

**ACCC V LEE LEE PTY LTD (1999) FCA 1121**

Federal Court of Australia – 20 August 1999

**FACTS**

The Commission issued proceedings against Lee Lee for breaches of section 51AC (1) of the Trade Practices Act 1974.

Section SIAC says that a corporation must not in trade or commerce when supplying or acquiring goods from a person engage in conduct that is unconscionable. That section became law on 1 July 1998.

The Commission issued proceedings on behalf of the Choongs, who were sub-tenants of Lee Lee. It was alleged that Lee Lee had been unconscionable in its business dealings with Lee Lee during the sub-lease term between 1991 and 1999.

**ISSUES**

Could the Commission plead allegedly unconscionable conduct by lease before 1 July 1998 to support the claims for unconscionable conduct after 1 July 1998?

**FINDING**

The commission could only plead conduct of Lee Lee before 1 July 1998 when it related to facts which were directly relevant to the post 1 July 1998 claims.

**QUOTE**

Mansfield J said

*“Those considerations lead me to the conclusion that, in determining whether an alleged contravention of section 51 AC(1) of the Act has occurred, the Court cannot take into account conduct on the part of the alleged contravener, using the term ‘conduct’ in the wide sense in which it is defined in s 4 (2) of the Act. It follows, in my judgment, that the applicant ought not be permitted to make allegations of conduct on the part of the respondents prior to 1 July 1998 in the statement of claim”.*

*“That does not indicate where the borderline between ‘circumstances’ and ‘conduct’ lies. Yet, borderline there must be. There may clearly be matters relevant to an alleged contravention of s 51AC(1) of the Act which do not involve any conduct on the part of the alleged contravener, and which arose before 1 July 1998. Where they provide the context in which an alleged contravention is sought to be proved, there is nothing to indicate that those matters might not be alleged and proved.*

*There may also be matters which involve some act done or transaction entered into by an alleged contravener prior to 1 July 1998 which proved the content in which the alleged contravention occurred. Such matters may well be ‘circumstances’ under section 51AC(6)(b). An illustration in the present claim*

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*may be Leelee's lease of the premises, and its underlease of the stall to the Choongs. Another illustration may be the fact of Mr Ong's directorship of Leelee.*

*Although, in sense, each of those matters involves conduct because Leelee had to act to accept the lease and grant the underlease, and Mr Ong had to give his consent to be a director of Leelee, I do not think that that is the sort of conduct to which s51AC(6)(b) refers.*

*That is because the definition of conduct, and of engaging in conduct, in section 4 (2) of the Act, although widely expressed, serves the purpose of identifying behaviour which may relate in some way to a potential contravention of provision of the Act. In the present matter, the fact of the underlease (for example) is not related in that way to the alleged infringement but provides the setting in which the alleged infringement occurred”.*

## **IMPACT**

A claim for unconscionable conduct under by section 51AC of the Trade Practices Act must relate to conduct after 1 July 1998. It is not permissible to rely on pre-1 July 1998 conduct before 1 July 1998 to support an unconscionability claim under the section.

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