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Unconscionable Conduct Issues Paper  
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Treasury  
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## **The Nature and Application of Unconscionable Conduct Regulation**

### **Can Statutory Unconscionable Conduct be Further Clarified in Practice?**

#### **VACC Response to Issues Paper**

#### **About VACC**

##### **Victorian Automobile Chamber of Commerce (VACC)**

VACC is the principal industry body (since 1918) for the Victorian and Tasmanian retail automotive industry. It represents around 5,500 members across 20 industry sectors and employs over 40,000 Victorians and Tasmanians in the automotive retail, service and repair sector (RS&R).

Franchising is a popular business structure in the retail auto industry. There are thousands of automotive business franchisees from “Ma and Pa” size, employing one or two people, right through to businesses employing hundreds.

Almost all new car dealerships in Australia are franchised. Motorcycles, Trucks, Tractors, Outdoor power equipment, car servicing, fuel and motor accessories are also commonly sold through branded franchised networks. Many VACC members are franchisees.

Some readily recognised brand names that are franchised are as follows: Ford, Holden, Honda, Mercedes, BMW, Mazda, Nissan, Kia, Ultratune, Midas, Novus, Autobahn, Kubota, Case, John Deere, Goodyear, Caltex, BP, Jax Tyres, Pedders suspension, Fluidrive Transmissions, ABS brakes, Brakes Plus, Bob Jane TMarts, The Tyre factory, Strathfield car radio, Natra Radiators, Bridgestone Tyres, Yamaha, Honda MPE, Suzuki, Hertz, Budget, Thrifty, Delta Europecar and many more are franchised.

It is common for retail auto business franchisees to commit to lease substantial and expensive properties in order to maximise their exposure to customers. A site on a major highway with strong passing traffic is desirable. Commercial property

agreements tend not to run concurrent with the Franchise agreement therefore exposing the franchisee to the risk of holding a lease without a franchise if the franchise is terminated or not renewed.

Franchisees often find themselves in a precarious commercial position.

Notwithstanding often longstanding arrangements with franchisors, they are required to enter into relatively short term fixed period franchise agreements which often may be terminated mid-term either at will or on very short notice (e.g. one month's notice).

There is usually little or no negotiation as to the terms, and bearing in mind the significant capital investment required at the beginning of the term or during the term in order to have the required standard of showrooms, as well as costly signage and proprietary equipment for testing and servicing of models, the franchisee is often left commercially exposed if the franchisor decides to not continue with the relationship.

## **Introduction**

This submission is made in response to the issues paper released. VACC agrees that there is a need to improve the understanding of the existing unconscionable conduct laws. It is our experience over many years that small business owners in the retail automotive industry are often disadvantaged when dealing with larger suppliers, franchisors and landlords.

We have found that the behaviours of larger, more commercially powerful businesses are often aggressive, overbearing, threatening and unconscionable in the circumstances. This type of behaviour is not confined to contract negotiations but also embedded in day to day business transactions. However despite attention paid to these laws the imbalance of power and practices of some of the more powerful business in their dealings with small business continues to cause concern.

Therefore VACC agrees with the proposition that more should be done to clarify the meaning of unconscionable conduct and support improved understanding and application of section 51 AC of the Trade Practices Act.

Commercial transactions between big business and small business are often uneasy interactions. Too often we hear the defence that the larger and more commercially powerful player is engaged in conduct that they justify as 'hard bargaining' or define as a 'commercial decision'. We reject these descriptors, these are excuses and weasel words that attempt to disguise the imbalance of power and excuse unacceptable taking advantage of a less powerful party to a contract.

On many occasions the power of the larger party has been applied overwhelmingly to force the smaller party to agree to conditions, changes or most disturbingly to terminate contracts or franchise agreements.

By way example VACC is aware of terminations of agreements or unilateral variations following closely behind substantial business development and infrastructure commitments made by franchisees. The result is that the franchisee not only losses the franchise or Prime Market Area and is unable to recoup the investment in the infrastructure that the franchisor insisted must be done. In our view it is unconscionable for franchisors to force expenditure upon the franchisees using their power and then makes a further decision that they know will cause losses.

We note that such decisions are often taken knowing that the impact will be detrimental or end the business relationship and that franchisors carefully prepare by putting aside money to fund legal cases that may be made against them.

## Examples

- A franchisee was informed mid term during the period of a franchise agreement that his PMA was to be cut in half and that no negotiations on the issue were possible. The Franchisee argued that he had invested substantially in building up his PMA and that the benefit of his expansion of the market should not fall to the franchisor by removing half of his market area. The franchisee could not convince the franchisor that his contribution should be recognised and that the reduction in PMA had devalued his business.
- A group of franchisees were informed simultaneously by personal visits that their franchise agreements would not be renewed and that compensation would not be paid for non-renewal despite the fact that some had been required by the franchisor to invest in major infrastructure rebuilding and rebranding of their sites. The ultimate beneficiaries of the rebranding paid for by the franchisees was the franchisor who took back the franchises and established their own factory run retail outlets in the same PMAs.
- A contractor sought an increase in the rate paid to provide services. In response the primary contractor said that because the increase sought was greater than CPI the contract would be 'put to the market' and new tenders sought. Advertisements were placed and the contractor put in his price. When contracts closed no other bids had been received. The primary contractor extended the period for tenders twice until another alternative tender was received. The process was clearly designed to intimidate the contractor in the first place and retrain increases to CPI and then to shut them out by allowing more time for other s to tender.

VACC submits that it is difficult for small business owners to take action under section 51 AC because of the following:

- Small is small, and therefore often less than well informed and under resourced and not legally represented
- Small businesses are vulnerable to threats and intimidation
- Small business owners often have their entire personal well being exposed; failure in business will mean failure in all aspects of their lives.
- The cost of fighting a legal battle is too high.

Therefore much more should be done to ensure that the protection of the Trade Practices Act against unconscionable conduct is preventative and that the fair-trading objectives of the Trade Practices Act are met by using proactive methods to support the intent of the legislation.

Therefore VACC agrees to both the concepts of providing examples and a set of principles. However we note that the examples or a Statement of principles should not be used to limit the interpretation of section 51 AC.

It is much better to educate, engage and prevent unconscionable conduct using a law that can be applied readily and understood rather than trusting and hoping that a rarely applied law will someday be used and a suitable legal precedent created.

## **A Statement of Principles**

VACC supports development of a statement of principles and that a statement of principles should be used by the Courts to determine unconscionable conduct.

## **Questions and Answers**

- 1.1 VACC agrees that examples could assist with understanding, interpretation and education of the business sector. As the TPA laws currently exist then it appears unlikely that additional information would add cost to compliance.
- 1.2 If a list of examples is to be introduced it should be a live document amended to add and subtract information that will assist with the objectives of the laws.
- 1.3 Additional information may assist all business owners to understand their obligations.
- 1.4 Examples should be agreed by an independent body of experts. The aim should be to clarify and enhance the application of the TPA.

2.1 VACC agrees that a statement of principles could assist with understanding, interpretation and education of the business sector. As the TPA laws currently exist then it appears unlikely that additional information would add cost to compliance.

3.1 Education of franchisors, landlords and contractors should be used increase understanding of the TPA generally.

3.2 VACC agrees that National Guidance should be published.

## **Further Consultation.**

Because of the importance of this subject VACC requests an opportunity to add further information to this submission in the near future. VACC supports the need to constantly inform the business community that fair trading is one of the foundation principles of Trade Practices Act.

Kind Regards

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