

Guarantees, Financial Services Regulation and the role of ASIC

By

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Those who follow developments in the law relating to guarantees have been confronted in recent times with an ever increasing array of statutory provisions designed to deal with unconscionable conduct. It seems that allegations of unconscionable conduct, in its various forms, on the part of the creditor have become part of the standard defence of those guarantors seeking to set aside the guarantee. This paper examines the scope and application of provisions in the ASIC Act which govern unconscionability with respect to financial services and considers their role in relation to contracts of guarantee. It further considers what role of the regulator, ASIC, has to play in setting normative standards in a systemic way for banks and financiers when taking guarantees.

Introduction

Disputes concerning guarantees have long been a fertile ground for the courts to consider the meaning and scope of both equity and statute. Vulnerable guarantors continue to enter into sureties which may be both improvident and unfair. Recent cases have involved the guarantors in the well-known and legally recognized category of wives,¹ as well as elderly parents,² siblings,³ de facto spouses⁴ and others in a close relationship to the guarantor.⁵

In earlier times, before the intervention of statute, plaintiffs could seek relief at common law under the *Amadio*⁶ principles, or, in the special case of wives, under the rule in *Yerkey v Jones*.⁷ The common law rules apply to guarantees given to support both consumer and business borrowings. Those principles can still be invoked, but in addition a plaintiff seeking to set aside a guarantee on unconscionability grounds has available an ever-increasing arsenal of statutory provisions which have the advantage of

¹ *Burrawong Investments Pty Ltd v Lindsay* [2002] QSC 82 (26 March 2002).

² *Watt v State Bank of New South Wales* [2003] ACTCA 7 (13 March 2003).

³ *Equuscorp Pty Ltd v Worts* [2000] VSC 179.

⁴ *Liu v Adamson* [2003] NSWSC 74 (21 February 2004); *State Bank of NSW v Hibbert* [2003] NSWSC 71 (21 February 2004).

⁵ *Kranz v National Australia Bank* [2003] VCSCA 92 (25 July 2003) (brothers-in-law); *ANZ Banking Group Ltd v Alirezai* [2004] QCA 6 (6 February 2004) (close friends).

⁶ *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447 ('*Amadio*').

⁷ (1939) 63 CLR 649, affirmed in *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395 ('*Garcia*').

providing for a wider range of remedies than available in equity.⁸ As this paper will explain, some of the more recent provisions codifying unconscionability appear to be replacing the traditional *Amadio* principles with broader notions of unfair exploitation.

Statutory remedies to set aside contracts, including guarantees, on the basis of unconscionability are a relatively recent development. While there are a number of advantages⁹ in pursuing an action for statutory unconscionability, it may not be too far fetched to suggest that the enactment of a raft of unconscionability provisions across a range of statutes at both state and federal levels has left many perplexed. Many of the provisions are similar, but not identical. This paper explains the coverage and interaction of the provisions in the *Trade Practices Act 1974* (Cth) ('TPA') and *Australian Securities and Investments Commission Act 2001* (Cth) ('ASIC Act') targeting unconscionable conduct in relation to financial services. The paper considers how those provisions apply in the guarantee context. The Uniform Consumer Credit Code ('UCCC')¹⁰ and State and Territory legislation also provide relief from unjust or unconscionable consumer contracts.¹¹ However, the focus of this paper is on statutory unconscionability at the Commonwealth level. Those provisions cover transactions which occur across State/ Territory boundaries. There is scope for the better resourced Commonwealth regulators, the Australian Securities and Investments Commission ('ASIC') and the Australian Competition and Consumer Commission ('ACCC'), to deal with contraventions of national significance and to take action where conduct involves major detriment to consumers and small business.

As a result of financial services reforms¹² providing for some conduct with respect to financial services which would previously have come under the TPA, to be governed by the ASIC Act, the two acts contain three sets of provisions which are substantially similar, but not identical. The ASIC Act substantially duplicates the TPA, containing

⁸ Remedies include injunctions, remedial orders avoiding or varying contracts and more recently damages: *Trade Practices Act 1974* (Cth) ('TPA') ss 80, 82 and 87; *Australian Securities and Investments Commission Act 2001* (Cth) ('ASIC Act') ss 12GD, 12GF and 12GM.

⁹ In particular, since 2001 plaintiffs may pursue a remedy in damages for breach of the TPA/ASIC Act unconscionability provisions.

¹⁰ The UCCC regulates guarantees given to support debts of a wholly or predominantly, household, personal or domestic nature: ss 6 (5).and 50.

¹¹ See, eg, s 70(1)-72 UCCC and s 7 (1) *Contracts Review Act 1980* (NSW) ('CRA') which provide relief from contracts which are termed 'unjust' rather than 'unconscionable'. The State and Territory Fair Trading Acts regulate 'unconscionable' consumer transactions. The Victorian and Tasmanian FTAs also catch unconscionability in small business dealings: *Fair Trading Act 1999* (Vic) s 8A; and *Fair Trading Act 1990* (Tas) s 15A. At the Commonwealth level see also s 991A *Corporations Act 2001* (Cth) which prohibits financial services licensees for engaging in unconscionable conduct. A discussion of s 991A is beyond the scope of this paper.

¹² The *Financial Services Reform Act 2001* (Cth) introduced ss 12CA-12CC dealing with unconscionable conduct into the ASIC Act.

provisions dealing with unconscionability within the meaning of the unwritten law, consumer-type unconscionability and small business unconscionability. The respective application of those three types of unconscionable conduct provisions to contracts of guarantee is determined by considering particular exclusions and definitions under the TPA and ASIC Act. As will be explained below, the TPA provisions continue to apply to situations involving small business unconscionability, but not to the two other categories, which now come within the coverage of the ASIC Act.

This paper highlights some of the limitations of the various statutory provisions dealing with unconscionable conduct in financial services. On the whole, it will be seen that the impact of statute law in this area is still of limited value in providing assistance to vulnerable guarantors seeking to set aside guarantees.. Provisions dealing with the 'unwritten law' have not been given an expansive interpretation, but have been confined within the traditional boundaries recognised in equity. The relatively recent introduction of prescriptive provisions dealing with consumer and small business unconscionability has generally been regarded as denoting an extension in the law¹³ but the degree to which this is the case is still uncertain. The consumer unconscionability provisions have a limited role to play given that most problems in the guarantee context have concerned guarantees given to support small business debts.¹⁴ The small business unconscionability provisions are largely untested, so although it is clear that in their terms they are of a broader ambit than the equitable doctrine, their ultimate scope is yet to be determined. The scarcity of cases under these provisions may be due to a transactional cap of \$3 million,¹⁵ which is presently under review.¹⁶ Frequently, complaints by guarantors against financiers go to the inherent unfairness and one-sidedness of the guarantee. The courts have not been predisposed to find that such unfairness can be remedied under statute. The provisions may have the potential to assist individual litigants, but a further issue arises as the appropriate way to deal with

¹³ See, eg, Bryan Horrigan, 'Unconscionability breaks new Ground-Avoiding and Litigating Unfair Client Conduct After the ACCC Test Cases and Financial Services Reform' [2002] *Deakin Law Review* 4; The Hon Paul de Jersey AC, Chief Justice Queensland Court of Appeal, 'Good Faith, Commercial Morality and the Courts', 22nd Annual Banking and Financial Service Law Conference, Cairns, 6 August 2005. (<http://www.courts.qld.gov.au/publications/articles/speeches/2005>).

¹⁴ See, eg, *Yerkey v Jones* (1939) 63 CLR 649 and in more recent times *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395; *Bylander v Multilink Investments Pty Ltd* [2001] NSWSC 53; *State Bank of New South Wales v Chia* (2000) 50 NSWLR 587; *Burrawong Investments Pty Ltd v Lindsay* [2002] QSC 82; *Watt v State Bank of NSW* [2003] ACTCA 7.

¹⁵ Section 51AC (10).

¹⁶ The Federal Government supports raising the threshold to \$10 million. See Joint Media Statement, Hon P Costello and Hon F Bailey, 'Government Progressing Trade Practices Act Reforms', Media Release No. 013/2005 www.treasurer.gov.au/tsr/content/pressreleases/2005). The increase was included in the *Trade Practices Legislation Amendment (Small Business Protection) Bill 2005*. The Bill has not yet been enacted.

problems involving guarantees in a systemic or general way. As a leading authority has noted:

[the TPA and similar regimes] may have limited effect in providing control in the interests of consumers generally. This is partly because of cost and other factors, increasingly discussed in public debate in Australia on 'access to justice' problems, making resort to the courts to resolve their disputes quite beyond the reach of most individuals. Moreover, even in those relatively rare cases which are brought to court, the decision in any individual case directly binds only the parties to the contract being sued on. The mere fact that a particular provision is likely to be held to be ineffective if litigation does arise does not necessarily deter enterprises from continuing to use such provisions in their contracts.¹⁷

While the inclusion of detailed indicia of unconscionability renders the terms of the consumer and small business provisions wider than those codifying the 'unwritten law', it remains the case that there has not been a substantial amount of successful litigation on these provisions and that actions which have been successful have involved only 'the most egregious behaviour'.¹⁸ In recent times commentators¹⁹ and consumer and reform bodies²⁰ have pointed to the need to consider regulatory approaches designed to deal with contracts which are unfair or harsh in terms of their outcomes, arguing that statutory prohibitions against unconscionable conduct are inadequate in this regard.

Background to the TPA unconscionability Provisions

The starting point of the analysis in this paper is to examine the TPA provisions from which mirror provisions enacted in legislation elsewhere have originated. Part IVA of the TPA, initially comprising ss 51AA and 51AB, was introduced into the Act by the *Trade Practices Legislation Amendment Act 1992* (Cth). Section 51AB is the previous s 52A²¹ renumbered. It was the first statutory provision prohibiting unconscionable conduct to be inserted into the TPA. It is confined to conduct relating to the provision of goods or services 'ordinarily acquired for personal, domestic or household use or consumption',²²

¹⁷ Carter and Harland, *Contract Law in Australia*, Butterworths, 2002, p 549.

¹⁸ Fair Trading Coalition, 'Trade Practices Act Reform-Policy Paper', 4 August 2003. (www.mtaa.com.au/news.ftcpolicypaper.pdf). See also, Robert Gardini, 'The Dawson Review-A Small Business Perspective' (2003) (26) (1) *UNSWLJ* 268.

¹⁹ Nicola Howell, 'An Update of Unfair Contracts legislation-Examining the Need for Nationally Consistent regulation of Unfair Terms in Consumer contracts', Paper presented at 15th Annual Credit Conference, 29 September 2005 (www.gu.edu.au/centre/cccl/content_publications.html).

²⁰ Standing Committee of Officials of Consumer Affairs ('SCOCA') National Working Party Discussion Paper, *Unfair Contract Terms*, January 2004 [2.1].

²¹ Section 52A was inserted in 1986.

²² Section 51AB (5). For a discussion of the meaning of services 'ordinarily acquired for personal, domestic or household use or consumption' see Paul Latimer, 'The definition of 'personal domestic or household use or consumption' in the TPA', (1998) 6 *Current Commercial Law* 45.

which, as this paper explains, limits its application in the guarantee context. Although the Act does not define ‘unconscionable conduct’, s 51AB (2) enumerates a non-exhaustive list of guiding facts, familiar to many, which guide the court in determining whether the conduct is ‘in all the circumstances’ unconscionable. Incorporation of these factors means that in its terms s 51AB is wider than unconscionability under *Amadio*.²³ The equitable doctrine is confined to procedural unfairness; that is, unfairness in the bargaining process.²⁴ In terms of the *Amadio* doctrine, this is established by showing that in the process of taking the guarantee the creditor had knowledge of the existence of a special disability suffered by the guarantor and took advantage of that disability.

Some of the factors listed in s 51AB (2) suggest that the statute may permit relief from contracts which are unfair in their terms or operation, despite the absence of unfairness in the bargaining process. That is, not all of the factors are directed towards conduct during negotiations. For example, the court may have regard to such matters as:

- Whether the consumer was required to comply with conditions which were not reasonably necessary for the legitimate interests of the supplier; and
- The amount for which, and the circumstances under which, the consumer could have acquired goods or services from another party.²⁵

Transactions involving unconscionable conduct targeted at businesses are caught by ss 51AA and 51AC. Section 51AA provides that ‘a corporation must not, in trade and commerce, engage in conduct that is unconscionable within the meaning of the unwritten law, from time to time, of the States and Territories’. The insertion of s 51AA was recommended by the then Trade Practices Commission to enable commercial transactions to be governed by traditional common-law principles of unconscionability, while allowing access to remedies under the TPA.

According to the Explanatory Memorandum²⁶ s 51AA:

...will not extend the existing principles of unconscionability, but will make available remedies under the Trade Practices Act and make possible the involvement of the Trade Practices Commission.

²³ *ACCC v Oceana Commercial Pty Ltd* [2003] FCA 1516 [336]; *ACCC v Simply No-Knead (Franchising) Pty Ltd* [2000] FCA 1365 [31].

²⁴ For a discussion of the failure of both the common law and statutory provisions in addressing substantive unfairness issues, see Standing Committee of Officials of Consumer Affairs (‘SCOCA’) National Working Party Discussion Paper, *Unfair Contract Terms*, February 1, 2004

²⁵ Sections 51AB (2) (b) and (e).

²⁶ Explanatory Memorandum to the Trade Practices Legislation Amendment Act 1992 (Cth), clause 41.

Section 51AC was introduced in 1998²⁷ and specifically prohibits one business (the business supplier') from dealing unconscionably with another business (the 'business consumer'). The provision was intended to assist small business and does not apply to transactions greater than \$3 million or to those in which the target business is a listed public company.²⁸ If the proposed increase of the threshold to \$10 million goes ahead, the provision will cover most guarantees of small business debts. The increase may well relegate s 51AA to only a small residual operation. Section 51AC provides a list of factors similar to, but more extensive than, those outlined in s 51AB. On the face of it, several of those factors also appear to catch instances of substantive injustice.

However, while it seems that statutory unconscionability under the expanded indicia provided in ss 51AB and 51AC TPA appear to cover contracts which are substantively unfair in their terms, it is disappointing to note that in practice the courts have tended to read down the provisions to cover only situations of procedural unfairness. Although there is no definition of unconscionable conduct in ss 51AB and 51AC of the TPA, its meaning appears to be coloured by the inclusion of the words 'in the circumstances' in those provisions. For example, in *Hurley v McDonald's Australia Ltd*²⁹ the Full Court of the Federal Court held that:

Before sections 51AA, 51AB or 51AC will be applicable, there must be some circumstances other than the mere terms of the contract itself that would render reliance on the terms of the contract 'unfair' or 'unreasonable'

This interpretation continues to limit the usefulness of unconscionability provisions in the guarantee context. Improved disclosure regimes and tighter pre-contractual requirements mean that it will be more difficult for a person to establish that procedural unfairness has occurred. The complaints of many aggrieved guarantors go to inherent unfairness in the terms of the guarantee itself. Standard form guarantees typically used by financial institutions, even those which comply with disclosure regimes under legislation and industry codes, may contain provisions which are unjust in themselves.³⁰ A good example is the inclusion in standard form guarantees of 'all moneys' clauses,

²⁷ Trade Practices Amendment (Fair Trading) Act 1998. See generally, Janine Pascoe, 'The Effect of the Federal Government's Small Business Package on Guarantees of Business Debts' (1998) 12 *Commercial Law Quarterly* 17.

²⁸ See above n 16.

²⁹ [1999] FCA 1728 [31].

³⁰ Most guarantees currently used in business lending have a provision to the effect that they cover 'all moneys which are now or may hereafter from time to time be owing or payable on any account to the creditor by the security provider'. Clause 28.13 of the Code of Banking Practice (revised August 2003, modified May 2004) permits 'all moneys' guarantees, albeit with some limitations. See, Janine Pascoe, 'Guarantees and All Moneys Clauses' (4) *QUT Law and Justice Journal* 1.

which may frequently be unexpected or misunderstood by the guarantor.³¹ This kind of unfairness can only be remedied by provisions which specially target unfair contract terms, and reforms in this area are still pending in Australia.³² Until such time as nationally consistent unfair contract laws are enacted, the principles of unconscionability will still play a major role in litigation involving allegations of improvident and unfair guarantees. It is important, therefore, to consider whether the boundaries of statutory unconscionability applicable to the financial services sector are expanding, as argued in the academic commentary,³³ or whether the provisions are of little practical utility to guarantors as argued by consumer bodies.³⁴

Although the unconscionability provisions contained in Part IVA of the TPA were generally outside of its terms of reference, the Dawson Report responded briefly to a number of submissions about the scope of those provisions. The Report concluded that there may be some uncertainty about the operation of Part IVA, noting that s 51AC was only added in 1998 and applies only prospectively so that its scope has, perhaps, not yet been fully explored.³⁵

Unconscionable Guarantees-ASIC Act or TPA?

Determining whether a conduct in relation to guarantee falls within the unconscionability provisions of the ASIC Act or Part 1VA TPA involves a circuitous consideration of various definitions and exclusions set out in those Acts. Section 4(1) of the TPA includes within the definition of 'services' a contract between a banker and a customer and 'any contract for or in relation to the lending of moneys'. But this definition can only include 'services' that are not specifically excluded 'financial services'. This is because the TPA excludes from its operation conduct that would otherwise fall within Part 1VA ss 51AA or 51AB, in so far as it is conduct relating to

³¹ See, eg, *Commonwealth Bank of Australia v Khouri* [1998] VSC 128; *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395; *State Bank of New South Wales v Chia* (2000) 50 NSWLR 587; *Karam v ANZ Banking Group Ltd* [2001] NSWSC 709.

³² See the SCOCA Discussion Paper, above, n 24..

³³ There is ample literature explaining this trend in recent times. See, eg, Gail Pearson, 'The Ambit of Unconscionable Conduct in relation to Financial Services' (2005) 23 *Companies and Securities Law Journal* 105, 107-8; Bryan Horrigan, 'The Expansion of Fairness-based Business regulation- Unconscionability, Good Faith and the Law's Conscience' (2004) *Australian Business Law Review* 159.

³⁴ Consumer Credit Legal Service (Vic), Submission to SCOCA Working Party on Unfair Contract Terms, 11 March 2004.; Consumers' Federation of Australia, Submission to SCOCA Working Party on Unfair Contract Terms, March 2004; Nicola Howell, Director, Centre for Credit and Consumer Law, 'An Update of Unfair Contracts Legislation' Paper presented at Griffith University, 29 September 2005(available at www.gu.edu.au/centre/cccl/content_publications.html).

³⁵ 2002 Review of the Competition Provisions of the *Trade Practices Act 1974* (the 'Dawson Report') [3.2].

‘financial services’.³⁶ Section 51AC, on the other hand, is not excluded from operation in relation to ‘financial services’, with the result that the ASIC Act consumer and general unconscionability provisions operate exclusively with respect to financial services, but there an overlap between the TPA and ASIC Act small business unconscionability provisions.

Definition of ‘financial services’

The starting point in determining which statute applies, therefore, is to consider whether conduct involving the taking of guarantees or giving advice about obligations under a guarantee can be considered to be a ‘financial service’ within the meaning ascribed by both the TPA and ASIC Acts.

‘Financial service’ is defined in s 4(1) of the TPA effectively to have the same meaning as in the ASIC Act. According to s 12BAB of the ASIC Act a ‘financial service’ encompasses a ‘financial product’ such that a person provides a financial service when they deal in a financial product or provide financial product advice.³⁷ In addition, ‘financial product’ is defined in s 12BAA ASIC Act. That provision explains that a ‘financial product’ encompasses a ‘credit facility’ within the meaning of the regulations.³⁸ Under Regulation 2B (1) (h) of the ASIC Act a ‘credit facility’ includes a ‘guarantee of an obligation under a credit contract’.

The result of these interlinking provisions, insofar as the interplay between the TPA and ASIC Acts is concerned, is that:

- A person who deals in guarantees of obligations under a credit contract provides a financial service.³⁹
- A person who gives advice about a guarantee of obligations under a credit contract provides a financial service.⁴⁰
- Contracts of guarantee are therefore considered ‘financial services’ which are generally regulated by the ASIC Act in respect of conduct that is unconscionable
- The ASIC Act provisions regulate the three types of unconscionability i.e. within the meaning of the unwritten law, consumer unconscionability and small business unconscionability.⁴¹

³⁶ Section 51AAB. Similarly, the consumer protection provisions of Part V TPA do not apply to ‘financial services’: s 51AF.

³⁷Section 12BAB (a) and (b) ASIC Act.

³⁸ An amendment expanding the definition of ‘financial services’ to include credit facilities came into effect on 11 March 2002. See s 12BAA (7) (k).

³⁹ Section 12BAB (1) (b). Section 12BAB (7)-(10) outlines the meaning of ‘dealing’ in a financial product.

⁴⁰ Section 12BAB (1) (a). Section 12 BAB (5) outlines the meaning of providing financial product advice.

- Sections 51AA and 51AB TPA governing the unwritten law and consumer unconscionability respectively, do not apply to 'financial services' and therefore do not apply to guarantees.
- Section 51AC TPA is not excluded from operation in relation to 'financial services', so it continues to apply, resulting in an overlap between the two sets of small business unconscionability provisions.

The TPA specifically provides that s 51AA, which applies to unconscionable conduct within the meaning of the unwritten law, is restricted to situations where consumer unconscionability (s 51AB) and small business unconscionability (s 51AC) do not apply.⁴² This effectively gives s 51AA a limited operation.⁴³ Unlike the TPA, the ASIC Act does not exclude the concurrent operation of provisions applying the unwritten law and small business unconscionability.⁴⁴ This gives the ASIC Act a wide operation in relation to guarantees, for, as this paper will explain, it seems that the courts have been adopting expanded views of what unconscionability 'within the meaning of the unwritten law' means.

Given that the introduction of ASIC Act unconscionability provisions regulating financial services is a relatively recent occurrence, the body of case law which now exists on the earlier mirror provisions in the TPA can be regarded as a useful guide to the interpretation on the ASIC Act sections, despite some minor differences in drafting. Dicta in a number of first instance decisions indicates that the meaning of similar provisions governing unconscionability and misleading and deceptive conduct in the two Acts should not differ in any significant respect.⁴⁵

Procedural versus Substantive Unfairness

The conduct of financiers in taking guarantees may be attacked on two grounds. First, it may be claimed that there was something unfair in the circumstances leading up to the

⁴¹ Sections 12CA, 12CB and 12CC ASIC Act.

⁴² Section 51AA (2).

⁴³ To unconscionability imposed upon a supplier or acquirer of goods/services where the transactional costs exceed the s 51AC threshold of \$3m.

⁴⁴ Section 12CA ASIC Act prohibits unconscionable conduct within the meaning of the unwritten law of the States and territories. It does not apply to conduct that is prohibited by s 12CB i.e. 'consumer type' unconscionability: s 12CA (2).

⁴⁵ See, eg, *GPG (Australia Trading) Pty Ltd v GIO Holdings* (2001) FCR 23 [100] (Gyles J); *Vitarni Pty Ltd v Macquarie Bank* [2002] NSWSC 978 [68] (Gzell J) and *Commonwealth Bank v Spira* [2002] NSWSC 905 [132] Gzell); *Reiffel v ACN 075 839 226 Ltd* [2003] RFCA 194, [60], [65] (Gyles J). For a fuller analysis of the various cases suggesting comparability of interpretation of overlapping TPA and ASIC Act provisions see Gail Pearson, "The Ambit of Unconscionable Conduct in relation to Financial Services" (2005) 23 *Companies and Securities Law Journal* 105, 107-8, who notes that statements indicating the comparability of the two sets of provisions were made in the context of the ASIC Act prior to the introduction of the Financial Services Reform Act 2001 (Cth).

guarantee or at the time of signing the guarantee. This kind of unfairness, often referred to as 'procedural' unfairness, covers such things as lack of adequate disclosure, heavy handed tactics and lack of comprehensibility of the documents.

Secondly, it may be alleged that the terms of the contract itself are inherently unfair and one-sided. This is referred to as 'substantive' unfairness. An example already mentioned, in the guarantee context, is the insertion of 'all moneys' clauses in lenders' standard form guarantee documents. Many recent cases coming before the involving vulnerable guarantors have involved such clauses.⁴⁶ It is often not realized by those inexperienced in dealing with securities that an 'all moneys' guarantee does not merely secure the existing liability of the borrower as a debtor, but additionally covers all future liabilities which the borrower may have assumed in any capacity and in any account with the particular creditor, whether, for example as a debtor, mortgagor or guarantor.

While unfairness of the first type has been identified as commonly occurring in financial services contracts, much has been done in recent times to alleviate the problem. It has generally been understood that the equitable doctrine of unconscionability is confined to procedural unfairness, that is, unfairness in the bargaining process as determined on a case-by-case basis. There has been a flow on effect from the leading cases setting out the parameters of unconscionability by way of the introduction of enhanced conduct and disclosure regimes as well as the introduction of the various unconscionability provisions which now exist at both state and federal levels, providing specific contextual indicators of unconscionability.

However, in the absence of unfairness in the pre-contractual dealings the common law doctrine of unconscionability does not offer relief on the substantive grounds that the contract is unfair in its terms.⁴⁷ Moreover, it is argued that substantive unfairness is also not addressed adequately in statutory provisions.⁴⁸ As this paper will emphasise, it can be argued that many standard form guarantees imposing a continuing and unlimited liability upon vulnerable guarantees and ought to be subject to systemic regulation on the grounds of substantive unfairness. This is not possible under the present legal framework.

⁴⁶ See cases referred to at n 31 above. Recent empirical research conducted by the New South Wales Law Reform Commission found that in over half the litigated cases reviewed the security documents contained an 'all moneys' mortgage, with 83 per cent of solicitors responding to the Commission's survey stating that on the last occasion they acted in a guarantee matter the loan included an 'all moneys' clause: Report on the Practice of Third Party Guarantees in New South Wales, *Darling please sign this form*, Research Report II, October 2003 [5.19].

⁴⁷ SCOCA Discussion Paper, *Unfair Contract Terms* [2.1.1] above n 20.

⁴⁸ Ibid.

Guarantees and Unconscionability within the meaning of the Unwritten Law-s 12CA ASIC Act

Section 12CA (1) of the ASIC Act applies the wording of s 51AA TPA to 'financial services'. It provides that:

A corporation must not in trade or commerce engage in conduct in relation to financial services if the conduct is unconscionable within the meaning of the unwritten law, from time to time, of the States and Territories.

Until there is a body of case law dealing with s 12CA the relevant jurisprudence on the mirror provision in s 51AA will necessarily guide its meaning. According to the Explanatory Memorandum accompanying the insertion of s 51AA into the TPA, this provision embodies the equitable concept of unconscionable conduct as recognized by the High Court.⁴⁹ The Explanatory Memorandum specifically refers to the High Court's decisions in *Blomley v Ryan*⁵⁰ and *Commercial Bank of Australia Ltd v Amadio*.⁵¹ There has been a debate in the cases and academic literature as to whether the unconscionability provisions encapsulating the 'unwritten law' are wider than the specific principles set out in *Amadio*. Whether the meaning of unconscionability under the unwritten law extends to specific equitable doctrines such as estoppel, unilateral mistake, and relief from forfeiture is still open for debate.⁵² In this regard, it is worth noting that the High Court majority in *Garcia v National Australia Bank Ltd* referred to⁵³ a passage from the judgment of Mason J in *Amadio* where his Honour said that 'It goes almost without saying that it is impossible to describe definitively all the situations in which relief will be granted on the ground of unconscionable conduct'.

Whether or not the 'unwritten law' extends to other equitable doctrines which are grounded in notions of unconscionable conduct remains uncertain. However, it

⁴⁹ Explanatory Memorandum accompanying the Trade Practices Legislation Amendment Bill 1992 (Cth) [41].

⁵⁰ (1956) 99 CLR 362.

⁵¹ (1983) 151 CLR 447.

⁵² The Full Federal Court in *ACCC v Samton Holdings Pty Ltd* [2002] FCA 62 [49] set out five categories of unconscionable conduct which would support the grant of relief on principles set out in specific equitable doctrines. See also Gino Du Pont and Donald Chambers, *Equity and Trusts in Australia and New Zealand*, (2nd ed 2000) 273, who note that 'Numerous equitable doctrines are grounded, at least in part, in the notion of unconscionable conduct, including estoppel, unilateral mistake, undue influence, economic duress, constructive trusts and relief against forfeiture'; Gino Du Pont, 'The Varying Shades of "Unconscionable Conduct"-Same Term Different Meaning', (2000) 19 *Australian Bar Review* 135. See also, Horrigan, above n 13, 175, who notes that the meaning of s 51AA requires clarification by the High Court, and the discussion in Pearson, above n 13, 114-116 who concluded that the issue of the width of meaning of the unwritten law has not been resolved.

⁵³ (1998) 194 CLR 395, 408.

undoubtedly also encompasses the principles relevant to the so called ‘special wives’ equity’ enunciated by the High Court in *Garcia v National Australia Bank Ltd*,⁵⁴ given that the majority, having analysed the basis of the equitable doctrine of unconscionability, concluded that the old rule protecting guarantor wives⁵⁵ was a specific sub species of a wider genus of unconscionability, although separate and distinct from the particular unconscionability principles outlined in *Amadio*.⁵⁶ The words ‘within the meaning of the unwritten law from time to time’ reinforce this conclusion, as they clearly envisage that the parameters of unconscionability are susceptible to variation and refinement from time to time, and are not restricted to the law as it stood at the time the section was enacted.⁵⁷ Like the *Amadio* doctrine, the special wives’ equity offers relief only from procedural unfairness. It is the failure to fully inform a volunteer wife of the nature and effect of the guarantee that gives the rise to the equity to set it aside. No equity arises by virtue of having entered into an improvident or unfair transaction.

Therefore, the relevant question to ask is not whether the unwritten law is intended to cover the principles of *Garcia* as well as the traditional *Amadio* principles of unconscionability, but what is the scope of those two doctrines for the purposes of unconscionability under ‘unwritten law’ principles. Two particular questions have arisen for debate in recent cases:

- What is the scope of ‘special disadvantage’ for the purposes of the *Amadio* defence to a guarantee?
- Does the requirement of a relationship of ‘trust and confidence’ under the *Garcia* principle extend to other relationships than wives?

Even allowing for the incorporation of *Garcia* type unconscionability into s 12CA, it seems, despite some signals to the contrary noted above, that unconscionability within the meaning of the unwritten law is tightly confined within well-understood yet narrow parameters. First, it is concerned with procedural rather than substantive unfairness. This is in line with the traditional reluctance of courts to rewrite contracts.⁵⁸ Secondly,

⁵⁴ Reaffirming the decision in *Yerkey v Jones* (1939) 63 CLR 649.

⁵⁵ Derived from *Yerkey v Jones*.

⁵⁶ See Horrigan, above, n 13, 174 who accepts that the unwritten law covers both *Amadio* and the special wives’ equity: ‘The flavour of the language in *Garcia* suggests an acceptance by the High Court of different strands of unconscionable conduct in this area of the law’.

⁵⁷ In *ACCC v Samton Holdings Pty Ltd* [2002] FCAFC 4 [50], the Full Federal Court held that the use of these words in the statute overcomes the Explanatory Memorandum’s suggested limitation of s 51AA to specific *Amadio* type unconscionability.

⁵⁸ As long ago as *Maynard v Mosely* (1676) 3 Swan 651, 655 Lord Nottingham noted that ‘Equity cases are replete with reminders that equity mends no man’s bargain’. The words of Lord Hodson in *White and Carter (Councils) Ltd v McGregor* [1962] AC 413, 445 that ‘It is trite that equity will not rewrite an improvident contract where there is no disability on either side’ foreshadow the development of unconscionability principles in Australia.

there has been a reluctance to extend equity's assistance to cases which do not fall squarely into traditional principles as affirmed by the High Court in *Amadio* and *Garcia*.

Limitations of Unconscionability under the Unwritten Law

Cases involving guarantees such as *Amadio* and *Garcia* have provided a paradigm for judges to explore the limits of unconscionability, in both its generic and specific forms. By its express reference to *Amadio*, the Explanatory Memorandum accompanying the introduction of s 51AA TPA creates no doubt that the general statutory provisions incorporating the judge-made law apply to guarantees. It is a question of how wide is the scope of the unwritten law. This is an important question to determine in the guarantee context so long as s 12CA of the ASIC Act remains subject to the \$3 million threshold. An examination of recent case law indicates just how narrowly the judiciary will interpret what is 'unconscionability within the meaning of the unwritten law'.

The Amadio doctrine-Situational disadvantage?

It is clear that s 12CA provides a statutory enactment of the *Amadio* principles, enabling a contract to be set aside where:

- one party was in a position of special disadvantage⁵⁹ vis-à-vis the other party and in the circumstances the other party knew or ought to have known of that special disadvantage; and
- the other party has taken advantage of that situation.⁶⁰

The *Amadio* doctrine focuses on the circumstances surrounding the taking of the guarantee and thus the 'unwritten law' within the meaning on the scope of s 12CA is accordingly confined to procedural unfairness. It does not cover substantive unfairness which occurs through the imposition of harsh contractual terms, although manifest inadequacy of consideration or some other kind of harsh outcome may well be evidence of unconscionable conduct.⁶¹

⁵⁹ Circumstances indicating a special disadvantage or disability include drunkenness age and infirmity, lack of education, illiteracy or poor English, intellectual disability, low income, emotional vulnerability and psychological problems: *Blomley v Ryan* (1954) 99 CLR 362, 405-6 (Fullagar J).

⁶⁰ (1983) 151 CLR 447, 462 (Mason J).

⁶¹ See, eg, *Blomley v Ryan* (1954) 99 CLR 362. A more recent case where substantive factors were given some weight is *Familiar Pty Ltd v Samarkos* (1994) 115 FLR 443 (Supreme Court of Northern Territory) where an administration fee of \$500,000 was charged for a loan of an equivalent amount. Ultimately, however, the court's decision was based on the fact that the defendant took unconscientious advantage of the plaintiff's particular financial vulnerability, in this case, his desperate financial need.

The High Court's decision concerning s 51AA TPA in *ACCC v CG Berbatis Holdings Pty Ltd* ('*Berbatis*')⁶² indicates just how narrowly the judiciary will confine the scope of general statutory provisions prohibiting unconscionability. It is only when a person is suffering from a special disadvantage in the traditional sense of some inherent personal difficulty⁶³ that equity will intervene. It will not avail for the weaker party to argue that they have been pressured into making a 'hard bargain' because they were in a position of acute financial or legal disadvantage. For example, it may be that the circumstances of the case mean that a weaker party is pushed into making a 'hard bargain' because of difficult financial circumstances where the stronger party is acting in accordance with their strict legal rights. At first instance in *Berbatis* French J had argued⁶⁴ that special disability might encompass such circumstances, which he termed as 'situational disadvantage' as opposed to disadvantage based on the traditional personal indicia.

Unlike French J, the majority in the High Court did not accept that such a congruence of situational factors would encompass a 'special' disadvantage in the *Amadio* sense. The majority held that to sustain an allegation of unconscionable conduct it would be necessary for the plaintiff to establish that the special disadvantage resulted in a loss of the weaker party's capacity to make a judgment about their best interests.⁶⁵ The High Court did not find it necessary to determine if the meaning of the unwritten law extends beyond the principles established in *Amadio*.

The case of *ACCC v Oceana Commercial Pty Ltd*⁶⁶ was decided post *Berbatis*. Keifel J observed that:⁶⁷

One party to a commercial transaction will often know much more than the other. A difference in bargaining power, even a substantial difference, does not amount to the 'special disadvantage' of which Mason J spoke in *Amadio* and as was further discussed in *Berbatis*.... The parties in *Berbatis*, as Gleeson CJ observed, were at a distinct disadvantage in seeking an extension or renewal of their lease but there was nothing 'special' about that. Critically, they did not suffer from a lack of ability to judge or protect their financial interests.

In *Oceana*, the plaintiffs' allegations of unconscionability under s 51AA failed on the basis of the same reasoning applied in *Berbatis*. The court held that they were not in a position where the ability to make a judgment in their best interests was seriously affected. The question arises whether the narrow interpretation of s 51AA will carry across to the small business unconscionability provisions. For the time being though, it

⁶² [2003] HCA 18.

⁶³ Above n 62.

⁶⁴ [2000] FCA 1376

⁶⁵ [2003] HCA 18, [55] (Gummow and Hayne JJ), [11] Gleeson J).

⁶⁶ [2003] FCA 1516

⁶⁷ *Ibid* [329].

is appropriate to conclude that unconscionability under the unwritten law does not include conduct, which, without more, is merely unfair, unreasonable or which amounts to a 'hard bargain'.⁶⁸

If provisions codifying the unwritten law covered only *Amadio* type unconscionability, this would significantly curtail their effectiveness in the guarantee context, given the large number of contested guarantee cases brought by women who have guaranteed their husbands' debts. Proof that the lender knew, or ought to have known, of the guarantor's disability and unfairly sought to take advantage of that disability is very difficult to establish. Prior to the High Court in *Garcia* affirming the existence of the special wives' equity there was a long list of failed unconscionability cases where the court was unable to discern any evidence of actual or constructive knowledge of a special disability on the part of the lender.⁶⁹ The *Garcia* case itself involved a failed *Amadio* defence. However, there are good reasons, explained above, and accepted in the recent case of *ACCC v Samton Holdings Pty Ltd*,⁷⁰ for regarding the special wives' equity as part of the unwritten law for the purposes of s 12CA.

The Garcia doctrine –Extending to relationships other than marriage?

The rule in *Garcia* although a narrow one, applying only to marital relationships where the wife is substantially regarded as a volunteer, nevertheless has the significant advantage of enabling a wife to resist enforcement of a guarantee on the grounds that she lacks full understanding of its effect. The rationale for the rule, as emphasised by the majority, was to be found in the special nature of the marriage relationship which is based on trust and confidence between the spouses.⁷¹ The majority left open the question of whether the protective rule would apply to de facto relationships, same sex relationships or to cases where there is an intimate relationship involving the emotional dependency of the guarantor vis-à-vis the debtor. The majority in *Garcia* spoke of the possibility that:

...[T]he principles applied in *Yerkey v Jones* will find application to other relationships more common now than was the case in 1939-to long term and publicly declared relationships short of marriage between members of the same or opposite sex.⁷²

⁶⁸ 'Significantly, for the present, unconscionability under the general law is not established by general notions of unfairness': The Hon Paul de Jersey AC, Chief Justice Queensland Court of Appeal, above n 13, 8.

⁶⁹ See, eg, *Akins v National Australia Bank Ltd* (1994) 34 NSWLR 155; *National Australia Bank v Garcia* (1996) 39 NSWLR 577; *European Asian of Australia Ltd v Kurland* (1985) 8 NSWLR 192; *Warburton v Whiteley* (1989) NSW Conv R 55-453; *ANZ Banking Group Ltd v McGee* (1994) ASC 56-278.

⁷⁰ [2002] FCAFC 4 [47]-[48].

⁷¹ (1998) 194 CLR 395 (Gaudron, McHugh, Gummow and Haynes JJ).

⁷² *Ibid* 404.

Aside from this obiter comment, the majority in *Garcia* provided no further specific guidance as to the kind of features in these other publicly declared relationships which would bring them into the protective net of the special equity.

However, cases since *Garcia* have, on the whole, adopted an inconsistent approach to the possible extension of the special wives' equity to other committed relationships based on trust and confidence. Despite some signals to the contrary, the courts have generally been slow to extend the wives' equity principles beyond the narrow boundaries of legal husband/wife relationships. In *Watt v State Bank of New South Wales*⁷³ the Supreme Court of the Northern Territory held that the relationship between parents who entered into improvident guarantees to assist their children should be clearly distinguished from the relationship between spouses. In *State Bank of NSW v Hibbert*⁷⁴ Bryson J declined to extend the principles in *Garcia* to de facto relationships. However, in the more recent case of *Liu v Adamson*⁷⁵ Master Macready in the same court preferred the view that de facto relationships were covered by the *Garcia* principles.

In the Victorian Court of Appeal case of *Kranz v National Australia Bank*⁷⁶ Charles JA disagreed with the necessity for confining the principles in *Garcia* to only 'the most intimate of family relationships'. In his judgment Charles JA, with whom Winneke P and Eames JA agreed, adopted a more liberal view of the possibility of extending the principles in *Garcia* to other relationships than Coldrey J at first instance. His Honour believed that this would 'confine the application of the principles applied in *Garcia* within limits that cannot be justified'. He held that a surety could rely upon a *Garcia* defence whenever the bank was aware of a relationship which put the bank on inquiry. Although only an obiter opinion, as the plaintiff failed to show the bank knew or ought to have known of the special relationship of trust and confidence between him and the debtor, *Kranz* has indicated a softening of attitude at the appellate level, leaving the door open a little further for future cases. Unfortunately, from the point of view of certainty of the law, the High Court refused to grant special leave to appeal.

In the recent Queensland Court of Appeal case of *ANZ Banking Group Ltd v Alirezai*⁷⁷ the majority judges agreed that the *Garcia* principle applied whenever there was a relationship of trust and confidence between the debtor and surety. Like the *Kranz* case, the evidence in *Alirezai* failed to disclose that the bank was put on inquiry. As both *Kranz* and *Alirezai* demonstrate, in cases outside of marriage, sureties will face major huddles in proving that the financier had notice of a special relationship of trust and confidence between debtor and surety.

⁷³ [2003] ACTCA 7,

⁷⁴ [2000] NSWSC 628 (6 July 2000).

⁷⁵ [2003] NSWSC 74 (21 February 2004).

⁷⁶ [2003] VSCA 92, Victorian Court of Appeal, Winneke P, Charles and Eames JJA, 25 July 2003.

⁷⁷ [2004] QCA 6 (6 February 2004).

Therefore the state of the law, so far as *Garcia* type unconscionability is concerned, is not settled. There have been several conflicting first instance decisions and the appellate decisions suggesting an extension of the doctrine to other relationships have been based on obiter comments. Until the High Court approves of such an extension it is not clear whether the doctrine is still narrowly confined to matrimonial relationships.

Ultimately, whilst there is scope for movement in interpretation of the elements of equitable doctrine, this has not happened to any significant degree in cases applying either *Amadio* or *Garcia* principles. Under the unwritten law, notice of special disability or of a relationship of trust and confidence plays a crucial role. As the post *Garcia* litigation demonstrates, this requirement seems to be a significant obstacle in the extension of the *Garcia* principles beyond spousal relationships. The straightforward test adopted in the UK,⁷⁸ whereby a financier is put on notice in any case where the relationship between the debtor and surety is non-commercial, would bring greater certainty to this area of the law. However, in Australia the equitable principles in relation to guarantees differ markedly from the direction of the courts in the UK⁷⁹ and there has been no indication that the UK test will gain approval in Australia. In any event, the development of extensive disclosure regimes, at least for mainstream financiers,⁸⁰ make it much harder for a case of unconscionability to be made out on the basis of lack of understanding of the nature and effect of guarantee.

Conclusions on the 'unwritten law'

Section 12CA ASIC Act, and its counterpart in s 51AA TPA, which embrace unconscionability within the meaning of the unwritten law, suffers from a number of limitations. It is necessarily confined to unfair bargaining, not unfair contract terms and even then unfairness in the bargaining process is viewed in narrow terms, as the *Berbatis* decision indicates. By its nature the 'unwritten law' develops on an incremental basis which creates uncertainty about the ambit and potential reach of the doctrine. As the post *Garcia* litigation shows, this can produce ambiguous and conflicting results and limits the usefulness of s 12CA. It may well be, however, that the ASIC provisions, as a package, offer the possibility of a broader approach. This is because the ASIC Act, unlike the TPA, allows for the concurrent operation of the general and small business unconscionability provisions⁸¹

⁷⁸ *Royal Bank of Scotland v Etridge (no 2)* [2002] 2 AC 773; [2001] UKHL 44.

⁷⁹ The High Court in *Garcia* (1998) 194 CLR 395, at [39] explicitly rejected the House of Lord's approach in *Barclays Bank v O'Brien* [1994] 1 AC 180, to setting aside spousal guarantees.

⁸⁰ See, eg, the detailed precontractual requirements under Clause 28.4 of the revised Code of Banking Practice, which apply to guarantees given to support loans to individuals and small business. As at 31 December 2005 13 banks had subscribed to the Code.

⁸¹ Section 51AA (2) TPA excludes s 51AA from conduct prohibited by ss 51AB or 51AC. However, s 12CA is only excluded from conduct prohibited by s 12CB.

Given the limitations of statutory unconscionability within the meaning of the unwritten law, it seems likely that in the future there will be an expanded role for s 12CC ASIC Act, governing small business unconscionability. The vast majority of cases involving disputed guarantees in recent times concern guarantees given to support small business debts incurred by spouses, family members and others in a close relationship to the guarantor. Section 12CC will undoubtedly have an increased role to play in the event that the transactional threshold is raised from \$3 million to \$10 million. Moreover, raising the monetary threshold for actions to be brought under the small business provisions may well relegate the general provisions to, at most, a residual role.

Guarantees and Consumer Unconscionability-

Section 12CB (2) generally mirrors s 51AB(2) TPA in setting out the following non-exhaustive factors to which a court may have regard in determining whether conduct was unconscionable:

- the relevant bargaining positions of the parties (para. (a));
- whether, as a result of the conduct the consumer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the corporation (para. (b));
- whether the consumer was able to understand any documents relating to the supply of goods or services (para. (c));
- whether any undue influence or unfair tactics were used (para. (d)); and
- the amount for which and the circumstances under which the consumer could have obtained the goods or services from an alternative supplier (para. (e)).

The list of enumerated factors provided in the various consumer provisions, including s 12CB ASIC Act, s 51AB TPA and s 70 UCCC include some which leave open the possibility that the sections may go beyond procedural unconscionability.⁸² However, the reference to 'all the circumstances' which is incorporated into these all these provisions has been generally interpreted as directing the court's attention to matters surrounding the making of the contract and not to whether the contract terms may themselves be unfair.⁸³

The consumer unconscionability provisions have a limited role to play in assisting disaffected guarantors given that the vast majority of third party guarantees are given to support small business borrowing⁸⁴ and that most litigation in the guarantee context has

⁸² For example, s 12CB (b) and (e).

⁸³ See discussion in SCOCA Discussion Paper, *Unfair Contract Terms*, January 2004 [2.1.1] above n 20.

⁸⁴ New South Wales Law Reform Commission, Report on the Practice of Third Party Guarantees in New South Wales, *Darling please sign this form*, Research Report II, October 2003 p xiii.

concerned guarantees given to support small business debts.⁸⁵ The case of *Begbie State Bank of New South Wales*⁸⁶ highlights this limitation. In that case the plaintiff's claim to have a mortgage and guarantee set aside under s 52A TPA (the predecessor of s 51AB) failed because the primary loan facility was not a service 'of a kind ordinarily acquired for personal, domestic or household use'. The case involved the common scenario of a vulnerable female guarantor acting as a surety to support the business debts of her partner. Drummond J noted that the borrowing of funds, even of a substantial amount, sufficient to enable the borrower to buy a private residence would be service of the kind covered by the consumer unconscionability provisions.⁸⁷ Consumer guarantees are specifically targeted by the UCCC,⁸⁸ which operates under the aegis of state government consumer agencies. Section 70 (1) UCCC prohibits 'unjust' contracts, with a list of factors guiding the meaning of 'unjust' set out in s 70(2). Like their ASIC Act/TPA counterparts, in practice these factors have been regarded as targeting procedural unfairness.⁸⁹

Guarantees and Small Business Unconscionability-s 12CC ASIC Act

Both ss 12CC of the ASIC Act and 51AC TPA regulate unconscionable conduct involving financial services.⁹⁰ As explained earlier 'financial services' are defined in s 4 (1) TPA to effectively have the same meaning as in the ASIC Act. The ASIC Act's definition of 'financial services' now captures conduct involving the giving of advice about guarantees and conduct involving the dealing in a guarantee of obligations under a credit contract.⁹¹ Although the current ACCC guidelines⁹² on unconscionable conduct

⁸⁵ See above n 14.

⁸⁶ (1994) ATPR 41-288.

⁸⁷ Ibid 41, 898.

⁸⁸ Sections

⁸⁹ See SCOCA Discussion Paper, above n 20, [2.1.3].

⁹⁰ Section 1AAB TPA does not exclude s 51AC from applying to 'financial services'.

⁹¹ See n 36 and n 37 above. This overcomes an earlier problem of statutory construction which arose when s 51AB was introduced into the TPA. The drafting of s 51AB (and later 51AC), and of the various factors listed in those two sections, is directed towards two party situations, not a three party situation such as the giving of a guarantee to support financial accommodation provided by a lender to a principal debtor. If s 51AC is restricted to bi-partite dealings between the 'supplier' and 'business consumer' then guarantors of small business debts are still governed by s 51AA which incorporates the *Amadio* principles of unconscionability, and which, under the High Court's interpretation in *Berbatis Holdings*, is confined to the traditional indicia of inherent disadvantage pointing to a special disability on the part of the guarantor. Although there were strong arguments for suggesting that the TPA domestic and small business unconscionability provisions applied to tripartite situations such as those involving third party sureties, the position was not entirely clear. See Mark Sneddon, 'Banking and Finance: Guarantees and the Trade Practices Act, Section 51AB' (1994) 22 *Australian Business Law Review* 368, who argues that the provisions do extend to transactions involving guarantees.

⁹² *A Small Business Guide to Unconscionable Conduct*, Australian Competition and Consumer Commission, May 2005. (www.accc.gov.au).

affecting small businesses make no reference to guarantee transactions, ss 12CC ASIC Act and 51AC TPA potentially have a far-reaching and flexible application in the guarantee context.

Section 12CC generally mirrors s 51AC in that it excludes transactions above a \$3 million threshold where the 'victim' is a listed public company. There are slight differences in the wording of the two sections.⁹³ Both s 12CC and s 51AC TPA are closely modeled on the domestic unconscionability provisions, albeit with a more extensive list of factors. Section 12CC (2) sets out a range of non-exhaustive factors which a court may consider in determining whether a party has engaged in unconscionable conduct under s 12CC. The enumerated factors cover both procedural and substantive unfairness. These factors include those listed in s. 12CB (2) as well as the following:

- the extent to which the supplier/recipient's conduct was consistent with its dealings with other small business parties (paras (2)(f) and (3)(f));
- the requirements of any applicable industry code (paras (3)(g) and (4)(g));
- the requirements of other industry codes which the other party might reasonably have expected to apply (paras (2)(h) and (4)(h));
- whether the supplier/acquirer unreasonably failed to disclose any relevant intended conduct and associated risks to the small business party (paras (2)(i) and (3)(i));
- the extent to which the supplier/acquirer was willing to negotiate the terms and conditions of any contract (paras (2)(j) and (3)(j)); and
- the extent to which the parties acted in good faith (paras (2) (k) and (3) (k)).

The relationship between the general law of unconscionability and the statutory provisions governing consumer and small business unconscionability is still being formulated by the courts and is yet to be considered by the High Court. The High Court in *Berbatis* provided a narrow interpretation of unconscionability under the 'unwritten law'. The Court applied the *Amadio* test of 'special disability', narrowly to situations where the weaker party's disability resulted in a loss of their capacity to make a judgment about their best interests. Although the High Court's decision in *Berbatis*, considering unconscionability under s 51AA,⁹⁴ may be seen as restricting the statutory boundaries of unconscionability and perhaps as an indicator of the courts' likely attitude to the other unconscionability provisions,⁹⁵ it is submitted that the terms of s 12CC give it a much wider application the 'unwritten law' which covers traditional notions of unconscionability as articulated in *Amadio* and *Garcia*. This construction is supported by

⁹³ For example, s 12CC ASIC refers to unconscionable transactions involving a 'supplier' and 'service recipient', which the TPA to a 'supplier' and 'business consumer'. For a full discussion of the minor differences in the working of the two provisions see Pearson above, n 33, 121-12.

⁹⁴ Which codifies the common law notion of unconscionability.

⁹⁵ As argued by Robert Baxt and Elizabeth Bennett, 'Unconscionability and the *Berbatis* case', June 2003, available at Allens Arthur Robinson website (www.aar.com.au).

the weight of opinion, both judicial and academic.⁹⁶ The language of the small business provisions and in particular the inclusion of detailed indicia of unconscionability indicates that those provisions are of wider ambit than the 'unwritten law'. A body of jurisprudence on s 12CC has not yet developed, however guidance can be sought from cases on the equivalent TPA provisions. This view has been widely accepted in case law and recently reinforced by the Full Federal Court in *Australian Securities & Investments Commission v National Exchange Pty Ltd*⁹⁷ where it was held that:

Section 12CC can be contrasted with s 12CA, which prohibits a person from engaging in conduct in relation to financial services and in trade and commerce where the conduct is unconscionable within the meaning of the "unwritten law". Section 12CC makes no reference to the unwritten law and refers to conduct that is, in "all the circumstances", unconscionable. It is also specific in its requirement that the supply of financial services must not only be "in trade or commerce", but the acquisition of those services must also be "for the purpose of" trade or commerce: s 12CC (8). In our view, his Honour erred in approaching the question of unconscionable conduct on the basis of the limitations that the general law imposed on that concept. It is evident from par 3.7 of the Explanatory Memorandum to the Financial Services Reform (Consequential Provisions) Bill 2001 (Cth), which concerned the proposed s 12CC of the ASIC Act, that this section was intended to operate as a 'mirror' provision to s 51AC of the Trade Practices Act 1974 (Cth): see also Hansard, vol 216, H of R, 8767 ('Ministerial Statements') and 8800 ('Second Reading Speech'). There is no foundation in the language or purpose of s 12CC to impose limitations from the unwritten law, such as the necessity to identify a specific or particular person. Authority on s 51AC supports the proposition that the prohibition in s 12CC is not to be read down by limiting its operation only to circumstances where the common law would grant relief in respect of unconscionable conduct: *Australian Competition and Consumer Commissioner v C G Berbatis Holdings Pty Ltd* (2000) 96 FCR 491 at 502ff per French J; *Australian Competition and Consumer Commissioner v Keshow* [2005] FCA 558 at [97] per Mansfield J and the cases and authorities there cited. It is equally clear both from the actual language of s 51AC and of s 12CC and from the extrinsic materials relating to s 51AC that these provisions were intended to build on and not to be constrained by common law case law: see *Australian Competition and Consumer Commission v Radio Rentals* [2005] FCA 1133 at [24]; and Hansard, H of R, above. The language must be given its ordinary meaning and must not qualified by pre-existing constraints on liability: see *Australian Competition and Consumer Commission v Simply No-Knead (Franchising) Pty Ltd* (2000) 104 FCR 253 at [30]-[37].

⁹⁶ *ACCC v Oceana Commercial Pty Ltd* [2003] FCA 1516 [336]; Gail Pearson, 'The ambit of Unconscionable Conduct in relation to Financial Services' (2005) 23 *Companies and Securities Law Journal* 105; The Hon Paul de Jersey AC, Chief Justice Queensland Court of Appeal, 'Good Faith, Commercial Morality and the Courts', Paper delivered at the 22nd Annual Banking and Financial Service Law Conference, Cairns, 6 September 2005, p 4; Bryan Horrigan, 'The Expansion of Fairness-based Business regulation-Unconscionability, Good Faith and the Law's Conscience' (2004) *Australian Business Law Review* 159, 162.

⁹⁷ [2005] FCAFC 226 [29]-[30] (Tamberlin, Finn and Conti JJ).

Despite the recognition that the terms of the small business provisions (and perhaps the consumer provisions) encompass a wider notion of unconscionability than exists at general law, the degree to which this is so remains unclear. Unlike the 'unwritten law' provisions the small business provisions do not depend on a finding of a 'special disability', but they do require a finding of conduct which is 'in all the circumstances' unconscionable. What is still to be resolved is whether the finding of the High Court in *Berbatis* that conduct which can merely be described as a 'hard bargain' is not unconscionable may be applied to the small business provisions as suggested by Baxt and Bennett.⁹⁸ The answer seems to depend on the threshold test defining unconscionable. A low threshold test for unconscionability would catch conduct which is 'unfair'. In *Garry Rogers Motors (Aust) Pty Ltd v Subaru (Aust) Pty Ltd*,⁹⁹ Finkelstein J stated in respect of s 51AC TPA: 'I take as the measure of unconscionability, conduct that might be described as unfair'.

A higher level test would require something in addition to 'unfairness', such as conduct offending against good conscience or involving lack of morality. It seems that in practice the courts have opted for the higher threshold test. In *Hurley v McDonald's Australia Ltd*,¹⁰⁰ the full Federal Court took as its starting point the Shorter Oxford Dictionary definition of 'unconscionable', i.e., 'showing no regard for conscience; irreconcilable with what is right or reasonable'. Beyond this, the Full Court further observed that:¹⁰¹

For conduct to be regarded as unconscionable, serious misconduct or something clearly unfair or unreasonable, must be demonstrated...The various synonyms used in relation to the term 'unconscionable' import a pejorative moral judgment..

See also *Australian Securities & Investments Commission v National Exchange Pty Ltd*¹⁰² where the Full Federal Court accepted that unconscionability is a concept that requires a high level of moral obloquy. It is not surprising that very few of the test cases brought to establish the ambit of the statutory unconscionability provisions have been successful. The cases have generally affirmed the traditional role of the courts in upholding contractual bargains. A bargain that is 'unfair', without more, will not be overturned on unconscionability grounds. Perhaps one of the limitations in the small business provisions is the absence of the word 'unfair' as a marker of unconscionable conduct.¹⁰³ It is interesting to note that the 1997 Reid Report, in its recommendations to the federal

⁹⁸ Above n 95.

⁹⁹ [1999] FCA 903 [46].

¹⁰⁰ [1999] FCA 1728 [22].

¹⁰¹ *Ibid.*

¹⁰² [2005] FCAFC 226, [43] the court referring to the decision of Spigelman J in *Attorney-General of NSW v Word Best Holdings Ltd* [2005] NSWCA 261 [21].

¹⁰³ See Robert Gardini, 'The Dawson Review-A Small Business Perspective' (2003) (26) (1) *UNSWLJ* 268.

government for enhanced small business protection, cautioned against the use of the term 'unconscionable' indicating that:

...[I]t would be better to use a new word, without the legal entailments of 'unconscionability' while avoiding the words 'harsh' or 'oppressive' in the initial clause establishing the standard.¹⁰⁴

It was recommended that the word 'unfair' be used instead. The federal government clearly had major reservations about the breadth of the Reid Report's recommendation for what amounted to an unfair trading law in Australia, preferring to adhere to traditional concepts. The Minister said in his Second Reading Speech:

The bill uses the expression 'unconscionable conduct' in order to build on the existing body of case law which has worked well in relation to consumer protection provisions of the Act and which will provide greater certainty to small business in assessing their legal rights and remedies.¹⁰⁵

The recent Report of the Senate Economics References Committee also cautioned against the use of the word 'unfair', noting that introducing the concept of unfairness into s 51AC TPA 'carries the risk of making the section unworkably ambiguous by calling on concepts with an unclear legal meaning'.¹⁰⁶

Indicia of unconscionability under s 12CC

The expanded indicia of unconscionability, for the purposes of s 12CC, go beyond traditional indicators of unconscionability under the general law principles¹⁰⁷ as incorporated in s 51AA. Reference to the factors which a court may consider when determining a case of unconscionability, provide at least three bases for supporting suggestions of a wider ambit. These are:

- The inclusion of factors which embrace substantive unfairness, including the proposed inclusion of a new 'unilateral variation' clause;
- Special recognition of the notion of unfairness; and

¹⁰⁴ Report of the House of Representatives Standing Committee on Industry Science and Technology, *Finding a balance-Towards fair trading in Australia*, May 1997, p 179.

¹⁰⁵ House of Representatives, Hansard, 30 September 1997.

¹⁰⁶ The Senate Economics References Committee Report on *The Effectiveness of the Trade Practice Act 1974 in Protecting Small Business*, March 2004, p 36 (available at www.aph.gov.au).

¹⁰⁷ The classic statement of Fullagar J in *Blomley v Ryan* (1956) 99 CLR 362, 405 referred to 'poverty or need of any kind, sickness, age, sex infirmity of body or mind, drunkenness, illiteracy or lack of education, lack of assistance or explanation where assistance or explanation is necessary'.

- Acknowledgement of the role of industry codes.

It is therefore useful to consider the factors which appear to extend the boundaries of unconscionability, insofar as they are relevant, in particular, in the guarantee context.

Substantive unfairness factors

On the face of it, the indicia of small business unconscionability appear quite far-reaching. Matters such as the equivalent terms and price offered by competitors¹⁰⁸ and being forced to comply with conditions which go beyond the stronger party's legitimate interests require a consideration whether the substantive terms of the contract are unfair.¹⁰⁹ Generally, however, consumer bodies have been unimpressed with so-called 'shopping lists' in various pieces of unconscionability legislation that contain terms which are clearly substantive.¹¹⁰ For example, it has been observed that although s 70(2) of the UCCC contains four factors which canvass issues of substantive unfairness:

In our opinion s 70 of the Code is primarily concerned with procedural unfairness and does not provide a tribunal to reopen a contract simply here a term of a contract is unjust. Academic consideration of the issue is divided and we are unaware of any judicial decisions in which substantive issues **in isolation** [emphasis added] formed the basis for orders reopening an unjust contract.¹¹¹

While it is true that most of the factors enumerated in unconscionability shopping lists deal with procedural matters, there have been a few decisions in which the substantive harshness of a standard term on which the stronger party sought to rely was a major factor, or the sole factor in the Court's decision.¹¹² Arguably, many very broadly framed 'all moneys' clauses, typically found in third party guarantees and mortgages could be subject to attack on the basis that they are not reasonably necessary to protect lenders' legitimate interests. Most guarantees currently used in business lending have a provision to the effect that they cover 'all moneys which are now or may hereafter from time to time be owing or payable on any account to the creditor by the security provider'. The widespread use of third party guarantees has been the subject of critical reports by government and law reform bodies,¹¹³ Given the plethora of cases involving spouses and

¹⁰⁸ Section 12CC (2) (e) and (3) (e) and its counterpart in s 51AC (3) and (4).

¹⁰⁹ Section 12CC (2) (b) and (3) (b) and its counterpart in s 51AC (3) and (4).

¹¹⁰ See above n 34.

¹¹¹ Victorian Consumer Credit Legal Service, above n 34 pp 11-12.

¹¹² In the general commercial context, see, for example, *ACCC v Black on White* [2001] FCA 372 4 April 2001) *John Dorahy' Fitness Centre Pty Ltd v Buchanan* CA NSW 16 December 1996.

¹¹³ Martin Committee Report, Australia, House of Representatives Standing Committee on Finance and Public Administration, *A Pocketful of Change: Banking and Deregulation* (AGPS, Canberra 1991); Trade Practices Discussion Paper (1992), *Guarantors: Problems and Perspectives*; Australian Law Reform Commission Report No.69 (1994) Part II, *Equality before the law: women's equality*; *Good Relations, High Risks: financial transactions between family and friends* Report of the

other vulnerable guarantors,¹¹⁴ coming before the courts in which the lack of awareness or comprehension of an 'all moneys' clause was one of the main grounds for challenging the guarantee, controlling their use is necessary in guarantees given to support small business debts. Therefore, the business unconscionability provisions in the ASIC Act may offer some potential for assisting individual litigants in striking down provisions such as all moneys clauses in guarantees which are substantively unfair. However, the provisions will not necessarily generally deter financiers continuing to use them as they do not effect any systemic control over unfair terms.¹¹⁵

Reference to industry codes

Courts may take note of the requirements of 'any applicable industry code'¹¹⁶ or 'any other industry code'¹¹⁷ if the 'service recipient' acted under the reasonable belief that there would be compliance with that code. An applicable code refers to a prescribed mandatory industry code.¹¹⁸ In the guarantee context, the incorporation of the 'code factors' into the business unconscionability provisions enables a court to consider best banking practice standards. For example, the Australian Bankers' Association Code of Banking Practice¹¹⁹ covers banking services generally and also contains detailed provisions which specifically relate to guarantees. It extends to guarantees over domestic as well as small business debts.¹²⁰ Adoption of the self-regulatory Banking Code is voluntary and not prescribed under s 51AE TPA. Therefore, it can be considered by the court to be 'any other industry code' for the purposes of the factors in s 12CC.

Expert Group on Family Financial Vulnerability (1996); Australian Banking Industry Ombudsman Ltd, Report on Relationship Debt (Bulletin No 22, 1999).

¹¹⁴ See, e.g., *Commonwealth Bank of Australia v Cohen* (1988) ASC 55-681; *Commonwealth Bank of Australia v ABC Property Planners Pty Ltd*, (Unreported, Supreme Court of NSW, Cohen J, 25 May 1991); *European Asian of Australia Ltd v Lazich* (1987) ASC 55-564; *Commonwealth Bank of Australia v Khouri* [1998] VSC 128; *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395; *State Bank of New South Wales v Chia* (2000) 50 NSWLR 587; *Karam v ANZ Banking Group Ltd* [2001] NSWSC 709.

¹¹⁵ See Harland and Carter, above n 17.

¹¹⁶ Section 12CC (2) and (3)(g).

¹¹⁷ Section 12CC (2) and (3)(h).

¹¹⁸ Section 51AE provides that the regulations may prescribe a code for the purposes of Part IVB TPA. To date the only prescribed code is the Franchising Code of Conduct.

¹¹⁹ *Code of Banking Practice*, Australian Bankers' Association, 2003 (Revised August 2003, modified May 2004). The Code can be obtained from the Australian Bankers' Association website (www.bankers.asn.au).

¹²⁰ Clause 40 defines 'small business' as any business which has less than 20 employees or, in the case of a manufacturing business, less than 100 employees. It further provides that a banking service which is a 'financial product' or 'financial service' applies to 'retail clients' as described in Chapter 7 of the *Corporations Act 2001* (Cth). The definition of 'retail client' includes a small business, which carries the same meaning for the purposes of both the *Corporations Act* and Banking Code: ss 761G (7) and (12) *Corporations Act*.

The Code contains a number of clauses which are relevant in the context of unconscionability. For example Clause 2.2 provides an undertaking by banks that:

We will act fairly and reasonably to you in a consistent and ethical manner. In doing so we will consider your conduct, our conduct and the contract between us.

Clause 25.1 states that banks will:

Exercise the care and skill of a diligent and prudent banker in selecting and applying our credit assessment methods and in forming our opinions about your ability to repay....

This commitment appears to be relevant to the practice of 'asset-based' lending, which has been recognised as an undesirable feature of many guarantee transactions.¹²¹ This refers to a situation the bank has doubts about both the borrower's and guarantor's ability to be able to repay the loan, but relies on the security in the case of default. Arguably it would be better if the Code imposed a positive obligation on banks to assess the actual capacity of borrowers and guarantors to repay.¹²²

Clause 25.2 states that:

With your agreement we will try to help you to overcome your financial difficulties with any credit facility you have with us.

Clause 28.4 mandates, in a highly prescriptive way, a disclosure and conduct regime for banks which have adopted the code.¹²³ The Code also permits, but imposes restrictions upon, the taking of 'all moneys' securities.¹²⁴ These provisions are directed at redressing problems concerning lack of procedural fairness highlighted in high profile guarantee litigation which had reflected unfavourably upon the practices of banks and other financiers in taking guarantees.

¹²¹ The New South Wales Law Reform Commission Report on the Practice of Third party Guarantees in New South Wales, *Darling please sign this form*, Research Report II, October 2003 [4.58]. See also Banking and Financial Services Ombudsman, Policies and Procedures Manual, p 24 (www.bfso.org.au) which states that 'No banker should rely on realisation of assets held as security as the primary source of repayment...'.

¹²² For a critique of the practice of 'asset-based' lending and the limitations of the Banking Code in that context, see Nicola Howell 'Ethical Lending: a corporate social responsibility or a legal responsibility', Paper presented to the 2nd National Consumer Credit Conference, Melbourne, 8 November 2004 (available at www.gu.edu.au/centre/cccl/content_publications.html).

¹²³ Clause 28.4 (b) and (c) refers to disclosure of demands, excesses and overdrawings in relation to the debtor as well as the provision of certain documents to the guarantor such as credit reports, statements of financial accounts, relevant credit reports and the final letter of offer to the debtor.

¹²⁴ Clause 28.13.

It has been considered that the Banking Code would be given considerable weight in informing courts of the standards required by banks and other financiers,¹²⁵ particularly given that it has been established and endorsed by industry after widespread consultation.¹²⁶ Therefore it seems likely that the Code has the potential to be relevant to cases brought under s 12CC ASIC Act, even in evaluating the conduct of a financier who had not adopted the Code.¹²⁷

Despite the comprehensive revision of the guarantee provisions of the Code, some aspects of its treatment of all moneys clauses are unsatisfactory and difficult to reconcile with the general obligation of unfairness in Clause 2.2. Clause 28.13 of the Code permits all moneys clauses in a way which significantly undermines the protection to guarantors. Clause 28.13 provides that:

A guarantee given by you will be unenforceable in relation to a future credit contract unless we have:

- (a) given you a copy of the contract document of the future credit contract; and
- (b) subsequently obtained your written acceptance of the extension of the guarantee except to the extent the future credit contract (together with all other existing credit contracts secured by that guarantee) is within a limit previously agreed in writing by you and we have included in the notice we give you... a prominent statement that the guarantee can cover a future credit contract in this way.

The qualification allowing the guarantee to be extended to future contracts in the manner spelt out in clause 28.13, effectively means that guarantees will be enforceable in relation to further advances that a guarantor may not be aware of, or has agreed to at the time, providing that a statement has been given that this can occur and the lending is within the previously agreed limit. Providing an initial warning purporting to cover transactions which may occur many years later is not sufficient protection and the effect of Clause 28.13 is not in the spirit of the general requirement to act fairly and reasonably in Clause 2.2. This is a significant deficiency in the Code, particularly given that unfairness relating to 'all moneys' provisions has been at the heart of many of the leading guarantee cases.¹²⁸

The meaning to be ascribed to the words in the Code 'acting fairly and reasonably to you' and whether a court would conclude that a guarantee with an 'all moneys' clause

¹²⁵ See, eg, Elizabeth Wentworth, *The New Code of Banking Practice and Guarantees: What Lawyers need to Know*, General Counsel to the Banking and Financial Services Ombudsman, Paper presented at the Law Council of Australia/Law Institute of Victoria Financial Services Seminar, 16 October 2002.

¹²⁶ The revised version of the Code, which came into effect in August 2003, adopts the recommendations of the Viney Report: Richard Viney, RTV Consulting Pty Ltd, *Review of the Code of Banking Practice*, Final Report, October 2001.

¹²⁷ Elizabeth Wentworth, above n 125, 5.

¹²⁸ See above n 31 and n 46.

which complies procedurally with the Banking Code is unconscionable are both uncertain. Therefore, although the inclusion of factors permitting reference to the terms of industry Code seemingly import an 'industry' standard of fairness into the business unconscionability provisions, it is by no means clear what this standard encompasses and therefore whether the standard will be higher than under existing equitable principles. Moreover, the Banking Code, by definition only covers a specific section of the financial services sector and not all banks have subscribed to the Code.¹²⁹ Other non-bank lenders are not under the same obligation to act 'fairly and reasonably' although, as noted, the requirements of the Code could well be regarded as a benchmark for other credit providers when taking third party guarantees.

Reference to good faith

'Good faith' is an elusive concept, but one that is receiving increasing prominence in recent Australian jurisprudence and academic writing, including a debate as to whether such an obligation should be implied into the contract.¹³⁰ The High Court in *Royal Botanic Gardens and Domains Trust v South Sydney City Council*¹³¹ considered, but found it unnecessary to decide, whether such an obligation exists and therefore the matter is unsettled. On the whole, courts have taken a strict approach to the implication of term into a contract, with the focus being on the extent to which the term was obvious, reasonable and equitable, and necessary as a matter of business efficacy.¹³²

What does 'acting in good faith' require? Perhaps, as some argue,¹³³ it involves moral or ethical considerations. Others have said '[i]t presumably transcends the implied obligation to cooperate to secure the fundamentals of the contract. Honesty comes to mind, as does not acting capriciously or for an extraneous purpose'.¹³⁴ Presumably, good faith differs from reasonableness. The question arises whether acting in a spirit of good faith requires a party to subordinate his or her own interests, or at least not to pursue them aggressively or unreasonably. On the meaning of good faith Barrett J in *Overlook v*

¹²⁹ As at 2005, 13 banks have subscribed. See Australian Bankers' Association website: www.auba.com.au.

¹³⁰ Recent examples include *Alcatel Australia Ltd v Scarcella* [2001] NSWCA 401 (Unreported, New South Wales Court of Appeal, Beazley, Stein JJA, Davies AJA, 14 November 2001) and *Burger King Corporation v Hungry Jacks Pty Ltd* [2001] NSWCA 187 (Unreported, New South Wales Court of Appeal, 21 June 2001). The concept that a contract imposes a duty of good faith and fair dealing on the parties is established jurisprudence in the United States and has been growing in acceptance in Australia. See Elisabeth Peden, 'Incorporating Terms of Good Faith in Contract Law in Australia' (2001) 23 *Sydney Law Review* 222 and J Paterson, 'Duty of Good faith-Does it have a Place in Contract Law?' (2000) 74 *Law Institute Journal* 47.

¹³¹ [2002] HCA 5.

¹³² *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266, [26].

¹³³ Robert Baxt and Joel Mahemoff, 'Unconscionable Conduct Under the Trade Practices Act-An Unfair Response by the Government: A Preliminary View' (1998) 26 *Australian Business Law Review* 5.

¹³⁴ The Hon Paul de Jersey AC, Chief Justice Queensland Court of Appeal, above n 13, 6-7.

*Foxtel*¹³⁵ held that it ‘underwrites the spirit of the contract and supports the integrity of its character, but it does not require a party to subordinate his or her own interests provided pursuing them did not unreasonably interfere with the other party’s enjoyment of contractual rights’. It is interesting to contrast this approach with earlier views in the United Kingdom regarding good faith between negotiating parties. The House of Lords in *Walford v Miles*¹³⁶ held that a duty to negotiate in good faith would be unworkable in practice, intruding into negotiations which could be broken off at any time.

Enhanced disclosure regimes affecting guarantees have made significant inroads into the traditional principle that guarantees are not contracts *ubirrimae fidei* (that is, of the utmost good faith). Whether the encroaching role of ‘good faith’ statutory requirements and the parallel Banking Code requirement of ‘acting fairly and reasonably’ require a financier taking a guarantee to attain a level somewhat akin to a person in a fiduciary relationship is doubtful. The relationship of banker and customer has never been a fiduciary one¹³⁷ and it is doubtful whether the existence of the ‘good faith factor’ in statutory unconscionability provisions will impose further requirements upon financiers than already exists under disclosure regimes.

Proposed Insertion of new ‘unilateral variation’ factor

The presence of a provision giving the stronger party the ability to unilaterally vary any clause in the contract may be a matter going to substantive unfairness, although the financial services industry regards such clauses as necessary and not inherently unfair.¹³⁸ Unilateral variation of a credit contract will accordingly result in a change in liability under a guarantee given to secure that loan. The *Trade Practices Amendment (Small Business Protection) Bill 2005*¹³⁹ proposes to introduce a package of reforms in response to recommendations made by the 2002 Dawson Review¹⁴⁰ and the 2003 Senate

¹³⁵ [2002] NSWSC 12, [65]; [67,]. See also *Commonwealth Bank of Australia v Spira* [2002] NSWSC 905 [155] (Gzell J).

¹³⁶ [1992] 2 AC 128, 138 (Lord Ackner).

¹³⁷ Except in exceptional circumstances: *Lloyds Bank v Bundy* [1975] QB 326; *Commonwealth Bank of Australia v Smith* (1991) 102 ALR 453; *National Bank of Australia Ltd v Finding* [2001] 1 Qd R 168.

¹³⁸ See, eg, Australian Association of Permanent Building Societies Submission (7 April 2004) and Australian Bankers’ Association Submission (8 April 2004) to the *Unfair Contract Terms* Discussion Paper, referred to above n 20. The financial sector argues that their unilateral right to vary contract should be retained in order to accommodate regulatory and market changes, to incorporate innovative developments in banking and credit services and to ensure compliance with prudential requirements.

¹³⁹ See above n 16. Presumably there will be mirror amendments in the ASIC Act covering unconscionability with respect to ‘financial services’. The legislation was proposed for introduction in the 2005 Spring Sittings of the Federal Parliament, but did not proceed.

¹⁴⁰ 2002 Review of the Competition Provisions of the *Trade Practices Act 1974* (the ‘Dawson Report’).

Inquiry.¹⁴¹ The Bill includes an amendment to s 51AC TPA providing that the 'shopping list' of factors be expanded to include reference to whether the contract imposed terms allowing for the unilateral variation of any of its terms. Consumer bodies have argued that the right to unilaterally vary a contract may be regarded as an unfair term and should be dealt with in proposed uniform unfair contracts legislation. Certain industry sectors, particularly the banking and finance sector have argued for the continued right to unilaterally vary contracts as a matter of necessity, given predominance of long term contracts in the industry.¹⁴² Ultimately, the Federal Government adopted the middle ground in accepting that such clauses should not be banned outright, but may in some cases be an indicator that unconscionable conduct has occurred 'in the bargaining process'.¹⁴³ The inclusion of this new factor may mean that it will be harder for financiers to justify why a unilateral variation clauses should be included, although presumably reference to the 'legitimate interests' factor will be relevant in standard credit and guarantee contracts. In that context the new factor does significantly alter the ambit of the unconscionability provisions.

Impediments imposed by the phrase 'in all the circumstances'

In *ACCC v Simply No Knead (Franchising) Pty Ltd*¹⁴⁴ Sundberg J, commenting with respect to s 51AC TPA, provided a reminder that 'the Court is aided but not controlled by the factors listed in subs (3). Ultimately, the statute requires conduct to be unconscionable "in all the circumstances" '. The statutory indicators may appear to include substantive unfairness, but the presence of a particular factor set out in s 12CC (2) or (3) may not be sufficient in itself to attract relief. Statutory unconscionability provisions provide the court with discretion to consider the various enumerated factors, but there is no discretion to ignore the circumstances or context in which the impugned conduct has occurred. The inclusion of these words has therefore been regarded by consumer bodies,¹⁴⁵ in particular, as placing the primary focus of these provisions on matters of procedural fairness and thus as an impediment to allowing redress for contracts the terms of which are inherently unfair. The Standing Committee of Officials of Consumer Affairs supports the general conclusion that the courts have been reluctant to find

¹⁴¹ The Senate Economics References Committee Report on *The Effectiveness of the Trade Practice Act 1974 in Protecting Small Business*, March 2004 (available at www.aph.gov.au).

¹⁴² The Australian Bankers Association, above n 138, p 3, has argued against the proposition that clauses permitting unilateral changes should be regarded as unfair *per se*, stating that the concept of unfair terms needs to be considered with due regard for the operating context of financial services contract, particularly credit contracts.

¹⁴³ See Press release, Hon P Costello 'Australian Government Response to the Senate Inquiry into the Effectiveness of the Trade Practices Act 1974 in Protecting Small Business' (available at www.treasurer.gov.au/tsr/content/pressreleases/2005).

¹⁴⁴ [2000] FCA 1365, [37].

¹⁴⁵ Victorian Consumer Credit Legal Centre, Submission (11 March 2004) to the *Unfair Contract Terms* Discussion Paper, referred to above n 34, p 12.

unfairness solely on substantive grounds.¹⁴⁶ This conclusion seems consistent with the view of the Full Federal Court in *Hurley v McDonald's Australia Ltd*.¹⁴⁷ This is of concern so far as banking and finance contracts are concerned, given that the imposition of standard terms in many cases goes beyond what is necessary for the protection of a financier's legitimate interests. The common inclusion of 'all moneys' clauses in guarantees is an example. The usual response of a court is to set aside the guarantee if it has been given in circumstances which are procedurally deficient, but it will rarely intervene solely on the grounds that the term is inherently unfair to the guarantor.

While the Full Court's statements in *Hurley* appears to exclude claims for relief based purely on substantively harsh terms, many guarantees taken by lenders could be impugned this basis, as discussed above. Nevertheless, it is to be hoped that the federal government proceeds with its small business unconscionability reforms in the near future. The raising of the monetary threshold to \$ 3 million together with the addition of the additional factor requiring a court to consider whether a unilateral variation clause is unconscionable in all the circumstances, will no doubt be useful reforms, particularly in the financial services context.

Statutory Unconscionability and the role of the regulator

Despite some of the developments affecting statutory unconscionability regimes, discussed above, they have remained, in the whole, focused on providing remedies for individual litigants adversely affected by procedural irregularities. The costs and hurdles of instigating litigation are obvious. While landmark decisions such as *Amadio* and *Garcia* have flow on effects which may impact generally upon the conduct of financiers when taking guarantees, technically the outcome of litigation is only binding on the parties. However, there is scope for involvement of financial services regulators in regulating unconscionable conduct at a general or systemic level.

Subsequent to 11 March 2002, when s 51AF was inserted into the TPA excluding ss 51 AA and 51AB and Part V from applying to 'financial services', unconscionable conduct with respect to financial services is now the generally the responsibility of ASIC under the 'mirror' provisions of the ASIC Act, ss 12CA, 12CB and 12CC. A point of interest, given that s 51AC is not expressly prohibited from applying to 'financial services', is whether the ACCC or ASIC is the appropriate regulator to deal with unconscionability in the 'financial services' context. The ACCC's role with respect to unconscionability in financial services is preserved by ASIC's delegation of its powers to take action on its behalf to the Chief Executive Officer of the ACCC.¹⁴⁸ The ACCC may commence proceedings or be joined as an applicant in proceedings with ASIC, although the

¹⁴⁶ Discussion Paper, *Unfair Contract Terms*, January 2004, above n 20.

¹⁴⁷ [1999] FCA 1728.

¹⁴⁸ As noted in *ACCC v Oceana Commercial Pty Ltd* [2003] FCA 1516 [314].

remedies it seeks, post 11 March 2002 will be based on ASIC Act provisions, such as the injunctive power in s 12GD, which is in substance the same in terms as s 80 TPA.¹⁴⁹

Test Cases

In recent times the ACCC has been running test cases¹⁵⁰ in matters involving unconscionability of importance to particular classes of consumers, in particular small business.¹⁵¹ It has sought a range of orders including declarations, corrective advertising and injunctions restraining future conduct which might affect classes of consumers generally. Some of these cases have involved the financial services sector¹⁵² and although very few cases have involved guarantors they potentially have implications for guarantee cases. On the whole, while the results of recent high profile public interest litigation have been disappointing in terms of the failure to establish unconscionable conduct in particular cases, the ongoing involvement of the regulator in testing the ambit of statutory unconscionability and the available statutory remedies is important. Intervention by the regulator in cases involving the public interest reinforces its proactive role in promoting normative standards of honesty, good faith and fair dealing. The courts have expressly approved of this role, exercising a degree of latitude as to the kind of orders which are appropriate for the regulator to seek in public interest unconscionability cases. For example, in *ASIC v National Exchange Pty Ltd*,¹⁵³ ASIC's claim of unconscionable conduct under s 12CC ASIC Act failed. However, the Full Court of the Federal Court dismissed the respondent's argument that the claims for declaratory and injunctive relief by ASIC were inappropriate as the appeal was an 'attempt by ASIC to obtain an advisory opinion on the law'. In the words of the Full Court:¹⁵⁴

It is said that this appeal is an attempt by ASIC to obtain an advisory opinion on the law by means of claims for declaratory relief. Injunctive relief is said to be inappropriate because there is no threat by National Exchange to send out any further offer documents and insofar as the injunction seeks to do no more than compel National Exchange to comply with the law it is both superfluous and oppressive. In our view there is no substance to this contention. There is a live issue as to the meaning and effect of the statutory provisions.

¹⁴⁹ *ACCC v Commonwealth Bank of Australia* [2003] FCA 1397 [22]. ASIC was joined as an applicant the proceedings.

¹⁵⁰ *ACCC v CG Berbatis Holdings Pty Ltd* [2003] HCA 18; *ACCC v Oceana Commercial Pty Ltd* [2003] FCA 1516; *ACCC v Samton Holdings Pty Ltd* [2002] FCA 62. See also the appeal by ASIC in *Australian Securities & Investments Commission v National Exchange Pty Ltd* [2005] FCAFC 226.

¹⁵¹ The cases have, inter alia, involved disputes about commercial tenancies, franchising and business financing. Some cases involve overlapping claims of misleading and deceptive conduct: see *ACCC v Oceana Commercial Pty Ltd* [2003] FCA 1516.

¹⁵² *Oceana*

¹⁵³ [2005] FCAFC 226 (25 November 2005)(Tamberlin, Finn and Conti JJ).

¹⁵⁴ *Ibid* [51]

Similarly, in *ACCC v Oceana Commercial Pty Ltd*¹⁵⁵ the Federal court dismissed an unconscionability claim against a bank and dismissed the ACCC's application for injunctions attaching terms and conditions upon the bank in relation to future secured lending. However, Keifl J accepted that declarations and injunctions may be useful and appropriate in public interest litigation where they serve to vindicate legislation aimed at the protection of consumers.¹⁵⁶ Therefore, it seems that while the regulator is actively trying assert a role in deterring unconscionable conduct in relation to financial services it is constrained by the terms of the unconscionability provisions, which as the results of three test cases show, catch only the most blatant forms of unconscionable conduct.¹⁵⁷ While the outcome of some of the test cases may have been disappointing from the regulator's perspective they have demonstrated the potential width of its powers to act in appropriate cases.

Financial sector codes of conduct

ASIC's powers to approve and monitor financial services sector codes of conduct¹⁵⁸ also provides scope for it to be proactive in generally promoting practices consistent with the objectives upon which the statutory prohibition against unconscionability are premised. While voluntary codes address industry specific issues and consumer problems not necessarily covered by legislation, under the statutory criteria for code approval in s 1101A(3) *Corporations Act* ASIC may only approve a code which is not inconsistent with the *Corporations Act* or any other law of the Commonwealth under which ASIC has regulatory responsibility. Additionally, ASIC must consider whether a relevant code promotes the provision of 'fair, honest and professional services'.¹⁵⁹ These powers to approve industry codes, although not yet exercised to date, potentially give the regulator the power to assess the provisions of codes to determine the extent to which they are consistent with the ASIC Act unconscionability provisions. The Banking Code's latitude in the treatment of 'all money's clauses in guarantees, discussed above, could potentially come under the scrutiny of ASIC under the powers vested in it under s 1101A *Corporations Act*. The Code arguably permits a bank to enforce an 'all moneys' guarantee many years after the initial guarantee had been signed in circumstances

¹⁵⁵ [2003] FCA 1516 (18 December 2003).

¹⁵⁶ Ibid [343]-[344].

¹⁵⁷ See the arguments of Robert Gardini above n 18.

¹⁵⁸ See s 1101A *Corporations Act 2001* (Cth) which provides ASIC with the power to approve and monitor, but not mandate financial services sector codes of conduct and ASIC Policy Statement 183 ASIC Policy Statement 183, Approval of Financial Services Sector Codes of Conduct (available at www.asic.gov.au). Until 2003 ASIC was responsible for monitoring industry compliance with the Code of Banking Practice. The terms of the revised Code, which were issued on 1 August 2003, provide for the establishment of an independent committee to be responsible for monitoring and ensuring compliance with the Code in the future.

¹⁵⁹ Policy Statement 183, ibid [47].

which, applying the 'not inconsistent test' may be regarded as unconscionable within the meaning of ss 12CC ASIC Act/ 51AC TPA. It is hard to envisage how such action could be construed as necessary to protect the best interests of the bank.

Use of the Injunctive power

Within the context of the current ASIC/TPA Act regime, it may be possible for some degree of general control over unfair terms to be achieved through the use of the injunctive remedy, although that approach has been used very rarely. Declarations of contraventions may also play a role in generally signalling accepted standard of conduct.

Under s 12 GD ASIC Act/s 80 TPA, the regulator and, indeed, any other party, can seek an injunction to restrain contraventions of the Act. An injunction might therefore be sought to restrain continuing use of an abusive term in a financier's standard contract on the basis that such use would constitute unconscionable conduct. If granted, an injunction of this kind would obviously have a general impact. The New South Wales Law Reform Commission,¹⁶⁰ briefly noted that the implementation of a preventative approach can be achieved through powers under the TPA.¹⁶¹ Section 80 of the TPA allows the court to grant an injunction in terms it deems appropriate in relation to contraventions of the Act. The Commission said:

It is possible that a similar [preventative] approach may be achieved by a broad power to grant injunctions to prevent conduct in breach of provisions under the trade practices legislation relating to unconscionable conduct and misleading and deceptive conduct. The provisions, however, remain untested in this regard.¹⁶²

Since those comments of the Commission, the ACCC has in fact had recourse to the injunctive powers of the TPA in a guarantee case. The case of *ACCC v National Australia Bank Ltd*¹⁶³ indicates the potential scope of a preventative approach utilising the injunctive power in guarantee cases. The case is of significance in illustrating the flexibility of remedies and orders which can be obtained for breach of s 51AA TPA. It is important to note that these kinds of proceedings can be brought against financial institutions and lenders generally, not just banks. The ACCC brought proceedings alleging that the bank had acted unconscionably in obtaining and enforcing a personal guarantee for \$200,000 from a wife as security for a business loan to a company of which

¹⁶⁰ New South Wales Law Reform Commission, Issues Paper 17 (2000) *Guaranteeing Someone Else's Debts* [2.108]-[2.103].

¹⁶¹ Or similarly, in New South Wales by the use of s 10 of the *Contracts Review Act 1980*, a provision which has rarely been used but allows the relevant Minister to apply for a court order restricting the terms on which a person may enter into a contract of specified class of contracts if the person 'has embarked, or is likely to embark, on a course of conduct leading to the formation of unjust contracts'.

¹⁶² Above n 29 [2.112].

¹⁶³ Unreported, Federal Court of Australia, 5 June 2001 No T 22 of 2000.

her husband was a director. The ACCC alleged that when the bank sought the guarantee, it did not explain its nature or effect or advise her that she should obtain independent legal advice. The ACCC also alleged that the bank knew the borrower company was in serious financial difficulty but did not inform the wife. A year later the bank demanded payment of the company's debts to the bank secured by the guarantee. The ACCC alleged that enforcement of the guarantee resulted in the sale of the Ashton's family home as NAB required the entire sale proceeds to be paid to the bank. The couple's home was used as security. The Federal Court declared that the bank had acted unconscionably in its dealings with the wife. The case was an extreme example of vulnerability on the part of the guarantor, who was not a director or shareholder of the company and whose husband was totally incapacitated at the time. While she would no doubt have made out a *Garcia* defence, the proceedings brought under s 51AA avoided protracted litigation and enabled the case to be resolved by mediation and consent orders.

The Court ordered, by consent, injunctions against the bank and one of its managers to restrain them from obtaining personal consumer or business guarantees in Tasmania without properly explaining the nature of the guarantee and the need to obtain independent legal advice before signing the guarantee. The Court also ordered by consent that the bank include in its internal Lending Manual a statement requiring its entire lending staff throughout Australia to strictly comply with these procedures when obtaining personal consumer or business guarantees. It ordered the bank to circulate to its entire lending staff throughout Australia a bulletin to this effect.

The objective of these proceedings initiated by the ACCC was not only to obtain a favourable result binding on the immediate parties to the litigation, but also to apply normative standards to the same or similar cases in the future. There is thus scope for the regulator, in appropriate cases, to obtain injunctions and seek consent orders restraining lenders from using onerous 'all moneys' clauses. In the *National Australia Bank* case, above, the ACCC brought proceedings based on a contravention of s 51AA of the TPA. There is greater scope for attacking 'all moneys' clauses under s 12CC ASIC Act/s 51AC TPA. The expanded indicia for unconscionability now contained in the small business provisions mean they are wider in scope than the 'unwritten law' provisions.

However, the injunctions in ACCC came about as a result of court sponsored mediation between the parties. There has not been a similar success in the use of the injunctive power in actual litigated disputes. For example, in a number of test cases the regulator has sought to deal with alleged contraventions of provisions that involve major detriment to consumers by seeking resort to the injunctive remedy. In *ACCC v Oceana Commercial Pty Ltd*¹⁶⁴ widely framed injunctions against a bank, restraining it from lending money, except on particular terms and requiring it to provide advice whenever someone informs it that a customer has been misled as to the value of a property, were

¹⁶⁴ [2003] FCA 1516.

refused. Keifl J held that the bank had not acted unconscionably and therefore did not find it necessary to determine the issue of the source of the injunctive power and whether it was available to the regulator in the circumstances. However, the court did make declarations of contraventions against a number of other respondents in the case, stating:¹⁶⁵

Declarations which simply reflect findings of contraventions are not always warranted but I accept that they may be useful in public interest litigation where they serve to vindicate legislation aimed at protection of consumers.

Injunctions against a bank, in the context of misleading and deceptive conduct, were refused on discretionary grounds in *ACCC v Commonwealth Bank*¹⁶⁶ despite evidence of behavior by bank which contravened the Act. The court ordered instead declarations and corrective advertising as an appropriate way of addressing misleading and deceptive conduct by the bank.

It seems that the injunctive power has not been widely utilized, and is likely to play, at most, a minor role in regulating unconscionable conduct in the financial sector.

Implementing specific unfair contract terms legislation?

While the codification of different types of unconscionability concerning ‘financial services’ remains a useful tool for informing financiers of the manner in which their conduct may be held unconscionable, as this paper has outlined, it is not enough to regulate the use of one-sided standard form contracts, commonly used in the financial sector. The issue of unfair standard terms, particularly as used in the financial sector, needs to be addressed more directly than it is under the current unconscionability and consumer protection provisions of the ASIC Act/TPA. It also needs to be addressed in a way that facilitates action by the regulator to deal with unfair terms at a general or systemic level. As this paper has explained, existing prohibitions against unconscionable conduct in equity and in the TPA/ASIC Acts¹⁶⁷ do not adequately deal with ongoing concerns involving substantive unfairness in the guarantee context. Contracts of guarantee, like other types of standard form contracts used in the financial sector, are often characterised by draconian provisions, heavily weighted in favour of the financier and, particularly in the case of ‘all moneys’ terms, going beyond what is legitimately needed for the financier’s protection. There is a strong case to be made for the implementation of unfair contracts legislation at the national level. This legislation could be seen as an important adjunct to existing unconscionability legislation, which, as the results of recent test cases show, catches some, but not all types of overreaching behaviour in the bargaining process. The provisions do not catch transactions which the

¹⁶⁵ Ibid [343].

¹⁶⁶ [2003] FCA 1397 [31].

¹⁶⁷ Mirrored in the State/Territory Fair Trading Acts.

courts may regard merely as a 'hard bargain' and, more significantly, they do not catch contracts tainted by substantive unfairness in their actual terms.

A uniform, national approach to harsh and unconscionable standard form contracts is needed. The problem of unfair terms is being more actively dealt with in other countries, which have introduced legislation specifically targeting unfair contract terms. This legislation is predicated upon the concept of 'abstract control' which, in the absence of knowledge about the precise circumstances of the transaction, generally prevents businesses from imposing 'unfair' contract terms on consumers. A useful approach to defining 'unfairness' is the European Directive on Unfair Terms in Consumer Contracts.¹⁶⁸ Reforms in the United Kingdom,¹⁶⁹ implemented in accordance with the European Directive treat a contractual term as unfair if, 'contrary to the requirement of good faith, it causes a significant imbalance the parties' rights and obligations under the contract'.¹⁷⁰ Examples include 'terms irrevocably binding the consumer to terms with which he or she had no real opportunity of becoming acquainted before the conclusion of the contract'.¹⁷¹ The term will not be binding and consumer regulators or other bodies can seek, by injunctive measures, to prevent their use. 'All moneys' clauses in guarantees are the sorts of 'take it or leave it terms' which may well be dealt with in this manner. The UK Law Commission noted that the *Unfair Terms in Consumer Contracts Regulations 1999* (UK) effect a form of 'abstract control'.¹⁷² There are some specific examples of 'abstract control' in Australian legislation¹⁷³ aimed at preventing entry into contracts with unfair terms, A recent example is the *Fair Trading Act 1999*(Vic) which includes provisions directly targeted at unfair consumer contracts.¹⁷⁴ The Victorian legislation is largely based on the *Unfair Contract Terms Act 1977* (UK) and, more specifically, on the *Unfair Terms in Consumer Contracts Regulations 1999* (UK) These UK regulations are, in turn, modeled on the relevant European Council Directive. Section 32W provides that:

¹⁶⁸ European Council Directive 93/13.

¹⁶⁹ *Unfair Terms in Consumer Contracts Regulations 1999* (UK).

¹⁷⁰ Ibid reg 5 (1).

¹⁷¹ Ibid Sch 2 cl 1 (i).

¹⁷² '[I]t must be the case that substantive unfairness alone can make a term unfair under [the UK Regulations]. This is because the Director General of Fair Trading and the bodies listed in Schedule 1 have the power to prevent the use of unfair terms and this may be done 'in the abstract' in the sense that the precise way in which the clause is presented to the consumer is unknown'. *Unfair Terms in Contracts* (2002) The Law Commission of England and Wales (Consultation Paper 166).

¹⁷³ An example, in the context of consumer guarantees, is the legibility and print size requirements under s 162(1) of the UCCC, which came into effect in 1996. A court may on the application of the relevant State Government consumer agency, prevent the lender using a non-complying provision in any guarantee.

¹⁷⁴ The *Fair Trading (Amendment) Act 2003* introduced part 2B, Unfair Terms in Consumer Contracts, into the FTA.

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.

Consumer Affairs Victoria, in its recently published guidelines on the new unfair contract terms provisions, adopts the following definition of good faith:

A principle of fair and open dealing; that is 'playing fair', especially when one party is in a position of dominance over a consumer who is vulnerable relative to that dominance or power... Good faith is intended as a broad term. For example, it could ask that a supplier take positive steps to make sure that a contract is fair, such as bringing a term in question to the consumer's attention, rather than hiding it away in the 'small print',¹⁷⁵

Unfair credit contracts and guarantees are not covered by the Victorian fair trading legislation, on the basis that they are covered by the UCCC¹⁷⁶. However, as already noted in this paper, the UCCC provisions on unjust contracts deal with procedural deficiencies, they do not operate to set aside a guarantee that is substantively unfair.

The issue of uniform unfair contract law has recently come under the scrutiny of the Standing Committee of Officials of Consumer Affairs ('SCOCA') national working party, which released its Discussion Paper on 1 February, 2004.¹⁷⁷ The paper noted that in recent times it is the standard form contract which has become the focus of allegations of unfairness¹⁷⁸. Clauses in financial services contracts, including guarantees, were amongst the types of unfair terms noted in the Discussion Paper.¹⁷⁹ The Discussion Paper highlighted the limitations of the common law and existing statutory provisions in providing systemic regulation of unfair contractual terms and considered five models¹⁸⁰ which could be implemented, providing a preliminary analysis of the costs and benefits of the various options.¹⁸¹ The working party considered the UK model in detail, and is presently seeking responses to its options. Consumer bodies have responded favourably to SCOCA's proposal for a national approach to regulating unfair contract terms.¹⁸² On the other hand, lenders have expressed some legitimate concerns about the appropriate model to adopt in terms of financial services' contracts. The

¹⁷⁵ Consumer Affairs Victoria, "Preventing unfair terms in consumer contracts", Guidelines on unfair terms in consumer contracts Amendments to the Fair Trading Act 1999 (2003), 4.

¹⁷⁶ Section 32V(a).

¹⁷⁷ Discussion Paper, *Unfair Contract Terms*, above n 20.

¹⁷⁸ Ibid [1.2].

¹⁷⁹ Ibid, Annexure III p 45.

¹⁸⁰ Ibid [2.1.1]-[2.1.5].

¹⁸¹ Ibid [4.1]-[4.5].

¹⁸² See above n 34.

Australian Bankers' Association, for example, points¹⁸³ to problems which might be encountered in adopting an unfairness test such as that set out in s 32W of the Victorian *Fair Trading Act*. Essentially it is argued that such a provision would not promote the business efficacy of financial services contracts, in particular long-term contracts, which require unilateral variation charges and are not open to individual negotiation.

It remains to be seen whether the Commonwealth government will be persuaded to implement unfair contract terms legislation. While the State and Territory governments have demonstrated their commitment to work towards a national regulatory response,¹⁸⁴ it is not clear whether the Commonwealth government supports the case for unfair contracts terms legislation.¹⁸⁵ This paper has demonstrated that concerns about unfair or unconscionable guarantees, to the extent that they go to the inherent or substantive unfairness of the transaction, cannot be adequately addressed by the financial services unconscionability provisions now contained in the ASIC Act. ASIC has itself acknowledged the limitations of those provisions, while accepting that available data points to the high incidence of unfair contract terms in financial services contracts.¹⁸⁶ To some extent the problem is one that centers on concerns about 'ethical lending'.

Corporate social responsibility is increasingly seen as a concept that should be embraced and promoted by financiers, particularly in regard to their lending policies. While banks which adhere to the Code of Practice have to some extent accepted this responsibility¹⁸⁷ there is a case for arguing that such values need the imprimatur of legislation which covers all lending transactions, not just the banking sector. Relying on voluntary codes to target unfair practices in the taking of guarantees will ultimately prove effective. It is to be hoped that unfair contract terms legislation can be implemented, if not at the Commonwealth level, then at least by an appropriate model, perhaps similar to the UCCC model, binding all states and territories to a systemic approach to eliminating substantively unfair terms in contracts.

For its part, ASIC notes the deficiencies in unconscionability legislation in dealing with situations involving substantive unfairness, yet remains equivocal about the introduction of unfair contract terms legislation. ASIC believes that:¹⁸⁸

¹⁸³ Australian Bankers' Association, Submission to the Victorian Consumer Credit Review, 16 September 2005. The Victorian Minister for Consumer Affairs launched the Consumer Credit Review on 10 May, 2005.

¹⁸⁴ Joint Communique, Ministerial Council on Consumer Affairs, Friday 2 September 2005 (available at www.consumer.gov.au).

¹⁸⁵ Chris Pearce, Parliamentary Secretary to the Treasurer has indicated that the federal government has no plans to initiate any legislation on unfair terms and that 'the case for intervening in the market to regulate unfair contract terms has not been made', *Financial Review*, 20 May 2005.

¹⁸⁶

¹⁸⁷ Articulated in Clause 25.1. See above n.

¹⁸⁸ ASIC Submission to SCOCA Working Party on Unfair Contract Terms, March 2004.

[T]he UK experience suggests that passing legislative amendments mirroring the Unfair Terms in Consumer Contracts Regulations is, of itself, unlikely to have a significant impact on the use of unfair contract terms. Regulatory agencies would also need to consider establishing appropriate administrative frameworks and actively enforcing the new regime through government action. If enforcement of unfair terms regime were left to private litigants, the result is likely to be similar to that produced under the current unconscionable conduct regimes.