



The Pharmacy  
Guild of Australia

**Submission in response to discussion paper**  
***An Australian Consumer Law: Fair Markets –***  
***Confident consumers***

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## EXECUTIVE SUMMARY

The Pharmacy Guild of Australia welcomes the opportunity to comment on what could be contained in a single Australian consumer law.

The Guild acknowledges:

- the work of the Productivity Commission in its publication *Review of Australia's Consumer Policy Framework* (**the PC Report**);
- the subsequent decision of the Ministerial Council of Consumer Affairs (**the Ministerial Council**) contained in its communiqué of 15 August 2008 (affirmed by COAG on 2 October 2008) to establish a new consumer framework comprising a single national consumer law based on the *Trade Practices Act 1974* (**the TPA**) that which draws on the PC Report and best practice in State and Territory consumer laws; and
- the proposals contained in *An Australian Consumer Law – Fair Markets Confident Consumers* (**the Discussion Paper**).

The concept of the 'seamless (national) economy' that is promoted by COAG behoves a single piece of legislation declaring the rights and obligations of parties (including consumers) engaged in trade and commerce within Australia.

The Guild agrees the TPA should contain the provisions housing the Australian consumer law.

It also agrees that the TPA should have a name that properly reflects the areas of public policy that it both currently regulates and is likely to regulate in the future.

**Therefore, in answer to the question on page 24, the Guild believes the TPA should be renamed as the *Business Practices and Consumer Protection Act*.**

The Guild notes the explanation contained in Part II of the Discussion Paper setting out how the COAG agreed consumer reforms were reached.

It particularly notes that in relation to unfair contracts the current proposal is that:

- a term will be unfair when it causes a significant imbalance in the parties rights and obligations arising under the contract, and it is not reasonably necessary to protect the legitimate interests of the supplier;
- remedies will be available only where the claimant (an individual or a class) shows detriment to the consumer (individually or as a class), or a substantial likelihood of detriment, not limited to financial detriment; and
- the provision will relate only to standard form, non-negotiated contracts (possibly) with a value of around \$40,000; should a supplier allege that the contract at issue is not a standard form contract, then the onus will be on the supplier to prove that it is not.

However, the Guild also notes that the work was developed within the auspices of a Ministerial Council with specific responsibility for consumer affairs.

Accordingly, the current proposal has been limited to apply only to individual consumers rather than being broadened to include small businesses which are often placed in the same disadvantaged position as consumers when dealing with larger corporations possessing inequalities of bargaining power.

The Guild has long been concerned about the dichotomy of bargaining power between larger businesses and small businesses such as pharmacies, particularly as it relates to the negotiation of retail leases with the large corporations operating shopping centres (particularly) in the growth corridors of Australia's major cities.

The Guild is of the view that when a large corporation (such as a landlord of a major shopping complex) takes advantage of the asymmetric relative dependency that it possesses over the smaller trader (such as a pharmacist) to such an extent that 'hard bargaining' becomes objectively unfair should be grounds to call into aid remedial legislation.

The Guild understands that this kind of behaviour will not be dealt with under the proposed arrangements as COAG only proposes to deal with 'unfair' provisions contained in standard form contracts.

However, the Guild believes that the new Australian Consumer Law should also be broadened to deal with what should be regarded as an 'unfair contract' in Australian trade and commerce.

Therefore, if the TPA is going to provide relief against unfair contracts, the proposed provision should deal with the issue holistically.

**In summary, the Guild believes that when settling the proposed Inter Governmental Agreement covering the Australian Consumer law in June 2009, COAG should permit all business relationships between consumers (including small business) and larger trading and financial corporations to gain access to remedial unfair contract provisions of any Australian Consumer Law.**

The Guild believes that the legislative design most appropriate for inclusion in the Australian Consumer Law is a provision similar to section 12 of the *Independent Contractors Act 2006*

It is noted that the provision does not define the term unfair. It applied the ordinary dictionary meaning of the term, which is:

1. not fair; biased or partial; not just or equitable; unjust. 2. Marked by deceptive dishonest practices. (Macquarie Dictionary)

Or

2. not equitable; unjust; not according to the rules, partial (New Shorter Oxford English Dictionary)

The Guild believes that the unfair contract provisions in the Australian Consumer Law should be drawn in a similar manner.

For the time being, it is not persuaded that the PC Report is correct when it suggests that a 'workable law must define what is 'unfair' ', or that the proposed Ministerial Council definition (significant imbalance in the parties rights and obligations arising under the contract, and it is not reasonably necessary to protect the legitimate interests of the supplier) necessarily assists in determining unfairness.

**For reasons that can be implied from the foregoing discussion, in answer to the question posed on page 35 of the Discussion Paper the Guild believes that particular contractual terms should not be prohibited *per se* in consumer contracts. What is 'unfair' will vary from circumstance to circumstance and so the broad sword of general prohibition is undesirable.**

**As can equally be implied, in answer to the questions posed on page 65 of the Discussion Paper, small businesses should be included in the definition of 'consumer'. For the purposes of the Australian Consumer Law, the Guild would prefer the class of corporation that can currently seek remedial action under Part IVA of the TPA (unconscionable conduct), which is all corporations other than listed companies, to be regarded as being a 'consumer'. No monetary limit on the transactions to be covered by the proposed Australian Consumer Law should be imposed.**

These observations apply even if relief is only applicable to 'unfair' standard form agreements.

This is because it is the experience of the Guild that from time to time large pharmaceutical companies can impose somewhat strenuous terms of supply on pharmacists that may be regarded as unfair.

Finally, with respect to some of the issues discussed in Chapter 11 of the Discussion Paper:

- the Guild is of the view that the current structure of section 53 of the TPA sufficiently deals with the issue of what constitutes false and misleading representations in trade and commerce;
- the Guild agrees that where two prices are indicated on a consumer product, the consumer should receive the advantage of the lower price, which is a similar outcome to that required by those businesses complying with the Scanning Code; and
- the Guild has no particular view as to what should be contained in consumer documents. However, the law must make perfectly clear:
  - what is meant by 'consumer documentation' – i.e. whether it only relates to documentation that creates the contractual relationship between consumer and supplier;'
  - that the Australian Consumer Law does not apply if a more specific law is in force.

# 1. Introduction

- 1.1 The Pharmacy Guild of Australia welcomes the opportunity to address the contents of a single consumer law for Australia.
- 1.2 The Guild is a national employers' organisation registered under the *Workplace Relations Act 1996*, which functions as a single legal entity rather than a federation. It was first established in 1928 and currently has Branches in every State and Territory.
- 1.3 The Guild's members are the pharmacist proprietors of some 4,500 community pharmacies, which are small retail businesses operating throughout Australia. Almost 80% of all pharmacist proprietors are Guild members.
- 1.4 Community pharmacy makes a significant contribution to the Australian economy with an annual turnover of over \$12 billion and \$300 million in tax revenue, employing over 46,000 – 15,357 (33%) working as pharmacists, 27,458 (59%) as pharmacy assistants and 3,723 (8%) as pharmacy technicians.
- 1.5 Through the Pharmacy Assistant Training Scheme, the Pharmacy Guild provides a significant career path for young Australians, particularly young Australian women, the Guild having trained and assessed over 15,000 pharmacy assistants.
- 1.6 The Guild's mission is to service the needs of proprietors of independent community pharmacies.
- 1.7 The Guild aims to maintain community pharmacies as the most appropriate primary providers of health care to the community through optimum therapeutic use of medicines, medicine management and related services. A range of services are provided to members including:
  - (a) the negotiation of an ongoing Agreement between the Government and the Guild to facilitate suitable conditions for approved pharmacies to dispense under the Pharmaceutical Benefits Scheme (PBS), including an appropriate level of remuneration;
  - (b) the maintenance of close liaison and negotiation with governments, manufacturers, wholesalers and other organisations involved in the health care delivery system;
  - (c) the implementation of strategies to enhance the professional role of pharmacists and to assist community pharmacists practising in rural and regional areas of Australia to ensure that the current network of community pharmacies in Australia is maintained; and
  - (d) the provision of economic and management information to community pharmacists to assist them in making their pharmacies more efficient.

## 2. The concept of a national consumer law for Australia

- 2.1 The Guild acknowledges the PC Report and the subsequent decision of the Ministerial Council contained in its communiqué of 15 August 2008 and affirmed by COAG on 2 October 2008, to establish a new consumer framework.
- 2.2 The concept of the ‘seamless (national) economy’ that is promoted by COAG behoves a single piece of legislation declaring the rights and obligations of parties (including consumers) engaged in trade and commerce within Australia.
- 2.3 The TPA and its regulations deal with a variety of issues, ranging from access to infrastructure to the regulation of restrictive and unfair business practices, and from product safety to the regulation of relations between franchisors and franchisees.
- 2.4 The Guild agrees that the TPA should contain the provisions housing the Australian consumer law.
- 2.5 It also agrees that the TPA should have a name that properly reflects the areas of public policy that it both currently regulates and is likely to regulate in the future.
- 2.6 **Therefore, in answer to the question on page 24, the Guild believes the TPA should be renamed as the *Business Practices and Consumer Protection Act*.**

### 3. The concept of unfair contracts within the TPA

#### The current COAG position

- 3.1 The Guild notes the explanation contained in Part II of the Discussion Paper setting out how the COAG-agreed consumer reforms were reached.
- 3.2 It particularly notes that in relation to unfair contracts the current proposal is that:
- a term will be unfair when it causes a significant imbalance in the parties' rights and obligations arising under the contract, and it is not reasonably necessary to protect the legitimate interests of the supplier;
  - remedies will be available only where the claimant (an individual or a class) shows detriment to the consumer (individually or as a class), or a substantial likelihood of detriment, not limited to financial detriment; and
  - the provision will relate only to standard form, non-negotiated contracts (possibly) with a value of around \$40,000; should a supplier allege that the contract at issue is not a standard form contract, then the onus will be on the supplier to prove that it is not.
- 3.3 However, it also notes that the work was developed within the auspices of a Ministerial Council with specific responsibility for consumer affairs.
- 3.4 This means that the current narrow proposal may have been the inadvertent result of 'silo thinking'; full weight may not have been given to the concerns of small businesses who are dealing with larger corporations in circumstances in which there are frequently inequalities of bargaining power.

#### Small business and unfair contracts

- 3.5 The Guild has long been concerned about the dichotomy of bargaining power between larger businesses and small businesses such as pharmacies, particularly as it relates to the negotiation of retail leases with the large corporations operating shopping centres, particularly in the growth corridors of Australia's major cities.
- 3.6 Many of the 4,500 community pharmacies referred to in paragraph 1.3 operate in these shopping centres.
- 3.7 Members of the Guild have found it increasingly difficult to negotiate leases with landlords, when leases come up for renewal.
- 3.8 Having a degree of security of tenure is important so that reasonable business stability can be achieved and reasonable security for employees can be provided.
- 3.9 A lease term must also be of sufficient length so as to be able to amortise all costs of establishment, operation, ongoing investment and trade with normal profitability.
- 3.10 Many original leases proceed on the basis that there is a high probability that leases will be renewed. Rental structures reflect this. This investment can include the purchase price of the business (or establishment costs), fitout (often fixed to walls) and building the brand value of the business

- 3.11 However, it is the experience of the Pharmacy Guild that when renegotiating leases, some landlords make an offer on a ‘take it or leave it’ basis as someone else (unspecified as to use or identity) will take the premises.
- 3.12 Alternatively, the landlord will seek a rent increase at renewal that is pitched at a level that captures much of the value that has been earned by the tenant, but just low enough that permits the tenant to continue trading – knowing that the tenant, who is bound to cover finance costs and the like – cannot simply walk away.
- 3.13 The Guild fully participated in the PC inquiry that led to the publication of the report *The Market for Retail Leases in Australia* (the **Retail Lease Report**) and closely monitored the ACCC inquiry that led to the publication of *The Report of the ACCC Inquiry Into the Competitiveness of Retail Prices for Standard Groceries* (the **Groceries Inquiry**).
- 3.14 Both the Retail Lease Report and the Groceries Inquiry found that zoning and planning laws increasingly encourages the development of retail space in a single area (and increasingly under a single roof with a single owner) and discourages development of retail spaces in other areas.
- 3.15 This has led to a degree of ownership concentration, with the Retail Lease Report finding that 63% of all retail space is owned by institutional or company investors, 31% by private investors/owner occupiers, with the remainder owned by other companies. It also found that six companies or funds own 85% of retail space in Australia’s ‘super-regional’ centres.<sup>1</sup>
- 3.16 In particular, the Retail Lease Report found:

The retail market operates within the confines of zoning and planning controls.

While such controls can have merit in preserving public amenity and contributing to the cost-effective use of public infrastructure, their application can limit competition and erode the efficient operation of the market for retail tenancies.

**They restrict the number and use of sites, can confer some negotiating power on incumbent landlords and retail tenants, and restrict commercial opportunities of others. Zoning and planning controls can particularly advantage owners that have control over large conglomerations of retail space located some distance from competitors and their tenants. They can also disadvantage businesses that wish to gain access to additional space.**

Where the tenant and landlord are of similar size and there is competitive provision of retail space, there is no evidence of an imbalance in bargaining position (for example, there are many small landlords and small tenants on retail strips, and large tenants dealing with large landlords).

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<sup>1</sup> Retail Lease Report p21; 24.

**Where there is a large landlord of a centre which is a drawcard to the consuming public, and many small existing and prospective specialty tenants competing for limited retail space, imbalances in negotiating power can exist. Large centre landlords who are able to offer contracts on a ‘take it or leave it’ basis, provide a clear indication that demand for such retail space has been outstripping supply.**<sup>2</sup> (emphasis added)

- 3.17 The Guild also notes that the Commission decided that, whilst making the observations extracted above and finding that the retail tenancy market is generally operating satisfactorily, it nevertheless said:

In the Commission’s assessment, the term ‘war’ is not representative of the balance of evidence provided in this inquiry — a few skirmishes, some lingering resentment, hard bargaining and some disappointments, but not ‘war’. **This is not to say, however, that the market is working perfectly. Indeed, the Commission heard evidence of difficult commercial negotiations and cases involving significant personal loss.**<sup>3</sup>

- 3.18 The Guild notes that the Groceries Inquiry found that although the grocery market was ‘workably competitive’, the buying power of Woolworths and Coles may adversely effect individual competitors.<sup>4</sup>

- 3.19 It would also appear from this transcript that the Chairman of the ACCC considers this behaviour not to be outside the terms of current trade practices legislation:

Q. Well let’s turn to page 432 of your report. You’ve obtained documents going back to 2002 and they show that rebates have increased in almost 60 per cent of cases and that Woolworths and Coles are taking longer to pay their suppliers. What do you make of that?

A. Ah there’s increasingly tougher dealings that are going on as far as Woolworths and Coles are concerned and indeed Metcash in dealing with their suppliers.

Q. Doesn’t that say they’ve got too much power?

**A. Ah I think what it says is that we are a major operator and in any industry you have a significant power in dealing with suppliers. That is inevitable. That will always occur. Ah it’s going to occur in an economy the size of Australia with 21 million people.**

Q. But how can it be workably competitive if they’re squeezing those bigger rebates and discounts from suppliers and the gains aren’t being passed onto consumers?

A. We need to keep in mind there’s a difference between the vertical supply chain and the tough dealings that occur at retailer level and dealing with their suppliers. And the horizontal process, that is the horizontal competition between the

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<sup>2</sup> Retail Lease Report pp.xx-xxi.

<sup>3</sup> Retail Lease Report p.83

<sup>4</sup> Groceries Inquiry p.xx.

independent sector, the Aldis, the Franklins in New South Wales, Coles and Woolworths. That's where the workable competition is occurring. But let's be the first to state that it is not as vigorous a horizontal competition between those retail players as we would otherwise like to see.

Q. When you say it's tough dealing, you had confidential information from small suppliers saying that they would be de-listed, they were threatened with being de-listed, unless they accepted longer terms of settlement or paid a bigger rebate to the major supermarket chains. Isn't that bullying?

A. Ah no what it is is you're simply tough dealing. Look we have this in every industry where we have parties that have got strong market power and let's not just separate the major supermarket chains in this area. Metcash itself has strong market power in dealing with it's suppliers as the almost monopoly supplier to the independent operators. Ah what we have is...

Q. ... Pay us more money or wait one, two, maybe three months to get paid, or we'll push your products off the shelf. That's just tough dealing, that's not bullying?

**A. That's tough dealing ah in this sense that what they're really saying is we have alternative suppliers that are prepared to supply us. Whether it is extending the terms or it's increasing the rebates or it's getting a lower price, what they're saying is we have alternative suppliers that will supply us, now you meet those competitive terms, in terms of the supply line, otherwise we'll go to those alternative suppliers now.<sup>5</sup> (emphasis added)**

3.20 On a fair reading of the Retail Tenancy and Groceries inquiries, it is simply the case that in some circumstances, when small businesses are attempting to supply or purchase goods and services from larger corporations, the party possessing substantial market power will go beyond a 'hard bargain' or 'tough dealing' but rather in a manner that is objectively unfair.

3.21 One of the technical concepts explored in the Groceries Inquiry was the relative dependency between large and small traders.

3.22 It found:

The idea is that a buyer and a seller are in a supply bilateral relationship and the relationship is of substantial financial importance to the seller but of lesser importance to the buyer, this will impart bargaining power on the buyer.

This may occur for two separate but interrelated reasons. First, where there is an unequal relative dependency on the relationship, there is likely to be an asymmetry in the respective consequences should either party walk away from the relationship. If the buyer walks away from negotiations, the consequences for the seller would be significant—whereas the consequences for the buyer of the seller walking away would be less significant. Second, because the consequences for the

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<sup>5</sup> Four Corners – transcript of interview with Graham Samuel for the program *The Price We Pay*, broadcast 1 September 2008 <http://www.abc.net.au/4corners/content/2008/s2351993.htm> accessed 15 September 2008.

buyer of walking away are not significant, any threat by the buyer to walk away from negotiations would be a credible threat. The interrelationship of these two factors in the case of a relatively dependent seller and a relatively non-dependent buyer would result (all else being equal) in the buyer having greater bargaining power than the seller.

**The effect of asymmetric relative dependency on the relationship is captured in an OECD definition of a retailer having buyer power, which states that a:**

**... retailer is defined to have buyer power if, in relation to at least one supplier, it can credibly threaten to impose a long term opportunity cost (ie. harmful or withheld benefit) which, were the threat carried out, would be significantly disproportionate to any resulting long term opportunity cost to itself. By disproportionate, we intend a difference in relative rather than absolute opportunity cost.**

The relative bargaining power of buyer and seller will be an important determinant in the outcome of negotiations over the supply price (and other terms) between buyer and seller. Bargaining power in a bilateral bargaining relationship is best described as being exercised by threatening to impose a cost, or to withdraw a benefit, if the other party does not grant a concession—for example, a price discount.

Buyer power in this context is the ability of powerful buyers to exercise bilateral bargaining power against less powerful sellers to negotiate more favourable price discounts and other favourable terms in these individual supply relationships than would be negotiated in the absence of buyer power.

The more outside options that either buyer or seller has, the stronger will its bargaining position be relative to the other party (all other things being equal). If a buyer and seller are negotiating a supply deal and if the buyer's outside options improve or the seller's outside options deteriorate, the consequence in general will be that the buyer will have improved bargaining power and will be able to capture a greater share of the joint net benefit, or joint surplus, arising from the deal between buyer and seller.<sup>6</sup> (emphasis added)

- 3.23 The Guild is of the view that when a large corporation (such as a landlord of a major shopping complex) takes advantage of the asymmetric relative dependency that it possesses over the smaller trader (such as a pharmacist) to such an extent that 'hard bargaining' becomes objectively unfair should be grounds to call into aid remedial legislation.

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<sup>6</sup> Groceries Inquiry pp.314-5.

- 3.24 The Guild acknowledges that the mischief referred to in paragraph 3.23 will currently not be dealt with as COAG only proposes to deal with ‘unfair’ provisions contained in standard form contracts.
- 3.25 However, the Guild would consider that a mistake. The new Australian Consumer Law should finally deal with what should be regarded as an ‘unfair contract’ in Australian trade and commerce. The next observation provides further support for this proposition.

**The Senate Standing Committee on Economics – The Need Scope and Content of a Definition of Unconscionable Conduct for the Purposes of Part IVA of the Trade Practices Act 1974**

- 3.26 The Senate Standing Committee considered this matter, reporting in December 2008.
- 3.27 The Guild notes the additional comments on the report made by non-government senators, which concluded as follows:

We are concerned that small businesses are being denied access to a remedy in relation to unfair contract terms in their contracts with big businesses. As noted by Associate Professor Zumbo, judicial scrutiny of unfair contracts terms is currently lacking:

Ensuring greater judicial scrutiny of unfair terms in consumer transactions and business to business relationships involving small businesses would go a long way to promoting ethical business conduct. Such judicial scrutiny of unfair contract terms is currently lacking and unfortunately can act as a green light to unethical business intent on including contract terms that go beyond what is reasonably necessary to protecting their legitimate interests. In such circumstances, a new national legislative framework within the *Trade Practices Act* is needed to deal with unfair terms within business to business relationships involving small businesses.

**In this regard, we believe that the current Victorian legislative framework for dealing with unfair contract terms in consumer transactions should be extended to cover business to business relationships involving small businesses. (emphasis added)**<sup>7</sup>

- 3.28 After having regard to all the matters discussed in the previous paragraphs of this part of the submission, the Guild believes that if the TPA is going to provide relief against unfair contracts, the proposed provision should deal with the issue holistically.
- 3.29 **It follows the Guild believes that when settling the proposed Inter Governmental Agreement covering the Australian Consumer law in June 2009, COAG should permit all business relationships between consumers (including small business) and larger trading and financial corporations to gain access to remedial unfair contract provisions of any Australian Consumer Law.**

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<sup>7</sup> The Senate, Senate Standing Committee on Economics *The Need, Scope and Content of a Definition of Unconscionable Conduct for the Purposes of Part IVA of the Trade Practices Act 1974* December 2008 p.49

## The preferred option of the Guild

3.30 The Guild believes that the legislative design that best remedies the mischief set out in paragraph 3.23 is to replace the current Part IVA, which deals with the concept of ‘unconscionable conduct’ when the Australian Consumer Law is introduced into the TPA. The new Law should contain a provision similar to section 12 of the *Independent Contractors Act 2006* which reads as follows:

### Court may review services contract

(1) An application may be made to the Court to review a services contract on either or both of the following grounds:

- (a) the contract is unfair;
- (b) the contract is harsh.

(2) An application under subsection (1) may be made only by a party to the services contract.

(3) In reviewing a services contract, the Court must only have regard to:

- (a) the terms of the contract when it was made; and
- (b) to the extent that this Part allows the Court to consider other matters-- other matters as existing at the time when the contract was made.

(4) For the purposes of this Part, **services contract** includes a contract to vary a services contract.<sup>8</sup>

3.31 The provision is based on independent contractors provisions contained in NSW, Queensland and federal industrial relations legislation.<sup>9</sup>

3.32 The Federal Magistrates’ Court has considered it in *Keldote Pty.Ltd v. Riteway Transport Pty.Ltd (Riteway)*.<sup>10</sup>

3.33 The court noted that the provision does not define ‘unfair’. It applied the ordinary dictionary meaning of the term of unfair, as being:

- 1. not fair; biased or partial; not just or equitable; unjust. 2. Marked by deceptive dishonest practices. (Macquarie Dictionary)

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<sup>8</sup> Section 5 of the *Independent Contractors Act 2006* defines a services contract as a contract for services between an independent contractor and either a constitutional corporation or the Commonwealth.

<sup>9</sup> Section 106 *Industrial Relations Act 1996*(NSW); section 276 *Industrial Relations Act 1999* (Qld); section 832 *Workplace Relations Act 2006* (Cth).

<sup>10</sup> FMCA 1167 22 August 2008.

Or

Not equitable; unjust; not according to the rules, partial (New Shorter Oxford English Dictionary)<sup>11</sup>

- 3.34 It also noted an applicant submission that, in the Australian Industrial Relations Commission, Munro J found in *Re Transport Workers Union of Australia*:

It is both well established and widely recognised that industrial tribunals have avoided rigidity in defining terms such as ‘unfair’ and harsh’. Those words are not terms of art. They should be understood by a commonsense approach, as words in common usage with no special or technical meaning.<sup>12</sup>

- 3.35 Drawing from NSW Industrial Commission jurisprudence, the Court in *Riteway* found that section 12 should operate in this manner:

96. Arising out of the above considerations and drawing on the reasons for judgment of the Full Court of the Industrial Court of New South Wales in *Port Macquarie Golf Club Ltd v Stead* (1996) 64 IR 53, which concerned the then s.275 of the *Industrial Relations Act 1991* (NSW), the following principles would appear to be applicable to considering applications for review under the ICA:

s.12 directs attention to the particular circumstances of the individual contract concerned. Whether or not a contract is unfair or harsh is a matter to be decided upon examination of the facts of each particular case;

unfairness or harshness may arise either from the terms of the contract itself or from the circumstances surrounding its formation. That is to say, it may be substantively unfair or harsh or procedurally unfair or harsh;

the test of unfairness involves the commonsense approach characteristic of the ordinary jury member by applying standards providing a proper balance or division of advantage and disadvantage between the parties who have made the contract;

- 3.36 The Guild believes that the unfair contract provisions in the Australian Consumer Law should be drawn in a similar manner.
- 3.37 For the time being, it is not persuaded that the PC Report is correct when it suggests that a ‘workable law must define what is ‘unfair’’, or that the proposed Ministerial Council definition (significant imbalance in the parties rights and obligations arising under the

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<sup>11</sup> Paragraph 77 of *Riteway*.

<sup>12</sup> (1993) 50 IR 171 at 214.

contract, and it is not reasonably necessary to protect the legitimate interests of the supplier) necessarily assists in determining unfairness.<sup>13</sup>

3.38 It also means that the Guild does not believe that legislation should contain a list of particular practices that should be prohibited, or non-binding factors for a court to 'have regard to', as it the case in the current section 51AC of the TPA when considering 'unconscionable conduct', or an indicative and non-exhaustive list of terms which may be regarded as unfair, as contained in Schedule 2 to *The Unfair Terms in Consumer Contracts Regulations 1999* (UK).

3.39 As the Guild submitted to the Senate Inquiry:

4.4 However, as the Full Federal Court said in the leading case of *Hurley v. McDonalds Australia Ltd*:

For conduct to be regarded as unconscionable, serious misconduct or something **clearly unfair or unreasonable**, must be demonstrated - *Cameron v Qantas Airways Ltd* (1994) 55 FCR 147 at 179. **Whatever 'unconscionable' means in sections 51AB and 51AC**, the term carries the meaning given by the Shorter Oxford English Dictionary, namely, actions **showing no regard for conscience**, or that are **irreconcilable with what is right or reasonable** - *Qantas Airways Ltd v Cameron* (1996) 66 FCR 246 at 262. The various synonyms used in relation to the term 'unconscionable' import a **pejorative moral judgment** - *Qantas Airways Ltd v Cameron* (1996) 66 FCR 246 at 283-4 and 298.<sup>14</sup>

4.5 The phrase underlined in this extract suggests merely adding 'non-exhaustive' matters to be considered does not particularly aid courts to determine what it is the Parliament is attempting to achieve with the provision.

4.6 It is also noted that the NSW Court of Appeal has said in *Attorney-General of New South Wales v. World Best Holdings and ors* in relation to NSW legislation similar in construction to section 51AC:

121 The Ministerial Second Reading speech, quoted above, **indicates a similar concern to distinguish what is unconscionable from what is merely unfair or unjust**. Even if the concept of unconscionability in s62B of the *Retail Leases Act* is not confined by equitable doctrine, as the decisions under s51AC of the *Trade Practices Act* suggest, **restraint in decision-making remains appropriate. Unconscionability is a concept which requires a high level of moral obloquy. If it were to be applied as if it were equivalent to what was 'fair' or 'just', it could**

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<sup>13</sup> PC Report p.159. The Guild acknowledges the Ministerial Council's definition draws from the attempt by the Victorian Civil and Administrative Tribunal to glean the meaning of a statutory meaning of unfairness of 'contrary to the requirements of good faith', the definition in force in the United Kingdom and Victoria in *Free v Jetstar Airways Pty Ltd, Civil Claims* [2007] VCAT 1405.

<sup>14</sup> [1999] FCA 128, paragraph 22. Underlining added. Other emphasis in the original.

transform commercial relationships in a manner which the Minister expressly stated was not the intention of the legislation. The principle of ‘unconscionability’ would not be a doctrine of occasional application, when the circumstances are highly unethical, it would be transformed into the first and easiest port of call when any dispute about a retail lease arises.

...

123 There is a suggestion that the Tribunal in the present case may have adopted an unacceptably low standard. After setting out its conclusions, the Tribunal found: ‘we consider the conduct of WBH to be quite unacceptable ... having regard to normal industry standards and practices’ (at [69]). It then proceeded to determine what were called ‘the legal issues’, including unconscionability, by identifying which of the considerations in s62B(3) of the *Retail Leases Act* were applicable without further analysis of matters of fact and degree that need to be considered when applying a test of unconscionability. **If, as appears likely, a test of ‘unacceptable conduct’ were adopted, this is a far lower standard than unconscionability.**

124 The matters to be considered under a retail tenancy claim, turning on the contract and well-established doctrine, were intended by Parliament to continue to have considerable scope. **The Parliament was careful to ensure that the amorphous and ambiguous term, ‘unconscionability’, did not come to completely override the legal rights and obligations created by the lease relationship. Parliament did not intend that ‘unconscionability’ claims could be made so readily as to virtually take the place of retail tenancy claims. They needed to meet a high standard of moral obloquy.**<sup>15</sup>

4.7 It follows that section 51AC (and other similar provisions, as applied in state and territory retail tenancy legislation) only adds a minor gloss to the traditional concept of ‘unconscionable conduct’ – something which has disappointed the retail sector as, however erroneous they may have been in law, many participants were under the impression that the section went much further.

**3.40 For reasons that can be implied from the foregoing discussion, in answer to the question posed on page 35 of the Discussion Paper the Guild believes that particular contractual terms should not be prohibited *per se* in consumer contracts. What is ‘unfair’ will vary from circumstance to circumstance and so the broad sword of general prohibition is undesirable.**

**3.41 As can equally be implied, in answer to the questions posed on page 65 of the Discussion Paper, small businesses should be included in the definition of**

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<sup>15</sup> [2005] NSWCA 261. Emphasis added.

**‘consumer’. The Guild would prefer the class of corporation that can currently seek remedial action under Part IVA of the TPA (unconscionable conduct), which is all corporations other than listed companies. No monetary limit on the transactions to be covered by the proposed Australian Consumer Law should be imposed.**

- 3.42 These observations apply even if relief is only applicable to ‘unfair’ standard form agreements.
- 3.43 This is because it is the experience of the Guild that from time to time large pharmaceutical companies can impose somewhat strenuous terms of supply on pharmacists that may be regarded as objectively unfair.
- 3.44 For example, some drug companies may not supply product to pharmacists at a particular price unless they commit to a particular sales growth target and a requirement to hold particular levels of stock.
- 3.45 On occasion, this can be objectively unfair because it is an exercise of inequality of bargaining power. This will particularly be the case if the catchment area for consumers of a particular pharmacy is so small that it is simply uneconomic for a pharmacist to stock a drug servicing the clinical needs of a very small portion of the consumer base.
- 3.46 Moreover, if the commercial decision is then made not to stock the product, consumers will encounter increased difficulty in obtaining the particular drug, leading to self-evident health policy concerns.

## 4. Other Issues – Chapter 11 of the Discussion Paper

- 4.1 Chapter 11 of the Discussion Paper asks for responses on a number of subject matters. The Guild makes some observations on some of them.

### **Section 53 of the Trade Practices Act**

- 4.2 The Guild is of the view that the current structure of section 53 of the TPA sufficiently deals with the issue of what constitutes false and misleading representations in trade and commerce.

### **Circumstances where two prices are indicated on a consumer product**

- 4.3 The Guild agrees that where two prices are indicated on a consumer product, the consumer should receive the advantage of the lower price, which is a similar outcome to that required by those businesses complying with the Scanning Code.

### **Minimum Standards of consumer documents**

- 4.4 The Guild has no particular view on what should be contained in consumer documents.

However, the law must make perfectly clear:

- what is meant by ‘consumer documentation’ – i.e. whether it only relates to documentation that creates the contractual relationship between consumer and supplier; ’
- that the Australian Consumer Law does not apply if a more specific law is in force. For instance, regulation 9A and Schedules 10 and 12 of the Therapeutic Goods Regulations 1990 set out what sponsors of therapeutic goods must include with packaging for the goods.