



# **COMPETITION LAW UNFAIR BARGAINING**

WIN In-House Counsel Day Melbourne 2017

**Thursday, 23 February 2017**

# Agenda

- 1 Introduction
- 2 Misuse of Market Power
- 3 Unconscionability
- 4 Unfair Contract Terms
- 5 Key Take Aways



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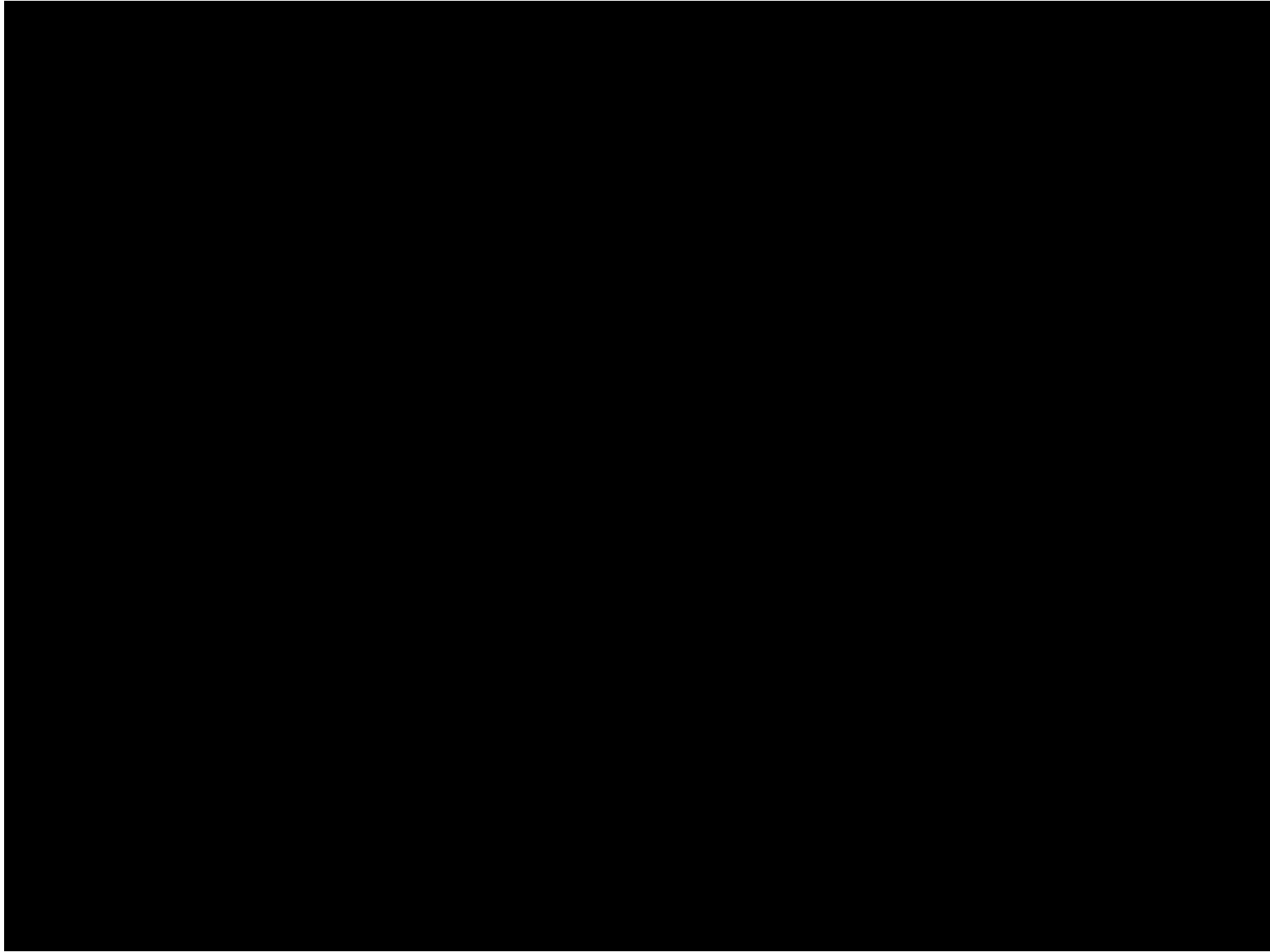
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# Misuse of market power

# Proposed changes to section 46

## Current s46

A corporation that has a **substantial degree of power** in a market

shall not **take advantage** of that power in that or any other market

for the **purpose** of:

- a) eliminating or substantially damaging a competitor of the corporation or of a body corporate that is related to the corporation in that or any other market;
- b) preventing the entry of a person into that or any other market; or
- c) deterring or preventing a person from engaging in competitive conduct in that or any other market.

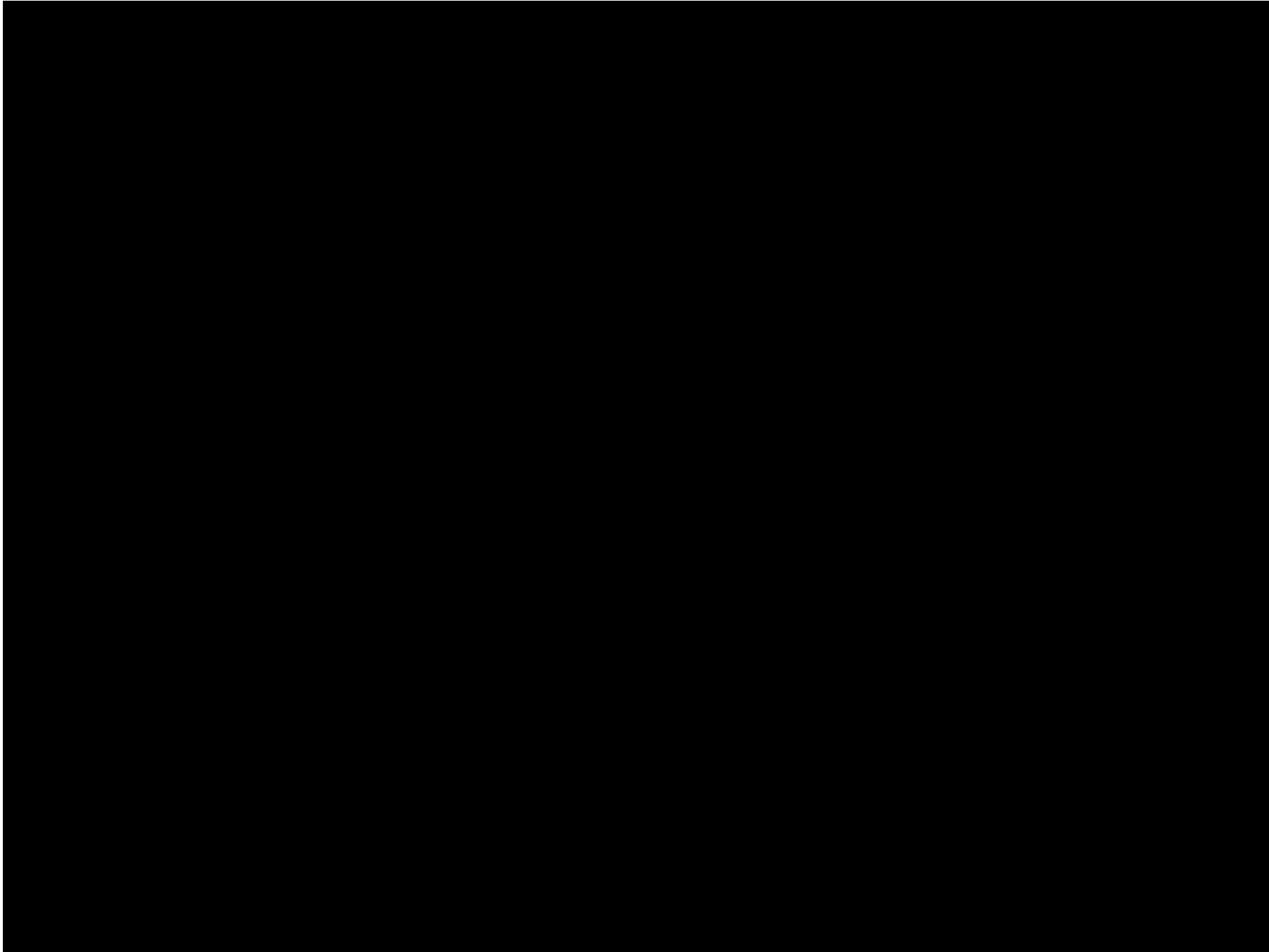
## Proposed s46

A corporation that has a **substantial degree of power** in a market

must not engage in conduct

that has the **purpose**, or has or is **likely to have the effect**, of **substantially lessening competition** in:

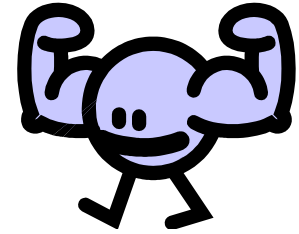
- a) that market; or
- b) any other market in which that corporation, or a related body corporate supplies or is likely to supply goods or services (including indirectly); or
- c) any other market in which that corporation or a related body corporate acquires or is likely to acquire goods or services (including indirectly).



## Key questions for initiative 1

- Does Batteries R Us have market power? In what market?
- What is Batteries R Us' purpose?
- Is there an anti-competitive effect? In what market?

# Market and substantial market power?



- Market?
  - Area of close competition
- Market Power?
  - Ability to act unconstrained by competitors, customers and suppliers
  - Power resulting from agreements
  - Market share relevant but not conclusive
  - Barriers to entry

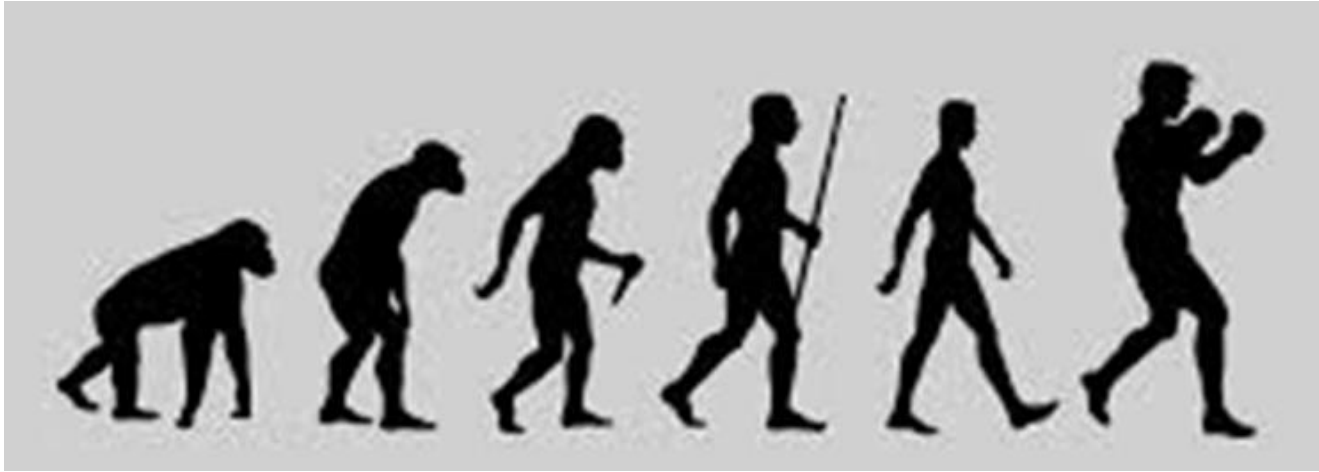


# Substantially lessening competition?

- Generally, need to consider
  - What is the impact of the conduct on the market?
  - Will the conduct lead to the reduction in competition with a major participant?
  - Will the conduct lead to the removal of a major participant from the market?
  - Ease of entry by new competitors into the market
  - Is there a legitimate business reason for engaging in the conduct?
  - The future state of competition in the market with and without the alleged conduct.

# Unconscionability

# Evolution of Unconscionable Conduct



Ancient  
times

Equity:

*Blomley v  
Ryan*

*CBA v  
Amadio*

1986

s52A

Statutory UC  
introduced

Applies to  
consumers

1992

s51AA

Codification of  
unwritten law on  
equitable UC

Expanded  
penalties

1998

s51AC

Extends  
statutory UC to  
B2B

2010

ACL: s21

Combined  
statutory UC for  
B2C and B2B

2016

*ACCC v Lux (2013)*

- \$370k penalty

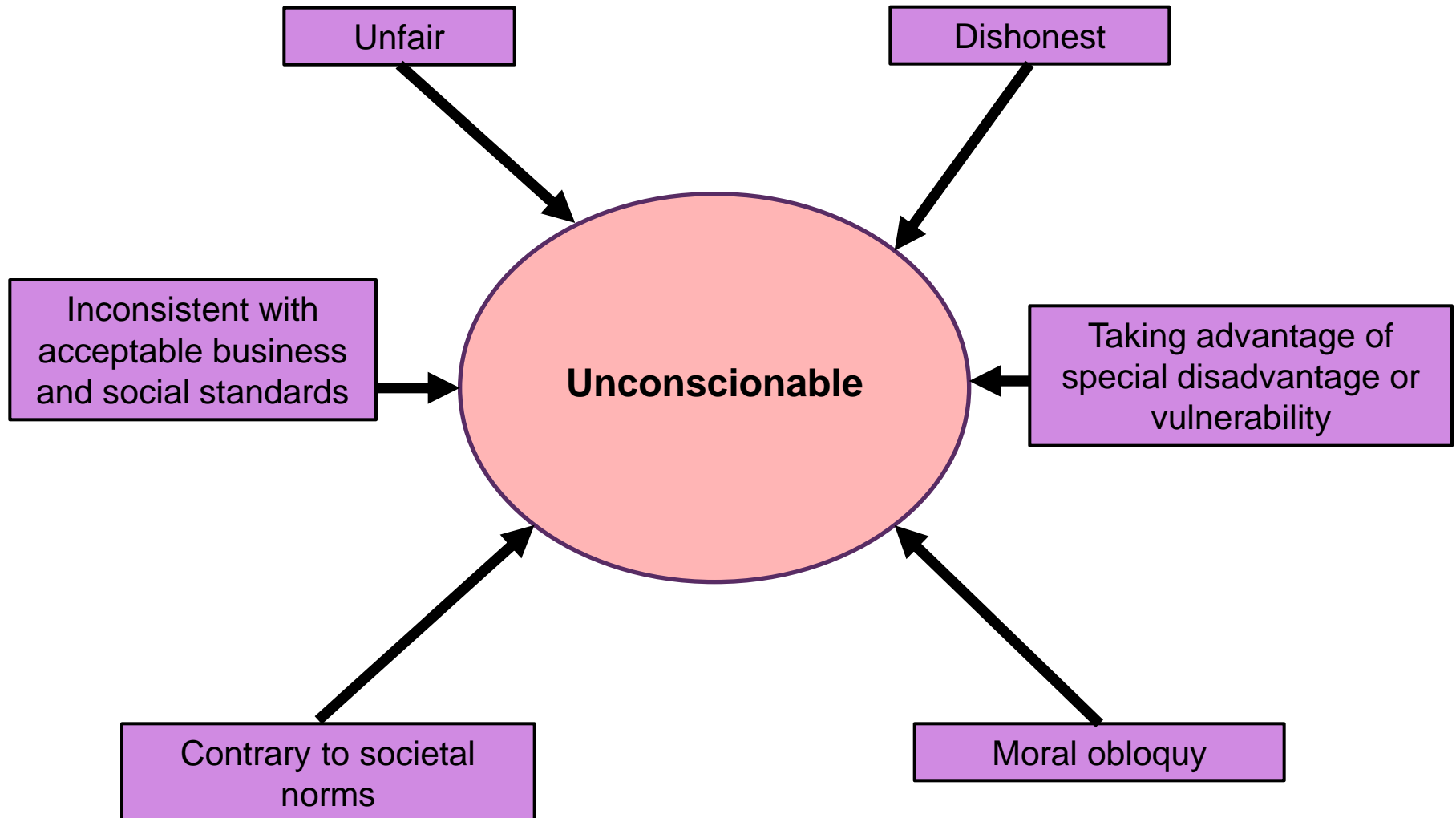
*ACCC v Coles (2014)*

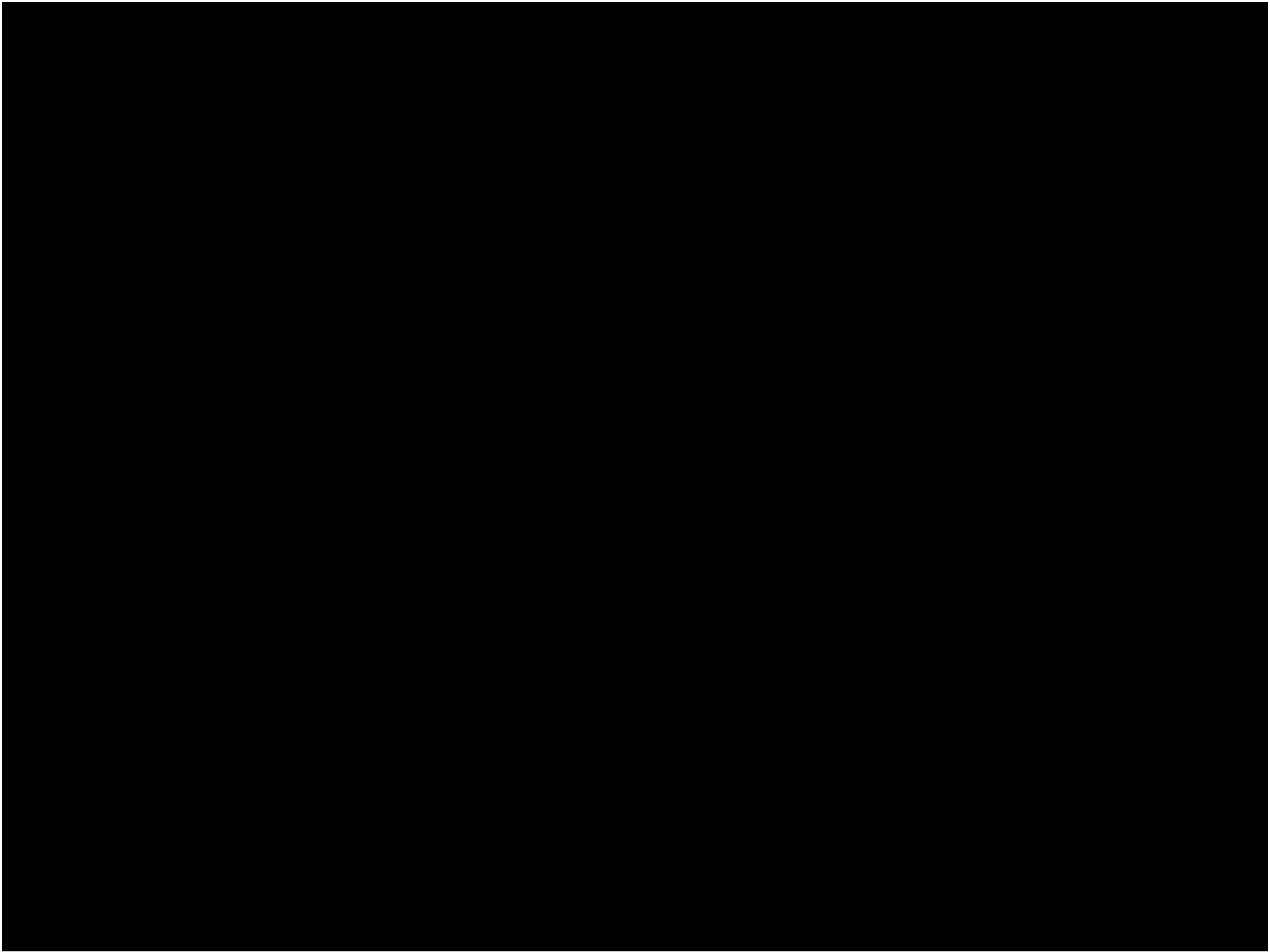
- B2B
- \$10m penalty

*ACCC v WOW (2016)*

- B2B
- ACCC lost

# What is unconscionable?





## Key questions for initiative 2

- What are all the relevant circumstances?
  - In the industry, what are normal commercial dealings: generally, and specifically in the dealings between Batteries R Us and its suppliers?
- Is there inequality in the bargaining position of Batteries R Us and the suppliers of LED lights?
- Is the strategy irreconcilable with what is right or reasonable?

## ACCC v Coles (2014)

- Agreed settlement of two proceedings
- Specific instances of different conduct aimed at particular suppliers
- Conduct was serious, deliberate, orchestrated, relentless and repeated.
- Coles misused its greater bargaining power, demanded payments from suppliers to which it was not entitled by threatening harm, and withheld money from suppliers it had no right to withhold

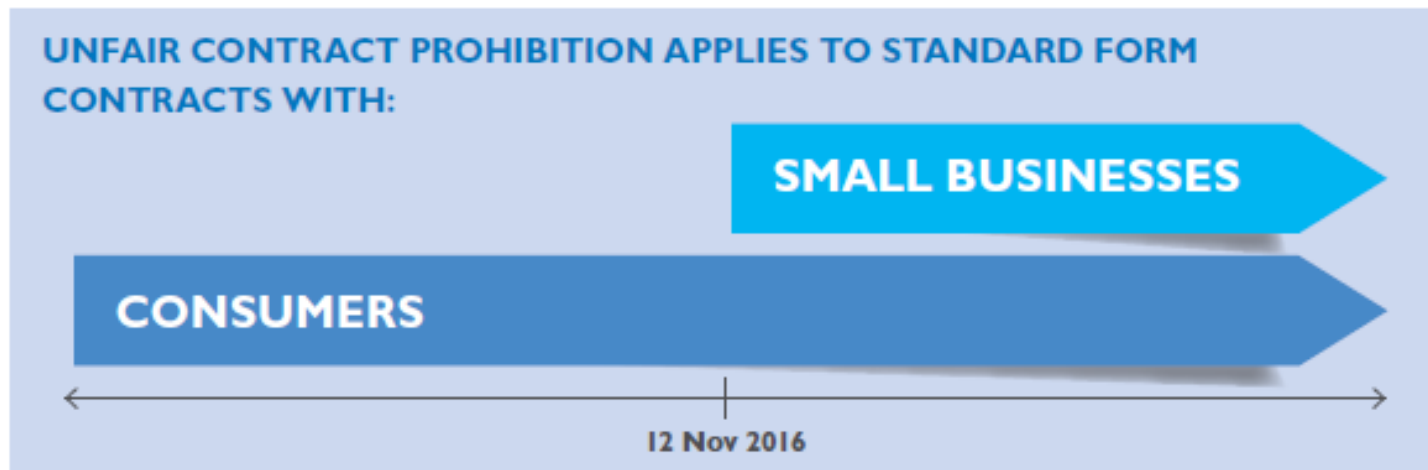
## ACCC v Woolworths (2016)

- Contested
- Systemic unconscionable conduct alleged – the design and implementation of the scheme
- Managers had discretion whether and how to implement the scheme
- Implementation was typical of WOW's usual dealings with suppliers
- The Court's knowledge of "all the circumstances" was incomplete as the ACCC's evidence was documentary only and incomplete

# Unfair contract terms



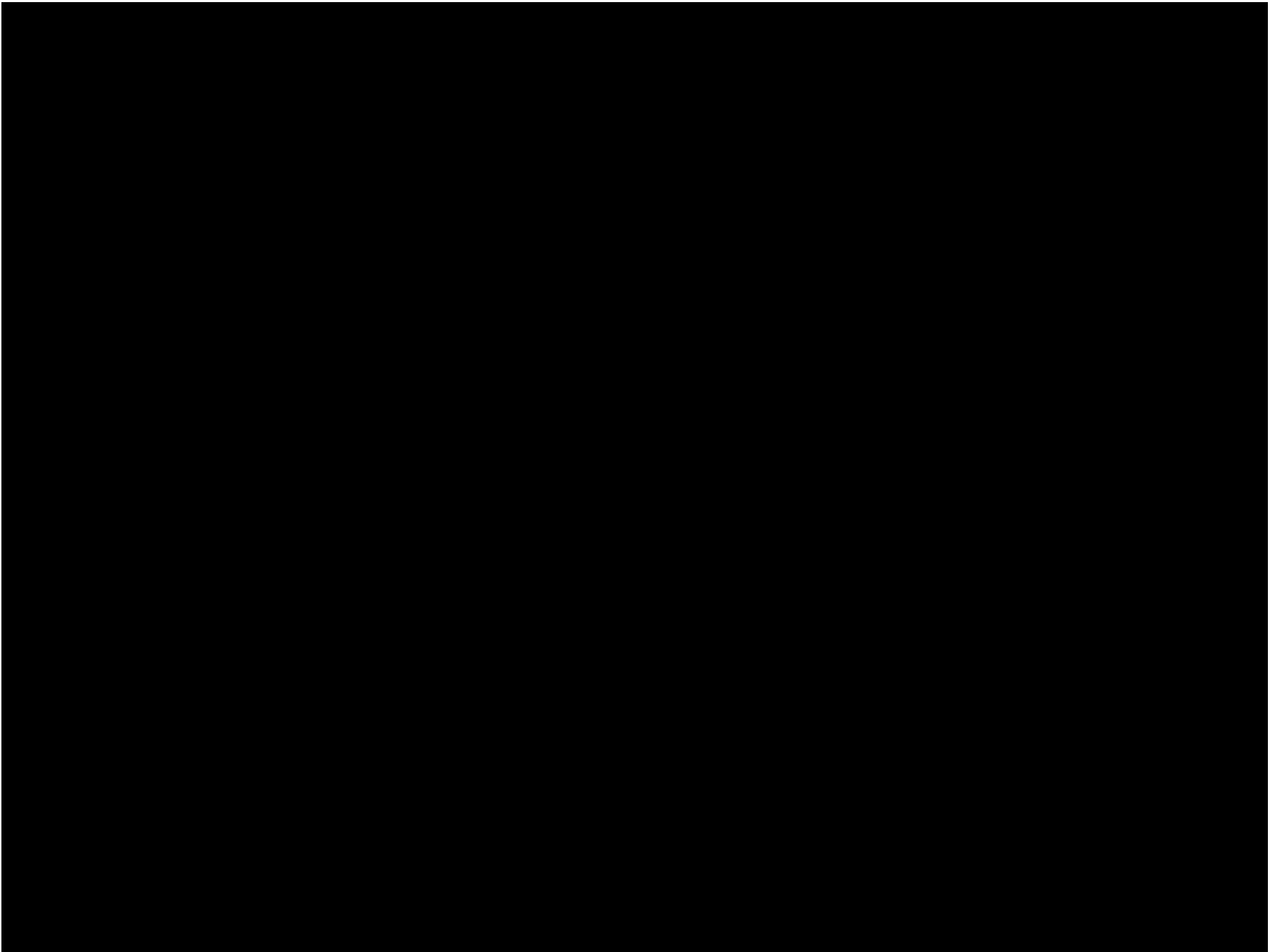
# Unfair contract terms





# Unfair contract terms

- A term will be "unfair" if it:
  - causes a **significant imbalance** in the parties' rights and obligations under the contract;
  - is **not reasonably necessary** to protect the legitimate interests of the party advantaged by the term; and
  - causes **detriment** to a party if relied on.



# Example term 1

## 8.3 Payment

BRU will pay the Installation Charge for each installation within 30 days of completion unless BRU offers longer payment terms to its customers, in which case the payment terms under this clause will be equivalently extended.

# Example term 1 – Mark's amendments

## 8.3 Payment

BRU will pay the Installation Charge for each installation within 30 days of completion unless BRU offers longer payment terms to its customers, in which case the payment terms under this clause will be equivalently extended [provided that Subcontractor consents to such extension.](#)

## Example term 2

### **32.1 Indemnity for Loss or Damage**

Subcontractor indemnifies BRU for any Loss or Damage arising in connection with the installation of the equipment.

## Example term 2 – Mark's amendments

### 32.1 Indemnity for Loss or Damage

Subcontractor indemnifies BRU for any Loss or Damage arising in connection with the installation of the equipment, save for Loss or Damage arising as a direct result of wilfully reckless or negligent conduct from BRU.

## Example term 3

### **34.1 Termination**

If Subcontractor breaches this agreement, BRU may terminate the agreement.



# Example term 3 – Mark's amendments

## 34.1 Termination

If Subcontractor materially breaches this agreement, BRU may terminate the agreement if the Subcontractor has not remedied the breach to BRU's reasonable satisfaction within 10 business days of receiving written notice.

# Key Take Aways

- Competition Law does not prevent hard bargaining of itself. However, there are 3 scenarios when you may need to take greater care. Each of those involves an inequality of bargaining power.
- Misuse of market power
  - Only applies to companies with substantial market power
  - Effects test broadens the scope
- Unconscionability
  - Can apply in B2B scenario
- Unfair Contract Terms
  - The provisions now apply in B2SB as well as B2C transactions
  - Apply to standard form contracts only

**It's nice to meet you B2SB**



# ACCC Priority Areas for 2016

## (2017 areas to be announced tomorrow)

Legislative provisions	Industries / consumers / providers
<ul style="list-style-type: none"> <li>Unfair contract terms</li> </ul>	<ul style="list-style-type: none"> <li>Agriculture sector</li> </ul>
<ul style="list-style-type: none"> <li>Cartels</li> </ul>	<ul style="list-style-type: none"> <li>Ensuring small business receives benefit from Industry Codes of Conduct</li> </ul>
<ul style="list-style-type: none"> <li>Misuse of market power</li> </ul>	<ul style="list-style-type: none"> <li>Vulnerable consumers including indigenous consumers</li> </ul>
<ul style="list-style-type: none"> <li>Anti-competitive agreements</li> </ul>	<ul style="list-style-type: none"> <li>New car retailing</li> </ul>
<ul style="list-style-type: none"> <li>Product safety including recalls of unsafe products</li> </ul>	<ul style="list-style-type: none"> <li>Health/medical sector</li> </ul>
<ul style="list-style-type: none"> <li>Consumer guarantees</li> </ul>	<ul style="list-style-type: none"> <li>Government procurement</li> </ul>
	<ul style="list-style-type: none"> <li>Scams</li> </ul>
	<ul style="list-style-type: none"> <li>Gas inquiry</li> </ul>
	<ul style="list-style-type: none"> <li>Petrol</li> </ul>

