

21 December 2009

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

*Attention: Expert Panel on Franchising and Unconscionable Conduct*

Dear Panel Members

## **Issues Paper - the Nature and Application of Unconscionable Conduct Regulation (November 2009)**

### **Introduction**

Insurance Australia Group (IAG) welcomes the opportunity to provide comment on aspects of the *Nature and Application of Unconscionable Conduct Regulation Issues Paper* (November 2009) as set out below.

IAG is an international general insurance group, with operations in Australia, New Zealand, the United Kingdom and Asia. Its current businesses underwrite more than \$7.8 billion of premium per annum. It employs more than 15,000 people of which around 9,500 are in Australia. IAG operates some of Australia's leading insurance brands including NRMA Insurance, CGU, SGIO, SGIC and Swann Insurance. IAG also distributes insurance in Victoria through the RACV brand. IAG insures approximately one in three motor vehicles, and one in four homes, in Australia.

### **Options for Clarifying Statutory Unconscionable Conduct**

#### List of Examples

IAG does not support including an indicative list of examples of unconscionable conduct within the *Trade Practices Act* (TPA) as this is unlikely to serve the intended purpose of clarifying the meaning of unconscionability.

The current law in relation to unconscionability is essentially principles-based for sound reason. Consideration of unconscionability is fact dependent and is based on the discrete circumstances of the conduct and the characteristics of the parties involved. Conduct which may be considered in one instance to be 'unconscionable' may not be so in different circumstances.

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Courts are adept at applying the relevant principles set out in the current law to a given situation. A list of examples may directly, or indirectly, fetter a court's discretion in determining matters of unconscionability. There is a real risk that the current law in relation to unconscionability shifts from being principles-based regulation to prescription.

Disadvantages of using examples in the TPA in relation to unconscionable conduct include:

- Limiting the scope of unconscionability;
- Creating constrained legislation if narrow or ineffective examples are used or unwieldy legislation if many or complex examples are given.

The paper asks whether examples by way of statutory presumption would be an appropriate mechanism for aiding understanding. Statutory presumptions undermine the most fundamental legal principle that a party making a complaint against another party must prove his or her case. Statutory presumptions which reverse the onus of proof should only apply to the most clear and egregious conduct. This conduct could more appropriately be the subject of specific statutory prohibition.

### Statement of Principles

IAG does not believe that a mandatory set of principles better supports interpretation of the TPA in relation to unconscionability than the discretionary factors that are currently available.

As noted earlier, consideration of unconscionability is dependent upon detailed factual inquiry into the particular circumstances and there is no evidence to show that the courts are in need of mandatory principles to aid judicial interpretation.

### Alternative approaches

IAG supports consideration of alternative approaches to provide clarity on the meaning of unconscionability.

Examples could be provided in regulatory guidance on actual or hypothetical scenarios. This regulatory guidance could be described in enough detail to emphasise the factual particularity of the circumstances and be more readily updated as case law develops.

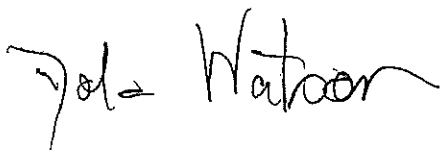
Furthermore, this could allow the regulator to consult by issuing draft guidance for feedback on good practice in a given area and would assist in providing certainty and reducing disputes.

IAG also agrees that industry-specific codes of conduct have a role to play in addressing concerns about unfair practices in a particular industry or context, particularly where there is perception of an inequality in the parties' bargaining position.

For example, IAG is a signatory to the Motor Vehicle Insurance and Repair Industry Code (MVIC) which is an effective mechanism to support the business relationships between insurers and smash repairers. The Code is voluntary in all states and territories except NSW where it is mandatory under the *Fair Trading Act*. The Code, which is currently under external review, is underpinned by a mutuality of obligation which promotes fair-trading, process and transparency in the relationship between insurers and smash repairers.

IAG would be happy to discuss this submission and to assist in any way we can. If you wish to discuss this matter or make further inquiries please contact Cecilia Warren, Manager, Government Relations on (02) 9292 1742 or myself on 9292 9744.

Yours sincerely

A handwritten signature in black ink that reads "Nola Watson". The signature is written in a cursive style with a long, sweeping underline.

**Nola Watson**  
**Head of the Chief Executive Office**  
**Insurance Australia Group, Direct Insurance**