a benchmark for the use of the terms 'unfair' and 'harsh' in establishing unconscionability within business-to-business contracts. The *Industrial Relations Act 1996* and its earlier renditions; the *Industrial Relations Act 1991* and the *Industrial Arbitration Act 1940*, provide a substantial judicial history of what constitutes 'unfair', 'harsh' and indeed 'unconscionable' conduct. The case of *A & M Thompson Pty Ltd v Total Australia Ltd* provides a clear example of one party exerting conduct upon another party which is 'unfair' and 'harsh'. In that case Total gave the applicants 30 days notice of the termination of their licence over a service station despite their hard work and success of the business. The Industrial Commission in court session found the conduct to be unfair on the basis that :

(a) the parties were clearly in an unequal bargaining position; and

(b) the applicants had been presented with a standard form contract on a 'take it or leave it' basis with no room to negotiate. In commenting on this case, in an article in the October 1994 issue of the Australian Business Law Review, Mr Frank Zumbo noted that this was a situation 'where the equitable doctrine of unconscionability (contained in the Trade Practices Act) would not have been relevant'.

The *Victorian Fair Trading Act 1999* and the United Kingdom's *Consumer Protection from Unfair Trading Regulations 2008* also provide a clear indication of what constitutes 'unfair' practice. Although both of these pieces of legislation relate to consumer protection from unfair business practices, the same principles of unfairness can be applied to small businesses dealing with large businesses. The case of *Consumer Affairs Victoria v AAPT Limited* (2006) provides an example of what constitutes an 'unfair term' in a contract. In that case the Director of Consumer Affairs Victoria claimed that AAPT Limited, a company that provided telephone services, entered into contracts that contained unfair terms. The Victorian Civil and Administration Tribunal found in session that many of the terms in the AAPT Limited contract, raised by Consumer Affairs Victoria, were indeed unfair. This decision was based primarily on Justice Stuart Morris' assertion that a term is deemed 'unfair' when the term: "*…causes a significant imbalance in the parties' rights and obligations arising under the contract (to the detriment of the consumer)…even if the term is individually negotiated or brought to the attention of the consumer"*.

The United Kingdom's *Consumer Protection from Unfair Trading Regulations 2008* is also particularly useful as it takes into account different areas of conduct that amount to unfair practice. Part 2 Section 5 of the Regulations cover the types of misleading actions that constitute unfairness, such as providing false information which results in a transaction taking place. Section six covers situations where conduct would be considered misleading as a result of failing to disclose information. Finally, section seven deals with aggressive commercial practices, which proscribe practices that significantly impair the freedom of choice of a party to a transaction.

It is evident that the terms 'unfair' and 'harsh' have been widely used for a number of years in other jurisdictions and as such, the criteria by which 'unfair' and 'harsh' conduct is determined has been well established through common law and statutory definition. It is for this reason that MTAA considers it appropriate to use the terms 'unfair' and 'harsh' in attempting to define unconscionable conduct.

3. STATUTORY DEFINITION

MTAA submits the following as a definition of the term 'unconscionable conduct'. In addition to a clear statutory definition, it includes the circumstances such conduct is likely to involve and a non-exhaustive list of the types of conduct that would be considered unconscionable.

3.1 UNCONSCIONABLE CONDUCT

It is proposed that section 51AC be amended to include the following:

Section 51AC

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 or a corporation; or
   (b) the acquisition or possible acquisition of goods or services from a person or a corporation;

   engage in conduct that is, in all the circumstances, unconscionable.

2. "Unconscionable conduct" is conduct in the course of business, whether the result of such conduct is intentional or not, that in all the circumstances is harsh or oppressive, unjust or unfair and has elements of exploitation or lack of good faith by one or more of the parties.

3. The circumstances of such conduct may involve or is likely to involve:
   - the exploitation of a party in a vulnerable situation;
   - the exploitation of a party in a captive situation;
   - a lack of good faith by a party; and/or
   - a substantial imbalance in bargaining power

4. Where the Court finds any of the above circumstances to exist then the following conduct shall be unconscionable conduct, unless there is evidence presented to the Court to show that the conduct was not unconscionable:
   - a transaction entered into as a result of the defective comprehension of one party and the influence of the other and the want of any independent explanation to the aggrieved party;
   - the prevention of a party from exercising a legal right in a way that is to his or her substantial detriment;
   - unilateral mistake where that is facilitated by the other party;
   - the unilateral assignment of legal rights and responsibilities where such assignment is to the substantial detriment of one of the parties;
   - a take it or leave it policy by one party where the other party has no choice but to deal with the first party;
   - an unreasonable failure to disclose;
   - intended conduct of the supplier that might affect the interests of a party;
   - risks to a party arising from the other party's intended conduct (being risks that the supplier should have foreseen would not be apparent to the first party); or
   - where one party has a contractual right to vary unilaterally a term or condition of a contract.

3.2 UNACCEPTABLE CONTRACT TERMS

The following section adds a new provision to Section 51AC whereby the Australian Competition and Consumer Commission can object to contract terms and can in fact "clear" contracts. This provision applies to all contracts with no threshold.

Section 51ACAAB

(1) The Commission may apply to the Court for an injunction against a corporation who, in the Commission's opinion, is using or recommending the use of unacceptable contract terms.

(2) A term is to be regarded as unacceptable if, it is contrary to the requirements of good faith and ethical conduct and in all circumstances, it causes a significant imbalance in the parties' rights and obligations arising under the contract to the substantial detriment of one of the parties.

(3) Before the Commission can make any application under (1) the Commission must issue and promote guidelines stating what it considers to be unacceptable contract terms and the Court will take notice of such guidelines but is not bound by them.

(4) The Commission will have the power to approve contract terms and if it so approves, the Commission will be prevented from objecting to the use of the contract terms.

MTAA believes that the proposed changes to section 51AC and the introduction of a section dealing with unacceptable contract terms would sufficiently strengthen the Trade Practices Act so as to provide more a more equitable basis for dealings between a stronger and a more vulnerable, often captive party.

MTAA also believes that some serious consideration needs to be given to the introduction of pecuniary penalties for breaches of section 51AC and sections 51AD and 51AE.

3.3 BUSINESS UNCERTAINTY

Of course opponents of the introduction of further clarity around the operation of s51AC will argue that any lowering of the barrier in terms of the type of conduct that might constitute unconscionable conduct will result in an increase in uncertainty for business and thus act as a disincentive for commercial activity. Risk is a 'zero sum game' – an 'increase' in risk for one party generally means a lessening of risk for the other party. The issue is about how the risks in a transaction can be efficiently and appropriately allocated.

This argument about increased uncertainty for business has been raised previously in the context of debates on proposals to amend the Trade Practices Act. MTAA seriously doubts that any of the changes to the competition provisions of the Trade Practices Act in the past two decades have resulted in a lessening of commercial activity.

From a small business and in particular a retail motor trades perspective changes to the Trade Practices Act have been sought to encourage behaviour change by parties with superior bargaining or market power. The issue seems to MTAA to be not one of increased business or contractual risk but rather how that risk is shared by the parties to the contract. The outcome of many arrangements currently is that too much of the risk is borne by the party in the weaker bargaining position (and that generally is the smaller party).

Given the significant investment in their businesses by retail motor traders (sometimes in the many millions of dollars) and other small businesses it is not unreasonable in MTAA's view that there is a more equitable sharing of any risks between the parties.

This could be facilitated in part by changes to section 51AC which define behaviour which is unconscionable.

4. CONCLUSION AND RECOMMENDATION

MTAA has a long history of involvement in Trade Practices Act matters, including the application of s51AC, which dates back to the establishment of the Association 20 years ago. MTAA has long considered that there needed to be a remedy against harsh, unfair and unconscionable behaviour. The introduction into the Act in 1998 of s51AC was generally welcomed by small business; however the principle of unconscionable conduct itself has been notoriously difficult to establish. Establishing a clear and appropriate statutory definition of unconscionable conduct would provide a solid basis from which unconscionablity could be proven; resulting, in turn, the Association believes in behaviour change by larger, more dominant parties and the creation of a fairer and more competitive business environment for all market participants. It is for this reason that the Association considers this Inquiry to be of significant importance to small business.

Central to the Association's proposal for a definition of unconscionable conduct is the following:

- *"Unconscionable conduct" is conduct in the course of business, whether the result of such conduct is intentional or not, that in all the circumstances is harsh or oppressive, unjust or unfair and has elements of exploitation or lack of good faith by one or more of the parties;*

and that

- *The circumstances of such conduct may involve or is likely to involve:*
  - *the exploitation of a party in a vulnerable situation;*
  - *the exploitation of a party in a captive situation;*
  - *a lack of good faith by a party; and/or*
  - *a substantial imbalance in bargaining power.*

The Association recommends that the Committee supports an amendment to s51AC to define unconscionable conduct as is set out in this submission in Section 3.1 and further that the Committee endorses the inclusion of a new section dealing with unacceptable contract terms as is proposed in Section 3.2 of this submission.
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