

# SECTION 22 UNCONSCIONABILITY - A SAUROPOD IN NEED OF LIFE SUPPORT

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## ***Abstract***

*The Full Federal Court decision in Allphones Retail Pty Ltd v Hoy Mobile Pty Ltd (2009) 178 FCR 57; ATPR ¶42-294 represents a step back towards an era where unconscionable conduct was not allowed to impinge on commercial certainty. Of the four judges who heard this matter three different approaches to the relationship of what is now s 22 of the Australian Consumer Law to s 243 were given. The paper concludes that the primary judge Rares J was the only one of the quartet who got it right. The other three approaches impose, using the criterion of causation, restrictive barriers on the operation of s 22 unconscionability. Regrettably, with the High Court refusing special leave to appeal and in the absence of any suitable test case to explore the parameters, s 22 remains underutilised and under threat of being cast in the same light as the sauropod – an assumption that it looms large in weight and height but in the absence of anyone sighting it, presumed extinct. For this reason, the Australian Competition and Consumer Commission is urged to identify an appropriate test case to explore the limits of s 22. If this is not done urgently, the present narrow, confining operation of the legislation will not only be out of step with Parliament’s intent, but positively moving in another direction.*

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## ***Introduction***

Section 22 of the Australian Consumer Law provide as follows:

- (1) A person must not, in trade or commerce, in connection with:
- (a) the supply or possible supply of goods or services to another person (other than a listed public company); or
  - (b) the acquisition or possible acquisition of goods or services from another person (other than a listed public company);
- engage in conduct that is, in all the circumstances, unconscionable.

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The initial equivalent to this provision, first inserted more than a decade ago<sup>2</sup> was designed to address and overcome the advantages provided to those with super bargaining strength, particularly property owners in relation to shopping centre tenants and franchisors and their bond to franchisees.<sup>3</sup> In essence, it articulates a norm of conduct, with a recognised purpose of protecting the small business consumer,<sup>4</sup> relief available even though loss may be minimal.<sup>5</sup> Unlike s 20, and more expansively than s 21, a non-exhaustive list of factors<sup>6</sup> is provided to assist the court in determining whether the conduct is unconscionable, this ‘principled discretion’<sup>7</sup> alleviating the legal professions conservative fear of unbridled judicial subjectivity and creativity. With judges to date defining unconscionability by way of recourse to dictionary definitions with generically unhelpful statements such as “very unfair”, “very unreasonable”, “against conscience”, or “moral obloquy” being the determinants of unconscionable conduct in the commercial setting’,<sup>8</sup> in use,<sup>9</sup> the section has oft been criticised,<sup>10</sup> rarely

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<sup>1</sup> The decision considered s 51AC of the *Trade Practices Act 1974*. This is now s 22 of the Australian Consumer Law. The Australian Consumer Law is Schedule 2 of the *Competition and Consumer Act 2010*.

<sup>2</sup> *Trade Practices Amendment (Fair Trading) Act 1998*.

<sup>3</sup> For a discussion of the history behind reforms to retail tenancy, see Eileen Webb, “The Productivity Commission Inquiry Report: The market for retail tenancy leases in Australia” (2009) *APLJ Lexis* 22.

<sup>4</sup> *Monroe Topple & Associates Pty Ltd v Institute of Chartered Accountants in Australia* (2002) 122 FCR 110; ATPR ¶41-879, [115].

<sup>5</sup> *Australian Competition and Consumer Commission v Leelee Pty Ltd* (2000) ATPR ¶41, 742, 40,600.

<sup>6</sup> See s 22(1) & (2) of the Australian Consumer Law.

<sup>7</sup> Liam Brown, “The Impact of Section 51AC of the Trade Practices Act 1974 (Cth) on Commercial Certainty”, (2004) 28 *Melb. U. L. Rev.* 589, 597.

<sup>8</sup> Peter Strickland, “Rethinking unconscionable conduct under the Trade Practices Act”, (2009) 37 *ABLR* 19, 19

<sup>9</sup> eg. *Qantas Airways v Cameron* (1996) 66 FCR 246, 283 (pejorative moral judgement); *ASIC v National Exchange Pty Ltd* (2005) 148 FCR 132 (against good conscience).

<sup>10</sup> For a discussion of the criticisms of what is now s 22 of the Australian Consumer Law, particularly in relation to shopping centre leases, see generally, Eileen Webb, “Almost a decade on – A (Reid) report card on retail leasing”, (2006) *APLJ Lexis* 7. See also Frank Zumbo,

successful<sup>11</sup> and the subject of much academic musing.<sup>12</sup> However, the purpose of this debate is not to traverse the limiting judicial pronouncements or the commentary on the legislative deficiencies - this already done more than adequately.<sup>13</sup> Its intent is primarily to consider the primary judge and the Full Federal Court decision in *Allphones Retail Pty Ltd v Hoy Mobile Pty Ltd*,<sup>14</sup> and to ask which of the four judges that heard the matter correctly interpreted the connection and relationship between s 22 (the normative standard) with s 243 of the *Competition and Consumer Act 2010* (see also s 87 of the *Competition and Consumer Act 2010*) (its remedial conclusion) and requirement with this latter section that to recover, the loss or damage must be caused by the unconscionable conduct.<sup>15</sup> It is respectfully suggested that it was the unique circumstances of this case that led the High Court to reject special leave to appeal but that they should a similar manner be reheard again, the error evident in the majority judgement in *Allphones* will, or at least should, be overturned. The conclusion is that the full Federal Court majority judgement of Goldberg and Jacobson JJ unnecessarily and severely limited the operation of s 22. If this decision is allow to stand, s 22 is not the elephant in the room (heavy, weighty and very visible), but the converse, the sauropod<sup>16</sup> – large, slow moving, and despite these features invisible to the weary vision of small business.

## **The Context – The Australian Consumer Law: s 22 and its remedial bedfellow, s 243**

Relevantly for present purposes, s 243 provides that where a person has suffered loss or damage because of conduct of another person that was in contravention of s 22, then the

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<sup>11</sup>“Promoting ethical business conduct: The case for reforming section 51AC”, (2008) 16 *TPLJ* 132; Ross Buckley, “Sections 51AA and 51AC of the Trade Practices Act 1974: The Need for Reform”, (2000) 8 *TPLJ* 5, 15.

<sup>12</sup> Michelle Sharpe and Christine Parker, “A bang or a whimper? The impact of ACCC unconscionable conduct enforcement”, (2007) 15 *TPLJ* 139.

<sup>13</sup> Frank Zumbo, “Promoting ethical business conduct: The case for reforming section 51AC”, (2008) 16 *TPLJ* 132; Strickland, above note 8, 19; Mathew Lees, “Contract, Conscience, Communitarian Conspiracies and Confucius: Normativism through the Looking Glass of Relational Contract Theory”, (2001) 25 *Melb. U. L. Rev.* 82

<sup>14</sup> See above the articles cited in footnotes 10-12.

<sup>15</sup> *Hoy Phones Pty Ltd v Allphones Retail Pty Ltd (No 2)* [2008] FCA 810; (Primary Judge Rares J); *Allphones Retail Pty Ltd v Hoy Mobile Pty Ltd* (2009) 178 FCR 57; ATPR ¶42-294 (FFC – Goldberg, Jacobson JJ. (majority); Perram J (dissent on one point));

<sup>16</sup> It should be noted that the action was brought under the equivalent provisions of the *Trade Practices Act 1974* – these being s 51AC and s 87. For the purposes of this article, the equivalent provisions in the *Competition and Consumer Act 2010* will be cited throughout (ss 22 and 243 of the *Australian Consumer Law*, s 87 of the *Competition and Consumer Act 2010*).

<sup>17</sup> The most widely known sauropod were the huge brontosaurus – the largest of which were up to 30 metres in length and could weigh up to 80 tons. They could only move at a top speed of 16 kilometres an hour. “Dinosaurs”, 17 *Encyclopaedia Britannica*, (15<sup>th</sup> edition, 1992), 315, 321

Court may make such order as it thinks appropriate.<sup>17</sup> This proposition is only noteworthy for how unremarkable it is – the loss or damage that is recoverable is only that caused by the unconscionable conduct. In stark terms, the unconscionable conduct must be causative of the loss. ‘Unconscionable dealing tracks the power norm’<sup>18</sup> and when this norm goes beyond the judicially crafted understanding of what this means, s 243 can deliver the remedial relief craved for by the oppressed litigant. The catalyst of s 22 delivers the outcome of s 243. The court is making a finding, somewhat imprecise and possibly subjective that one or more persons should be held liable for the losses occasioned upon another. The creative and nebulous nature of this inquiry shadowed by a High Court willing to appeal to ‘common sense’ as the legal criterion through which one is satisfied as to whether the act or event in issue materially causes the damage imposed on the unsuspecting plaintiff,<sup>19</sup> even when they reiterate that in the statutory context that they must loyally ‘carry into force the objects of the legislation, as understood from the language and structure of the statutory text.’<sup>20</sup> As French CJ notes in the 2009 decision of *Campbell v Backhouse*<sup>21</sup> (a case on what is now s 18 of the Australian Consumer Law), though the comment is equally applicable to s 22), that whilst it is ‘logically anterior’ to consider whether the conduct was misleading or deceptive [of which we add, unconscionable] to that of causation, ‘In so saying, it is necessary to acknowledge that there may be practical overlaps in the resolution of these logically distinct questions. The characterisation of conduct may involve assessment of its notional effects, judged by reference to its context. The same contextual factors may play a role in determining causation.’<sup>22</sup> In so doing, the courts are cognisant that logic will not necessarily deliver a result unchallengeable, that at the end of the day, practicality, policy and value judgements will play a central function.<sup>23</sup> The question raised by *Allphones* was thus: For unconscionability to cause the loss or damage suffered by the plaintiff, must that

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<sup>17</sup> It should be noted that prior to the introduction of the *Australian Consumer Law*, the conjunctive was ‘by’ and this still remains in s 87. Little is made of this difference. Section 243 of the Australian Consumer refers back to ss 237 and 238 of the *Australian Consumer Law* and these sections use the term ‘because’.

<sup>18</sup> Lees, above n 12, 96.

<sup>19</sup> *I&L Securities v HTW Valuers (Brisbane) Pty Ltd* (2002) 210 CLR 109; *Henville v Walker* (2001) 206 CLR 459; and *March v Stramare (E & MH) Pty Ltd* (1991) 171 CLR 506.

<sup>20</sup> *Travel Compensation Fund v Tambree* (2005) 224 CLR 627, 645,

<sup>21</sup> (2009) 257 ALR 610.

<sup>22</sup> *Ibid*, [24].

<sup>23</sup> A point recognised by French J. (as he then was) in *Pavich v Bobra Nominees Pty Ltd* [1988] ATPR (Digest) 46-039.

oppressive behaviour directly, inexorably, and indisputably feed into the loss occasioned on the plaintiff. In *Allphones*, four judges provided three different responses, and in the view of these authors, it is the judgement of the primary judge, Rares J that was correct. The majority judgement of Goldberg and Jacobson JJ lacking an appreciation of the role s 22 is to play, with the other appellate judge Perram J (whilst coming to the same final result of Rares J) achieving that in a way which lacked the legal coherence of the primary judge.

### ***Allphones Retail Pty Ltd v Hoy Mobile Pty Ltd***

Allphones is a franchisor. The respondent was one of its franchisees. It operated a store in the Westfield Shopping Centre in Eastgardens, Sydney. Unlike many other telecommunication franchises, Allphones was not tied to any particular carrier – for this reason, an Allphones franchisee was able to arrange a broader range of services than its competitors were. The relationship between the parties became dysfunctional,<sup>24</sup> with three aspects to the dispute:

- First, Hoy was entitled to receive from the franchisor 72.5% of any mobile telephone sales commission. As part of a promotion, Optus agreed that for every new phone activation, Allphones would receive a ‘stretch’ bonus payment of \$150. Allphones did not regard this as something that would attract the 72.5% commission. Hoy Mobile disagreed.
- The second dispute concerned renewal of Optus phone contracts. Allphones would canvass Optus customers seeking to have them renew their telephone contracts. When this occurred, Optus would pay Allphones a bonus of \$30 – none of which was passed on to Hoy. However, if the customer did renew, the commission of 72.5% continued to be paid to the franchisee. In so doing, Allphones would deduct an administration fee of \$50 and a further delivery

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<sup>24</sup> As described by Rares J *Hoy Mobile Pty Ltd v Allphones Retail Pty Ltd (No 2)* (2008) ATPR 42-240; [2008] FCA 810, [425].

fee of \$11 should there be a new handset. Hoy Mobile considered that these deductions should not have been made.

- The third area of dispute was a decision by Allphones to deduct fees owed to Hoy Mobile on the basis that Hoy Mobile would ‘refresh’ the look of the store. Again, Hoy considered that Allphones could not compel a change of store appearance and in any event, disputed the amount that Allphones had deducted.

Behind these, what objectively might be considered as minor financial discord between a franchisor and a franchisee, lay a dispute that was far more poisonous and which was in some way masked by the this context. Hoy Mobile had fraudulently unlocked mobile phones. This is a practise where a phone that was to be linked to a particular carrier was unlocked whereby the phone could then be attached to any particular telecommunications company. When this fraud came to the attention of Allphones, the franchise was terminated based on the contractual right contained within clause 9.3(viii) of the agreement that the franchisor could terminate if the franchisee engaged in fraudulent practices. The context in which this occurred however, was a judicial acceptance and acknowledgement that Allphones had acted deceitfully,<sup>25</sup> oppressively and engaged in overt bullying of the franchisee.<sup>26</sup> Some of these darker allegations consisted of a failure to address the substance of the correspondence provided by the franchisee, making threatening and unjustifiable demands as well as indicating that the franchisee had no tenure in that position.<sup>27</sup>

### ***The decision of the primary judge, Rares J<sup>28</sup>***

Rares J found as a matter of law that Allphones had no entitlement to deduct the stretch bonus with the franchisor being aware of this. For this reason, Allphones had repudiated the agreement. Similarly, Rares J considered that Allphones was not entitled to make the renewal deductions, and whilst it was entitled to charge for store refresh costs, the amount deducted was not reasonable. Finally, even though Hoy Mobile was guilty of

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<sup>25</sup> (2008) ATPR 42-240, [406].

<sup>26</sup> *Ibid.*

<sup>27</sup> *Ibid.*

<sup>28</sup> (2008) ATPR 42-240; [2008] FCA 810.

fraudulently unlocking the phones, as Allphones were not in a position to perform the agreement, they could not therefore rely on the express power of termination in the franchise arrangement. Such rights could only be exercised by parties under an agreement that were ready, willing, and able to perform that agreement.<sup>29</sup> Rares J then went on to find that s 22 was triggered because of Allphones' conduct generally; the bullying and oppressive conduct previously canvassed made it unconscionable for the termination to proceed. For these reasons, Allphones had engaged in unconscionable conduct and an order was made to pay Hoy Mobile the sum of \$52,893.35, and an injunction was granted under what was then s 87 of the *Trade Practices Act 1974* (see now ss 87, of the *Competition and Consumer Act 2010*, 243 of the Australian Consumer Law) preventing the termination of an agreement.

The approach here of Rares J is intriguing, but one we would suggest is correct. The judge could simply have examined the termination issue separately, without resort to s 22. Indeed, on appeal it was queried why resort was had to s 22 at all<sup>30</sup>. Nevertheless, it is suggested that Rares J was clearly looking at a wider reach of s 22 - one that took into account, but could override the express terms of the contract and which implicitly recognises and understands the nuances of remedial intervention into the contract that s 22 and s 243 would allow on any plain reading. His Honour noted that s 22 permits the Court to take a broader view of the whole of the relationship and assess conduct in that broader context.<sup>31</sup> As noted:

One purpose of [s 22] was to set a norm of conduct for corporations acting in trade or commerce...The second reading speech stated that this norm of conduct had the purpose of protecting the legal rights of small businesses and ensuring that they could confidently deal with large firms...[Whilst] equity would not find a nexus between Allphones entitlement to terminate and the fraud in which Hoy Mobile had

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<sup>29</sup> (2008) ATPR 42-240 ; [2008] FCA 810, [385].

<sup>30</sup> (2009) 178 FCR 57, [24].

<sup>31</sup> (2008) ATPR 42-240 ; [2008] FCA 810, [419]

engaged...But, [s 22] authorises the Court to look more broadly at the whole of the relationship and to assess the corporation's conduct in that broader context.<sup>32</sup>

In the view of Rares J, the context *included* Allphones' breaches of the franchise agreement, which were the basis of the finding that Allphones was not entitled to terminate. Rares J also specifically referred to other conduct engaged in by Allphones that was relevant under s 22.

Allphones was not willing to carry out the franchise agreement honestly or in good faith according to its terms. Both parties have been in default of their obligations, both contractual and moral, towards one another in the conduct of the relationship. I have had regard to all of the circumstances, including Allphones' conduct leading up to the notice of intention to terminate, and the consequences on Hoy Mobile of a termination. *I am of the opinion that it would be unconscientious for Allphones to insist upon its strict legal rights to force an immediate termination in all the circumstances where the performance of its own obligations under the franchise agreement has been lamentably and dishonestly short of the standards that it ought to have followed.* It engaged in unjustified bullying and oppressive conduct: cf *Simply No-Knead* 104 FCR at 210 [51].<sup>33</sup>(emphasis added)

On appeal, it was noted regarding this statement:

It is, I think, impossible to read this other than as a finding that the decision to terminate pursuant to cl 9.3(viii) was unconscionable. The primary judge's conclusion was not that the misappropriation of the commissions was unconscionable. *Rather it was that termination of the agreement in light of all the circumstances would be unconscionable.* Those circumstances were the dishonest retention of commission by Allphones, the dishonest unlocking of phones by Hoy Mobile, the bullying and oppressive conduct by Allphones, the

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<sup>32</sup> *Ibid*,[414]-[419].

<sup>33</sup> (2008) ATPR 42-240; [2008] FCA 810, [427].

dysfunctional nature of the relationship and the grave consequences to Hoy Mobile if the agreement were terminated. Once that is accepted, as I think it must be, it is plain that the injunction had the effect of preventing the loss and damage to Hoy Mobile caused by that conduct, that is, caused by the termination of the agreement.<sup>34</sup> (emphasis added)

### ***The Appeal (Goldberg and Jacobson JJ (majority); Perram J (minority))***

On appeal the two crucial issues were:

- the accuracy of Rares J's conclusions regarding Allphones inability to be ready and willing to complete given their repudiation of their obligations under the franchise agreement right to terminate; and
- whether it was appropriate for the injunction to have been issued via s 243 for a breach of s 22.

### ***The Majority***

At the outset, the brief majority judgement of Goldberg, and Jacobson JJ should be distinguished from that of Perram J. In the authors' view the majority took, with respect, an incorrect approach to the issue at hand, as they regarded the termination issue and the s 22 issue as virtually the same. Therefore, once they decided that the express clause could be relied upon by Allphones, and that there was no causal nexus between Allphones otherwise inappropriate conduct and the decision to terminate for Hoy Mobile's fraud, the unconscionability issue fell away. The majority considered that s 243 could not be engaged unless the conduct was causative of the loss. '[If] Allphones did not cause or contribute to the fraudulent conduct which gave rise to its entitlement to terminate the agreement, there could be no causal connection between the circumstances complained of under [s 22] and the termination of the agreement.'<sup>35</sup> Accordingly, the franchisor was entitled to terminate the agreement pursuant to clause 9.3(viii). The

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<sup>34</sup> (2009) 178 FCR 57, [86].

<sup>35</sup> *Ibid*, [7].

authors are in disagreement with this limiting and narrow approach. The legislation is clear, the objectives easily understood. Section 22 establishes a norm of conduct for business, unconscionability is to be considered in all the circumstances. The status and circumstances involving the exercise of the express term and the s 22 issues are completely separate. While the former may be taken into account in assessing the latter, the conclusion regarding the express term, that it was operational, does not jettison the s 22 issue. To do this has not merely ameliorated the effect of s 22, but has allowed commercial behaviour that was uniformly accepted as oppressive and unconscionable to go unpunished, in essence no penalty for failure to comply with the statutorily demanded norm of conduct.

### ***The Minority***

Perram J also held that, with regard to the exercise of the contractual right to terminate, Allphones were not motivated by any extrinsic purpose or capriciousness to breach any duty of good faith. Therefore, the exercise of the right to terminate could not be regarded as unconscionable as there was no causal nexus between the allegedly unconscionable conduct by Allphones (the commissions) and the unrelated, and legitimate decision to terminate. Despite this, his Honour, correctly, it is asserted, treated the s 22 issue quite separately. Unlike the majority, Perram J did not disagree with Rares J conclusion that the termination was unconscionable, prevention possible by the issuing of an injunction under s 243. Perram J noted that Allphones' contention was that the unconscionable conduct identified by Rares J consisted of the wrongful retention of commission; there was no alternative argument that the conclusion that the termination was unconscionable should itself be set aside.<sup>36</sup> Therefore, there was no occasion to assess whether Allphones behaviour was unconscionable. Nevertheless, Perram J did go on to make the following statement:

I would not, however, wish necessarily to be seen as endorsing an approach to that question which downplays the fact that the termination of the agreement was not causally connected to the oppressive behaviour of Allphones. *There may be*

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<sup>36</sup> *Ibid*, [26].

*much to be said for the idea that the circumstances referred to in [s 22] include notions of causation. So viewed, it may be necessary to ask what the logical connexion is between any particular circumstances identified for the purposes of [s 22] and the conclusion that the impugned conduct is unconscionable. Unless such an approach is taken there is a real risk that the conclusion that conduct is unconscionable "in all the circumstances" ceases to be a statement that a norm required by the Act has been breached and becomes instead a remedial conclusion thought to be appropriate by reason of the particular constellation of circumstances. However, there having been no direct attack on the primary judge's conclusion that the conduct was unconscionable, it is not appropriate that I take the matter any further.<sup>37</sup> (emphasis added)*

Perram J's views should be examined with regard to:

- The separate treatment of the termination issue and the unconscionability issue;
- Whether a causal nexus should restrain s 22;
- What impact this decision may have on the interpretation of s 22.

#### *Separate treatment*

First, it is suggested that the contractual issue should be kept quite separate from the operation of s 22. Section 22 promotes a norm of conduct with which corporations and persons must comply. Even though, in isolation, the exercise of the contractual right of termination was not exercised based on any impugned conduct on Allphones' part, this is just one of the many circumstances making up a consideration of unconscionable conduct in this particular context. It should not be permissible to use an isolated circumstance to, artificially it is suggested, prevent consideration of the wider context and operation of s 22.

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<sup>37</sup> *Ibid.*, [87].

### *Causal Link*

Second, the fact that there was, fortuitously for Allphones, no causal link between the express right of termination and Hoy Mobile's fraud, should not automatically absolve Allphones from its other instances of oppressive business conduct; the majority should not have jumped to a conclusion that the conduct was not unconscionable. The basis of the injunction under s 243 was much wider than the express right; indeed, in Rares J's view the two issues were quite separate, to the extent that given that decision on the termination point, Rares J need not have proceeded to consider s 22.

Section 22 requires an examination of all the circumstances and, if it was determined after consideration of those circumstances that the conduct was unconscionable remedies will follow. If a remedy is granted, *because overall the conduct is unconscionable*, the fact that the most appropriate remedy may override the operation of an express term that is unaffected by the otherwise unconscionable behaviour is simply a fact. In this case, although there was no a causal nexus between Allphones unconscionable conduct and its decision to terminate, there was conduct which, in all the circumstances, seemed to be regarded by Rares J as sufficiently unconscionable to justify the grant of the injunction. Although it is not clear on the face of the case, the only way that Rares J could have reached this decision is by assessing the overall conduct, including a consideration of the existence of the express term and Hoy Mobile's fraudulent conduct, and determining it was unconscionable. Only then would the remedy be available.

Perram J's concern was that there must be a logical connection between the conduct and the remedy sought – otherwise s 22 would cease to be a provision establishing a norm of conduct, but a remedial conclusion in itself, the bedfellow of s 243 would presumably merely be a procedural adjunct. But, it is suggested, that Rares J did find that connection. There *was* a logical ligation between the instances of Allphones (in particular the non-payment of commissions and the bullying and uncooperative behaviour) and a finding of unconscionable conduct. Although references were made to the *termination* being unconscionable, it is suggested that this was the remedial conclusion (i.e. the most appropriate remedy on the facts) which could only be available reaching a conclusion that

in all the circumstances, Allphones conduct, including the existence of the express clause, the lack of a causal nexus on that issue and a consideration of Hoy's fraud, was unconscionable.<sup>38</sup> It seems even if the express clause had been held by Rares J to be valid, His Honour could have continued with the discussion of s 22 anyway. The remedial conclusion is only justifiable by breach of the norm, which is done by the constellation of circumstances. Rares J's judgment does not undermine the requirement for a causal nexus.

#### *Effect on interpretation of s 22*

Unfortunately, the application for special leave to the High Court on this issue has been refused.<sup>39</sup> The special leave application was based on the termination and unconscionability issues. In relation to the termination, French CJ and Gummow J were of the view that the issue was one of construction of the particular clause and it was unnecessary to revisit the 'ready and willingness' issues examined at first instance and on appeal.<sup>40</sup>

The unconscionability point is intriguing. Counsel for Hoy Mobile stressed the difficulties in which would be experienced in the interpretation of s 22 if the decision of the majority of the Full Court stood.<sup>41</sup> Indeed, this contention caused French CJ to query if the majority's approach had the effect of limiting s 22 to equitable notions.<sup>42</sup> It was contended that the majority's interpretation would limit s 22 to the common law and, if this were correct, there would be no more work for s 22 to do in respect of termination. Special leave was not granted but it is worthwhile noting French CJ's comments in full:

The Full Court also decided, by majority, that the exercise by Allphones of its contractual right to terminate could not constitute conduct that was

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<sup>38</sup> We submit that the approach described at (2009) 178 FCR 57, [86] is the correct one, namely, that one looks at the conduct in relation to a termination to see whether the termination would be unconscionable. Then in terms of the causation element, one can say that it would be likely to produce loss or damage if the party unconscionably seeking to exercise a right of termination were to go ahead and do it and that livens the 87 remedy. That, we submit, is the correct approach.

<sup>39</sup> *Hoy Mobile Pty Ltd v Allphones Retail Pty Ltd* [2009] HCATrans 325.

<sup>40</sup> The power of Allphones to terminate its contract with Hoy Mobile was conferred by the terms of the written agreement between them. The conclusion reached by the Full Court that the power was not qualified by anterior repudiation of the contract by the terminating party is not, in our opinion, attended with sufficient doubt to warrant the grant of special leave.

<sup>41</sup> *Hoy Mobile Pty Ltd v Allphones Retail Pty Ltd* [2009] HCATrans 325, lines 10-90.

<sup>42</sup> *Ibid*, line 95.

unconscionable for the purposes of section [22] of the *[Australian Consumer Law]*. Without endorsing all that was said by the Full Court in the circumstances which gave rise to Allphones' contractual power to terminate, an appeal against this decision has insufficient prospects of success to warrant the grant of special leave. (Emphasis added)

It is suggested that the failure to grant special leave in this case was based on Hoy's ultimate prospects of success. The franchisee had behaved fraudulently, and although s 22 does not require parties to come 'with clean hands' it is suggested that Hoy was a 'weak' prospect and perhaps, in the High Courts view, an undeserving one. More importantly, the High Court did not endorse the Full Court's view regarding the circumstances involving the power to terminate. This can only refer to the majority's view on the unconscionability point as, on this issue, the majority diverged from Perram J. This suggests that the upholding of the express right of termination will not jettison the s 22 considerations. But, unfortunately, more cases will be required to achieve an ultimate answer. In some respects, this refusal by French CJ (along with Gummow J) to grant special leave was somewhat surprising. French J (as he then was) in the first instance decision in *Berbatis*<sup>43</sup> promoting an expansive view of unconscionability with the possibility that this doctrine would unify various equitable tenets such as estoppel, unjust enrichment, economic duress and unilateral mistake,<sup>44</sup> with the recognition that its parameters are "normative rather than logical".<sup>45</sup> Given this we may have thought that as the Chief Justice in the High Court, the opportunity presented by *Allphones* to reverse the restrictive constraints placed on the doctrine by the then majority of the High Court in *Berbatis*<sup>46</sup> would have been too strong to resist. As readers will recall, in that matter the High Court refused to accept that mere inequality of bargaining power, or the lack of any expectation of a right of renewal of a lease, or the hard, uncompromising bargain of the stronger party could amount to special disadvantage. Callinan J. summing up what these authors perceive as an overly draconian view: 'unfair exploitation of disadvantage

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<sup>43</sup> *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd* (2000) 96 FCR 491; 169 ALR 324.

<sup>44</sup> *Ibid*, [25], see also Ross Buckley, "Sections 51AA and 51AC of the Trade Practices Act 1974: The Need for Reform", (2000) 8 *TPLJ* 5, 15.

<sup>45</sup> *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd* (2000) 96 FCR 491, [25].

<sup>46</sup> *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd* (2003) 214 CLR 51.

amounting to unconscionable conduct...is far too broad and imprecise to be accepted in this Court.’<sup>47</sup> Perhaps *Allphones*, with the conduct of the franchisee under examination, and despite the dramatic and drastic consequences for the franchisee was simply not the vehicle to revisit what the majority had said.

Section 22 offers considerable potential. It clearly requires a normative analysis,<sup>48</sup> and demands of the curial discretion that consideration be given to the behaviour of the parties throughout the contractual process. The direction to the Bench to engage in social engineering<sup>49</sup> is clear, explicit and should be heeded, concern as to uncertainty and imprecision swept aside in a search for not merely truth, but fairness.

## Conclusion

The then Justice French, writing extra judicially, described common law causes of action when compared with misleading and deceptive conduct as a “slow-growing sauropod.”<sup>50</sup> Today, and when unconstrained by curial conservatism, the now Chief Justice of the High Court may well use a similar analogy to describe s 22 when compared with its Jurassic relative, the common law doctrine of unconscionability. However, the decision the subject of focus in this paper, unless reversed, may well alter that thinking. Indeed, it may be suggested that in the decade of s 22, it has become that sauropod, slowly moving, rarely seen and glacially moving towards its extinction. These factors led the Senate Standing Committee on Economics to recommend that the ACCC undertake a number of test cases,<sup>51</sup> to ensure that the legislation rightfully achieves its objectives of fairness in commercial dealings.<sup>52</sup> In the absence of this, however, and to combine an interpretation of unconscionable conduct that necessitates moral obloquy with, as *Allphones* did, with a view of causation and connexion to remedial outcome that is extraordinarily narrow renders the section largely redundant. It need not be so. The underlying purposive basis

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<sup>47</sup> *Ibid*, 112.

<sup>48</sup> See Lees, above n 12, 107-108.

<sup>49</sup> As noted by Lees, above n 12, 108: “Thus [ss51AA-51AC] aim to reinforce contract norms and can be considered a form of social engineering.”

<sup>50</sup> Justice RS French, “A Lawyers Guide to Misleading or Deceptive Conduct: (1989) 63 *ALJ* 250, 250.

<sup>51</sup> The Senate Standing Committee on Economics, *Report on 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), 39.

<sup>52</sup> See generally, Daniel Clough, “Coexistence of Fairness and Competition under the Trade Practices Act 1974 (Cth)”, (2005) 33 *ABLR* 99.

for any interventionist consumer/small business legislation lies in the schism that occurs between strong seller/supplier and weak buyer/recipient. Section 22 is directly aimed at inducing ‘behavioural change’,<sup>53</sup> the conduct that occurred in *Allphones* and the incapacity of Hoy Mobile to realise the value of their investment in the franchise tells us starkly that s 22 and its interpretation by the Full Federal Court has failed to deliver on its promise. After all, it must be emphasised that the conduct of the franchisor was accepted as being oppressive, threatening, and bullying, yet no remedy was available to the franchisee. Absent any express provision that corporations must engage in unfair conduct (and whilst a question for a different day, it may be queried as to why such a provision could not be included, with many jurisdictions having something of this ilk),<sup>54</sup> unconscionability doctrines provide the next best alternative. With the Australian economy dominated in many key areas by industry shaped with oligopolistic features, the small business owner, (now recognised as vital in a modern economy)<sup>55</sup> has no opportunity to transact transparently, confidently, and secure in the knowledge that not only the process, but the substance of the arrangement has been concluded and engaged in a spirit of commercial fairness. Whilst economists may well disagree with consumer advocates about the costs and benefits of market intervention, the behaviour of Allphones in this litigation should send a salutary message about the value of good faith intervention – here was a company able to get away with behaviour that was indisputably unconscionable, yet no penalty flowed from that, yet the franchisee had their livelihood destroyed. Sadly, the comment of Cornwall-Jones<sup>56</sup> shortly after the enactment of s 22 has not been fulfilled. In 2000, he stated:

“The more recent addition of [s 22 of the Australian Consumer Law], which extends the statutory prohibition of unconscionable conduct to commercial contracts, indicates that fairness applies beyond the consumer context. The movement toward fairness, referred to as a ‘measured mutation’ by Seddon is general in nature. Any expansion of [s 18 of the Australian Consumer Law and the

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<sup>53</sup> Commonwealth, Parliamentary Debates, House of Representatives, 30 September 1997, 8801 (Peter Reith, Minister for Workplace Relations and Small Business).

<sup>54</sup> See generally Jennifer Martin, “An Emerging Worldwide Standard for Protection of Consumers in the Sale of Goods: Did We Miss an Opportunity with Revised UCC Article 2?” (2006) 41 *Tex. Int’l L. J.* 223 for an overview of global developments.

<sup>55</sup> Commonwealth, Parliamentary Debates, House of Representatives, 30 September 1997, 8802 (Peter Reith, Minister for Workplace Relations and Small Business).

<sup>56</sup> Jason Cornwall-Jones, “Breach of Contract and Misleading Conduct: A Storm in a Teacup?”, (2000) 24 *Melb. U. L. Rev.* 249

authors would add here statutory unconscionability] can easily be reconciled with this evolution of the law, and is to be encouraged.”<sup>57</sup>

Fairness, justice, morality and no doubt efficiency, fashion the law<sup>58</sup> but the overly technical and doctrinal limiting interpretation by the Full Federal Court in *Allphones* undermines the respect that franchisees like Hoy Mobile would have for our legal institutions. The intent of Parliament was clear, the wording explicit, the conclusion reached by Rares J appropriate. Allphones engaged in unconscionable conduct – to respond that this was causally distinct from the power of termination and was independent of the oppressive conduct is to dimidiate behaviour in a way that has no commercial or practical reality. The relationship of franchisor and franchisee had become dysfunctional and to segregate some conduct into behaviour that was dishonest, oppressive and bullying, but to equally suggest that the power of termination was a legitimate exercise of contractual power serves only to undermine the stated intent to the *Competition and Consumer Act 2010*, and the reasons behind s 22 of the *Australian Consumer Law*. Whatever may be the economic costs of intervention, the less quantifiable notion of underlying fairness is no less important. Unconscionability is fast becoming the sauropod – if the common law is unable to deliver Parliament’s aims, then Parliament must act.

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<sup>57</sup> *Ibid*, 275.

<sup>58</sup> For Consideration of on the role of law and economics and the balance needed with notions such as fairness see Sir Anthony Mason, “Law and Economics”, (1991) 17 *Monash University Law Review* 167, 171.