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Statutory Unconscionability and Guarantees

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STATUTORY UNCONSCIONABILITY AND GUARANTEES

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Introduction

Cases involving guarantees have proved a fertile ground for the courts to consider the parameters of unconscionability, both in equity and under statute. Vulnerable guarantors continue to enter into sureties which may be both improvident and unfair. Recent cases have involved wives,¹ as well as elderly parents,² siblings,³ de facto spouses⁴ and others in a close relationship to the guarantor.⁵

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¹ *Burrawong Investments Pty Ltd v Lindsay* [2002] QSC 82.

² *Watt v State Bank of New South Wales*.

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

⁴ *Liu v Adamson* [2003] NSWSC 74; *State Bank of NSW v Hibbert* [2000] NSWSC 628.

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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. As this article will explain, some of the recent provisions codifying unconscionability appear to be replacing the traditional *Amadio* principles with broader notions of unfair exploitation.

Statutory remedies to set aside unconscionable contracts, including guarantees, are of relatively recent origin. While there are advantages⁸ in pursuing an action for statutory unconscionability, the enactment of a raft of unconscionability provisions across a range of statutes at both state and federal levels has left many perplexed. This article 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' and considers how those provisions apply in the guarantee context. The Uniform Consumer Credit Code ('UCCC')⁹ and State and Territory legislation also provide relief from unjust or unconscionable consumer contracts.¹⁰ However, the focus of this paper is on statutory unconscionability at the Commonwealth level, with particular attention given to provisions affecting guarantors of small business debts. 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.

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

⁸ In particular, since 2001 plaintiffs may pursue a remedy in damages for breach of the TPA/ASIC Act unconscionability provisions.

⁹ The UCCC regulates guarantees given to support debts of a wholly or predominantly, household, personal or domestic nature: ss 6 (5) and 50.

¹⁰ See, for example, 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.

As a result of financial services reforms¹¹ 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. Those provisions deal 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.

This article highlights some limitations of the various provisions dealing with unconscionable conduct in financial services. 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 law¹² but the degree to which this is the case is still uncertain. The consumer unconscionability provisions have a limited role to play in the guarantee context, given that most problems have concerned guarantees given to support small business debts.¹³ There have not been many appellate decisions concerning the small business unconscionability provisions, so although clearly their terms are of a broader ambit than the equitable doctrine, their ultimate scope is yet to be determined. Those actions which have been successful have involved only 'the most egregious behaviour'.¹⁴ The scarcity of cases under these

¹¹ The *Financial Services Reform Act 2001* (Cth) introduced ss 12CA-12CC dealing with unconscionable conduct into the ASIC Act.

¹² See, for example, 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 Services Law Conference, Cairns, 6 September 2005. (<http://www.courts.qld.gov.au/publications/articles/speeches/2005>).

¹³ See, for example, *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] NSWSCA 53 (Unreported, New South Wales Court of Appeal, Handley, Giles and Heydon JJA, 14 March 2001); *State Bank of New South Wales v Chia* [2000] 50 NSWLR 587; *Burrawong Investments Pty Ltd v Lindsay* [2002] QSC 82.

¹⁴ Fair Trading Coalition, 'Trade Practices Act Reform-Policy Paper', 4 August 2003 (available at www.mtaa.com.au/news.ftcpolicypaper.pdf). See also, Robert Gardini, 'The Dawson Review-A Small Business Perspective' (2003) 9(1) *UNSWLJ Forum*.

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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. In recent times commentators¹⁷ and consumer and reform bodies¹⁸ 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 common law and statutory prohibitions against unconscionable conduct are inadequate in this regard.

Background to the TPA Unconscionability Provisions

The starting point of the analysis in this article 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 52A¹⁹ 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'.²⁰ Although the Act does not define 'unconscionable conduct', s 51AB

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. It has been renamed the Trade Practices (Legislation Amendment) Bill (No 2) 2006.

¹⁷ 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).

¹⁸ Standing Committee of Officials of Consumer Affairs ('SCOCA') National Working Party Discussion Paper, *Unfair Contract Terms*, January 2004 [2.1] (available at <http://www.consumer.gov.au/html/publications.htm>). A list of submissions to the SCOCA Working Party on Unfair Contract terms may be found at www.fairtrading.qld.gov.au).

¹⁹ Section 52A was inserted in 1986.

²⁰ 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

(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*.²¹ The equitable doctrine is confined to procedural unfairness; that is, unfairness in the bargaining process.²² 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 surrounding the taking of the guarantee. 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.²³

Transactions involving unconscionable conduct in the business context 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 principles of unconscionability, while allowing access to remedies under the TPA.²⁴

'personal domestic or household use or consumption' in the TPA' (1998) 6 *Current Commercial Law* 45.

²¹ *ACCC v Oceana Commercial Pty Ltd* [2003] FCA 1516 [336]; *ACCC v Simply No-Knead (Franchising) Pty Ltd* (2000) 104 FCR 255, 265.

²² For a discussion of the failure of both the common law and statutory provisions in addressing substantive unfairness issues, see SCOCA National Working Party Discussion Paper, above n 18.

²³ Sections 51AB (2) (b) and (e).

²⁴ Explanatory Memorandum to the *Trade Practices Legislation Amendment Act 1992* (Cth), clause 41.

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Section 51AC was introduced in 1998²⁵ 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 excludes transactions greater than \$3 million or those in which the target business is a listed public company. If a proposed increase of the threshold to \$10 million goes ahead,²⁶ the provision will cover most guarantees of small business debts. The increase may well relegate s 51AA to only a 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.

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 all the circumstances' in those provisions. For example, in *Hurley v McDonald's Australia Ltd* the Full Court of the Federal Court held:

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'....²⁷

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. A good example is the inclusion of clauses imposing a continuing and unlimited liability upon vulnerable guarantors. Known as 'all moneys' or 'all accounts' guarantees,²⁸ these may frequently be unexpected or misunderstood by the guarantor.²⁹ This kind of unfairness can be more appropriately remedied by laws which specially target unfair

²⁵ *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.

²⁶ See above n 16.

²⁷ (2001) 22 ATPR ¶41-741, 40, 586.

²⁸ 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' (2004) 4 (2) *QUT Law and Justice Journal* 245.

²⁹ See, for example, *Commonwealth Bank of Australia v Horkings* [2000] VSCA 244; *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395; *State Bank of New South Wales v Chia* (2000) 50 NSWLR 587; *ANZ Banking Group Ltd v Karam* [2005] NSWCA 344.

contract terms, and reforms in this area are still pending in Australia.³⁰ Given that the principles of unconscionability continue to play a role in litigation involving allegations of improvident and unfair guarantees it is important to consider whether the boundaries of statutory unconscionability are expanding, as argued in the academic commentary,³¹ or whether the provisions are of little practical utility to guarantors as argued by consumer bodies.³²

Unconscionable Guarantees-ASIC Act or TPA?

Determining whether conduct in relation to a 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 'financial services'.³³ 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 is an overlap between the TPA and ASIC Act small business unconscionability provisions. This issue of overlap, however, can be dealt with under the rule of statutory construction that a later specific Act, in this case the ASIC Act, impliedly overrides an earlier Act, such as the TPA which has a general operation.

³⁰ See the SCOCA Discussion Paper, above, n 18.

³¹ There is ample literature explaining this trend in recent times. See, for example, 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.

³² 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, above n 17.

³³ Section 51AAB. Similarly, the consumer protection provisions of Part V TPA do not apply to 'financial services': s 51AF.

Definition of 'Financial Services'

The starting point in determining which statute applies, therefore, is to consider whether conduct involving the taking of a guarantee 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 12 BAB 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.³⁴ 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.³⁵ 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 or who gives advice about a guarantee of obligations under a credit contract provides a financial service.³⁶
- 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.³⁷
- 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.

³⁴ Section 12BAB (a) and (b) ASIC Act.

³⁵ An amendment expanding the definition of 'financial services' to include credit facilities came into effect on 11 March 2002. See s 12BAA (7) (k).

³⁶ Sections 12BAB (1) (a) and 12BAB (1) (b). Section 12BAB (7)-(10) outlines the meaning of 'dealing' in a financial product. Section 12BAB (5) outlines the meaning of providing financial product advice.

³⁷ Sections 12CA, 12CB and 12CC ASIC Act.

- Section 51AC TPA is not excluded from operation in relation to ‘financial services’, but as a matter of statutory construction the ASIC Act takes precedence.

Given the relatively recent introduction of ASIC Act unconscionability provisions covering ‘financial services’, the case law 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 provisions governing unconscionability and misleading and deceptive conduct in the two Acts should not differ in any significant respect.³⁸

Guarantees and Unconscionability within the Meaning of the Unwritten Law

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

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, jurisprudence on the mirror provision in s 51AA will necessarily guide its meaning. According to the Explanatory Memorandum³⁹ accompanying the insertion of s 51AA into the TPA, this provision embodies the specific equitable concept of unconscionable conduct as recognized by the High Court in *Commercial Bank of Australia Ltd v Amadio*.⁴⁰ It undoubtedly also encompasses the ‘special wives’ equity’ established in *Yerkey v Jones*⁴¹ and reaffirmed

³⁸ See, for example, *GPG (Australia Trading) Pty Ltd v GIO Holdings* (2001) 117 FCR 23, 68 (Gyles J); *Vitarni Pty Ltd v Macquarie Bank* [2002] NSWSC 978 [68]; *Commonwealth Bank v Spira* [2002] NSWSC 905 [132] and *Reiffel v ACN 075 839 226 Ltd* [2003] FCA 194, [60], [65]. For a fuller analysis of the various cases suggesting the comparability of interpretation of overlapping TPA and ASIC Act provisions see Gail Pearson, above n 31. Pearson notes, at 107-8, 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).

³⁹ Explanatory Memorandum accompanying the Trade Practices Legislation Amendment Bill 1992 (Cth) [41]. The EM also refers to the High Court’s decisions in *Blomley v Ryan* (1956) 99 CLR 362.

⁴⁰ (1983)151 CLR 447.

⁴¹ (1939) 63 CLR 649.

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by the High Court in *Garcia v National Australia Bank Ltd*,⁴² given that the majority in that case, concluded that the old rule protecting guarantor wives was a specific sub species of a wider genus of unconscionability, although separate and distinct from the particular unconscionability principles outlined in *Amadio*.⁴³ Like the *Amadio* doctrine, the special wives' equity offers relief only from procedural unfairness. It is the failure to inform fully a volunteer wife, who has reposed trust and confidence in her husband, 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 the wife having entered into an improvident or unfair transaction.

Whether the unwritten law also incorporates other broader notions of unconscionability which extend to specific equitable doctrines such as estoppel, unilateral mistake, and relief from forfeiture is still open for debate.⁴⁴ It is worth noting that the High Court majority in *Garcia* referred to a passage from the judgment of Mason J in *Amadio* where his Honour said: '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'.⁴⁵ 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.⁴⁶

⁴² (1998) 194 CLR 395

⁴³ (1998) 194 CLR 395, 408. See Horrigan, above, n 31, 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'.

⁴⁴ The Full Federal Court in *ACCC v Samton Holdings* (2002) 117 FCR 301, 318, 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 Dal Pont, 'The Varying Shades of "Unconscionable Conduct"-Same Term Different Meaning' (2000) 19 *Australian Bar Review* 135. Horrigan, above n 31, 175, who notes that the meaning of s 51AA requires clarification by the High Court.

⁴⁵ (1998) 194 CLR 395, 408.

⁴⁶ In *ACCC v Samton Holdings Pty Ltd* (2002) 117 FCR 301, 319, 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.

Limitations of Unconscionability under the Unwritten Law

Guarantees cases 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 makes clear that the general statutory provisions incorporating the judge-made law apply to guarantees. What remains unclear is the scope of the unwritten law. This is important to determine in the guarantee context, because while s 12CC of the ASIC Act remains subject to the \$3 million threshold the unwritten law will continue to be relevant to disputes in the financial services sector, including, inter alia, disputes involving guarantees.

The Amadio doctrine-Situational disadvantage?

Section 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 disadvantage⁴⁷ 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.⁴⁸

The *Amadio* doctrine focuses on the circumstances surrounding the taking of the guarantee and 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.⁴⁹

⁴⁷ 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'.

⁴⁸ (1983) 151 CLR 447, 462 (Mason J).

⁴⁹ See, for example, *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.

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In *ACCC v CG Berbatis Holdings Pty Ltd ('Berbatis')*⁵⁰ the High Court confined s 51AA TPA within narrow boundaries. The majority, referring to the *Amadio* test, emphasised that a mere inequality in bargaining position would not suffice to establish unconscionable conduct. The weaker party would have to suffer from a disadvantage or disabling condition that was 'special' in the sense that it seriously impaired their capacity to make a judgment about their best interests.⁵¹ It will not avail for the weaker party to argue that they have been commercially pressured into making a 'hard bargain' as a result of an inevitable disparity in bargaining position.

At first instance in *Berbatis*⁵² French J had argued that special disability might also encompass circumstances, which he termed 'situational disadvantage', arising from a position of acute financial or legal disadvantage as well a special disadvantage in the traditional sense of some inherent personal difficulty.⁵³ The High Court, while dismissing the ACCC's claim on the facts, did not determinatively rule that 'special disability' might not be based on situational factors, however the thrust of the majority judgments favoured the traditional *Amadio* approach.

More recently, in *ACCC v Oceana Commercial Pty Ltd*⁵⁴ Keifel J, considering the scope of s 51AA TPA, observed:

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.⁵⁵

The *Berbatis* approach was also followed recently by the New South Wales Court of Appeal in *ANZ Banking Group Ltd v Karam*,⁵⁶ a guarantee case concerning alleged unconscionability under the general law and the *Contracts Review Act 1980* (NSW). The decision confirms that a finding of unconscionable conduct will not be supported in the absence of a special disability or disadvantage on the part of the weaker party. An interesting issue which arose in the *Karam* case concerned the interaction of the

⁵⁰ (2003) 214 CLR 51.

⁵¹ (2003) 214 CLR 51, 77-78 (Gummow and Hayne JJ), at 11 (Gleeson CJ). Kirby J dissented.

⁵² *ACCC v C G Berbatis Holdings Pty Ltd* [2000] ATPR ¶41-778, 41,196-7.

⁵³ Above n 47.

⁵⁴ [2003] FCA 1516.

⁵⁵ *Ibid* [329].

⁵⁶ [2005] NSWCA 344.

doctrines of unconscionability and economic duress. Like *Berbatis*, the *Karam* case involved parties entering a contract under circumstances of acute financial difficulties, of which the other party, in this case the bank, was aware. The trial judge made a finding of unconscionability based on his conclusion that illegitimate economic pressure, amounting to economic duress, had been imposed by the bank. However, the NSW Court of Appeal rejected the finding of illegitimate pressure, concluding that a claim to relief on the basis of pressure which is not in itself unlawful should be determined under the equitable doctrines of undue influence, unconscionability and relevant statutory remedies and not under economic duress.⁵⁷ Although the *Karams* faced perilous financial circumstances, this was not of the bank's making and it could not be said that there was anything unlawful or unconscionable about the bank's conduct. Therefore, it seems that the general law doctrine of unconscionability remains well constrained within its traditional boundaries.

The question arises whether this narrow interpretation of s 51AA will carry across to the small business unconscionability provisions. For the time being though, it 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'.

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 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 affirmation of the special wives' equity in *Garcia* there was a long list of failed unconscionability cases where the wife failed to prove actual or constructive knowledge of a special disability on the part of the lender.⁵⁸ 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*,⁵⁹ for regarding the special wives' equity as part of the unwritten law for the purposes of s 12CA.

⁵⁷ Ibid [95]-[96].

⁵⁸ See, for example, *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.

⁵⁹ (2002) FCR 301, 309-10.

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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.⁶⁰ The majority in *Garcia* left open the question of whether the *Yerkey* principles might apply in the future to 'long term and publicly declared relationships short of marriage between members of the same or opposite sex'.⁶¹

Cases since *Garcia* have adopted an inconsistent approach to the extension of the special wives' equity to other committed relationships based on trust and confidence. 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. 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 NSW*⁶² the ACT Court of Appeal held that the law in Australia had not yet developed to the stage where the *Garcia* principles extended to parent/child relationships. In *State Bank of NSW v Hibbert*⁶³ Bryson J declined to extend the principles in *Garcia* to de facto relationships. However, in the more recent case of *Liu v Adamson*⁶⁴ 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*⁶⁵ Charles JA, with whom Winneke P and Eames JA concurred, disagreed with the necessity for confining the principles in *Garcia* to only 'the most intimate of family relationships'. 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.⁶⁶ 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, it indicated a softening of attitude at the appellate level, leaving the door open a little further for

⁶⁰ (1998) 194 CLR 395, 403 (Gaudron, McHugh, Gummow and Haynes JJ).

⁶¹ Ibid 404.

⁶² [2003] ACTA 7.

⁶³ [2000] NSWSC 628.

⁶⁴ [2003] NSWSC 74.

⁶⁵ [2003] VSCA 92.

⁶⁶ Ibid [24].

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 *Kranz* case.

Subsequently, in the Queensland Court of Appeal case of *ANZ Banking Group Ltd v Alirezai*⁶⁷ 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. Until the High Court determines the issue it is not clear whether the doctrine is still narrowly confined to matrimonial relationships. An application for special leave to appeal the *Alirezai* decision has been lodged with High Court. As both *Kranz* and *Alizerai* demonstrated, presently in cases outside of marriage, sureties will face major hurdles in proving that the financier had notice of a special relationship of trust and confidence between debtor and surety.

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,⁶⁸ 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 UK⁶⁹ 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,⁷⁰ 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'

Recent cases indicate the limitations of the 'unwritten law'. First, it is concerned with procedural rather than substantive unfairness. Even then, unfairness in the bargaining

⁶⁷ [2004] QCA 6.

⁶⁸ *Royal Bank of Scotland v Etridge (no 2)* [2002] 2 AC 773, 814 (Lord Nicholls).

⁶⁹ The High Court in *Garcia* (1998) 194 CLR 395 at explicitly rejected the House of Lord's approach in *Barclays Bank v O'Brien* [1994] 1 AC 180, to setting aside spousal guarantees.

⁷⁰ See 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.

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process is viewed in narrow terms, as the *Berbatis* decision indicates. This is in line with the traditional reluctance of courts to rewrite contracts.⁷¹ There has been a reluctance to extend equity's assistance to cases which do not fall squarely into the principles outlined by the High Court in *Amadio* and *Garcia*. Secondly, by its very nature the 'unwritten law' develops on an incremental basis, which, as the post *Garcia* litigation shows, can produce uncertainty about the ambit of unconscionability in the guarantee context. This limits the usefulness of s 12CA.

Given these limitations, it seems likely that in the future there will be an expanded role for s 12CC ASIC Act, governing small business unconscionability, particularly if the proposal for raising of the transactional threshold from \$3 million to \$10 million takes effect. The majority of recent cases involving disputed guarantees concern guarantees supporting small business debts incurred by spouses and others in a close relationship to the guarantor.

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 factors enumerated in various consumer provisions, including s 12CB ASIC Act, s 51AB TPA and s 70 UCCC include some which suggest that the sections may go

⁷¹ 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 law that equity will not rewrite an improvident contract where there is no disability on either side' foreshadow the development of unconscionability principles in Australia.

beyond procedural unconscionability.⁷² However, the reference to ‘all the circumstances’ which is incorporated into all of 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.⁷³

The consumer 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 borrowing⁷⁴ and that most guarantee litigation has concerned guarantees given to support small business debts.⁷⁵ The case of *Begbie v State Bank of New South Wales*⁷⁶ 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 a service of the kind covered by the consumer unconscionability provisions.⁷⁷ Consumer guarantees are specifically targeted by the UCCC,⁷⁸ 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.⁷⁹

⁷² For example, s 12CB (b) and (e).

⁷³ See discussion in SCOCA Discussion Paper, *Unfair Contract Terms*, January 2004 [2.1.1] above n 18.

⁷⁴ 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.

⁷⁵ See, for example, *Yerkey v Jones* (1939) 63 CLR 649 and more recently *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.

⁷⁶ (1994) ATPR ¶41-288.

⁷⁷ *Ibid* 41, 898.

⁷⁸ Sections 50-57.

⁷⁹ See SCOCA Discussion Paper, above n 18 [2.1.3].

Guarantees and Small Business Unconscionability

Both ss 12CC of the ASIC Act and 51AC TPA regulate unconscionable conduct involving financial services.⁸⁰ 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.⁸¹ Although the current ACCC guidelines⁸² on unconscionable conduct affecting small businesses make no reference to guarantees, ss 12CC ASIC Act and 51AC TPA potentially have a flexible and far-reaching 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.⁸³ Both s 12CC and s 51AC TPA are closely modeled on the domestic unconscionability provisions, albeit with a more extensive list of factors set out in s 12CC (2). The enumerated factors cover both procedural and substantive unfairness. These factors include those listed in s 12CB (2) as well as the following:

⁸⁰ Section 51AAB TPA does not exclude s 51AC from applying to ‘financial services’.

⁸¹ See n 36 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 bipartite dealings between the ‘supplier’ and ‘business consumer’ then guarantors of small business debts are still governed by s 51AA which incorporates the *Amadio* principles and was given a narrow interpretation by the High Court in *Berbatis*. 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 did extend to transactions involving guarantees.

⁸² *A Small Business Guide to Unconscionable Conduct*, Australian Competition and Consumer Commission, May 2005 (www.accc.gov.au).

⁸³ For example, s 12CC ASIC to unconscionable transactions involving a ‘supplier’ and ‘service recipient’, while s 51AC TPA refers ‘to a ‘supplier’ and ‘business consumer’. For a discussion of the minor differences in the wording of the two provisions see Pearson above, n 31, at 121-12.

- 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 provisions governing consumer and small business unconscionability is still being formulated by the courts and is yet to be considered by the High Court. However, the language of the small business provisions and in particular the inclusion of detailed indicia of unconscionability, clearly give them a wider application than the 'unwritten law' which covers traditional notions of unconscionability as articulated in *Amadio* and *Garcia*. This construction is supported by the weight of opinion, both judicial and academic.⁸⁴

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 be described as a 'hard bargain' is not unconscionable applies to the small business provisions.⁸⁵ 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*, Finkelstein J stated in respect of s 51AC TPA: 'I take as the measure of unconscionability, conduct that might be described as unfair'.⁸⁶

⁸⁴ *ACCC v Oceana Commercial Pty Ltd* [2003] FCA 1516 [336]; *Securities & Investments Commission v National Exchange Pty Ltd* [2005] FCAFC 226, [29]-[30]; Gail Pearson, above n 31, 123-124; The Hon Paul de Jersey AC, above n 12, 4 and Bryan Horrigan, above n 31, 162.

⁸⁵ As suggested by Robert Baxt and Elizabeth Bennett, 'Unconscionability and the *Berbatis* case', June 2003, available at Allens Arthur Robinson website (www.aar.co.au).

⁸⁶ (1999) 21 ATPR ¶41-703, 43, 016.

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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*,⁸⁷ 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:

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.⁸⁸

In *Australian Securities & Investments Commission v National Exchange Pty Ltd*⁸⁹ the Full Federal Court also accepted that unconscionability is a concept that requires a high level of moral obloquy. Consequently, 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 entered into under pressure 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.⁹⁰ It is interesting to note that the 1997 Reid Report, in its recommendations to the Federal Government for enhanced small business protection, cautioned against using the term ‘unconscionable’ indicating:

...[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.⁹¹

It was recommended that the word ‘unfair’ be used instead. The Federal Government clearly had 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

⁸⁷ (2000) 22 ATPR ¶41-741 (Heerey, Drummond and Emmett JJ).

⁸⁸ *Ibid* 40, 585.

⁸⁹ [2005] FCAFC 226 [43].

⁹⁰ See Robert Gardini, above n 14.

⁹¹ 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.

protection provisions of the Act and which will provide greater certainty to small business in assessing their legal rights and remedies.⁹²

The recent Report of the Senate Economics References Committee 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'.⁹³

Indicia of Unconscionability Under s 12CC ASIC Act

The expanded indicia of unconscionability in s 12CC go beyond traditional indicators of unconscionability under general law principles as incorporated in s 51AA. This conclusion can be supported on three grounds:

- The inclusion of factors which embrace substantive unfairness, including the proposed inclusion of a new 'unilateral variation' clause;
- Special recognition of the notion of good faith; and
- Acknowledgement of the role of industry codes.

It is therefore useful to consider those factors insofar as they are relevant, in particular, in the guarantee context.

Substantive Unfairness Factors

Matters such as the equivalent terms and price offered by competitors⁹⁴ and being forced to comply with conditions which go beyond the stronger party's legitimate interests require a consideration of whether the substantive terms of the contract are unfair.⁹⁵ Generally, however, consumer bodies have been unimpressed with so-called 'shopping lists' in various pieces of unconscionability legislation that contain terms which are apparently substantive.⁹⁶ For example, it has been observed that although s 70(2) of the UCCC contains four factors which canvass issues of substantive unfairness:

⁹² House of Representatives, Hansard, 30 September 1997.

⁹³ 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.apf.gov.au).

⁹⁴ Section 12CC (2) (e) and (3) (e) and its counterpart in s 51AC (3) and (4).

⁹⁵ Section 12CC (2) (b) and (3) (b) and its counterpart in s 51AC (3) and (4).

⁹⁶ See above n 32.

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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 where 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.⁹⁷

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.⁹⁸ Arguably, many 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.⁹⁹ Given the plethora of cases involving spouses and other vulnerable guarantors,¹⁰⁰ 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 provide some potential for assisting individual litigants in striking down provisions such as all moneys clauses in guarantees which are

⁹⁷ Victorian Consumer Credit Legal Service, above n 32, 11-12.

⁹⁸ In the general commercial context, see, for example, *ACCC v Black on White* [2001] FCA 372 (Unreported, Federal Court of Australia, Spender J, 4 April 2001); *John Dorahy's Fitness Centre Pty Ltd v Buchanan* (Unreported, NSWCA 16 December 1996, No 94040386).

⁹⁹ 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 Expert Group on Family Financial Vulnerability (1996); Australian Banking Industry Ombudsman Ltd, Report on Relationship Debt (Bulletin No 22, 1999).

¹⁰⁰ See, for example, *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, Equity Division, 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 (Unreported, Supreme Court of Victoria, Harper J, 4 December 1998) ; *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.

substantively unfair. However, the provisions do not effect any systemic control over unfair terms so will not necessarily deter financiers continuing to use 'all moneys' clauses in their standard guarantee documents.

Reference to Industry Codes

Courts may take note of the requirements of 'any applicable industry code'¹⁰¹ or 'any other industry code'¹⁰² 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.¹⁰³ 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 Practice¹⁰⁴ 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.¹⁰⁵ Adoption of the self-regulatory 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.

The Banking Code contains several 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:

¹⁰¹ Section 12CC (2) and (3) (g).

¹⁰² Section 12CC (2) and (3)(h).

¹⁰³ Section 51AE provides that regulations may prescribe a code for the purposes of Part IVB TPA. To date the only prescribed code is the Franchising Code of Conduct.

¹⁰⁴ *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).

¹⁰⁵ Clause 40 defines 'small business' 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*.

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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 seems relevant to the practice of 'asset-based' lending, which has been recognised as an undesirable feature of many guarantee transactions.¹⁰⁶ 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 rely on security in the case of default.¹⁰⁷ 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 prescribes a disclosure and conduct regime for banks which have adopted the code.¹⁰⁸ The Code also permits, but imposes restrictions upon, the taking of 'all moneys' securities.¹⁰⁹ 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.

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,¹¹⁰ particularly given that it has been established and endorsed by industry after widespread

¹⁰⁶ 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...'

¹⁰⁷ 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 (www.gu.edu.au/centre/cccl/content_publications.html).

¹⁰⁸ 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.

¹⁰⁹ Clause 28.13.

¹¹⁰ 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.

consultation.¹¹¹ 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.¹¹²

Despite the comprehensive revision of the guarantee provisions of the Code,¹¹³ 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 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, particularly given that unfairness relating to 'all moneys' provisions has been at the heart of many of the leading guarantee cases.¹¹⁴ Clause 28.13 is a weaker provision than s 54 UCCC, which requires the specific written consent of the guarantor at the time of the future advance. Therefore, despite the fact that a guarantee with an 'all moneys' clause complies with the Banking Code and requires a

¹¹¹ 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.

¹¹² Elizabeth Wentworth, above n 110, 5.

¹¹³ Adopting the recommendations of the Viney Report, above n 111.

¹¹⁴ See cases referred to above n 29.

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generic warning of the risks involved, it may be still have been presented on a take it or leave it basis, drafted incomprehensibly and without specific warnings of the degree of risk involved or requiring written acceptance at the time of later advances.

The meaning of 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 which prima facie complies procedurally with the Banking Code is unconscionable are both uncertain. Therefore, although the inclusion of factors permitting reference to the terms of industry codes 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, obviously covers a specific section of the financial services sector and not all banks have subscribed to the Code.¹¹⁵ 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 Australian jurisprudence and academic writing, including a debate as to whether such an obligation should be implied into the contract.¹¹⁶ The complexities of the debate are beyond the scope of this paper, but some general observations can be made.

The High Court in *Royal Botanic Gardens and Domains Trust v South Sydney City Council*¹¹⁷ 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. The focus, from the point of view of whether there has been a breach of an implied contractual term, is on the extent to

¹¹⁵ As at 2005, 13 banks have subscribed. See Australian Bankers' Association website: www.asn.au.

¹¹⁶ Recent examples include *Alcatel Australia Ltd v Scarcella* [1998] NSWSC 483 (Unreported, New South Wales Court of Appeal, Sheller, Powell and Beazley JJA, 16 July 1998) and *Burger King Corporation v Hungry Jacks Pty Ltd* [2001] NSWCA 187. 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.

¹¹⁷ (2002) ALJR 436, 443.

which the term was obvious, reasonable and equitable, and necessary as a matter of business efficacy.¹¹⁸

However, s 51AC merely requires of whether good faith has occurred in contractual dealings, it does not elevate the concept into an implied contractual duty. What does 'acting in good faith' require? Arguably, it can incorporate a number of different concepts. Perhaps, as some argue,¹¹⁹ it involves moral or ethical considerations. Others have said 'It 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'.¹²⁰ 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 this point, Barrett J in *Overlook v Foxtel*¹²¹ 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*¹²² 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. Recently the Victorian Supreme Court considered the implied duty of good faith in commercial contracts in the case of *Meridian Retail v Australian Unity Retail Network*.¹²³ It was unnecessary for the court to determine whether a term requiring good faith could be implied into the franchise agreement under consideration, but observed generally that the High Court had not yet definitely endorsed an implied term of good faith into commercial contracts. The Court noted that principles under Victorian case law indicated that:

- Courts should be reluctant to imply a term of good faith into commercial contracts as a matter of course;
- If implied such a term might mean nothing more than an obligation to act reasonable in the course of the contract; and

¹¹⁸ *BP Refinery (Westernport) Pty Limited v Shire of Hastings* (1977) 180 CLR 266.

¹¹⁹ 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.

¹²⁰ The Hon Paul de Jersey AC, above n 12, 6-7.

¹²¹ [2002] NSWSC 17 [65]; [67].

¹²² [1992] 2 AC 128, 138.

¹²³ [2006] VSC 223.

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- The implication of such a term probably operates to protect a vulnerable or disadvantaged person from exploitative conduct which subverts the original purpose of the contract.

Enhanced guarantee disclosure regimes have already made inroads into the traditional principle that guarantees are not contracts *ubirrimae fidei* (that is, of the utmost good faith). However, the relationship of banker and customer has never been a fiduciary one¹²⁴ 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. Whether the absence of good faith will constitute unconscionable conduct will invariably depend on a consideration of all the circumstances surrounding the particular transaction.

Proposed Insertion of New 'Unilateral Variation' Factor

The presence of a provision giving the stronger party the ability unilaterally to 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.¹²⁵ Unilateral variation of a credit contract will invariably result in a change in liability under a guarantee given to secure that loan. The *Trade Practices Amendment (Small Business Protection) Bill 2005*¹²⁶ proposes to introduce a package of reforms in response to recommendations made by the 2002 Dawson Review¹²⁷ and 2003 Senate Inquiry.¹²⁸ 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

¹²⁴ 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.

¹²⁵ See eg, Submissions of the Australian Association of Permanent Building Societies (7 April 2004) and Australian Bankers' Association (8 April 2004) to the *Unfair Contract Terms Discussion Paper*, referred to above n 18. The financial sector argues that their unilateral right to vary a 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.

¹²⁶ 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.

¹²⁷ 2002 Review of the Competition Provisions of the *Trade Practices Act 1974* (the 'Dawson Report').

¹²⁸ 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).

imposed terms allowing for the unilateral variation of any of its terms. Consumer bodies have argued that the right unilaterally to vary a contract may be regarded as unfair and should be dealt with in proposed uniform unfair contracts legislation. On the other hand, participants in the banking and finance sector, have argued for the continued right to unilaterally vary contracts as a matter of necessity, given the predominance of long term contracts in the industry.¹²⁹ 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'.¹³⁰ The inclusion of this new factor may mean that it will be harder for financiers to justify why a unilateral variation clause 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 may significantly alter the ambit of the unconscionability provisions by requiring financiers to justify the inclusion of terms which can be altered unilaterally on the basis that they are necessary for the protection of their legitimate interests.

Impediments Imposed by the Phrase 'In all the Circumstances'

In *ACCC v Simply No Knead (Franchising) Pty Ltd*¹³¹ Sundberg J, commenting on s 51AC TPA, provided a reminder that 'the Court is aided but not controlled by the factors listed in subs (3). Ultimately, although the additional factors in s12CC give it a wider ambit than the 'unwritten law', the statute requires conduct to be unconscionable "in all the circumstances" '. The inclusion of these words has been regarded by consumer bodies,¹³² as placing the primary focus of these provisions on procedural fairness and thus as an impediment to allowing redress for contracts with terms which are inherently unfair. The Standing Committee of Officials of Consumer Affairs indicated that courts have been reluctant to find unfairness solely on substantive grounds.¹³³ This conclusion seems consistent with the view of the Full Federal Court in *Hurley v*

¹²⁹ The Australian Bankers Association, above n 125, 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.

¹³⁰ 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).

¹³¹ [2000] FCA 1365 [37].

¹³² See, for example, Victorian Consumer Credit Legal Centre, Submission (11 March 2004) to the *Unfair Contract Terms* Discussion Paper, above n 18, 12.

¹³³ Discussion Paper, *Unfair Contract Terms*, *ibid* n 20.

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*McDonald's Australia Ltd.*¹³⁴ This is of concern so far as banking and finance contracts are concerned, given that the imposition of standard terms in many cases go beyond what is necessary for the protection of a financier's legitimate interests. As this paper has emphasized, the common inclusion of 'all moneys' clauses in guarantees is an example of potential substantive unfairness. Unfortunately, the usual response of a court is to set aside a guarantee if it has been given in circumstances which are procedurally deficient, but it will rarely intervene solely on the grounds that its term are inherently unfair to the guarantor. 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 \$ 10 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 generally remained 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.¹³⁵ The ACCC may commence proceedings or be joined as an applicant in proceedings with ASIC, although the 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

¹³⁴ See above, n 27.

¹³⁵ As noted in *ACCC v Oceana Commercial Pty Ltd* [2003] FCA 1516 [314].

its terms as s 80 TPA.¹³⁶ However, it can be argued, that statutory construction that the ASIC should have the principal role as regulator relation to financial services.

Test Cases

In recent times the ACCC has initiated test cases¹³⁷ in matters involving unconscionability of importance to particular classes of consumers, in particular small business, pushing for a wider interpretation of the small business provisions, in, for example, the *Berbatis* case.¹³⁸ ASIC's current case against Citigroup Ltd, for insider trading is coupled with an associated allegation of unconscionable conduct, suggesting that it too is pushing for a wider interpretation of unconscionability which overlaps various kinds of market misconduct in the financial services sector.¹³⁹

The ACCC 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 sector 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*,¹⁴⁰ ASIC's claim of unconscionable conduct under s 12CC ASIC Act failed. However, the Full Court of the Federal Court dismissed the respondent's

¹³⁶ *ACCC v Commonwealth Bank of Australia* [2003] FCA 1397 [22]. ASIC was joined as an applicant in these proceedings.

¹³⁷ See, for example, *ACCC v CG Berbatis Holdings Pty Ltd* (2003) 214 CLR 51; *ACCC v Oceana Commercial Pty Ltd* [2003] FCA 1516; *ACCC v Samton Holdings* (2002) 11 FCR 301. See also the appeal by ASIC in *Australian Securities & Investments Commission v National Exchange Pty Ltd* [2005] FCAFC 226.

¹³⁸ 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 *Oceana*, *ibid*.

¹³⁹ ASIC Media Release 06-096, 'ASIC commences proceedings against Citigroup for conflicts and insider trading breaches'.

¹⁴⁰ [2005] FCAFC.

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argument that the claims for declaratory and injunctive relief by ASIC were inappropriate because the appeal was an ‘attempt by ASIC to obtain an advisory opinion on the law’. In the words of the Full Court:

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.¹⁴¹

Similarly, in *ACCC v Oceana Commercial Pty Ltd*¹⁴² 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, Keifel 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.¹⁴³ Therefore, it seems that while the regulator is actively trying to 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 the test cases show, catch only the most blatant forms of unconscionable conduct.¹⁴⁴ 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 conduct¹⁴⁵ also provides scope for it to be proactive in generally promoting practices consistent

¹⁴¹ Id bid[51].

¹⁴² [2003] FCA 1516.

¹⁴³ Ibid [343]-[344].

¹⁴⁴ See also the arguments of Robert Gardini above n 14.

¹⁴⁵ 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.

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'.¹⁴⁶ These powers to approve industry codes, although not yet exercised to date, do 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 s1101A *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 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 signally accepted standard of conduct.

Under ss 12GD ASIC Act/ 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 abrasive 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 Commission¹⁴⁷ briefly noted that the implementation of a preventative approach can be achieved through powers under the TPA.¹⁴⁸ Section 80 of the TPA

¹⁴⁶ Policy Statement 183, *ibid* [47].

¹⁴⁷ New South Wales Law Reform Commission, Issues Paper 17 (2000) *Guaranteeing Someone Else's Debts*, April 2000 [2.108]-[2.103].

¹⁴⁸ 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

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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.¹⁴⁹

Since those comments, the ACCC has had recourse to the injunctive powers of the TPA in a guarantee case. The case of *ACCC v National Australia Bank Ltd*¹⁵⁰ 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 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 resulting in the sale of the family which was used as security. The Federal Court declared that the bank had acted unconscionably in its dealings with the wife. While she may 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 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.

order restricting the terms on which a person may enter into a contract of a 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'.

¹⁴⁹ Above n 147, [2.112].

¹⁵⁰ Unreported, Federal Court of Australia, 5 June 2001 No T 22 of 2000.

There is thus scope for the regulator, in appropriate cases, not only to obtain a favourable result binding on the immediate parties to the litigation, but also to apply normative standards to similar cases in the future, to obtain injunctions and seek consent orders restraining lenders from using onerous 'all moneys' clauses. In the *National Australia Bank* case 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, given the expanded indicia for unconscionability now contained in those 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*¹⁵¹ 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 refused. Keifel 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:

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.¹⁵²

Injunctions against a bank, in the context of misleading and deceptive conduct, were refused on discretionary grounds in *ACCC v Commonwealth Bank of Australia*¹⁵³ 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.

¹⁵¹ [2003] FCA 1516.

¹⁵² *Ibid* [343].

¹⁵³ [2003] FCA 1397 [31].

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 Acts¹⁵⁴ 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 courts may regard merely as a ‘hard bargain’ and, more significantly, they generally 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.¹⁵⁵ Reforms in the United Kingdom,¹⁵⁶ 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’.¹⁵⁷ Examples include ‘terms irrevocably binding the

¹⁵⁴ Mirrored in the State/Territory Fair Trading Acts.

¹⁵⁵ European Council Directive 93/13.

¹⁵⁶ *Unfair Terms in Consumer Contracts Regulations* 1999 (UK).

¹⁵⁷ *Ibid* reg 5 (1).

consumer to terms with which he or she had no real opportunity of becoming acquainted before the conclusion of the contract'.¹⁵⁸ The term will not be binding and consumer regulators or other bodies can seek, by injunctive measures, to prevent their use. The UK Law Commission noted that the *Unfair Terms in Consumer Contracts Regulations 1999* (UK) effect a form of 'abstract control'.¹⁵⁹ There are some specific examples of 'abstract control' in Australian legislation¹⁶⁰ 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.¹⁶¹ 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, modelled on the relevant European Council Directive. Section 32W provides:

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'.¹⁶²

¹⁵⁸ Ibid Sch 2 cl 1 (i).

¹⁵⁹ '[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).

¹⁶⁰ 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.

¹⁶¹ The *Fair Trading (Amendment) Act 2003* introduced Part 2B, Unfair Terms in Consumer Contracts, into the FTA.

¹⁶² 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 (available at <http://www.consumer.vic.gov.au>).

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Unfair credit contracts and guarantees are not covered by the Victorian fair trading legislation, presumably on the basis that they are covered by the UCCC.¹⁶³ However, as has already been 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. Significantly, in the guarantee context, the UCCC does not catch guarantees given to support credit contracts for business borrowing.

The issue of uniform unfair contract terms 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 February 1, 2004.¹⁶⁴ The paper noted that in recent times it is the standard form contract which has become the focus of allegations of unfairness¹⁶⁵. The Discussion Paper referred to overseas statistics indicating that the financial services sector, along with real estate, was the industry sector in which unfair contractual terms were most commonly encountered.¹⁶⁶ 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 models¹⁶⁷ which could be implemented, providing a preliminary analysis of the costs and benefits of the various options.¹⁶⁸ The working party considered the UK model in detail, and is presently seeking responses to its options. Consumer bodies have responded favourably to the SCOCA's proposal for a national approach to regulating unfair contract terms.¹⁶⁹

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,¹⁷⁰ it is not clear whether the Commonwealth Government supports the case for unfair contracts terms legislation.¹⁷¹ The financial services

¹⁶³ Ibid 30.

¹⁶⁴ Discussion Paper, *Unfair Contract Terms*, January 2004.

¹⁶⁵ Ibid 16-17.

¹⁶⁶ Ibid, Annexure III.

¹⁶⁷ Ibid, 40-55.

¹⁶⁸ Ibid.

¹⁶⁹ See above n 32.

¹⁷⁰ Joint Communique, Ministerial Council on Consumer Affairs, Friday 2 September 2005 (available at www.consumer.gov.au).

¹⁷¹ 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

regulator, ASIC points out that a new unfair contract terms regime would impose additional regulatory costs, but does not currently have a view on whether the reforms are needed.¹⁷²

This article 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. To some extent the problem is one that centres 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 Banking Practice have to some extent accepted this responsibility¹⁷³ there is a case for arguing that such values need the imprimatur of legislation which covers all lending transactions, not just those in the banking sector. Relying on voluntary codes to target unfair practices in the taking of guarantees will ultimately prove ineffective. It is to be hoped that unfair contract terms legislation can be implemented, if not at a 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.

The Ministerial Council on Consumer Affairs has agreed to progress a national regulatory response to unfair contract terms as a matter of urgency, following extensive consultation by the national working party with consumers and business and successful implementation of unfair contract terms legislation in Victoria.¹⁷⁴ The Council has noted that the preferred option of the working party for regulation is nationally consistent state and territory legislation in line with unfair contract terms provisions in the Victorian *Fair Trading Act*.

¹⁷² ASIC Submission, March 2004, to SCOCA Working Party on Unfair Contract Terms, above n 18.

¹⁷³ Articulated in Clause 25.1 of the Code, discussed above.

¹⁷⁴ Joint Communiqué, Ministerial Council on Consumer Affairs Meeting, Friday 22 April 2005 (http://www.consumer.gov.au/html/joint_communique/jointcommunique_April_2005.htm).