

PART VII – STATUTORY UNCONSCIONABILITY

I INTRODUCTION

A *Relevant Provisions*

Unconscionable conduct is prohibited by ss 51AA, 51AB, and 51AC. Each section varies in scope and requirements, and is directed at separate types of modern commercial transactions:

- s 51AA: conduct unconscionable 'within the meaning of the unwritten law' (catch-all);
- s 51AB: conduct 'in all the circumstances unconscionable' in consumer transactions; and
- s 51AC: (additional factors enumerated) in business transactions.

The meaning of 'unconscionable conduct' varies between each section, making it necessary to examine conduct within the context of a particular provision.

It may also be noted that ss 51AA-C appear in order of increasing specificity with respect to the definition of unconscionability; s 51AA adopts a rather minimalist definition, leaving 'the unwritten law' (equity) to determine the exact scope of its application, whereas s 51AC specifies the greatest number of specific factors deemed relevant to the determination of unconscionability.

These differences may be summarised in the following table (with thanks to Peter Little):

	s 51AA	s 51AB	s 51AC
<i>Date of enactment</i>	1992	1986 (s 52A: 1992)	1998
<i>Type of transaction</i>	Big business	Consumers	Small business
<i>Specification of scope</i>	s 51AA(2)	s 51AB(5)-(6)	s 51AC(7)-(10)
<i>Definition of 'unconscionability'</i>	Equitable	Wider than equity: s 51AB(2)	Wider than equity: s 51AC(3)-(4)
<i>Broad interpretation of unconscionability</i>	Includes all equitable doctrines incorporating unconscionability	Dictionary meaning of unconscionability, as confined by s 51AB(2)	Dictionary meaning of unconscionability, as confined by 51AC(3)-(4)
<i>Narrower interpretation of unconscionability</i>	<i>Amadio</i> unconscionability	Includes all equitable doctrines incorporating unconscionability	Includes all equitable doctrines incorporating unconscionability

Of chief concern when applying Part IV provisions is the meaning and scope of unconscionability. For each section (most problematically, s 51AA), various interpretations have been advanced, and in many cases the relevant definition remains a subject of controversy.

B Applicability of Part IV

1 Financial services

The ambit of all three sections is restricted in several respects. First, financial services are entirely excluded; unconscionable conduct in respect of these transactions is instead prohibited under the separate *Australian Securities and Investments Commission Act* ('the ASIC Act').

Because the Act's definition of 'supply of services' does include the lending of money (eg, under contracts between a banker and their customer), s 51AAB expressly excludes this aspect of the definition from ss 51AA and 51AB:

s 51AAB: Part does not apply to financial services:

- (1) Section 51AA does not apply to conduct engaged in in relation to financial services.
- (2) Section 51AB does not apply to the supply, or possible supply, of services that are financial services.

However, perhaps due to some oversight on the part of the legislators, or other ulterior purpose, this exclusion does not seem to apply to s 51AC. It thus appears that s 51AC *does* apply to financial services (since s 51AAB only extends the exclusion in respect of ss 51AA and 51AB).

In summary:

- ss 51AA and 51AB do not apply to financial services: s 51AAB(1)-(2)
- s 51AC applies to financial services
- The equivalent section in the *ASIC Act* also applies to financial services
 - Financial services is defined as encompassing financial products (eg, investments, consultancy), but not loans
 - Loans are covered by the *Trade Practices Act*
 - However, some overlap exists

2 Employment

Relationships of employment not in trade or commerce are not covered by Part IV of the *Trade Practices Act (Concrete Constructions)*. Though such relationships do fall within the ambit of the *Workplace Relations Act*, provisions prohibiting unconscionable conduct do not apply.

II SECTION 51AA

A Definition

s 51AA: Unconscionable conduct within the meaning of the unwritten law...:

- (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.

B Explanation of Purpose

The explanatory memorandum accompanying the legislation enacting the provision stated that:

The provision embodies the equitable concept of unconscionable conduct as recognised in Blomley v Ryan and Commercial Bank of Australia v Amadio...

The advantages of providing a statutory prohibition for conduct which is already dealt with by equity lie in the availability of remedies under the Trade Practices Act and the potential involvement of the Australian Corporations and Consumer Commission.

On the somewhat cryptic employment of the words 'within the meaning of the unwritten law, from time to time,' Duggan offers the following comments:

The section reads at first like an elliptical reference to some arcane branch of natural law. However 'unwritten law' turns out to be no more than an ill-chosen synonym for 'judge-made law' (as opposed to statute law)...

Characterisation of judge-made law as unwritten law is open to objection ... it implies adherence to the outmoded declaratory theory of judicial process (judges merely declare the law, they do not make it)

C Scope

Section 51AA only covers the areas of unconscionability prohibited under the *Trade Practices Act* which are not otherwise covered by ss 51AB or 51AC. It is thus a so-called 'mop up' provision, and warrants consideration only *after* concluding that neither ss 51AB nor 51AC apply. It is only in the event that neither of these sections are applicable that s 51AA applies.

Because s 51AC applies to small business transactions and s 51AB concerns consumer transactions, s 51AA may apply to transactions with the following characteristics:

- Publicly listed corporations are concerned
- The transaction is priced at greater than \$3 000 000

- No consumers are involved (not consumer goods)
- The item of the transaction is not goods or services (eg, sale of land)
 - Note, however, that land may also be sold with a financing or improvement package, which could be said to constitute the supply of services and so fall under one of the other Part IV provisions
- Section 51AA does not apply to 'financial services'; however, it does apply to loans (s 51AAB(1))

Despite the negatively-defined ambit of s 51AA, its scope remains quite wide, making it a section frequently relied upon by corporations for protection from unconscionable conduct in commercial environments.

D 'Within the Meaning of the Unwritten Law'

Using the explanatory memorandum to s 51AA as a guide, the meaning of unconscionable conduct may be roughly articulated as referring to the equitable concept of unconscionable conduct as recognised in *Blomley* and *Amadio*. (Note: third party impropriety, as noted in *Garcia*, can also amount to unconscionable conduct in equity, and may thus allow satisfaction of s 51AA).

The purposes of s 51AA are primarily to make remedies available for unconscionable dealing (rather than just rescission) and invoke the power of the ACCC to bring action on behalf of litigants. Referring to unconscionability in the context of 'the unwritten law' imports all the developments of the common law into the Act; individual decisions are amalgamated into a broad body of principle. Given these purposes, the meaning of 'unconscionability' as understood by judges of equity is of some educational effect upon the meaning of s 51AA.

Though s 51AA is not limited to a specific doctrine like unconscionable dealing, a court cannot simply apply general principles of equity to determine whether a defendant's conduct is 'unconscionable within the meaning of the unwritten law'. Unconscionability under s 51AA is constrained by specific equitable doctrines, the specific (and successful) application of which is necessary (*Samton Holdings*).

ACCC v Samton Holdings Pty Ltd:

Facts

- This contract concerned the sale of a business on leased premises
- Samton owns the premises on which a lunch bar business is operated, leasing the land to X, who runs the lunch business
- X subsequently sells the business to Executive Bloodstock (the Ranaldis) for \$200,000 (however, ¾ of this sale price is specified to be good will)
- The Ranaldis ('the Rs') take over the lease with 3 months until its date of expiry, but with the option to extend the lease for seven years
- The option must be exercised by 2 March 1997, and would allow the Rs to continue operating under the same terms to which X is presently entitled
- Mr Ranaldi carelessly fails to exercise the option for renewal by the due date (the application comes two weeks after its expiration)
- Samton now demands \$70,000 for the lease extension
- Thus, in addition to having paid for the business from the lessees, the Rs (to whom the lessees have sold their business) now have to pay \$70 000 to Samton in order to renew the lease
- The ACCC brings an action asserting unconscionable conduct on the part of the lessors

in asking for the \$70 000 as a price for renewal of the lease (which would normally have cost nothing had it been requested in time)

Issues

- Did Samton engage in unconscionable conduct in contravention of s 51AA?
- Did the trial judge err in failing to give consideration to (or giving incorrect weight to) factors that determine whether the conduct was unconscionable?

Reasoning

- Trial Judge (Carr J): were the Rs in a position of special disability?
 - Mr R was in a position of 'situational' disadvantage'; LL was aware of that position
 - LL imposed harsh and opportunistic terms, but had not 'taken advantage' unconscionably
 - The lessors did not take advantage because they were not obliged to renew the lease
 - They just struck a hard bargain
- ACCC's appeal:
 - ACCC argues that unconscionability embraces any conduct which is unconscionable in the dictionary meaning of the word
 - I.e., an expansion of the common law meaning
 - ACCC also argues, in the alternative, that the case was one of unconscionable dealing
- Full Court of the Federal Court (Gray, French and Stone J):
 - Rejects the argument that s 51AA refers to the dictionary meaning of unconscionability
 - The reference is not to be construed at large – s 51AA refers to the unwritten law (specific common law equitable doctrines)
 - The relevant unwritten law is not confined to unconscionable dealing, which is only one of several doctrines involving unconscionability
 - There are at least five specific doctrines where unconscionability is relevant (non-exhaustive): unilateral mistake, forfeiture and penalties, etc
 - The underlying idea is that a person may not exercise their strict legal rights unconscionably
 - This is not a specific equitable doctrine, just an overarching, simple principle
 - Therefore, s 51AA is not limited to unconscionable dealing
 - But it is limited to specific equitable doctrines
 - That is, the court cannot just apply general principles of equity to resolve the dispute
- s 51AA: 'unwritten law from time to time of the States and territories' refers to the common law of Australia
- A party having a legal right may not exercise it in such a way that the exercise amounts to unconscionable conduct
- Professor Finn notes four distinct ways that unconscionable conduct has been described in law:
 - Forming the implicit basis for various equitable rules and doctrines
 - Preventing strict enforcement of legal rights (eg, estoppel, unilateral mistake, and undue influence) where it would be unfair

- Preventing unconscionable dealing (*Amadio*; *Louth v Diprose*)
- Similarly, four ‘classes of case’ in which unconscionability is said to arise are noted, each with a policy justification in support of equitable relief:
 - ‘Exploitation of vulnerability or weakness’
 - People in positions of influence should not take advantage of another’s relative weakness
 - Abuse of position of trust or confidence
 - Insistence upon rights in circumstances which make it harsh or oppressive
 - People should not cause hardship to others by violating their reasonable expectations in exercising legal rights inequitably
 - Inequitable denial of legal obligations’
 - Fiduciaries should act only in the interests of those to whom their duty is owed
- Equitable remedies are available where unconscionable conduct is established:
 - Rescission of a contract where disadvantage is exploited
 - The disadvantage may be derived from (*Amadio*): age, illness, poverty, constitution, lack of education, inexperience; can also be situational (*Berbatis Holdings*), relational, psychological (*Louth v Diprose* – emotional dependence)
 - Set aside third party transactions resulting from undue influence, lack of independent explanation, or defective comprehension (*Garcia*)
 - Prevent the exercise of a legal right where it would amount to an unconscionable departure from a representation relied upon by another (*Waltons Stores; Verwayen*)
 - Rescind contracts entered into under the influence of unilateral mistake (*Taylor v Johnson*)
- s 51AA requires the unconscionable conduct to be identified (ie, being capable of precise expression)
- Appellants (ACCC on behalf of Mr Ranaldi and their corporation, Executive Bloodstock):
 - Argued: the trial judge erred in directing that unconscionable conduct must be ‘towards the extreme end’ of the scale of unreasonable conduct
 - On appeal:
 - Determinations of unconscionable conduct are fundamentally evaluative
 - ‘Unconscionability’ is a relative term
 - Such a characterisation of unconscionable conduct is justifiable
 - It is not enough that a person acts unreasonably
 - The kind of conduct that does attract equitable relief is ‘towards the extreme end’ of unreasonableness
- Appellants:
 - The trial judge failed to give weight to the fact that the conduct must be in trade or commerce
 - s 51AA should extend to persons with some business background because it purports to expand the unwritten law of unconscionable conduct
 - On appeal:
 - Argument rejected
 - Though s 51AA involves applications of the unwritten law to new circumstances, the content of this body of law is not specified or limited by statute
 - Trial judge’s approach is not erroneous, despite focusing on ‘special

disadvantage' as a necessary aspect of unconscionable conduct, because it is a feature of the unwritten law being applied

- Second through fifth grounds of appeal: the respondents' conduct did not fall short of unconscionability:
 - Trial judge's findings:
 - Mr Ranaldi suffered a special disadvantage due to his financial exposure and the potential loss he faced when not able to continue operating the business as a lessee
 - The respondents (the lessors) were aware of that special disadvantage
 - The respondents drove a 'very hard bargain' in extracting the sum of \$70 000 for renewal of the lease
 - Though mere refusal to allow execution of the option to buy the sandwich shop is unlikely to be unconscionable in the circumstances, the extraction of a large sum of money for its extension was argued to be unconscionable
 - The failure to exercise the option within time and the position in which Mr Ranaldi (on whose behalf the ACCC appealed) found itself was not attributable to the respondents
 - Though 'many fair-minded people would condemn' the respondents' conduct, this does not make it unconscionable
 - The respondents were under no legal or equitable obligation to provide Mr Ranaldi with the rights to continue operating his business
 - The initial agreement between Samton Holdings and Mr Ranaldi was illegal; it was submitted that this illegality should be indicative of unconscionability in exacting a hard bargain for its continuance (which was not illegal due to the presence of an artificial contrivance)
 - The trial judge gave adequate consideration to the amount of money paid by Mr Ranaldi to regain the financial position that Executive Bloodstock (his company) had lost by his failure to exercise the option to renew the lease from Samton Holdings in time
 - Executive Bloodstock generated in excess of \$100 000 profit from the business, which was sold for a further \$180 000 12 months later
 - It was actually in Mr Ranaldi's business interests to pay the \$70 000, steep though it was
 - 'The fact that someone is in a position of special weakness because they have lost *through their own fault* [eg, in failing to exercise an option] rights necessary to the operation of their business does *not* provide a basis upon which a claim for unconscionable conduct can be built because another party puts a premium on the [re]acquisition of those rights' (emphasis added)
 - 'To hold otherwise would be... to compel the other party to enter into a transaction which it could not be compelled by law to do and which...no doctrine of equity requires'
- Special disadvantage:
 - The Ranaldis and Executive Bloodstock 'were at a serious disadvantage', lacking bargaining power and being compelled to pay whatever price was demanded by the respondents
 - However, the disadvantage arose because of a lack of 'considered commercial judgment' (they borrowed heavily to purchase the business, leaving them financially exposed and vulnerable) and Mr Ranaldi's 'oversight' (failing to resecure the option)
 - Where the disadvantaged person is 'an experienced business person', there must be something more than 'commercial vulnerability (however extreme)' in order for it to be of a 'special' character
 - Otherwise the courts would, in effect, be granting a concession to

- financial mismanagement and business errors
 - Doing so would prevent efficient competition and undermine commercial transactions
 - This is not a case falling within the recognised categories of ‘situational disadvantage’ (arising out of a particular set of circumstances: *Berbatis Holdings v ACCC*) and constitutional (inherent) disadvantage because the respondents could only have ameliorated or conscientiously dealt with the appellants’ weakness by granting them a new lease on the same terms as if the option had been exercised in time
 - This would undermine the economic surety of an option, and unreasonably
- ‘It is inappropriate to characterise the detriment that a tenant has by reason of the imminent expiration of a lease as a special disadvantage’ (*Berbatis Holdings v ACCC*)
 - ‘[The] mere refusal to permit an option to be exercised out of time would not be likely to be the subject of a valid complaint at law or in equity in the absence of other conduct. It was said [by the ACCC] that the extraction of a large premium in the circumstances of this case rendered the conduct unconscionable. [But] if it would not have been unconscionable for the respondents to refuse to grant a new lease and simply commence to operate a like business from the same premises themselves, how could it be unconscionable for them to agree to grant a new lease on conditions including payment of a lump sum?’
 - ‘It is difficult to see how it would be correct to characterise the case as one of “special disadvantage”. The disadvantage of Mr R had arisen from a combination of considered commercial judgment (the decision to borrow heavily in order to purchase the business) and Mr R’s oversight in neglecting to exercise the option in good time ... At least in the case of an experienced business person there must, in our opinion, be something more than commercial vulnerability (however extreme) to elevate disadvantage into special disadvantage.’
 - Carr J: not unconscionable conduct by Samton – just a hard bargain to solve a commercial problem

Decision

- Here, unconscionable dealing is the relevant doctrine; however, in light of the trial judge’s findings, the applicant’s claim must fail
- The Ranaldis’ situation was not one of special disadvantage purely because Samton Holdings failed to make an offer that had already expired
- Tenants whose careless failure to exercise an option to renew a lease results in economic disadvantage should not be entitled to renewal of the term
 - Such a tenant is not, a fortiori, in a position of special disadvantage, though economic duress may, in extreme circumstances, be possible to assert
- The respondents were under no legal or equitable obligation to provide Mr Ranaldi the rights to continue operating his business and their conduct was not unconscionable within the meaning of s 51AA

Berbatis confirms that the meaning of unconscionable conduct under s 51AA is not at large. Instead, it is tied to specific equitable doctrines, a remedy for which must have been available to the claimant before s 51AA will be deemed to have been contravened. Even so, the term ‘unconscionable conduct’ under s 51AA is essentially only a normative characterisation of conduct.

ACCC v Berbatis Holdings Pty Ltd:Facts

- Mr and Mrs R are the lessees of a fish and chip shop in a shopping centre
- Their lease is due to expire; however, the Rs want to leave the business, so they will require a renewal in order to sell it
- They approach the owners of the centre and request a renewal, explaining they want to sell
- The centre offers them a lease for 10 years; however, they don't accept it immediately
- This is probably because tenants in the centre (including the Rs) have been fighting the owners in respect of fees levied upon them
- Several tenants claim in a legal action against the owners that they have been overcharged
- The Rs had meanwhile received an offer, but when it was discovered by the potential buyer that a legal action was still in progress against the centre, they pull out
- The Rs now tried to accept the 10 year lease, but it had expired, so they signed a new lease for 7 years
- Holland, the new buyer, now buys the Rs' business subject to the extension of the lease
- Based on negotiations, the Rs believed that no mutual release clause would be included in the lease extension; however, the new lease does, in fact, contain such a clause
- The contract between Holland and Mrs R is settled; Mrs R now has no choice but to sign the release clause in order to fulfil the contract with H
- The ACCC institutes proceedings, alleging that the conduct of the centre owners in making renewal of the Rs' lease conditional upon their agreement to a release clause is unconscionable

Issue

- Is Berbatis Holdings' conduct unconscionable 'within the meaning of the unwritten law'?

Reasoning:

- Trial judge (French J): Berbatis acted unconscionably
 - 'Unconscionability' has two meanings:
 - The general thread of equity (ie the maxim: 'equity operates on the conscience')
 - The specific 'unconscionable dealing' doctrine (*Amadio; Louth*)
 - However, both the distinction between the two is murky
 - 'Special disability':
 - Only one of the three tenants was in a position of 'special disability': the tenant seeking to sell their business and goodwill to a third party
 - This was a 'situational' disadvantage [caused by law and commerce] as opposed to 'constitutional' disadvantage [an inherent vulnerability]
 - **[123]** However, the circumstances in which a business operator on a lease may effectively lose the value of that business on expiry of the lease does place the tenant at a special disadvantage in dealing with the owner. This does not import any obligation on an owner to renew. The question is whether the owner has unfairly exploited the tenant's disadvantage in a way that equity would regard as unconscionable.'
 - 'Taking advantage' was in requiring tenant to drop bona fide action; there would have been no 'taking advantage' if the action was frivolous or there was a blanket refusal to renew
 - 'Unfair exploitation of disadvantage amounting to unconscionable conduct may occur when an owner uses its bargaining power to extract a concession from the tenant that is commercially irrelevant to the new lease. **[124]** For the owners to insist on the Roberts abandoning their

- rights to proceed with *bona fide* litigation in relation to their rights under their existing lease was to engage in unconscionable conduct.’
- **[124]** The way in which the owners acted ... was a grossly unfair exploitation of the particular vulnerability of the Roberts in relation to the sale of their business.’
 - However, the other leaseholders were not taken advantage of, nor even disadvantaged in the same way as the Roberts:
 - The Ternents
 - **[125]** The position of the Ternents differed significantly from that of the Roberts. There was no potential purchaser for their business. The business was losing money and they were significantly in arrears of their rent. The option they considered was relocation to another site within the Centre at a lower rent.’
 - **[126]** The [Ternents] did not feel constrained to accept the condition and in fact refused to accept it.’
 - The Raitts:
 - **[127]** Mr and Mrs Raitt had no plans to sell the business which they operated. The issue for them was the need for renewal. In a general way it may be said that this placed them at some disadvantage in dealing with the owners. For if no new lease were granted the business would have to be established elsewhere with accompanying costs and the possible loss of goodwill.’
 - **[127]** [But] the negotiations ... concerned the rental he was going to pay ... The issue of a release was not raised. **[128]** Raitt lost the tenancy ... because he was outbid. He never accepted any release clause. Raitt did not fit the mould of a person labouring under a serious disadvantage.’
 - Full Federal Court: no taking advantage; appeal is allowed, reversing judgment:
 - ‘A tenant engaged in litigation with a landlord could well suffer a greater detriment by loss of the opportunity to extend or renew than he would by abandoning claims that he had against the landlord. That would be a matter about which the tenant must make a judgment. A tenant with no option to renew and not right at all to require an extension may be very grateful to be offered the opportunity of a renewal or extension on terms. The tenant would not have to accept the terms but he would be in a better position than if he were simply refused a renewal or extension.’
 - High Court of Australia:
 - The ACCC alleges that s 51AA unconscionability encompasses more than just equitable doctrine
 - They claim that it includes any conduct contrary to conscience; and
 - That the word should be given its ordinary dictionary meaning
 - This argument is again rejected:
 - There needs to be a specific equitable doctrine, such as unconscionable dealing, that would provide a remedy
 - For conduct to be in contravention of s 51AA, it needs to be such as to have normally attracted equitable relief
 - Here, there was no taking advantage of a special disability on the part of the Rs, so the conduct cannot be considered unconscionable for the purposes of s 51AA

Decision

- The meaning of unconscionable conduct under s 51AA not at large; it is tied to specific

equitable doctrines

- Here, there was no unconscionable dealing by *Berbatis* because they did not take advantage of a special disability afflicting the Rs
- Appeal dismissed

Samton and *Berbatis* suggest that the applicability of one of the following equitable remedies will first need to be established before s 51AA will relieve against unconscionable conduct:

- Unconscionable dealing (unfair exploitation of known special disadvantage)
- Undue influence (use of influence or ascendancy to procure a transaction)
- Estoppel (prevents the unconscionable departure from an assumption on which a party is induced to rely to their detriment)
- Unjust forfeiture or penalty (relieve against the unconscionable loss of a right or interest)
- Unilateral mistake (equitable doctrine of mistake)

However, despite these indications that the concept of unconscionability must be mediated by these equitable doctrines, *Boral Formwork* (and also *Olex Focus*) utilise the basic equitable principle that legal rights may not be exercised unconscionably to construct the meaning of unconscionable conduct under s 51AA.

Boral Formwork:

Facts

- In May 2002, Boral Formwork ('B'), a NSW company, and Action Makers ('AM'), a UK company, make a long-term agreement (8 years) under which AM will deliver scaffolding equipment to Boral for a construction project
- An irrevocable standing letter of credit is established, allowing AM to obtain payment from B's bank whenever they export a consignment of equipment
- In February 2003, Boral orders 18 containers of scaffolding
- B receives the scaffolding equipment; however, 7 containers out of the 18 have not been constructed to their standards
- On 11 March 2003, Boral emails AM's receivers that rectification work has been performed, from which costs are to be deducted
- On 5 June 2003, AM's receivers write to Boral demanding payment in full
- On the same day, AM's receivers go to the bank and obtain payment in full under the letter of credit
- B seeks an injunction to prevent AM from making its demand and receiving full payment; it does so on 3 bases
 - An implied term such that AM would be in breach of the contract if it exacted payment for unfit materials
 - s 51AC of the *Trade Practices Act* (see below Part IV)
 - s 51AA of the *Trade Practices Act*

Issue

- What equitable doctrines defined the scope of unconscionability under s 51AA?

Reasoning:

- A letter of credit was designated as the means of payment precisely because the exporter wanted the absolute right of payment, irrespective of any complaints made by B
- This is a mechanism to which B agreed

- Can s 51AA overcome the principle of contractual autonomy?
 - Austin J: yes
 - If it would be unconscionable to make a demand under a letter of credit then, under an appropriate equitable doctrine, this can be prevented
 - Here, the relevant equitable doctrine for s 51AA is the basic equitable principle that a party cannot exercise its legal rights unconscionably
 - Contra *Samton*

Decision

- Despite the parties providing otherwise, s 51AA can overcome the contractual stipulation of an absolute right to payment on the basis that it would be unconscionable for AM to exercise it [???

On a similar point, and to similar effect, see also *Olex*, which discusses the scope of s 51AA unconscionability as defined by general equitable principles.

It is difficult to reconcile *Boral Formwork* with preceding case law, which requires that equitable concepts of unconscionability be mediated by specific doctrines (*Samton Holdings*; *Berbatis*). Commentators have remarked that it must surely be possible for unconscionable conduct to occur without mediation by specific doctrines, suggesting a more abstract approach might be possible; however, in the wake of *Boral Formwork*, the legal meaning of unconscionability under s 51AA remains in the air. However, cases like *Tanwar* (though in a very different legal and factual context, pointedly unanimous) suggest that the current High Court prefers a mediating doctrine.

III SECTION 51AB

A Definition

Bearing in mind the above comments on definitional aspects of Part IV, section 51AB essentially prohibits a corporation from acting unconscionably in the supply of consumer goods or services to an individual or corporation:

s 51AB: Unconscionable conduct:

- (1) A corporation shall not, in trade or commerce, in connection with the supply or possible supply of goods or services to a person, engage in conduct that is, in all the circumstances, unconscionable.
- (2) Without in any way limiting the matters to which the Court may have regard for the purpose of determining whether a corporation has contravened subsection (1) in connection with the supply or possible supply of goods or services to a person (in this subsection referred to as the consumer), the Court may have regard to:
 - the relative strengths of the bargaining positions of the corporation and the consumer;
 - whether, as a result of conduct engaged in by the corporation, the consumer was required to comply with conditions that were not reasonably necessary

- for the protection of the legitimate interests of the corporation;
- whether the consumer was able to understand any documents relating to the supply or possible supply of the goods or services;
 - whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the consumer or a person acting on behalf of the consumer by the corporation or a person acting on behalf of the corporation in relation to the supply or possible supply of the goods or services; and
 - the amount for which, and the circumstances under which, the consumer could have acquired identical or equivalent goods or services from a person other than the corporation.
- (3) A corporation shall not be taken for the purposes of this section to engage in unconscionable conduct in connection with the supply or possible supply of goods or services to a person by reason only that the corporation institutes legal proceedings in relation to that supply or possible supply or refers a dispute or claim in relation to that supply or possible supply to arbitration.
- (4) For the purpose of determining whether a corporation has contravened subsection (1) in connection with the supply or possible supply of goods or services to a person:
- the Court shall not have regard to any circumstances that were not reasonably foreseeable at the time of the alleged contravention; and
- (5) A reference in this section to goods or services is a reference to goods or services of a kind ordinarily acquired for personal, domestic or household use or consumption.
- (6) A reference in this section to the supply or possible supply of goods does not include a reference to the supply or possible supply of goods for the purpose of re-supply or for the purpose of using them up or transforming them in trade or commerce.

B Purpose

Section 51AB is concerned to protect consumers from unconscionable conduct by corporations in consumer transactions.

Section 51AB was the earliest addition to the Act that referred to unconscionable conduct. It applies to the supply of goods and services of a kind ordinarily acquired for personal use to consumers. However, it does not apply to goods that will be resold in trade or commerce – only consumers may be protected by the section.

C Scope

1 Identity of the parties

'Person' can mean an individual or corporation, though this is not defined in the Act. However, in light of the *Acts Interpretation Act 1901* (Cth), the term 'individual' is likely to mean 'legal person' (ie, person or corporation) unless the context indicates otherwise. In the context of s 51AB, there is no reason why 'person' cannot refer to both an individual or corporate consumer.

The claiming party must be a consumer (s 51AB(5)).

2 *Type of transaction*

The transaction must concern goods or services of a kind 'ordinarily acquired for personal, domestic or household use' (s 51AB(5)). 'Ordinarily' imports an objective test.

Similarly, the goods must be acquired for consumption. Goods and services purchased for re-supply or as imports in manufacture are excluded from the operation of the section (s 51AB(6)).

The section only covers the supply of goods or services (s 51AB(1)). It does not include the acquisition of goods or services, or the resupply, reuse or transformation of goods (s 51AB(6)).

3 *Commercial context*

The transaction must occur 'in trade or commerce' (s 51AB (1)). However, s 51AAB(2) excludes financial services (note, however, the *ASIC Act* (Cth) s 12CB).

4 *Unconscionable consumers*

It is unclear whether consumers must also come before a court 'with clean hands' (as in equity); the section only requires that providers must not act unconscionably – there is no such restriction placed upon the consuming party.

C *Unconscionability*

There are five matters to which a court may have regard in determining whether the corporation has engaged in conduct 'that is, in all the circumstances, unconscionable.' Any single matter may be sufficient, depending on its extent, and not all matters are necessarily relevant in a given case.

- (a) **Relative strengths**
Compare bargaining positions of corporation and consumer
- (b) **Unreasonable conditions**
Whether the consumer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the corporation
- (c) **Comprehension**
Whether the consumer was able to understand any documents relating to the supply
- (d) **Procedural unfairness**
Whether any undue influence or pressure or unfair tactics were used by the corporation
- (e) **Equivalent supply**
Whether the consumer could have acquired identical or equivalent goods or services from a person other than the corporation more cheaply or fairly

Note, however, that legal action will not in itself be sufficient to ground a finding of unconscionable conduct under s 51AB (s 51AB(3)).

Unlike unconscionable dealing, where procedural unconscionability is typically a requirement, s 51AB seems to have regard mostly for the substantive unconscionability of the transaction:

- Relative bargaining strengths of the parties (s 51AB(2)(a));
- Whether the conduct is not reasonably necessary to protect the corporation's interests (s 51AB(2)(b));
- Whether the consumer understood the contract (procedural – s 51AB(2)(c));
- Whether unfair tactics were employed (broadly procedural – s 51AB(2)(d));
- Effectively grants a cause of action due to a party missing out on a better deal; this goes well beyond the unwritten law (highly substantive – s 51AB(2)(e))

Looking at the criteria for unconscionability under s 52AB, it is easy to see why the Act has been claimed to specialise in vague standards of behaviour. However, though perhaps 'fuzzy law', the consumer protection provisions of the *Trade Practices Act* have seen significantly less litigation than those regulating interactions between corporations.

George T Collings v HF Stevens provides an example of how the courts will interpret and apply the five criteria of unconscionability set out in s 51AB.

George T Collings v HF Stevens:

Facts

- The seller of a 'factoriette' employed George T Collings ('GTC') as agent
- The business manager, HF Stevens ('Stevens'), on 3 occasions signs a standard form sole-agency agreement with GTC
- Stevens believes that she is appointing GTC as sole agent for only the specified term
- However, a clause states that even after the expiry of the sole-agency agreement, if the GTC introduces a buyer to the seller, commission is payable
- The agreement expires
- Two months later, GTC produces a willing purchaser and request their commission from Stevens, who resists, attempting to escape liability for the commission under the clause

Issue

- Does unconscionable conduct under s 51AB on the part of GTC prevent them enforcing the agreement against Stevens?

Reasoning:

- Latham J:
 - Is there a special disability giving rise to an impaired judgment on the part of Stevens?
 - It seems unlikely
 - Even so, under s 51AB, two indications of unconscionability are present
 - s 51AB(2)(a)
 - Mrs C is in a position of inferior bargaining strength because she asked Stevens to explain the agreement without reading it herself
 - In relying on Stevens' explanation, she placed herself in an unequal bargaining position
 - This suggests that the fact that a consumer placed themselves in an inferior position is irrelevant to the question of whether there actually existed such an inequality
 - s 51AB(2)(b)
 - The clause was not reasonably necessary for protecting GTC's rights as agent
 - The clause, as specified, created an open-ended agency term,

which was clearly excessive protection of exclusivity

Decision

- There has been unconscionable conduct in equity *and* under s 51AB

Before unconscionable conduct will be found, it is also necessary to establish that the goods or services are of a consumer nature. Is, for example, selling a house a 'consumer' service? In order to answer this question, the test to be applied is objective and based on a standard of ordinariness: whether the goods or service are ordinarily acquired for consumer use.

The scope of consumer services is difficult to articulate, for its boundaries depend upon how broadly 'service' is defined. For example, selling houses might be a consumer service, but would this cover commercial property such as warehouses or stores?

ACCC v Lux Pty Ltd (2004) FCA:

Facts

- Lux sells vacuum cleaners
- The salesman pressures a woman at her home to in an attempt sell her a cleaner
- The purchaser now seeks to avoid the contract on the basis of unconscionable conduct on the part of the salesman

Reasoning:

- The Court examines the criteria systematically
- [???
- Also note: s 60 – consumer harassment, which may allow escape from a contract

Decision

- [???

III SECTION 51AC

A Definition

Section 51AC governs the acquisition of goods and services from a person other than a publicly listed company, who must not engage in unconscionable conduct:

s 51AC: Unconscionable conduct in business transactions:

- (1) A corporation must not, in trade or commerce, in connection with:
- the supply or possible supply of goods or services to a person (other than a listed public company); or
 - 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:

- the supply or possible supply of goods or services to a corporation (other than a listed public company); or
- 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.

(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:

- (a) the relative strengths of the bargaining positions of the supplier and the business consumer; and
- (b) whether, as a result of conduct engaged in by the supplier, the business consumer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the supplier; and
- (c) whether the business consumer was able to understand any documents relating to the supply or possible supply of the goods or services; and
- (d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the business consumer or a person acting on behalf of the business consumer by the supplier or a person acting on behalf of the supplier in relation to the supply or possible supply of the goods or services; and
- (e) the amount for which, and the circumstances under which, the business consumer could have acquired identical or equivalent goods or services from a person other than the supplier; and
- (f) 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; and
- (g) the requirements of any applicable industry code; and
- (h) the requirements of any other industry code, if the business consumer acted on the reasonable belief that the supplier would comply with that code; and
- (i) 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); and
- (j) the extent to which the supplier was willing to negotiate the terms and conditions of any contract for supply of the goods or services with the business consumer; and
- (k) the extent to which the supplier and the business consumer acted in good faith.

(4) Sub-section (3) also applies in relation to the determination of whether a corporation

or a person (the acquirer) has contravened subsection (1) or (2) in connection with the acquisition or possible acquisition of goods or services from a person or corporation (the small business supplier).

- (5) A person is not to be taken for the purposes of this section to engage in unconscionable conduct in connection with:
- (a) the supply or possible supply of goods or services to another person; or
 - (b) the acquisition or possible acquisition of goods or services from another person;

by reason only that the first-mentioned person institutes legal proceedings in relation to that supply, possible supply, acquisition or possible acquisition or refers to arbitration a dispute or claim in relation to that supply, possible supply, acquisition or possible acquisition.

- (6) For the purpose of determining whether a corporation has contravened subsection (1) or whether a person has contravened subsection (2):

- (a) the Court must not have regard to any circumstances that were not reasonably foreseeable at the time of the alleged contravention; and

- (7) A reference in this section to the supply or possible supply of goods or services is a reference to the supply or possible supply of goods or services to a person whose acquisition or possible acquisition of the goods or services is or would be for the purpose of trade or commerce.

- (8) A reference in this section to the acquisition or possible acquisition of goods or services is a reference to the acquisition or possible acquisition of goods or services by a person whose acquisition or possible acquisition of the goods or services is or would be for the purpose of trade or commerce.

- (9) A reference in this section to the supply or possible supply of goods or services does not include a reference to the supply or possible supply of goods or services at a price in excess of \$3,000,000, or such higher amount as is prescribed.

- (10) A reference in this section to the acquisition or possible acquisition of goods or services does not include a reference to the acquisition or possible acquisition of goods or services at a price in excess of \$3,000,000, or such higher amount as is prescribed.

B *Explanation of Purpose*

Section 51AC performs two protective functions:

- 1 Prevents small business suppliers from acting unconscionably towards persons; and
- 2 Protects business consumers from unconscionable conduct by persons.

The section is, however, still within the ambit of the 'trade or commerce' constitutional power conferred upon the Commonwealth by the *Australian Constitution*. The section extends only to transactions:

- 1 In trade or commerce; and
- 2 Involving either –
 - a. A corporation –
 - i. Supplying a person; or
 - ii. Acquiring from a person; or
 - b. A person –
 - i. Supplying a corporation; or
 - ii. Acquiring from a corporation;
- 3 In a transaction priced at less than \$3 000 000; and
- 4 Concerning goods or services being acquired for the purpose of trade or commerce.

In these circumstances, the supplier or acquirer may not act unconscionably.

C Scope

1 *Identity of parties*

Section 51AC covers business-to-business, business-to-person, and person-to-business transactions (ie, X supplies Y, who acquires goods for trade or commerce).

Transactions between individuals may not covered by s 51AC, which only deals with supply and acquisition by corporations. However, the *Fair Trading Act* (Vic) (and Tas) contains equivalent sections that protect individuals involved in commercial transactions with other individuals.

The claimant must be a small business in trade or commerce (ss 51AC(1)(a), 51AC(7)).

2 *'Publicly listed company'*

In order to attract relief for unconscionable conduct under s 51AC, the corporate party must not be publicly listed (s 51AC(1)-(2)).

A company is publicly listed if its shares are available for purchase on a stock exchange. This is a practical, though somewhat inadequate, definition.

Listed public companies have no rights conferred upon them by s 51AC, which is designed primarily to protect small businesses. Larger corporations are excluded from its ambit of protection. Some have suggested that this is a questionable distinction, since many large companies are privately held; however, the generalisation that large companies are listed holds in most cases.

The nature of the section is indicated by the names of the parties to the transaction employed by ss 51AC(4) and (5): 'business consumer' (in the case of a non-listed corporation acquiring goods or services) and 'small business supplier' (in the case of a non-listed corporation supplying goods or services).

3 *'Goods or services'*

Section 51AC distinguishes between supply and acquisition, with sub-section (a) of ss 51AC(1)-(2) dealing specifically with the supply of goods or services and sub-section (b) with the acquisition of goods or services, respectively.

Acquisition or supply of goods and services includes financial services (s 51AC is not covered by s 51AAB, though this may be unintentional). However, they do not include goods and services not supplied or acquired for the purposes of trade or commerce (ss 51AC(7)-(8)).

4 'In trade or commerce'

The transaction must occur 'in trade or commerce', meaning that consumers are excluded from the section (ss 51AC(1)-(2)).

Further, the purpose of the acquisition must itself be for trade or commerce; the Act applies only where the 'acquisition or possible acquisition of the goods or services is or would be for the purpose of trade or commerce' (ss 51AC(7)-(8)).

5 'Price in excess of \$3 000 000'

Sub-sections (4) and (5) restrict the operation of s 51AC by reference to the magnitude of the transaction. A transaction will only fall within the ambit of s 51AC if its total value is below \$3 000 000 (ss 51AC(9)-(10)). If the transaction is above this amount, another section (most likely s 51AA) may apply, but not s 51AC.

D Unconscionability

In determining the presence of unconscionability in a given case, the first five criteria are identical to those of s 51AB. However, there are six additional criteria:

- (f) **Consistency** – expanded form of (c) - dealing with one customer in a more unfavourable manner potentially in breach
- (g) **Breach of code itself** a contravention of the Act and gives rise to damages; also relevant to unconscionable conduct as a criterion
 - Section 51AC prevents a corporation in trade or commerce from contravening an applicable industry code
- (h) **Breach of any other industry code** with which the business consumer reasonably believed the corporation to be complying
- (i) **Expected to disclose** any intended conduct that will affect the consumer
- (j) In the context of a dispute (or during pre-contractual discussions), **unwillingness to negotiate** indicates unconscionable conduct
- (k) **Good faith**

From these criteria, the scope of s 51AC unconscionability appears fairly wide. However, in practice, it is applied conservatively. See, for example, *ACCC v Simply No-Knead*.

ACCC v Simply No-Knead:Facts

- Simply No-Knead ('SNK') supplied training materials for making bread and other related products in the home
- SNK entered into franchise agreements with several Melbourne businesses, who agreed to carry SNK products
- Mr Bates, the director of SNK, evidently decided to desert his franchisees and operate in the market of bread products itself (effectively competing with his company's franchisees)
- Conduct argued to be unconscionable:
 - Advertising and selling its products itself, without going through franchisees, often in the same territories as its existing franchisees
 - Refusing to deliver additional products to franchisees
 - Refusing requests from franchisees to negotiate matters in dispute with SNK
 - Mr Bates' breach of the industry franchising code by failing to disclose details of his conduct to franchisees prior to their decision whether to renew their franchise agreements, causing them to proceed on an uninformed basis
 - Distributing promotional material which omitted information about the franchisees
- The ACCC argues that SNK engaged in unconscionable conduct, and seeks orders that the Managing Director of SNK was 'knowingly concerned' in breaches of s 51AC

Issue

- Did SNK engage in conduct that was unconscionable under s 51AC?

Reasoning:

- Sundberg J on the meaning of unconscionability under s 51AC:
 - 'In my view, "unconscionable" in s 51AC is not limited to the cases of equitable or unwritten law unconscionability the subject of s 51AA. The principal pointer to an enlarged notion of unconscionability in s 51AC lies in the factors to which subsection (3) permits the Court to have regard. Some of them describe conduct that goes beyond what would constitute unconscionability in equity'
 - 'The 51AB(2) factors do not so clearly suggest, as do the 51AC(3) factors, that unconscionability in 51AB is a more ample concept than the unwritten law's unconscionability ... nevertheless it would be curious if "unconscionable" in the two provisions had different meanings'
- Reference is made to *Hurley*, in which the full bench of the Federal Court noted that:
 - 'For conduct to be regarded as unconscionable, serious misconduct or something clearly unfair or unreasonable, must be demonstrated (*Cameron v Qantas Airways Ltd* (1994) 55 FCR 147 at 179). Whatever "unconscionable" means in ss 51AB and 51AC, the term carries the meaning given by the *Shorter Oxford English Dictionary*, namely, actions showing no regard for conscience, or that are irreconcilable with what is right or reasonable (*Qantas Airways Ltd v Cameron* (1996) 66 FCR 246 at 262). The various synonyms used in relation to the term "unconscionable" import a pejorative moral judgment.'
- Relevant matters to the course of conduct in s 51AC include –
 - s 51AC(2)(a)
 - The bargaining position of the franchisees was here compromised
 - The parties were unequal because SNK was able to set the terms of the agreement and control distribution and promotion of its products, at the expense of the franchisees, if it so chose
 - s 51AC(2)(b)

- Imposing the condition that franchisees pay for advertising that doesn't mention them constitutes an unreasonable condition
- s 51AC(2)(d)
 - Mr Bates refusing to grant free access to marketing materials was unreasonable
- s 51AC(2)(e)
 - Unfair tactics were present in the form of SNK's refusal to deliver products to the franchisees
 - Mr Bates' 'intimidating and belligerent means' was illegitimate pressure
 - SNK's exclusion of franchisee's from advertising and promotional material was also unfair
- s 51AC(2)(g)
 - Industry code requires delivery of disclosure documents
 - Mr Bates was in breach of the relevant code
- s 51AC(2)(i)
 - Argued to be relevant: Mr Bates' intended conduct (discontinuing franchisee agreements) affects the franchisees but they were not informed
 - However, this sub-section was not applied on the facts
- s 51AC(2)(j)
 - An unwillingness to negotiate was manifest in Mr Bates' dealings with the franchisees
 - SNK avoided communication with franchisees and was unwilling to discuss their desired expansion with them
 - Franchisor's behaviour was 'unreasonable, unfair, harsh, oppressive and wanting in good faith'
- s 51AC(2)(k)
 - Competing with the franchisees in the same territory was 'wanting in good faith'

Decision

- Mr Bates' conduct discloses an overwhelming case of unreasonable and thuggish behaviour that, in the circumstances, amounts to unconscionable conduct

Note, however, that the criteria are not exhaustive (*ACCC v Simply No-Knead* per Sundberg J; *Gary Rogers*).

Gary Rogers v Subaru:

Facts

- Gary Rogers, a franchisee of Subaru, refused to participate in their new 'six-star' program, which was designed to improve levels of service and presentation at franchisee dealerships
- Subaru threatened to terminate Rogers' franchise agreement, so he eventually complies
- However, Rogers' compliance is too late; the no-fault termination power is exercised by Subaru
 - Subaru does, however, give 13 months for the agreement to take effect
 - Only 32 days notice are required under the contract
- Rogers alleges that Subaru cannot terminate the contract because it would be in breach of an implied term of good faith, or, in the alternative, that it would be unconscionable and therefore in breach of s 51AC of the *Trade Practices Act 1974* (Cth)

Issue

- Would it be unconscionable within the s 51AC meaning of ‘unconscionability’ for Subaru to terminate its contract of dealership with Rogers in these circumstances?

Reasoning:

- A factor that mitigates against a finding of unconscionability is that under s 51AC(2)(g), Subaru here complied with the relevant industry code
 - The code required the provision of written reasons for termination, where necessary, and sufficient notice of termination
 - No written reasons were given for termination, but this did not amount to a breach of s 51AC because the course of their dealing made the explanation unnecessary; termination was due to a failure to adopt the six-star program
 - ‘A failure to state in writing what the applicant knew to be the case could not constitute unconscionable conduct’
 - Here, written reasons were unnecessary, and sufficient notice was given
- Subaru was thus doing no more than it was permitted to do by the franchising code
- There were no unfair tactics used, and the termination was not in bad faith (rather, a protection of their legitimate interests from a belligerent and uncooperative dealer)
- Finklestein J:
 - Rogers was aware that the principal factor motivating Subaru’s termination was its failure to adopt the six-star program
 - A failure to state in writing what GR already knew cannot be unconscionable
 - Moreover, while Rogers was not contractually obliged to adopt the six-star program, its failure to do so and criticism of Subaru’s directorship was indicating that it was not willing to act in the best interests of Subaru
 - Once Subaru lost confidence in Rogers to cooperate with their programmes, it is not easily restored and not unconscionable to terminate the relationship

Decision

- There was no unconscionable conduct under s 51AC because Subaru was perfectly entitled to terminate recalcitrant dealers, given the requisite notice, which was here substantial

Shopping centre lease cases would today be dealt with under s 51AC. The facts of *Berbatis* provide an example of how such a case might be decided today.

ACCC v Berbatis Pty Ltd:Facts

- [See above Part II, section D]

Issue

- Hypothetically, would the conduct of Berbatis be characterised as unconscionable, were the case decided under s 51AC today?

Reasoning:

- Consider s 51AC(2)(a) – unequal bargaining position – though probably not sufficient in itself for unconscionability
- Here, there is no special disability – the judgment of the lessees was not impaired – they

- chose the most favourable outcome available to them
- The lessees were not misled; they knew of all relevant facts and do not fall within the Fullagar J list of disabilities
 - No unconscionable taking advantage – shopping centre just exacting a hard bargain
 - No obligation to renew, not unconscionable
 - Asking for a lease
 - Procedurally, no unconscionability
 - Substantive aspects:
 - No substantive unconscionability in terms of the profit gained by the Rs
 - Rs get sale of their business: lost \$2800 in order to gain \$65 000
 - The lessees were thus gaining (rather than losing) overall

Decision

- Public interest issue? Or would same deal have been struck irrespective of disadvantage?
- Element of unusualness as between the litigants – justice between individuals?
- If *Berbatis* were brought under s 51AC today:
 - Criterion (a) would definitely be satisfied
 - Criterion (b) legitimacy – protecting legal liabilities? Legitimate?
 - Criterion (d) transactional course of conduct – only at last moment is a mutual release clause included
 - Kirby J: changing stance took advantage of Rs' pressured situation, concluding sale, etc – unfair tactics?
 - Criterion (j) unwillingness to negotiate – no
 - Criterion (k) lack of good faith – opportunistic, have not kept Rs informed; possible

IV HYPOTHETICAL

A Exercise 7

- Validity of variation contract
 - Consideration?
 - Practical benefit?
 - Bona fide compromise?
 - Vitiating factors?
 - No misrepresentation or misleading and deceptive conduct
 - Undue influence? Unlikely – ABC's will independent
 - Duress – economic (but what is the unlawful pressure?)
 - If like *Berbatis* – no duress
 - However, if an analogy could be drawn with *TA Sundell* then there may be illegitimate pressure
 - Unconscionable dealing
 - Taking advantage of a special disability such as to impair the innocent party's ability to judge what is in their interests
 - Substantive unconscionability
 - Giving up the right to be protected from immediate termination in order to get additional money

- Like *Berbatis* – pressure, but not lack of judgment as to own best interests
- If the contract is binding (ie, not voidable or rescinded), ABC should claim that *exercising* a right to terminate (under the contract) would be unconscionable or in breach of an implied obligation (eg, good faith)
 - Exercise of the legal right to terminate is here restricted by equity and s 51AC
 - TPA Part IV – which section applies?
 - Start with ss 51AB and 51AC – s 51AA covers the rest
 - s 51AB
 - Goods
 - For consumers? No!
 - s 51AC
 - SCAM supplying or acquiring services? Yes
 - For trade and commerce? Yes
 - Are ABC publicly listed? Unlikely, but unknown
 - Transaction priced at less than \$3 million
 - After variation, greater than
 - Before variation, yes
 - Separate transactions?
 - Try to class the transactions as separate
 - Or: perhaps the only purpose of adding \$5001 to the value is to *defeats* 51AC
 - It ought not be possible to circumvent the Act by employing tricks like that
 - Argue analogy to misleading and deceptive conduct circumventions
 - If it is possible to circumvent the price threshold requirement, look at the following criteria:
 - Unfair tactics
 - Conditions not reasonably necessary
 - Good faith
 - Relative strength
 - Negotiability
 - Other transactions
 - *Unilateral variation subsection – **forthcoming enactment***
 - Large scope for arguments on these matters
 - s 51AA
 - If s 51AC does not apply (ie, if the price cap cannot be circumvented), then s 51AA applies
 - Use equitable doctrine to establish unconscionability
 - Unconscionable dealing – apply/distinguish *Berbatis*
 - The ostensible reason given for termination is the fracture in the girder
 - However, an investigation establishes that this had nothing to do with ABC
 - There is probably an ulterior motive for termination
 - This is suggestive of a lack of good faith