7 June 2010

Mr John Hawkins
Secretary
Senate Economics Legislation Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Mr Hawkins

**Inquiry into Competition and Consumer Legislation Amendment Bill 2010**

In relation to the proposed changes to the unconscionable conduct provisions in the *Competition and Consumer Legislation Amendment Bill 2010*, we opposed the insertion of a list of principles in the *Trade Practices Act* ("the Act") in our submission to the Expert Panel on 18 December 2009. In our view there is no evidence that the unconscionable conduct provisions in the present Part IVA of the Act are confusing to the courts, or to relevant tribunals; nor to the body given primary responsibility for enforcing these provisions, the Australian Competition and Consumer Commission.

Nevertheless, with some reservation, we accept the proposed legislative changes. The reservation we have is that the change may arguably encourage unintended judicial activism, leading to findings that statutory unconscionable conduct exists in commercial settings commonly accepted as unobjectionable. Such a development would be regrettable as it would take the law beyond what was envisaged by the Federal Government when the present section 51AC was introduced in 1998 and thus add to, rather than reduce, commercial uncertainty.

We would point out that in the 12 years in which these provisions have been in operation, the following legislative changes have occurred.

First, the provisions have now been extensively 'drawn down' into State and Territory fair trading and retail tenancy legislation and Section 51ACAA was introduced into the Act to enable this mirroring of provisions in state and territory legislation to occur. In doing so, the unconscionable conduct provisions of state and territory legislation is now subject to a much lesser standard of judicial administration than occurs at the Federal level.

Second, the list of non-exhaustive factors in the sub-paragraphs of Section 51AC (3) and (4) has been expanded by the Federal Parliament.



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Third, the ceiling on transactions 'caught' by section 51AC was first increased from $2 million to $10 million and now the ceiling has been removed completely.

Finally, as noted above, the present Bill creates potential for the scope of statutory unconscionability to be expanded beyond the sensible limits that were intended by Parliament when the provision was first introduced in 1998.

In addition, there have been two specific Senate inquiries into these provisions as well as the recent examination by the Expert Panel

Given this history it is surely now time, when the present Bill is passed, for a long period of legislative stability in this area of the law. This will enable a body of jurisprudence concerning statutory unconscionable conduct to continue within a stable legislative setting; will facilitate a more settled understanding by both the ACCC and by industry of the kinds of commercial conduct that invoke statutory unconscionable conduct and will promote greater commercial certainty. We **recommend** that the Senate Committee urges such a period of legislative stability.

I apologise that this submission is lodged after the deadline of 4 June. I would note, however, that a deadline of two days for the lodgement of submissions does not give organisations an adequate length of time to consider all the ramifications of the Bill and to undertake the necessary consultations with members.

Yours sincerely

Milton Cockburn
**Executive Director**