



A.C.N. 006 382 314

SUBMISSION FOR THE  
SENATE STANDING COMMITTEE ON ECONOMICS  
WITH REGARD TO THE  
A STATUTORY DEFINITION FOR UNCONSCIONABLE  
CONDUCT IN THE TRADE PRACTICES ACT 2007

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## Terms of Enquiry

*The need to develop a clear statutory definition of unconscionable conduct for the purposes of Part IVA of the Trade Practices Act 1974 and the scope and content of such a definition. Currently, sections 51AA, 51AB and 51AC of the TPA prohibit 'unconscionable conduct' but the expression is not defined in the Act. The Courts have been reliant on case law to guide their rulings under these sections. The Act refers to matters to which the Courts may and may not have regard in determining whether there has been unconscionable conduct.*

Thank you for the opportunity to participate in the review of the *Trade practices Act 1974* and especially the issues around unconscionable conduct.

POAAL has for many years been a strong advocate on the need for reform in this area of the law.

The Post Office Agents Association Limited (POAAL) is the national industry body representing Licensees that operate nearly 3,000 Licensed Post Offices in Australia. The organisation's members also include mail contractors that deliver mail and parcels for Australia Post. This is one of the largest franchising and contractor operations in Australia.

### **Definition: Unconscionable**

1. *unreasonably excessive*
2. *not in accordance with what is just or reasonable*

### **unconscionable behaviour**

3. *not guided by conscience, unscrupulous*

### **Macquarie Concise Dictionary**

1. *Not restrained by conscience; unscrupulous:*
2. *Beyond prudence or reason; excessive:*
3. *unscrupulous or unprincipled:*
4. *excessive in amount or degree:*

### **Various web-based dictionaries**

Unconscionable conduct is unfair or unreasonable conduct in business transactions that goes against good conscience. This can occur in transactions between businesses or in transactions between businesses and consumers.

### **ACCC Website**

**"The courts have described unconscionable conduct as:**

- serious misconduct or something clearly unfair or unreasonable
- conduct which shows no regard for conscience
- conduct which is irreconcilable with what is right or reasonable."

**Guide to Unconscionable Conduct – ACCC - May 2008**

It has been the experience of our industry that the protections and support anticipated in the Act and the associated codes of conduct have not been realised. Further, that the bodies charged with its enforcement have lacked the power to give proper effect to the principles proclaimed in the legislation.

This situation is exacerbated by the lack of case law to establish a framework in which the legislation should work. In retrospect it is evident that case law is unlikely to provide these principles within a meaningful time frame. Potential complainants taking action to create these precedents are, by definition, unlikely to have the resources to pursue remedies in a court of record. It will therefore be many decades before the framework is established.

Leadership in establishing an appropriate body of case law might be expected from related regulatory authorities such as the Australian Competition and Consumer Commission. The ACCC has brought action for unconscionable conduct and while resolution has provided some help with the body of case law many of the cases also resolve before judgements are reached. The ACCC also readily admits that it is not able to investigate all allegations of unconscionable conduct.

POAAL has drawn the attention of the ACCC to a number of events considered to be a misuse of power by Australia Post in relationships with Licensees and Mail Contractors. In doing so POAAL has sought remedies under the *Trade Practices Act* and the *Franchising Code* to protect the rights of its members or to simply redress the unilateral and unfair decisions of a large organisation.

The issues cover a broad range of matters. Examples include arbitrarily changing the area of the businesses premises that are subject to the franchise agreement, refusing to re-negotiate mail contracts despite material changes to fuel costs and actively competing for or transferring the customers of franchisees to the corporate operation. All of these are to the substantial detriment of the franchisee or contractor.

Australia Post also uses its capacities to delay or frustrate the outcome of negotiations or mediation when a contractor attempts to resolve these matters

In each case, the ACCC has concluded that the test related to unconscionable behaviour under the *Trade Practices Act* was unlikely to have been met to a level required for a prosecution to succeed.

The term unconscionable has a meaning related to extreme and absolutely abhorrent behaviour. It would appear that the ACCC sees that the test for such

behaviour is difficult to determine, that it can only operate where extreme (not just “unfair” or even “bullying”) behaviour can be established or that there is some public benefit in the prosecution.

Of course there is a wide range of other behaviour expressed by a major party in its relationship with a smaller party that denies equity, fairness and in the franchising industry a “mutually beneficial relationship”. The *Trade Practices Act* seems to be reserved for the extreme nature of unacceptable behaviour. This leaves far too much room to allow a large organisation to use its power inappropriately but still just short of that which is unconscionable. There is no remedy other than in extreme situations and most large organisations will know enough to stay just short of that test. Using the test of public interest there may also be a range of unconscionable conduct that goes unaddressed by the ACCC or the courts.

In other reviews of this issue POAAL has proposed that companion elements be established in the *Franchising Code* that would empower the ACCC to require explanations of franchisors about their behaviour. These companies could then be put on notice that the pattern of their behaviour as well as the specific instances raised needs to be modified if it is not to receive some sanction from the ACCC. This would be more productive than attempting to redress problems or seek remedies once they have occurred.

Recourse to the services of an Ombudsman (or similar) would provide greater protection for complainants against large organisations, even where the large organisation’s actions fall short being unconscionable.

Finally, if the government is serious about principles of unconscionable conduct and the creation of appropriate business practices then it should require its own agencies to act in an appropriate manner. They should be examples of the principles established in the *Trade Practices Act* and the *Franchising Code of Practice*. This is similar to governments adopting model litigant codes of practice in its business and community dealings. It is extremely disappointing that a major government agency such as Australia Post does not train its people and adopt systems that follow these principles.

To redress these matters it is recommended that

- the *Trade Practices Act* be expanded to deal in more detail with the principles around unconscionable conduct and that explicit requirements be expressed in the legislation;

- the *Franchising Code* be expanded to deal with behaviour which is not at the level of being unconscionable, but acts to the detriment or fails to be mutually beneficial to the parties;
- the ACCC's responsibilities be expanded to include investigative powers, similar to those of Australian Ombudsmen, to examine complaints of behaviour short of that considered unconscionable but operating to the detriment of the offended party; and
- the government adopt a code of practice compelling its agencies to act in good faith and a manner that models the principles of the *Trade Practices Act*.

It is essential that the principles and standards associated with unconscionable conduct be established. This is crucial if the broad range of small and medium business enterprises that make up the vast majority of the country's commerce are to operate with reasonable certainty about the rights and responsibilities they can expect.

### **Obligation to Act in Good Faith**

A further measure to address the issues of unconscionable conduct is to create explicit obligations to act in good faith. For the franchising industry this should be incorporated into the *Franchising Code* in a manner that matches or enhances the *Trade Practices Act*. The current provisions do not create an explicit obligation to act in good faith and this emphasis needs to be addressed in the Code.

At common law there is no obligation upon contracting parties to act in good faith in connection with their dealings. This principle, however, is only suited to adversarial situations. It is not suited to a franchising relationship where the parties are expecting to work together collaboratively in what is effectively a "partnership".

Legal partnerships create an obligation on the participants to act in good faith towards each other. A franchising relationship operates like a partnership (at least commercially) rather than a contract, so the good faith principle should apply. There should be a mutual good faith obligation. Interestingly, the Australia Post manual related to the operation of its franchise system emphasises that the parties will create a "mutually beneficial relationship". Such principles may have more success of being adopted in practice if they are incorporated into the *Franchising Code of Practice*.

From our experience, in the absence of an express good faith obligation, Australia Post sometimes acts in a manner that disregards the interests of the franchisee. When challenged, Australia Post relies on the strict wording of the Code to protect itself. This black-letter law interpretation is inconsistent with the spirit of a franchise.

The only way to ensure that the parties act in others' mutual benefit is to add a specific requirement to the Code that the parties operate in good faith.

It would express a principle of active responsibility to behave properly to one another rather than creating a punishment for acting inappropriately.

It is recommended that:

- an obligation to act in good faith be created in the Franchising Code of Practice; and
- consideration is given to legislative provisions that replace the present common law requirements regarding good faith dealings.

### **Dispute Resolution Processes**

The next step in dealing with unconscionable conduct is the means by which the issue is to be resolved.

The ACCC receives approximately 1,000 complaints each year from consumers and businesses about franchising. However, many complaints fall outside the jurisdiction of the ACCC and the *Trade Practices Act 1974* because they are of a private contractual nature or cannot be substantiated to the degree required to allow further action.

Our experience is that a satisfactory outcome is rarely, if ever, obtained for our members from the process managed by the Office of the Mediation Advisor (OMA). In its long years of experience POAAL is unaware of outcomes from this process that achieves satisfaction for both parties at the same time.

Franchisees in our industry are often reluctant to proceed with the OMA review because:

- they lack skills and resources to adequately document and research the dispute, especially when compared to the means available to the franchisor;
- they fear later retribution from the franchisor;
- costs are high, particularly if the dispute is over a minor matter;

- franchisors mostly come to mediation resolved to maintain their original position or send a representative to mediation lacking the authority to achieve a result;
- franchisors draw out proceedings, placing immense pressure on franchisees, who, faced with the mounting costs of mediation and the need to return to their business, succumb to the franchisor's demands.

A better model is the dispute resolution process involving a stepped procedure with early discussion and resolution at the lowest management level. Provision is made for higher referral if the dispute is not resolved quickly and to the satisfaction of both parties. Such a system was established through negotiation with Australia Post by POAAL. It works well except in situations where Australia Post forces it to formal mediation.

It is recommended that the effectiveness of the Office of the Mediation Advisor be reviewed.

### **Other Jurisdictions**

In other overseas jurisdictions similar problems seem to exist. In the United States it has been noted the franchisor/franchisee relationship can easily cause conflict if either side is incompetent (or not acting in good faith).

Franchise agreements in the United States are described by industry authorities as unilateral contracts or contracts of adhesion wherein the contract terms generally are advantageous to the franchisor. This is especially the case when there is conflict in the relationship.

The legal internet website NOLO, ([www.nolo.com](http://www.nolo.com).) indicates that one of "Ten Reasons Not to Buy a Franchise" was the "Lack of Legal Recourse", which indicates "As a franchisee, you have little legal recourse if you're wronged by the franchisor".

In the USA most franchisors make franchisees sign agreements waiving their rights under federal and state law and in some cases allowing the franchisor to choose where and under what law any dispute would be litigated. The Federal Trade Commission (FTC) investigates only a small minority of the franchise-related complaints it receives.

In the United Kingdom, there are no franchise-specific laws. Franchises are subject to the same laws that govern other businesses. For example, franchise

agreements are produced under regular contract law and do not have to conform to any further legislation or guidelines.

## **Conclusion**

The franchise industry in Australia is a growing sector of commerce. However, the disproportionate bargaining power of the franchisor over the franchisee is still unresolved in a manner that allows this type of industry to operate satisfactorily. Creating explicit obligations to act in good faith and compelling government agencies to adopt positive business model practices are important steps in creating the right framework for the industry to expand.

Waiting for the courts to establish sufficient precedent to guide and resolve unconscionable conduct is many years off and initiatives to address the issue needs to come from government.

## **Summary of recommendations**

It is recommended that

- the *Trade Practices Act* be expanded to deal in more detail with the principles around unconscionable conduct and that explicit requirements be expressed in the legislation;
  - the *Franchising Code* be expanded to deal with behaviour which may not be at the level of being unconscionable, but acts to the detriment or fails to be mutually beneficial to the parties;
  - the ACCC responsibilities be expanded to include investigative powers, similar to those of Australian Ombudsmen, to examine complaints of behaviour short of that considered unconscionable but operating to the detriment of the offended party;
  - the government adopt a code of practice compelling its agencies to act in good faith and a manner that models the principles of the *Trade Practices Act*;
  - an obligation to act in good faith be created in the Franchising Code of Practice and consideration be given to legislative provisions that replace the present common law requirements regarding good faith dealings; and
  - the effectiveness of the Office of the Mediation Advisor is reviewed.
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