

FOREIGN AND INTERNATIONAL COMPETITION LAW AND POLICY DEVELOPMENTS

AUSTRALIAN NEWSLETTER

By: Robert Baxt, Arthur Robinson Hedderwicks
Melbourne, Australia and
Hank R. Spier, Australian Competition and
Consumer Commission
Dickson, Australia

How Can Unconscionability Be So Important? Because the Government Says So

Under section 29 of the Australian *Trade Practices Act* (our competition law) the Federal Government can direct the federal regulator, the Australian Competition & Consumer Commission (the "ACCC") to do certain things. These include a direction that the ACCC take certain action in relation to breaches of the *Trade Practices Act* (the "TPA") including breaches involving the consumer protection provisions. Excluded from this list of directions that may be given by the Minister are competition law cases, cases in relation to access to essential facilities, as well as certain other areas of the law where the ACCC must exercise complete independence in carrying out its work. An area which the Federal Government has been particularly concerned about in the last twelve months is unconscionable conduct. Indeed, from July 1, 1998 sweeping changes to the TPA applied to so called small business contracts and arrangements. These may be reviewed by a court on the basis that

the conduct was unconscionable. Unconscionability is defined in a very sweeping way by the relevant legislation.

Now, the Federal Government has decided that it wishes some action in this area. This is to assist small business - better appreciate their rights when they cannot obtain protection by virtue of s. 46 of the TPA - the provision that prohibits what might be loosely described in antitrust terms as monopolization. Section 46 actually prescribes misuse of market power not only by monopolists but by companies which have a substantial degree of market power (which has been defined quite widely by the courts) as long as there is an anti-competitive purpose. Purpose is the key to the operation of this provision which makes it perhaps less useful than it might otherwise be.

On August 26, 1998 the Federal Minister for Consumer Affairs directed the ACCC to take action in a matter relating to the unconscionable conduct provisions. This applies to small business.

The ACCC has already been voted a considerable amount of additional funding (up to AU\$1/2 million per annum) to pursue claims in this area of the law.

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The nature of the direction (which is most unusual) is for the ACCC to identify an appropriate case and pursue it to conclusion so that suitable case law explaining the meaning of the provision can be developed.

Since s. 51AC was foreshadowed in 1997, the ACCC has in fact been pursuing this area of the law most diligently. It has been trying to identify appropriate cases but so far has not launched a major case. The issue of a direction will place unnecessary pressure on the ACCC to identify a suitable case and then pursue it to completion. Of course, judgment at first instance may not be nearly enough in enabling the ACCC and the general community to understand what the section means and how it is to be interpreted. The section contains so many difficult issues for interpretation that it will only be when the High Court of Australia provides a suitable detailed explanation of it that we are likely to have some comfort of its meaning and how widely it may be interpreted.

In that context, the recent decision of the High Court of Australia in *Garcia v. National Australia Bank* (1998), 72 A.L.J.R. 1243, poses some further concerns for the business community. In this case, (which dealt with the applicability of an earlier High Court decision *Yerkey v. Jones* (1939), 63 C.L.R. 646), the court set aside a guarantee provided by a spouse to a bank in relation to a loan to her husband. The High Court confirmed the relevance of that earlier decision despite some English decision to the contrary. It further emphasized that notions of unconscionability (which are the foundation upon which issues such as those which arose in *Yerkey v. Jones* and *Garcia v. National Australia Bank* are considered) should not be regarded as limited to such narrow areas. The majority of the High Court

repeated what Mason J. (a former Chief Justice of the High Court) had noted in *Commercial Bank of Australia Limited v. Amadio* (1983), 151 C.L.R. 447 at 461, that "it goes without saying that it is impossible to describe definitively all the situations in which relief will be granted on the ground of unconscionability".

Clearly the notion of unconscionability is a very important one for business (especially small business) in Australia. It will be used as a bargaining tool in litigation involving contractual and other disputes. A definitive statement from the highest court of the land would be very welcome because unless the High Court narrows the operation of the notion of unconscionability quickly it is likely that it will become an effective bargaining chip and basis for litigation similar to the provision of the TPA which deals with misleading and deceptive conduct (section 52 of the TPA). Section 52 was introduced primarily to protect consumers but now is used mostly by big business against big business in litigation. It will not take long, in the writer's view, before similar arguments are raised by business against business relying on unconscionability as the basis for reviewing contracts, or conduct in particular cases, with a view to changing the nature of the relationship between the parties.

The case to be brought by the ACCC may well provide some guidance on the meaning of the concept of unconscionability, and may also lead the courts to produce a narrower focus for the operation of this concept in the context of our competition law. The developments in this area will be particularly critical.
