



17 December 2009

Unconscionable Conduct Issues Paper
Competition and Consumer Policy Division
Treasury
Langton Crescent
Parkes ACT 2600

**Australian Institute of Credit Management Submission in response
to
The nature and application of unconscionable conduct regulation;
Can statutory unconscionable conduct be further clarified in
practice? – Issues Paper**

Introduction

The Australian Institute of Credit Management (AICM) welcomes the opportunity to respond to the *Unconscionable Conduct Regulation – Issues Paper*.

The legal construct of unconscionable conduct is a matter of ongoing significance to members of AICM in relation to the provision of commercial and consumer credit as well as the recovery of outstanding debt.

AICM welcomes any policy and/or legislative initiatives that will contribute to the clarification of the interpretation of unconscionable conduct.

The importance of the current legislative provisions to the credit industry is highlighted by the specific inclusion of guidance as to how to ensure that a creditor and/or collection method is compliant by its inclusion in the joint publication released by the ACCC & ASIC *Debt Collection Guidelines: for collectors and creditors*.

AICM acknowledges that the interaction between the recovery of outstanding debt is only one dimension of the unconscionable conduct provisions but it is a vital component in ensuring professional conduct by credit professionals.

It is within this context that AICM provides the following responses to the questions posed in the *Issues Paper*.

1.1 Given the nature of the concept of unconscionable conduct in law, will an indicative list of examples aid in the understanding and application of the existing unconscionable conduct provisions of the TPA? Please give reasons for your answer.

In particular, are there any costs associated with pursuing this option? Please bear in mind any possible impacts on consumers, businesses and governments

1.2 What form would it be appropriate for a list of examples to take? Should they be statutory presumptions of unconscionability?

Should a list of examples apply equally to the three statutory prohibitions of unconscionable conduct? Should the provisions be treated differently?

If a list of examples were introduced, would there be a need for other, additional changes to the legislation, such as introducing statutory defences?

1.3 Would a list of examples change the way the unconscionable conduct provisions of the TPA are applied? Is it possible to predict in what way this might change?

1.4 What examples of unconscionable conduct could be included on the face of the law? Should they be examples of conduct that courts have found to be unconscionable, or are there other examples of conduct that should be considered unconscionable?

Response

AICM would express reservation at the inclusion of examples of unconscionable conduct within legislation. It has been AICM's experience that the inclusion of examples within legislation contributes to two unfortunate outcomes. First, it encourages the commencement of claims that are frivolous and /or vexatious in nature by persons or organisations that use the inclusion of examples to seek to avoid their legal obligations.

Secondly the inclusion of examples may unintentionally result in decisions which are narrow in interpretation and potentially unnecessarily prescriptive.

2.1 Given the nature of the concept of unconscionable conduct in law, will a statement of principles aid in the understanding and application of the existing unconscionable conduct provisions of the TPA?

Are there any costs associated with pursuing this option? Please bear in mind any possible impacts on consumers, businesses and governments.

2.2 What form should a statement of principles take, and what effect should it have on the reasoning of the courts?

2.3 What general principles can be distilled from the jurisprudence around equitable and statutory unconscionable conduct that might be included in a statutory statement of principles?

Response

AICM would support the development of a statement of principles however AICM would be reluctant for these to be incorporated into legislation for similar reasons to those outlined above.

3.1 Are there alternative ways in which the TPA's unconscionable conduct provisions might be clarified, rather than through (or additional to) amendments to the law?

3.2 For example, what would be the advantages or disadvantages of:

- the publication of national guidance on unconscionable conduct by regulators under the Australian Consumer Law;
- increased use of section 87B undertakings; or

industry-specific codes of conduct, or specific provisions in industry codes relating to 'unconscionable conduct'?

Response

AICM strongly supports the publication of national guidance on unconscionable conduct by the appropriate regulators.

AICM believes that by providing guidance the regulators are empowered to work proactively with industry to achieve outcomes which serve to

- minimise legal remedies
- engender greater understanding and co-operation by industry
- inform consumers of their rights and entitlements

This conclusion is affirmed by AICM's experience in promoting the use and adherence to the *ACCC/ASIC Debt Collection Guidelines: for collectors and creditors*. AICM has consistently found that compliance with legislative provisions is more likely when undertaken within a positive context rather than a prescriptive regime.