

The Institute of Public Accountants
**Submission to the APESB on proposed
standard APES 350**

June 2015



IPA INSTITUTE OF PUBLIC
ACCOUNTANTS[®]

12 December 2016

The Manager
Australian Consumer Law Review Secretariat
The Treasury
Langton Crescent
PARKES ACT 2600

Dear Sir/Madam

Australian Consumer Law Review *Interim Report*

The Institute of Public Accountants (IPA) welcomes the opportunity to comment on the Australian Consumer Law Review *Interim Report* (October 2016).

Our specific comments to some of the questions posed are noted in the Appendix below.

This submission has been drafted on behalf of the IPA by the IPA Deakin University SME Research Centre and in particular Professors Julie Clarke and Philip Clarke of the Deakin University Law School.

If you would like to discuss our comments or have any queries, please contact me at either vicki.stylianou@publicaccountants.org.au or on mob. 0419 942 733.

Yours faithfully



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About the IPA

The IPA is one of the three professional accounting bodies in Australia. Representing more than 35,000 members in over 80 countries, the IPA represents members and students working in industry, commerce, government, academia and private practice. More than three-quarters of our members work in or with small business and SMEs.

Appendix

Qs 1, 2 and 3: Fundraising activities and the ACL

The IPA does not support amending the ACL to deal specifically with fundraising activities. Whilst acknowledging that such activity can be conducted unscrupulously, or in a manner that misleads consumers, as the Interim Report notes, where this occurs the activity will very often already be caught by the ACL. This is because the ‘in trade of commerce’ threshold requirement is defined broadly in s. 2(1) of the ACL and has been interpreted expansively by the courts (the majority of the leading cases dealing with this issue have found that the conduct *did* occur in trade of commerce – the principal exception being *Concrete Constructions*) with the result that much fundraising activity will satisfy that requirement and hence be caught by s. 18 of the ACL and other relevant provisions. For example, this would be the case if that activity occurred as part of a business conducted by the fundraiser to generate funds, or if it was engaged in by a business engaged by a fundraiser to solicit funds, or if professional fundraisers were used.

On the other hand, regulatory guidance by the ACCC may be appropriate. This could take the form of material explaining the potential application of the ACL to fundraising activities and informing consumers of their rights in relation to such activities.

Q 4: Who is protected under the ACL?

The IPA accepts that the different classes of persons protected by the ACL makes the ACL more complex than would be the case were protection extended to a single class only. However, this complexity is an unavoidable consequence of the ACL adopting a nuanced approach to protection; that is, by varying the level of protection it affords, having regard to the nature of the class of persons to be protected and the nature and significance of the conduct of which complaint is made. Thus, for example, whilst it is appropriate to limit the consumer guarantee provisions to consumers as defined in s. 3, the IPA would *not* wish to see the protection afforded by s. 18 limited in the same way. However, if rationalisation of the concept of consumer is to occur (as some have advocated) the IPA would urge that the broader concept be used; in other words, that is, if there is to be a single definition of ‘consumer’ for the provisions listed in Table 1 (other than s. 18 which, as noted above, should not be restricted to consumers) it should be along the lines of the current s. 3 and not restricted to persons who acquire goods for personal use or consumption. This is because the definition in s. 3 makes important provisions of the ACL available to small businesses and the IPA would be opposed to any curtailment of their rights.

Thus, as far as the monetary threshold in s. 3 is concerned; the IPA

- (i) supports the retention of this threshold as it operates to extend to small businesses the protection afforded by key provisions of the ACL, in particular, the consumer guarantee provisions. In many instances, small businesses are in a no less vulnerable position than individual consumers and deserve the same protection and whilst it is the case that big business can also take advantage of the threshold, trying to separate the two would add further complexity to the ACL in an area that has not been shown to have unreasonably burdened suppliers.
- (ii) supports increasing the \$40,000 threshold. This has existed since 1986 and increasing it in line with price movements since then is appropriate and would extend the protection afforded to small businesses. Provision should also be made for subsequent increases, linked to the CPI, to occur periodically by regulation.

Qs 7, 8 and 9: Interaction between the ACL and the ASIC Act

The IPA supports removing the financial services and products exclusion from the ACL (s. 131A (1) of the *Competition and Consumer Act 2010*). As other submissions have noted, having two almost identical regulatory regimes, one covering financial services and products and one covering goods and services more generally, creates complexity, uncertainty and cost without any tangible benefit. Removing this exclusion would address the other issues raised on pp 31-33 of the *Interim Report* and could occur without derogating from the additional industry specific regulation referred to.

However, should the financial services and products exclusion remain, for the reasons advanced in the *Interim Report*, the IPA would support amending the ASIC Act to explicitly apply its consumer protection provisions to 'financial products'.

Qs 37 and 38: Are the unconscionable conduct provisions working effectively?

With one qualification, noted below, IPA supports the retention of the status quo regarding the ACL's unconscionable conduct provisions. In its opinion they are working effectively as the courts (in cases such as *Lux* and *Coles*) have displayed an ability to develop this area of law (in particular, the concept of 'unconscionable' conduct) to cover business transactions as well as those involving consumers and to do so in a manner that reflects community attitudes concerning what is, and is not, acceptable conduct. As a result, no case has been made for change. Rather, the courts should be left to 'continue to develop and clarify the concept as appropriate in response to changing social values'. In this regard it also notes the following:

- (i) The *Interim Report's* discussion of unconscionable conduct makes only fleeting reference to a far more important aspect of the reform brought about by the introduction of Part 2-2 of the ACL, namely, the availability to consumers of the remedy provisions of the ACL and, most importantly, the penalty provisions that now apply to unconscionable conduct. A major impediment to protecting consumers and small businesses from unconscionable conduct is the cost of invoking the law, rather than the terms of the law itself. For this reason, it is suggested that the most important reform achieved by Part 2-2 was not the introduction of the statutory prohibitions in ss. 20 and 21, or the assistance provided in relation to the latter by s. 22, but the application to them of the ACL's remedy provisions and the ability of the ACCC to seek remedial orders¹, issue infringement notices² and obtain pecuniary penalties³. That this is so is evidenced by the fact that (*Coles* aside) most of the leading cases that have successfully invoked the provisions have been brought by the ACCC.
- (ii) The use of the term 'unconscionable' in Part 2-2 of the ACL reflects a deliberate policy decision not to prohibit conduct that is merely unfair. Having regard to the breadth of Part 2-2 (especially s. 21) changing this policy would have wide commercial ramifications and for that reason should not be undertaken without a comprehensive review extending beyond consumer related considerations.
- (iii) Attempting to define 'unconscionable' conduct for the purposes of s. 21 is unlikely to produce greater certainty about its scope and operation than that already achieved by the courts. Furthermore, doing so risks imposing a temporal freeze on the concept, thereby stymying the ability of the courts to develop it to meet new circumstances and to reflect changes in community attitudes concerning what is acceptable conduct.

¹ See especially ACL s. 237.

² See *Competition and Consumer Act 2010* s. 134A(2)(a).

³ See ACL s. 224(1)(a)(i).

The qualification referred to above is that the IPA remains of the view that 'Price' should be included in the list of matters in s. 22 to which the court may have regard when determining whether conduct is unconscionable. In 2014 we made a submission to this effect to the Competition Policy Review Secretariat. In this submission we argued that although s. 21(4)(c)(i) allows a court to consider 'the terms of the contract' (one of which could be the price paid or payable) and although the list of matters in s. 22 to which a court may have regard is not exhaustive, price is of such significance to small businesses that it should be specifically referred to in s. 22. As the IPA noted in its submission, this is not to suggest -

'that merely charging an 'unfair' price should make a transaction unconscionable. However, it should do so when this is combined with and results from '[T]he absence of a reasonable equality of bargaining power by reason of the special disability of one party to a transaction'⁴ so that a finding of unconscionability is necessary to 'prevent victimisation of the weaker party by the stronger'⁵.

Although it may not always be easy to determine whether the price extracted by a dominant firm was so 'unfair' as to make its conduct unconscionable, the law is not unfamiliar with addressing problems of this nature. In various jurisdictions it has, for example, been achieved in:

- price gouging legislation designed to protect consumers⁶
- price gouging being made a competition law offence⁷
- adapting the unwritten law to respond to particular instances of exploitation such as happened in the salvage cases, and cases involving expectant heirs.⁸
- empowering courts to reopen unjust credit contracts where the injustice results from excessive interest charges.⁹

Qs 39 and 40: Unconscionable conduct and publicly listed companies

The IPA supports the removal from s. 21 of the ACL of the 'other than a listed public company' exception. As a matter of principle, unconscionable conduct should be prohibited regardless of the nature of the victim. In this connection it notes the following:

- (i) Whether conduct actually *is* unconscionable will invariably be influenced by the nature of the person complaining of that conduct. As a result, it will usually be impossible for a substantial and economically powerful publicly listed company to establish that it was the victim of unconscionable conduct as the indices of unconscionable conduct, especially those

⁴ *Kakavas v Crown Melbourne Ltd* [2013] HCA 25 per curium French CJ, Hayne, Crennan, Kiefel, Bell, Gageler and Keane JJ at para 117.

⁵ *Ibid.*

⁶ For an Australian example, see the (now repealed) provisions in Part VB of the *Trade Practices Act 1974* which prohibited 'price exploitation' in the wake of the introduction of the GST. This involved the concept of an 'unreasonably high' price and the matters that could be taken into account in determining whether a price was unreasonably high. As noted above, in the USA general and specific price gouging legislation exists in a majority of states and the District of Columbia.

⁷ European Community competition law makes charging excessive prices an offence: see *General Motors v Commission* [1976] 1 CMLR 95 and *United Brands Continental BV v Commission* [1978] 1 CMLR 429. Under the UK Competition Act 1998 charging an excessive price was found to be an offence in *Napp Pharmaceuticals Holdings Ltd v Director General of Fair Trading* [2002] CAT 1. In Australia, however, it would be a competition law offence only if it amounted to a contravention of s. 46 of the CCA.

⁸ See, for example, *Earl of Aylesford v Morris* [1962-73] ALL ER Rep 300 (borrowing money at an interest rate of 60%). This situation is now regulated by Consumer Credit legislation: see, for example, *Consumer Credit (Victoria) Act 1995*, s. 39. For US examples under the Uniform Commercial Code s. 2-302(1), see *Kugler v Romain* 279 A 2d 640 (1971) (charging a consumer of limited education and economic means 2.5 times a reasonable market price) and *Jones v Star Credit Corp* 198 NYS 2d 264 (1969) (charging a consumer over \$1,234.80 for goods worth less than \$300).

⁹ See the *National Credit Code*, s. 76(2)(o) (Schedule 1 to the *National Consumer Protection Act 2009*).

listed in s. 22, are unlikely to operate in its favour. Nevertheless, if such a company were to transact in circumstances in which the matters listed in s. 22 operated in its favour, there is, in principle, no reason why that conduct should not to be challenged on the grounds of unconscionability. Enabling this to be possible would not lower the threshold for unconscionable conduct; it would merely recognise that publicly listed companies can, albeit in exceptional circumstances, be the victims of unconscionable conduct.

- (ii) The IPA agrees with the observation in the *Interim Report* that being publicly listed does not automatically mean that the company has the power and resources to resist unconscionable conduct. As a result, such companies should have available to them the advantages of being able to rely on the prohibition in s. 21.
- (iii) Section 20 (the prohibition of unwritten law unconscionable conduct) has no publicly listed company exception. As a result, removing this exception from s. 21, as well as bringing the two prohibitions into line, may not significantly change the law. This is because both sections prohibit persons from engaging (in trade or commerce) in 'unconscionable conduct' and there is reason to believe that that concept will be developed by the courts for the purposes of s. 20 in much the same manner it will be for the purposes of s. 21. Although s. 21(4)(a) makes it clear that s. 21 is not to be limited by the unwritten law relating to unconscionable conduct, it does not follow that the meaning given to that concept in s. 21 cases will not also be adopted in those brought under s. 20. Indeed, given that there is no restriction on the matters to which the courts may have regard when determining whether conduct is unconscionable under the unwritten law, judicial comity is likely to produce the same outcomes. In this connection, it is also noted that the relevant remedy and penalty provisions of the Act and the ACL apply to both sections.

Qs 43-47: Unfair contract terms

The IPA acknowledges that the unfair contract terms provisions of the ACL have recently been extended to small business contracts. Although it would have preferred this extension to have been achieved without imposing monetary limits, it welcomes these being increased to \$300,000/\$1,000,000, rather than \$100,000/\$250,000 as originally proposed. However, it is disappointed that the *Interim Report* did not take the opportunity raised by the terms of its preceding *Issues Paper* to pursue reforms that would further have assisted small business. These include:

- (i) Removing the 'standard form contract' requirement from s. 23(1)(b)
- (ii) Removing the 'upfront price payable' exclusion in s. 26(1)(b)

The 'standard form contract' requirement: the IPA is concerned that this requirement is inherently uncertain and could be used by businesses with market power, when dealing with consumers or small businesses, to preclude the unfair contract terms provisions from applying to their contracts. These concerns led this requirement being removed from the UK equivalent in 2015. It should also be removed from the ACL.

The 'upfront price payable' exclusion: the IPA is concerned that this exclusion prevents the unfair contract terms provisions being used when the only unfair aspect of the contract is the price being charged or offered. This may not be an issue when consumers, or small businesses, have choices open to them; however, it is a major problem when they can deal only with a business that is effectively a monopolist or monopsonist. This is especially acute for small businesses in those industries where they have only one supplier of goods or services essential to their business, or only one buyer for their produce. Recent controversies over sharp increases in the price of certain drugs

and medical implants illustrate how dominant firms can use their power to charge unfair prices.¹⁰ The unfair contract terms provisions of the ACL should be able to respond to this situation; precedents for legislative responses to unfair pricing are noted above in connection with unconscionable conduct.

Q 43: Applying the ASIC Acts unfair contract terms provisions to insurance contracts

The IPA does not see this as a major issue because the insurance obligations of disclosure and utmost good faith currently operate to protect consumers and small businesses in a manner similar to the ASIC Act's unfair contract terms provisions. However, as it believes that there should be as few exemptions from those provisions as possible, it supports removing the insurance exemption in s. 15 of the *Insurance Contracts Act 1984* in respect of all types of insurance.

Q 44: Should the use of terms declared 'unfair' by a court be prohibited?¹¹

The IPA supports prohibiting terms that have been declared 'unfair' by a court. The ACCC's 2013 report, *Unfair Contract Terms – Review of Industry Outcomes*, indicates that although many firms have responded positively to Part 2-3 of the ACL, not all firms have exhibited a willingness to do this. As consumers and small businesses cannot be relied upon to take general enforcement proceedings, it falls to the ACCC (and ASIC in relation to the ASIC Act equivalent) to police and seek to realise Part 2-3's policy objectives. The most efficient and effective means of doing this is through ACCC/ASIC enforcement and their ability to fulfil this responsibility would be enhanced by them having the power to seek the imposition of pecuniary penalties. This should be possible, however, only in the case of the egregious use of unfair terms – understood in this context to mean the use of a term after it has been determined to be unfair. This approach could be achieved by:

- (i) including in Part 2-3 of the ACL, or perhaps as a new sub-section of s. 250, a provision to the effect that a 'person should not apply or rely on, or purport to apply or rely on a term (or a term to the like effect¹²) once that term has been declared under s. 250 to be an unfair term'
- (ii) amending s. 224(1) so that it applies to the contravention of that new prohibition
- (iii) making equivalent amendments to the ASIC Act.

Such amendments would enable the ACCC/ASIC to seek the imposition of a pecuniary penalty where a firm has had a term declared to be unfair under s. 250 but has continued to use the term, or a term to the like effect. In other words, it would visit the imposition of a pecuniary penalty upon a firm only after it has been warned that the term was unfair and has ignored the warning. In such a case, the continued use of the term warrants the imposition of a pecuniary penalty. Also, using s. 224 would extend liability to attempting to use the term and to all those persons covered by s. 224(1)(c)-(f). To the extent that the threat of receiving a pecuniary penalty can have a positive effect on behaviour, this would be a more efficient and effective means of ensuring compliance than seeking

¹⁰ See, for example, *The Australian*, 21 September 2016, p 1 and 7; see also Turing Pharmaceutical's decision in 2015 to increase by 500% the price of Daraprim, a drug used to treat Aids and which cost US\$1 per pill to produce; and Mylan's 2016 400% increase in the price charged in the USA for EpiPens. In response to such cases, in November 2016, the European Competition Commissioner, Margrethe Vestager, delivered a speech highlighting the need to sometimes intervene to protect the public in relation to excess pricing: see Margrethe Vestager, 'Protecting consumers from exploitation' (Chillin' Competition Conference, Brussels, 21 November 2016) (http://ec.europa.eu/commission/2014-2019/vestager/announcements/protecting-consumers-exploitation_en).

¹¹ This response is based on the submission to the Review made by Emeritus Professor Philip Clarke who, with Dr Julie Clarke, has assisted the IPA with its preparation.

¹² Included to prevent the prohibition being avoided by redrafting the clause but without altering its effect.

and then enforcing an injunction. Also, adopting a pecuniary penalty approach (rather than creating a criminal offence) has the advantages that the criminal standard of proof would be avoided and that it would make the new prohibition of the use of unfair terms consistent with the existing prohibition of unconscionable conduct.

Q 45: Would empowering ACL regulators to compel evidence from businesses to investigate whether a term is unfair be an appropriate enforcement tool? If so what should be the scope of this power?

The IPA notes that the ACCC (and the State and Territory equivalents) has extensive remedial powers under ss 232, 237, 239 and 243 of the ACL once a declaration that a contract term is unfair has been obtained under s. 250. However, it understands that the Commission cannot be assisted in seeking such a declaration by s. 155 of the *Competition and Consumer Act 2010* because it is not a 'contravention' of the ACL for a person to include an unfair contract term in a contract (at least not until such a declaration has been obtained) as is required for s. 155 to be invoked. This may make it difficult for the ACCC to obtain the evidence it needs to be able to proceed.

The IPA believes that this situation should be remedied and that the preferable method of doing this would be to amend s. 155 so that it can be used in respect of contract terms that may be unfair under Part 2-3 of the ACL.¹³ This would bring the Commission's investigative powers relating to unfair contract terms into line with its powers relating to conduct that constitutes, or may constitute, a contravention of the Act (including the ACL). As businesses are already subject to s. 155 in relation to the prohibitions contained in the ACL, such an extension would not subject them to a novel investigative power, or give the Commission a novel power.

¹³ Provisions overcoming the fact that including an unfair contract term in a contract is not a contravention of the ACL already exist in ss. 232, 237 and 239.

Q 47: Should the 'grey list' of examples of unfair contract terms be expanded

The IPA supports expanding the 'grey list' in s. 25 where this is necessary to provide guidance about new or emerging unfair terms. However, it shares the caution expressed about this matter in the *Interim Report*; indeed, it suggests that, arguably, most of the examples set out on p. 131 of the *Report* are already covered by s. 25. The exception relates to terms that exclude, or restrict, liability for death or personal injury resulting from negligence. Whilst, as the *Interim Report* notes, such terms would be defeated by s. 64 of the ACL where the consumer guarantee provisions of the ACL can be relied upon, s. 64 may not apply to a 'small business contract'. As a person should not be able to exclude their liability for negligently causing death or personal injury such terms should be added to the grey list. This would not make them automatically void – the opportunity would remain for a person wishing to rely upon such a term to show that, in the particular circumstances, it was not unfair. However, including such terms in the grey list would indicate that such an outcome would be unusual and that they are very likely to be found to be unfair in small business contracts. This would provide useful guidance to those who might wish to include them in their contracts and rely upon them when calculating their costs of doing business. In this regard, the IPA notes that the UK has gone further than this and has made such terms per se inoperative so that it is not possible under any circumstances for a person to exclude, or restrict, their liability for death or personal injury resulting from negligence.¹⁴ On the other hand, in the UK a reasonable term *can* exclude or restrict liability for negligently causing *other* forms of loss or damage.¹⁵

¹⁴ See (UK) Unfair Contract Terms Act 1977, s. 2(1) and for consumer contracts, *Consumer Rights Act 2015*, s. 65.

¹⁵ See (UK) Unfair Contract Terms Act 1977, s. 2(2).