6 Legislative protection against unfair conduct

The law hath not been dead, though it hath slept.
(William Shakespeare, *Measure for Measure*).

Common features of unfair conduct

6.1 Evidence presented to the inquiry dealt with a range of unfair business conduct. Based on its experience in the administration of the Trade Practices Act, the Australian Competition and Consumer Commission (ACCC) advised that there are a number of common features in the complaints it has received from small businesses in relation to their dealings with more powerful firms:

- *little or no ability to negotiate terms of the contract (often pro-forma 'take it or leave it' contracts are used);*
- *inadequate disclosure of relevant and important commercial information which the weaker party should be aware of before entering the transaction;*
- *inadequate and unclear disclosure of important terms of the contract, particularly those which are weighed against the weaker party. This can occur through:*
  - ⇒ *the technical wording of the document;*
  - ⇒ *the 'theatre' of the negotiations whereby the small business person is under-represented, lacks the legal fire power brought to the table by the other party, and is discouraged (or not given the opportunity) to consider the details of the contract; and*
  - ⇒ *the fact that the terms which can operate against the interests of the weaker party are not brought to the attention of that party, or their full import is not spelt out to that party.*
- *When smaller parties have committed themselves to a long term relationship eg through a lease or franchise, the dominant parties seek to vary the nature of the relationship so that it is more favourable to the dominant player and conversely, affects the viability of the weaker party.*

- *When disputes do arise there is often no quick, cheap and market sensitive way of dealing with them and even where they do exist, there is a reluctance by small business to access any remedial action through fear of reprisal.* [1]

6.2 The Committee agrees that such common features have been involved in the unfair conduct brought to its notice.

The concept of 'unconscionable conduct'

6.3 The concept of 'unconscionable conduct' has its origins in Equity.[2] In its broadest sense, it is used to describe conduct by a party who stands to receive a benefit from a transaction which, in good conscience, should not be allowed to stand. Such conduct typically involves the use of, or insistence upon, the legal entitlements under contracts and in property, trusts and other interests; but it can also involve the use of superior bargaining power in a transaction between two parties. However, the categories where relief has been granted are isolated and exceptional and the jurisdiction is confined within narrow limits. Those narrow limits are contained within a number of equitable doctrines developed over the centuries. The relevant doctrines are those of:`

- unconscionable bargains:

  ⇒ an inequality of bargaining power is said to exist when the weaker party has been shown to suffer from a 'special disability' (such as a lack of understanding or the absence of legal advice);[3]

1 ACCC, *Submission No 62*, pp 5-6.

2 Equity, in the sense in which it is distinguished from the Common Law, consisted originally of a body of rules and procedures which grew up separately from the Common Law and which were administered in different courts. The Common Law courts might provide no remedy for a plaintiff, and it became customary for suitors to apply to the Chancellor, who as 'keeper of the King's conscience' would give equitable relief.

3 The occasions upon which a party may be said to be at a special disadvantage in this context cannot be comprehensively classified. But in *Blomley v Ryan*, Fullagar J mentioned 'poverty, or need of any kind, sickness, age, sex, infirmity of body or mind, drunkenness, illiteracy or lack of education, lack of assistance or explanation where assistance or explanation is necessary. Kitto J referred to 'illness, ignorance, inexperience, impaired facilities, financial need' and other circumstances affecting a party's ability 'to conserve his own interests'. In *Amadio*, Dawson J suggested that unfamiliarity with the English language may be added to the list while Mason J stressed that the disadvantage must be special. But, having made his point, Mason J added the significant comment:

> *Because times have changed new situations have arisen in which it may be appropriate to invoke the underlying principle. Take, for example, entry into a standard form of contract dictated by a party whose bargaining power is greatly superior . . . In situations of this kind it is necessary for the plaintiff who seeks relief to establish unconscionable conduct, namely that unconscientious advantage has been taken of his disabling condition or circumstance.*

Finn, P D, ed., *Essays in Equity* (The Law Book Company Limited, Sydney, 1985) pp 3-4.

- undue influence:

  ⇒ an inequality arises from the existence of a special relationship;

- economic duress:

  ⇒ this doctrine focuses on the lack of a practicable alternative as the source of inequality. The inequality arises when there is a threat to a party's economic interests so that there is no practicable alternative but to submit.

  ⇒ However, the mere presence of an inequality is not conclusive of unconscionable conduct. The inequality must be such that the weaker party suffers from an inability to protect its interests. If the stronger party is sufficiently aware of the inability and takes advantage of the weaker party, there is a presumption that the conduct in question is unconscionable. It is then up to the stronger party to rebut the presumption by showing that, in all the circumstances, the terms of the transaction were fair, just and reasonable.

6.4 In relation to these concepts Toohey J in *Louth v Diprose* (1992) 175 CLR 362 at 405 had this to say:

> *Although the concept of unconscionability has been expressed in fairly wide terms, the courts are exercising an equitable jurisdiction according to recognised principles. They are not armed with a general power to set aside bargains simply because, in the eyes of the judges, they appear to be unfair, harsh or unconscionable.* [4]

4 cited *Exhibit No. 13.* As a further illustration, in 1973 in *South Australian Railways Commissioner v Egan*, Menzies J in the High Court regarded the contract as 'so outrageous that it is surprising that any contractor would work for the Railways Commissioner upon its terms ...'. His Honour commented that it was 'perhaps the most wordy, obscure and oppressive contract that I have ever come across ...'. The High Court made it clear that such provisions found little favour in modern eyes but nevertheless held that it was required to give legal effect to the provisions and was 'not to be deflected from that course because they appear unfair and one-sided'. cited Terry A L, 'Unconscionable Contracts in New South Wales: Contracts Review Act 1980' (*Exhibit No. 27).*

6.5 The various equitable doctrines dealing with unconscionable conduct have increasingly been modified by statute but, initially, legislative intervention was in specific areas such as consumer credit. The first comprehensive legislation in Australia was the *NSW Contracts Review Act 1980,* followed by Section 52A of the Trade Practices Act in 1986. Both pieces of legislation were motivated by the conviction that the relief available under the equitable doctrine of unconscionability (and in the case of NSW, the C*ontracts Review Act 1980,* the *Moneylending Act 1941* and the *Hire-Purchase Act 1960*[5]) was too narrow.

6.6 In respect of the Contracts Review Act the following reasons were given for its introduction by the responsible Minister:

> *The fundamental purpose of the Contracts Review Bill is to provide relief to be granted against certain contracts that prove to be harsh, oppressive, unconscionable or unjust. The principles of sanctity and freedom of contract that largely emerged from the 18th and 19th centuries are still honoured by the courts. Those principles bear little relationship to the climate that often prevails over today's contractual transactions. . . In individual and selective cases, the courts have, in effect, subverted the doctrine of sanctity of contract through the use of various judicial devices. But this practice merely accounts for a multitude of decisions that fail even collectively to lend any real, constructive authority. The problem is that the common law has failed to keep abreast of the needs of a rapidly changing society by developing a general doctrine for dealing with unconscionable contracts. . . In the government's considered view, it is the duty of this Parliament to remedy this inadequacy in New South Wales and to provide our Supreme Court and District Court with legislative power and guidance within which to administer justice in unconscionable bargains.* [6]

5 Peden, John R, *Harsh and Unconscionable Contracts*, Report to the Minister for Consumer Affairs and Co-operative Societies and the Attorney-General for New South Wales (Macquarie University, October 1976).

6 cited *Exhibit No. 14.*

Existing unconscionability provisions of the Trade Practices Act

6.7 While other sections also deal with issues which come under the heading of 'unfair', Part IVA of the Trade Practices Act specifically deals with 'unconscionable conduct'. The section dealing with 'commercial' transactions is Section 51AA and it provides:

> ***51AA (1)*** *A Corporation must not, in trade or commerce, engage in conduct that is unconscionable within the meaning of the unwritten law, from time to time, of the States and Territories.*
>
> ***(2)*** *This section does not apply to conduct that is prohibited by section 51AB.*

6.8 The following Section 51AB deals with 'consumer' transactions. The text of this Section is at Appendix VII. At the time of the enactment of Section 51AA in 1992 it was specifically decided to provide a separate section dealing with 'commercial' transactions different from the existing section dealing with consumer transactions (the then Section 52A and now Section 51AB). Section 51AA was not intended to create new legal rights but to provide a statutory codification of the equitable doctrine of unconscionability as determined by the courts. Such codification was seen as having the following advantages:

- it opened unconscionable conduct in commercial transactions to scrutiny by the Trade Practices Commission;
- it provided for representative action by the Trade Practices Commission; and
- if proved, it allowed remedies such as damages and variations of contract as provided for by sections 80 and 87 of the Trade Practices Act respectively.

6.9 It is generally considered that Section 51AB provides a higher level of protection to consumer transactions than that provided by Section 51AA to commercial transactions.[7] In relation to the formulation of Section 51AA Mr Allan Asher, Deputy Chairman of the ACCC, said:

> *That is not the one that the Commission was supporting at the time of the parliamentary inquiry. Indeed, that was a compromise, I think, reached between the Attorney-General's Department and interest groups to use that formula about the unwritten law of the states.*

7 The report of the Senate Standing Committee on Legal and Constitutional Affairs, *Mergers, Monopolies & Acquisitions: Adequacy of Existing Legislative Controls* (1991) argued that the consumer section did not enhance the protection afforded by the common law. This view is not consistent with the experience of the ACCC.

> *... The view that the Commission took, and argued at those hearings, was that the simplest way of fixing it at the time is just to delete one sentence from the old section 52A and it would apply across the board.*[8]

6.10 The Committee understands that the then Minister had hoped that the capacity of the ACCC to bring actions for unconscionability would lead to rapid judicial development of these doctrines; but this has not happened in practice. The ACCC advised the inquiry that:

> *The Commission considers that it needs to be recognised that section 51AA in its present form does not solve many of the problems which were debated during its development ...*[9]

6.11 Further, the ACCC has advised that legal opinion obtained in relation to particular complaints about 'unconscionable' conduct has indicated that the chance of successful litigation was poor. In relation to this experience Mr Gerald Watts, representing the Australian Petroleum Agents and Distributors Association (APADA) said:

> *APADA has been concerned, I suppose, about unconscionable conduct for many years. It has been a supporter of changes to the Trade Practices Act for those many years - at least six or seven. We were keen, when 51AA came in, for example, in 1992, to change the original 52A, which of course was the original provision and related only to consumers. However, we have been very disappointed at the outcome of 51AA.*[10]

6.12 The Gardini Report on franchising agreed that Section 51AA of the Trade Practices Act is of little practical benefit. It said:

> *... the inability of a franchisee to demonstrate that he or she suffered from a special disability, or was placed in some situation of disadvantage in dealing with a franchisor is likely to preclude the use of s.51AA. In these circumstances, it is not surprising that ... the Trade Practices Commission has not taken any s.51AA proceedings in relation to franchising ...*[11]

8 Allan Asher, ACCC, *Transcript of evidence*, p. 378.
9 ACCC, *Submission No. 62*, p. 28.
10 Gerald Watts, APADA, *Transcript of evidence*, p. 390.
11 Report by the Franchising Task Force to the Minister for Small Business and Customs, the Hon David Beddall MP, 1991.

6.13 Submissions from small business operators and their representative bodies have almost without exception agreed with this assessment. Typical of these submissions was the following from the Australian Automobile Dealers Association (AADA):

> *... in practice there has been no effective protection for franchisees or other small business operators, through either common law or the current provisions of the Trade Practices Act - despite the enactment in 1992 of s.51AA.* [12]

6.14 This advice should come as no surprise as Baker & McKenzie, Solicitors, had advised the Trade Practices Commission in November 1989 about the limitations of the common law doctrine of unconscionability, in the following terms:

> *This suggests that the general law will rarely provide a remedy in cases where a business with weak bargaining power enters into a transaction with a stronger party even if the weaker party is disadvantaged. The courts are therefore unlikely, in most circumstances, to intervene in commercial, as opposed to consumer, transactions. ... The fact that a person has taken advantage of a position of commercial strength is not of itself regarded as illegitimate, even though the commercial strength may be very great ...* [13]

6.15 Some big business interests represented before this inquiry have argued that the existing provisions are adequate.[14]

6.16 For example, Mr James Starkey, representing the Australian Institute of Petroleum, (AIP) said:

> *We believe that a robust Trade Practices Act is essential.*
>
> *... We have addressed in our submission the question of whether the current act adequately protects against harsh and oppressive behaviour. Our current belief is that the provisions regarding unconscionable conduct are sufficient but recognise that to date they may not have been sufficiently tested. We are aware of some recent action by the ACCC to test the legislation and the initial indication is that the legislation as currently drafted is effective.* [15]

12 ACCC, *Submission No. 116.*

13 Trade Practices Commission, *Unconscionable Conduct and the Trade Practices Act: Possible Extension to cover commercial transactions,* Report to the Attorney-General and the Minister for Small Business and Customs (July 1991), Attachment E.

14 *Submissions Nos. 34* (ABA), *73* (ANZ), *75* (ACCI), *83* (AIP), *102* (BP) and *113* (FCAI).

15 James Starkey, AIP, *Transcript of evidence*, p. 361.

6.17 Similarly Mr Tony Conaghan, Phillips Fox (solicitors), argued that it was unnecessary to legislate against harsh conduct on the basis that the common law has demonstrated an ability to adapt to changing business circumstances and that more time is required for the development of the case law.[16] Mr Conaghan referred in particular to the introduction of Section 51AA and the emerging successful intervention by the ACCC for example in Hamilton Island Enterprises Pty Ltd and Ultra Tune. However, Mr Robert Gardini, Solicitor, pointed out that, in relation to the Hamilton Island case the plaintiffs did not succeed in the Federal Court[17]. Mr Gardini also drew attention to a legal opinion provided to the Franchising Code Council by Mr Tom Bathurst QC which covered recent matters investigated by the ACCC including both the Hamilton Island and Ultra Tune cases. Mr Gardini summarises that advice in the following terms:

> *In particular, Mr Bathurst states that both the Hamilton Island case and the Ultra Tune matter would have succeeded on grounds of misleading and deceptive conduct and he did not consider that they turned on the issue of unconscionability.* [18]

6.18 Accordingly the Committee has concluded that the views expressed by the AIP and by Mr Conaghan cannot be sustained. In any event the Committee considers that the Courts have had more than enough time to develop the unconscionability doctrines.

16 Tony Conaghan, *Submission No. 63.*
17 Robert Gardini, Franchising Code Council Ltd, *Transcript of evidence*, p. 41.
18 Robert Gardini, *Submission No. 191.*

6.19 As Mr Michael Delaney, on behalf of the Motor Trades Association of Australia (MTAA) argued:

> *Our very great disappointment is that it has taken years of prodding, most recently a somewhat embarrassing exchange with Mr Asher of the TPC in December 1994, before the commission even conceded that that part of the act needed to be employed or tested, or applied. Now what we see are a whole lot of extraordinary wins, or allegedly coming through, including Hamilton Island and others, but still no one has been in court. We say if no one has been in court then the tests that were put into the act have never been established. We do not know the extent of the exporting of the common law provisions into the statute law, we do not know if the hurdles are the same as they are more generally for harsh or unconscionable conduct and we are, in effect, lost. Here it is four years later which adds another four years to the then 18 years that the TPA had been in place, and supposedly been able to protect smaller parties against larger parties in business, and still nothing has happened.*[19]

6.20 A little later, Mr Delaney continued:

> *The other parties who propose that there is not a problem, that nothing needs to be done, the present measures work, are the very same parties who so rigorously and comprehensively opposed Minister Beddall's amendments back in 1992. The same arguments were trotted out, the same thing. Their purpose in all truth is to deflect and defer and hope another 24 years will go past before anything has to happen.*[20]

6.21 The Committee considers that primary responsibility for dealing with this situation rests with the Parliament and that the Parliament would be neglecting its duty if it failed to deal with these injustices in the vain hope that the courts might deal with them better.

6.22 The Committee does not accept that the equitable doctrine of unconscionability embodied within Section 51AA of the Trade Practices Act is capable of dealing with the types of conduct complained about to this inquiry and considers that a broader provision is required.

19 Michael Delaney, MTAA, *Transcript of evidence*, p. 335.
20 Michael Delaney, MTAA, *Transcript of Evidence*, p. 335.

Misleading conduct

6.23 As some of the unfair conduct concerns misleading information, Section 52 in Part V of the Trade Practices Act is also relevant:

> ***52. (1)*** *A Corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.*
>
> ***(2)*** *Nothing in the succeeding provisions of this Division shall be taken as limiting by implication the generality of subsection (1).*

6.24 To the extent that conduct is unfair because it involved misleading or deceptive information, Section 52 already provides ample relief. The courts have interpreted this section widely, holding in particular cases that a failure to disclose material information breaches the Act. Nevertheless, the Section does not impose a clear positive duty to disclose information necessary to a fully informed decision to enter a long term economic relationship or during the course of the relationship itself.

6.25 In this regard it stands in contrast with the Corporations Law which does contain a strong positive disclosure requirement. Consequently, it can be said that the provisions relating to the 'governance' of such relationships fail to ensure that the weaker party is provided with the information necessary for the protection of its interests. It could be desirable therefore to legislate for such a requirement. One approach could be to extend, by legislation, the meaning of misleading or deceptive conduct. Alternatively, the problem could be resolved by including a reference to the extent of prior information disclosure in a list of issues to which the courts can have regard under the proposed replacement for Section 51AA. This latter approach is the one the Committee recommends.

Concerns which have inhibited earlier action

6.26 The question must be asked why, if the economic and moral case for effective legislative action is so persuasive, Governments have been so reluctant to act. Proposals for legislative action to deal with unfair business conduct were made as long ago as 1976 by the Swanson Committee. The substance of that Committee's recommendations to prohibit unconscionable conduct in contracts were adopted in comprehensive amendments which were incorporated in the 1984 Green Paper on proposals for changes to the Trade Practices Act. In the event, these proposals were substantially watered down so that the resulting amendment, the former Section 52A, now Section 51AB, was limited to consumer transactions. An outline of previous inquiries and reports on business conduct issues over the last twenty years appears at Appendix V of this report.

6.27 Similarly, comprehensive proposals to regulate franchise agreements contained in an *Exposure Draft Franchise Agreement Bill* early in 1986 were watered down in *a Second Draft Franchise Agreement Bill* later that same year

before being abandoned completely in 1987. The first draft was watered down on the basis that it was 'too onerous on franchisors and was an unwarranted interference with the parties' freedom to contract'. However, franchisee groups saw the narrowing of the focus of the draft bill to exclude the fairness provisions and the second draft's recognition of the dominant position of the franchisor as a reaction by the Ministerial Council to 'pressure from franchisors, potential franchisors and presumably larger business interests'.[21]

6.28 More broadly, the issues of 'uncertainty in commercial arrangements' and the 'freedom to contract' have been significant objections raised to amendments to the Trade Practices Act to deal with unfair conduct. Some of this concern is reflected in the terms of reference for this inquiry:

> *4. In developing options, the Committee will seek to ensure certainty in the market place, contract dealings and other commercial transactions, minimise the regulatory burden on business, and keep litigation and costs to a minimum.*

Freedom to Contract

6.29 According to Angelo and Ellinger, academic authorities cited by the Property Council of Australia, the phrase 'freedom to contract' originated in the late eighteenth and the early nineteenth centuries, and was based on the natural law principle that it is 'natural' for parties to perform their bargains.[22] However, it should be noted that contract, and the law surrounding it, is a socially constructed institution serving social purposes. This necessarily involves some socially and legally defined limits on the use of power and deceit.

6.30 Action to prohibit unfair conduct does not unduly infringe the autonomy of the parties. It is simply a recognition that the freedom to contract is not a totally unfettered right but exists within a set of social and legal obligations, which the Parliament also has a responsibility to define and protect. Indeed, in commercial life, agreements are valued for the relationships they establish, rather than vice versa. If the relationships they establish are exploitative, they are no longer to be valued. Consequently, far from undermining the institution of contract and economic exchange, any law which insists on standards of fairness in contracts, and commerce more generally, would be protecting the fundamental social and economic purposes of those institutions.

6.31 In particular, such fairness rules would protect the voluntary nature of a transaction, the quality and completeness of the information on which the transaction

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21 House of Representatives Standing Committee on Industry, Science and Technology, *Small Business in Australia: Challenges, Problems and Opportunities* (AGPS, January 1990) p. 231.

22 Angelo, A H and Ellinger, E P, 'Unconscionable Contracts: A Comparative Study of the Approaches in England, France, Germany, and the United States' in, *Loyola of Los Angeles International and Comparative Law Journal*, Volume 14 (*Exhibit No. 180).*

is based, the reciprocal benefits which induced the transaction in the first place and the economic relationships formed as a result. In doing so they would be upholding the essential dignity of the parties. As Angelo and Ellinger, two academic commentators, said:

> *It is ironic that during the last decades of the nineteenth century and into the twentieth century, the concept of 'freedom of contract', which originally was used to invalidate contracts made without the parties' freely given consent, became the very tool used to establish the sanctity of standard form contracts.* [23]

6.32 In practice, it has long been recognised that the assumptions underlying the doctrine of freedom to contract - that contracts are based always on the mutual agreement of fully informed individuals and arise out of free choice - cannot be sustained. Consequently, the doctrine of the 'freedom to contract' has already been heavily eroded by judicial action and by legislation.

Uncertainty

6.33 The Victorian Employers' Chamber of Commerce and Industry (VECCI) claimed that extending the provisions on unconscionable conduct has the potential to undermine the legal status and enforceability of contracts between large and small business. [24] Similarly, Mr Martin Soutter of the Business Council of Australia (BCA) was concerned that the existence of a harsh or oppressive conduct provision could be used to overturn or delay the action of contracts which would normally be enforceable.[25] The Business Council, however, also saw advantages in a 'slightly fuzzy approach' to any new legislative provision because of the flexibility that this would allow in dealing with people who were behaving in egregious ways. The Business Council saw a need to balance the two needs.

6.34 Others have argued that a strengthened general unconscionability provision would not lead to undue uncertainty. For example Mr Allan Asher, Deputy Chairman of the ACCC, said in evidence:

> *I would like to say just a brief word about what seems to be the constant catchcry of many in the business community that, if you do anything further to the law, it will generate uncertainty - that any contract entered into in commercial conduct will no longer be certain.*
>
> *... As to those arguments of uncertainty, I think the committee should look at those with a very critical eye.* [26]

23 Angelo and Ellinger, *Exhibit No. 180.*
24 VECCI, *Submission No. 9.*
25 Martin Soutter, BCA, *Transcript of Evidence,* p. 569.
26 Allan Asher, ACCC, *Transcript of Evidence,* p. 633.

6.35 While much is made of the need for certainty in contracts, in practice many contracts in franchising, in retail tenancy and in commerce more generally provide the weaker party with no certainty about the environment they will be facing. Indeed, they provide the stronger party with wide discretions. Such uncertainty provides the basis of some of the complaints made. In franchising, for instance, examples were cited where the franchisor maintains the right to unilaterally alter agreements or to terminate agreements with often serious financial consequences for the weaker party. In retailing agreements shopping centre managements maintain the right to relocate a tenant or to alter the business mix in a centre often with disastrous results for the tenant. In such cases the weaker party is systematically denied certainty. It has even been suggested that provisions of this sort are used to discipline weaker parties who seek to protect their contractual and legal rights. If stronger parties are allowed to shift the liability for risks onto others, which should arguably be theirs, they may behave more carelessly than they would otherwise do. In regard to these issues Access Economics said:

> *Some have argued that the additional uncertainty that would flow from legislation to strengthen protection against unconscionability in commercial transactions is a reason for not taking such action.*
>
> *That argument needs close scrutiny. Depending upon how any legislation is drafted, the result may be either less uncertainty overall, or at least a more even distribution of uncertainty as between the parties to a commercial contract, rather than the claimed increase in uncertainty.*[27]

6.36 It may also be argued that any such legislation would involve the Court in the application of value judgements.[28] It could be said a rule has advantages compared to a statutory standard in that it promotes consistency, predictability and uniformity in decision-making. The problem is that the only possible rule - that contracts will always be enforced - has already been found wanting: it is a licence to the unscrupulous. In any event it is usually suggested that any statutory standard be accompanied by a list of criteria to provide guidance on that standard. The inclusion of codes of conduct within that list of criteria would provide business with the opportunity to agree, in a transparent and accountable fashion, on the standard of conduct appropriate to the particular industry. This opportunity to codify practices would provide business with a practical means quickly to reduce any such uncertainty without imposing a significant bureaucratic overhead. Terms and practices in common use which conform to ordinary standards appropriate to the circumstances are unlikely to be at risk in the absence of particular procedural or substantive unfairness arising from the circumstances of the transaction or the susceptibilities of the weaker party. Nor should onerous terms and conditions be at risk where they bear a reasonable relation to the business risks involved.

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27 cited by AADA, *Submission No. 116*, p. 46.

28 *Exhibit No. 165.*

6.37 The Committee notes that it has received little detailed supporting argument from those who state that there is a significant risk or who state that the impact would be adverse. The Australian Bankers Association (ABA) was an exception. Mr Ian Gilbert, on behalf of the ABA, said that such a provision might discourage the banks from 'working out' problem loans.[29] The Committee does not accept that this is a likely outcome. Rather, a strengthened unconscionability provision would place greater pressure on financial institutions to work out such problem loans, and where they had sought to do so in good faith, the Committee does not believe that the courts would take an adverse view of such arrangements. Mr Michael Delaney of MTAA suggested:

> *We think behaviour change rather than litigation would result because there is a risk element for everyone under the Trade Practices Act and it does produce behaviour change, and that is a good thing. We think a lot of the problems could be addressed through behaviour change. For example, we do not know that we would any longer be subject to take it or leave it contracts and renewals if there was a risk that there was a head of action. We suspect that if the act were changed in that way we would never have to employ it.*[30]

6.38 This view is supported by previous experience. For example, Mr Allan Asher, Deputy Chairman, ACCC, reported in respect of Australia's product liability laws:

> *But right from the outset, when that legislation was passed the Commission and others were saying the measure of the success of product liability laws will not be in how often they are used or how big the awards are, but in how effectively they change business practice - the way products are designed, produced, distributed, the sorts of warnings that are given on packages and things like that - and how effective recall systems are. Undoubtedly, the product liability laws are a tremendous success, even though there have been only four or five matters in the court in the three years since they were passed. The same applies to this area, or it would with a bit more improvement.*[31]

6.39 The Committee has concluded that in practice business would respond positively to the formal establishment of such a standard. Those businesses who currently enforce high ethical standards among their employees have little to fear. Indeed, such honest firms should not have to face unfair competition from the unscrupulous. The Committee also expects that the majority of firms which do not currently enforce such standards, would comply with the community's expectations.

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29 Ian Gilbert, ABA, *Transcript of evidence*, p. 210.
30 Michael Delaney, MTAA, *Transcript of evidence*, p. 335.
31 Allan Asher, ACCC, *Transcript of Evidence*, p. 376.

Of course, there will be those who will not respond and they should be accountable to the courts.

6.40 There would also be those who, in bad faith, would seek to take advantage of such a standard so as to avoid responsibility for their own decisions. The Committee considers that they would have little success. The presumption would remain that a contract and a transaction should stand unless it could be demonstrated that there are good reasons to the contrary. This would remain a significant hurdle. The costs and the risks involved in such an action would remain as significant barriers to vexatious actions. Further, the remedies the courts are likely to order would be the minimum necessary to remove the perceived unfairness.

6.41 Consequently, the Committee considers that the costs associated with any additional uncertainty would be limited and would largely be of a transitional nature. The fears of uncertainty and their potential costs have to be seen against the backdrop of the very real economic and social costs currently involved in the continued unfair exploitation of small businesses by larger businesses.

Relevant Australian experience

6.42 Mr Frank Zumbo, an academic lawyer, was one witness who submitted that a general provision in the Trade Practices Act prohibiting unconscionable, harsh or oppressive conduct would **not** have the effect of undermining freely and openly negotiated contracts. He referred in particular to experience with the *NSW Industrial Relations Act 1991* which gives the Industrial Court of NSW the power to deal with particular types of unfair or harsh and unconscionable conduct:

> ***275. (1)*** *The Industrial Court may make an order declaring wholly or partially void, or varying, either from the commencement or from some other time, any contract or arrangement or any related condition or collateral arrangement under which a person performs work in any industry if the Industrial Court finds that the contract or arrangement or any related condition or collateral arrangement:*
>
> *(a) is unfair; or*
> *(b) is harsh or unconscionable; or*
> *(c) is against the public interest; or*
> *... [various other reasons].*[32]

6.43 Professor Andrew Terry, Director, Centre for Franchising Studies at the University of NSW, supported this view:

> *The experience in New South Wales under the jurisdiction granted to the Industrial Court pursuant to s275 of the Industrial Relations Act 1991 (NSW) to grant relief from*

32 cited *Exhibit No. 13.*

> *the consequences of 'unfair, harsh, or unconscionable' contracts in industry provides an interesting precedent for extending consumer protection provisions to commercial transactions. The section, added to the predecessors of the current legislation in 1959, was aimed at protecting the influx of European migrants from unjust contracts of work in industry. At the time, the section was regarded as 'radical law' conferring 'massive powers' but its use in providing wide protection for franchisees (the main beneficiaries of its largesse) demonstrates an even more radical nature than was first envisaged. Despite criticism of the FAANZ that the cases under the section are 'widely divergent and unpredictable', the industrial judges have exercised caution in its exercise and there is little evidence that it has opened the floodgates to 'palm tree' justice. The limited nature of the jurisdiction and the significance of the particular facts and circumstances have not led to a comprehensive body of jurisprudence. However, the leading case makes it clear that the section does not provide a general insurance policy against all small business failure.*
>
> *The case is an illustration of the perils involved in seeking to make use of the wide discretions provided by s88F as a means of rescue where a calculated business risk is taken which contrary to expectations, turns out not to be as profitable as anticipated and results in loss to all concerned. To adopt the words of Sheldon J. in an earlier case under the section, Davies v General Transport Development Pty Ltd [1967] AR (NSW) 371 at 374, [the section] 'should not become a refuge for those who are merely disgruntled with a bargain entered into on even terms ... It is not sufficient for an applicant ... to succeed that it should relate merely to an unprofitable business transaction entered into on even terms,*[33]

6.44 Professor Terry also pointed out that Australian judges are no strangers to applying broad standards of commercial behaviour. In particular he referred to the massive jurisdiction conferred by Section 52 of the Trade Practices Act which prohibits, in broad and general terms, 'misleading or deceptive conduct', a prohibition which has been applied responsibly. While the terms 'misleading or deceptive' are not, and probably cannot be, comprehensively defined, a comprehensive body of jurisprudence has developed, which has accommodated higher standards of commercial morality without handicapping commercial reality. He also agreed that providing criteria for the courts when assessing such matters would reduce uncertainty.[34]

33 *Exhibit No. 27*, p. 38.

34 Professor Andrew Terry, *Exhibit No. 27.*

Relevant overseas experience

6.45 According to the academic authors Angelo and Ellinger, in England the freedom of contract doctrine has been eroded in substantial branches of contract law, such as hire-purchase, carriage of goods, restrictive trade practices, and most recently, in the field of consumer credit.[35] This gradual abrogation of freedom of contract in specific fields has impacted on the attitude of the courts. A number of modern cases suggested that the English courts were favourably inclined to the notion of developing a general doctrine of setting aside unconscionable bargains. However, Angelo and Ellinger also reported that later decisions show that the movement lost its momentum. More recently still, decisions in the field of entertainment law suggest that a general principle may indeed be making a comeback via the doctrine of restraint of trade.[36] In relation to the relevant law in France, Angelo and Ellinger concluded that the French, like the English, have a number of specific rules relating to unconscionability and although they have no general doctrine under which unconscionable contracts can be set aside, they are moving rapidly towards such a general rule.

6.46 In contrast, German law has already developed a general doctrine of unconscionability. Articles 116 and 145 of the German Civil Code emphasise the importance of 'freedom of will' while articles 138, 242 and 826 contain general provisions pertaining to unconscionability. Paragraph 138 which dates from 1896 prohibits transactions that are contrary to public policy or which exploit the distressed situation, inexperience, lack of judgemental ability or grave weakness of will of another to obtain a disproportionate benefit.[37] Paragraph 242 imposes a duty to perform contracts in good faith, having regard to good business mores. Article 826 provides that a person who wilfully causes damage to another in a manner contrary to public policy is bound to compensate the other for the damage. No distinction is made between commercial or consumer transactions.

35 Angelo and Ellinger, *Exhibit No. 180.*
36 Property Council of Australia, *Submission No. 119.*
37 Angelo and Ellinger, *Exhibit No. 180.*

6.47 In the United States (US) the covenant of good faith and fair dealing is implied through the operation of statutes such as state franchise laws, the Automobile Dealer's Day in Court Act and the Petroleum Marketing Practices Act and is directly provided for in Section 1.203 of the Uniform Commercial Code (UCC), whose present shape dates from 1948.[38] 'Good faith' is defined in the case of a merchant as honesty in fact and the observance of reasonable commercial standards of fair dealing.

6.48 Section 2.302 of the US Uniform Commercial Code dealing with unconscionable conduct does not make any distinction between commercial and consumer transactions. The provision reads:

> *(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.*
>
> *(2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.*[39]

6.49 The Official Comments on Section 2.302 indicate that the Section was created principally to give courts the explicit ability to decline to enforce a contract based on an absence of fairness in the exchange. The definition adopted by the United States Supreme Court is as follows:

> *[An unconscionable contract is one] such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other.*[40]

6.50 While Section 2.302 as generally enacted applies only to contracts for the sale of goods, courts have regularly used the Section to resolve issues in other types of contracts.[41] In California it applies by statute to all contracts.

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38 Hadfield, Gillian K, 'Problematic Relations: Franchising and the Law of Incomplete Contracts' in *Stanford Law Review*, Vol 42:877 *(Exhibit No. 229).*

39 Prince, Harry G, 'Unconscionability in California: A Need for Restraint and Consistency' in *Hastings Law Journal*, Vol 46, January 1995, cited *Submission No. 119.*

40 Prince, 'Unconscionability in California', p. 471.

41 Evidence of the broader influence of Section 2.302 is found in Section 208 in the Second Restatement of Contracts, which embodies the language of UCC Section 2.302(1) and proposes that the unconscionability doctrine be generally applied to the law of contracts. Prince, 'Unconscionability in California', p. 462.

6.51 It is clear that the issue of unconscionability within commercial transactions has also created a great deal of controversy in the United States but Professor Prince, Professor of Law, University of California, has suggested that:

> *Since the promulgation of Section 2.302 the fears of its detractors have proved to be largely unwarranted. Generally, the courts in most US States have shown restraint in examining contracts or clauses for unconscionability.*[42]

6.52 From the outset the American courts have tended to draw a distinction between 'procedural' and 'substantive' unconscionability. Cases are cited where US courts have held commercial contracts to be unconscionable on either of these two grounds. A common feature of many of the successful claims of unconscionability within a commercial setting has been the fact that one of the parties to the contract was an 'unsophisticated business person' under some disadvantage or totally lacking experience with respect to the particular transaction.

6.53 Angelo and Ellinger concluded in their four country comparison:

> *The foregoing comparative study of the legal systems of England, France, Germany, and the United States confirms that the unconscionability concept serves a useful function. Moreover, the experience gained in Germany and the United States demonstrates that a general unconscionability doctrine does not introduce uncertainty into the law of contract. The fact is that both the United States and the German courts have been cautious and conservative in exercising their powers under the unconscionability rules applicable in their respective systems. Indeed, in both countries the courts tend to compare the terms of transactions assailed under the unconscionability rules with the terms for such deals from other sources. The courts have been strongly disinclined to intervene in a transaction founded on ordinary terms. Therefore, the danger of unconscionability rules being used as a general assault on standard form contracts can be ruled out.*[43]

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42 Prince, 'Unconscionability in California'. Professor Prince goes on to argue that the courts in California have been less restrained and more inconsistent than courts in other American jurisdictions in applying this doctrine. There was some reluctance initially to the adoption of Section 2.302 in California. While there was concern about giving the courts too much power, it was considered that the common law of California was already well developed enough to guard against unfair contracts. Specifically, the courts were deemed to have explicit power to refuse enforcement of grossly unfair bargains under equity doctrines and to have achieved similar results at law by construing contract language. However, after Section 2.302 was enacted in California, the courts held that it was compatible with the State's judicially developed doctrine of unconscionability.

43 Angelo and Ellinger, *Exhibit No. 180.*

6.54 The Committee is satisfied that the unconscionability doctrine applied generally in the United States is wider than the Australian equitable doctrine and that it does not appear to have led to undue uncertainty in contracts in the US. Indeed, the US courts appear to be broadening their doctrine. As Mr Edward J Sack, Staff Vice President and General Counsel of the International Council of Shopping Centres advised the Property Council of Australia:

> *I must add, however, that the courts acting under our common law are stretching the concept of what is 'unconscionable'.*[44]

Options

6.55 To the extent that problems are common across industry sectors it seems reasonable for there to be a common solution and, of course, it is highly desirable for there to be uniformity in the regulatory regime across sectors. As the Communique of the Premiers and Chief Ministers' Meeting, (Adelaide, 21-22 November 1991) said:

> *As far as possible, universal and uniformly applied rules of market conduct should apply to all market participants ...*[45]

6.56 In this regard Mr James Starkey, representing the Australian Institute of Petroleum, said in evidence to the Committee:

> *We do not think we need industry-specific legislation. We think the provisions of the Trade Practices Act, amended or not, ought to be sufficient to govern the behaviour of industry generally. Within that, or below that, you can have the individual industries with their codes of practice, self-regulatory arrangements.*[46]

6.57 The Committee believes that it is necessary to amend the *Trade Practices Act 1974* to provide a general statutory standard of fairness in commerce broader that the present equitable doctrine of unconscionability.

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44 *Exhibit No. 182.*

45 cited by the National Competition Policy Review, *National Competition Policy, Report by the Independent Committee of Inquiry* (AGPS, August 1993) p. 17.

46 James Starkey, AIP, *Transcript of evidence*, p. 370.

6.58 The question therefore arises as to how best this should be done. A number of proposals have been made, the most comprehensive of which was that proposed by Mr Frank Zumbo, lawyer.[47] Mr Zumbo suggested the repeal of Section 51AA and the amendment of Section 51AB. This is similar to the proposal supported by the Trade Practices Commission in 1991. He suggested that a modified Section 51AB of the Act would be comparable to the current US doctrine of unconscionability.[48] The text of Mr Zumbo's proposed amended Section is at Appendix VII.

6.59 The effect of Mr Zumbo's proposal would be to prohibit 'unconscionable, harsh or oppressive' conduct in relation to all transactions conducted by a corporation in trade or commerce. The *Trade Practices Amendment (Better Business Conduct) Bill 1995* followed a broadly similar form but with a more restricted purpose. It did not involve amendment of Section 51AB nor the repeal of Section 51AA but the insertion of a new Part IVB - Harsh or Oppressive Conduct. It would have prohibited 'harsh or oppressive' conduct in circumstances where:

- two parties are in a pre-existing commercial relationship (this relationship may or may not be based on contract);
- the nature of that relationship gives one party a significant advantage in bargaining power; and
- the stronger party knowingly exploits that advantage to engage in conduct or impose terms and conditions of contract that are, subject to a reasonable person test, outside prevailing market conditions.

6.60 This Bill would have prohibited the exploitation of 'economically captive' firms where commercial freedom is impaired by the nature of the relationship between the parties giving the corporation opportunity to extract extra-market rents. The Bill did not prohibit harsh or oppressive outcomes, but prohibited the exploitative conduct that leads to harsh or oppressive outcomes. The substantive parts of the relevant Section are also at Appendix VII.

6.61 The effect of a Bill along the lines of the Better Business Conduct Bill would be to establish three separate standards for 'unconscionable' conduct in the Trade Practices Act :

- one would deal with unconscionable conduct in relation to transactions between a consumer and a corporation (the existing Section 51AB);
- another standard, the existing limited equitable doctrine of unconscionability (Section 51AA) would relate to transactions between corporations; and
- a new standard would relate to transactions between a corporation and an 'economically captive' firm.

47 Frank Zumbo, *Submission No. 35.*
48 APADA, *Submission No. 97.*

6.62 This attempt to limit the impact of the amendment to conduct involving the exploitation of 'economically captive' firms comes at the price of added complexity in the law with the associated costs. In the process some of the unfair conduct about which complaints were made was excluded from the ambit of the Bill.

6.63 Nevertheless, the Better Business Conduct Bill would deal with a class of conduct which should be illegal. It simply does not go far enough and involves unnecessary complication. The Committee rejects the proposition that any extension of the legislation should be limited to exclude unfair conduct occurring during negotiations, particularly those related to the formation of a longer-term economic relationship. The Committee also notes that by including a 'grandfathering' clause (51AC(6)), the Bill would have had a minimum impact in the short run. There is no good reason for such a limitation.

6.64 Mr Zumbo's proposal is not limited to 'economically captive' firms and eliminates the separate provisions for 'consumer' transactions and 'commercial' transactions. In the process his proposal simplifies the Act. There has been wide support for this approach over the years. Indeed, the original Swanson Committee proposal and the proposal embodied in the 1984 Green Paper took this approach and it was supported by the Trade Practices Commission in 1991.

6.65 In the past consumer groups may have feared that the hard won protection provided to consumers by the separate consumer provision could have been diluted if a single provision dealing with both consumer and commercial transactions had been enacted. Under the course recommended by the Committee that the equitable doctrine be clearly broadened, that risk should be significantly lessened. However, the terms of reference of this inquiry do not provide for any examination of the consumer protection provisions. The Committee therefore makes no recommendation regarding the possible merging of the commercial and consumer provisions.

6.66 Mr Zumbo's proposed Section would prohibit conduct that is, in all the circumstances, 'unconscionable, harsh, or oppressive'. This form of words is attempting to widen the equitable doctrine of unconscionability to take into account both procedural and substantive 'unconscionability'. The Better Business Conduct proposal also relies on the formula 'harsh and oppressive'. However, the Committee is concerned that this form of words would not provide a sufficiently clear signal to the courts of the intention to broaden the equitable doctrine of unconscionability. Employing the word 'unconscionable' in the statutory standard would retain in the Act the legal history associated with that word. There would be a tension between that history and the legislative intention. As Mr Guy Aitken, representing the Attorney-General's Department, said:

> *When you have a common law concept like unconscionability in legislation, the court is naturally attracted to apply its own common law concepts which it has developed.*[49]

6.67 While the intention could and should be made clear in the explanatory memorandum and the Second Reading Speech, the Attorney-General's Department advised it would be better to make the intention clear in the Act. The Committee believes that repeal of the word 'unconscionable' and its replacement by a broader term would give a clear signal to the courts that something else was intended. There is also a risk that the mere importation of the terms 'harsh' and 'oppressive' may not add anything. As the ACCC advised:

> *The Commission believes that adding the words 'harsh' and 'oppressive' to the word 'unconscionable' in section 51AA would probably result in a tautological situation which would not only fail to add anything to the existing situation, but may also unduly raise the expectations of the small business sector.*[50]

6.68 While this view is open to some dispute, it would be best to avoid any such problem. Unfortunately, the ACCC's own suggestion, that of adding the common law concept of economic duress to the Act as an adjunct to unconscionability, could suffer from the same defect. For all these reasons, the Committee believes that it would be better to use a new word without the legal entailments of 'unconscionability' while avoiding the words 'harsh and oppressive' in the initial clause establishing the broad statutory standard.

6.69 The NSW Contracts Review Act uses the term 'unjust' while the NSW Arbitration Act uses the formula 'is unfair or is harsh or unconscionable or against the public interest'. The Committee believes that the terms 'unjust' and 'unfair' are equivalents and would permit the examination of all the circumstances covered by the terms unconscionable, harsh and oppressive. The Committee believes that the term unfair covers both procedural matters and substantive matters.

6.70 The word 'unfair' has the strong advantage of being widely understood, being part of the every-day moral vocabulary of all Australians. Indeed, fairness is the social value central to the maintenance of social cohesion and the legitimacy of the social system. It has the added advantage of directly addressing the problem as it is usually articulated. The term 'unfair' is also used within the US law. For example the Federal Trade Commission defines 'unfair' as:

49 Guy Aitken, Attorney-General's Department, *Transcript of evidence*, p. 847.
50 ACCC, *Submission No. 62.*

> 1. *whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise - whether, in other words, it is within the penumbra of some common law, statutory, or other established concept of unfairness;*
>
> 2. *whether it is immoral, unethical, oppressive, or unscrupulous;*
>
> 3. *whether it causes substantial injury to consumers (or competitors or other businessmen).*[51]

6.71 Interests opposed to any broadening of the equitable doctrine of unconscionability will most certainly claim that the term 'unfair' is too broad or too imprecise. Such a lack of precision is inherent in all such moral terms and this criticism could be applied to any word chosen other than 'unconscionable' with its existing legal history. All such terms involve a judgement following an examination of the particular circumstances, not a mechanical formula to be applied without mature thought. Unfortunately the range of circumstances considered by the courts to be relevant to the interpretation of 'unconscionability' has been too limited to deal with the range of anti-social conduct brought before this Committee. In relation to such terms Mr Guy Aitken, representing the Attorney-General's Department, advised:

> *To the extent that I do not think a court would singularly seize upon the words 'oppressive' or 'unfair' to set aside contracts which they personally did not agree with, then it is probably a fair comment that the courts would continue to act judicially.*[52]

6.72 Both the Better Business Conduct Bill and Mr Zumbo's proposal included additional clauses to provide guidance to the courts as to the range of circumstances that might be examined. Indeed, this is the approach already adopted by Section 51AB. In adopting a similar approach the opportunity would again arise to make clear to the courts the intention to broaden the equitable doctrine of unconscionability and that the word 'unfair' is intended to encompass the words unconscionable, harsh, and oppressive. It would also be necessary to include a number of other clauses which are generally supported.

51 Statement of Basis and Purpose of Trade Practices Rule 408.

52 Guy Aitken, Attorney-General's Department, *Transcript of evidence*, p. 852.

6.73 Recommendation 6.1

The Committee recommends that Part IVA of the *Trade Practices Act 1974* be amended by repealing the existing Section 51AA and incorporating a new provision proscribing unfair conduct in commercial transactions. The Section should read as follows:

Unfair Conduct

New Section 51AA

(1) A corporation shall not, in trade or commerce, engage in conduct that is, in all the circumstances, unfair.

(2) Without in any way limiting the matters to which the Court may have regard for the purposes of determining whether a corporation has contravened subsection (1) the Court may have regard to:

(a) the harshness of the result;

(b) any influence or pressure exerted on or any tactic used against a person by the corporation or a person acting on behalf of the corporation;

(c) whether or not a person has suffered from any disability;

(d) whether or not there was a disparity in bargaining power between the parties;

(e) whether or not, as a result of conduct engaged in by the corporation, a person was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the corporation;

(f) whether or not the other person was able to understand any documents;

(g) the amount for which, and the circumstances under which, a party could have acquired identical or equivalent goods or services from a person other than the corporation;

(h) the extent to which the conduct of the corporation is consistent with its conduct towards other persons who have entered into transactions or commercial relationships with the corporation that are the same as, or substantially similar to, the transaction or the commercial relationship between the corporation and the other person;

(i) the requirements of any code of practice applying to participants in the area of trade or commerce in which the corporation is involved and which have been approved by the Australian Competition and Consumer Commission in accordance with Section 51AAA;

(j) the extent to which the corporation has made prior disclosure of any of its intentions affecting the interests of the other party and of the risks involved to that party;

(k) in relation to a contract, the extent to which the corporation was prepared to negotiate with the other person in relation to the terms and conditions of the contract; and

(l) the good faith of the parties.

(3) A corporation shall not be taken for the purposes of this section to engage in unfair conduct in connection with the supply or possible supply of goods or services to a person by reason only that the corporation institutes legal proceedings in relation to that supply or possible supply or refers a dispute or claim in relation to that supply or possible supply to arbitration.

(4) For the purposes of determining whether a corporation has contravened subsection (1):

(a) the court shall not have regard to any circumstances that were not reasonably foreseeable at the time of the alleged contravention; and

(b) the court may have regard to conduct engaged in, or circumstances existing, before the commencement of this section.

6.74 There may be related machinery amendments required but the Committee has not given consideration to such machinery considerations.

6.75 Sub-clauses 2(a), (b), (c) and (d) effectively pick up the concepts of harshness, oppression and unconscionability but in a way which does not limit the circumstances to which the courts may have regard. In particular sub-clause 2(c) widens the special disability test by deleting the requirement for the disability to be 'special'. The enactment of this proposed legislation with the inclusion of the word 'special' could subvert the intention to broaden the doctrine. Sub-clauses 2(b), 2(e), 2(f) and 2(g) are similar to clauses in the existing Section 51AB. Sub-clause 2(h) is similar to a sub-clause in the Better Business Conduct Bill as is sub-clause 2(k).

6.76 The Committee has recommended in Chapter 3 the enactment of specific franchising legislation and this will provide the legislative underpinning for codes of practice in the franchising areas. There will be other sectors where such codes of practice may be desirable and it would be desirable for a general power to be provided for the courts to take these into account in assessing unfair conduct. In this case legislative underpinning would arise only as a result of the operation of sub-section 2(i) of the proposed new Section 51AA. As such it would provide only limited legislative backing to codes of practice approved by the ACCC. The ACCC examination would ensure that such codes met adequate standards in respect of information disclosure, standards of conduct and dispute resolution.

6.77 The inclusion of such a provision would provide industry groups with the opportunity to codify their practices in association with affected groups, in a transparent and accountable fashion.

6.78 Recommendation 6.2

The Committee recommends that Part IVA of the *Trade Practices Act 1974* be amended to incorporate a new provision (Section 51AAA) providing for the Australian Competition and Consumer Commission to approve codes of practice – the section to read as follows:

Power of the Commission to approve codes of practice

(New Section 51AAA)

Where the Commission is satisfied that associated corporations in a field of trade or commerce have, in consultation with organisations representing other interested persons, agreed to abide by a particular code of practice for fair dealing with those interested persons, the Commission may approve that code of practice.

Other proposals for amendment to the Trade Practices Act

6.79 In Chapter 7 the Committee examines the problem of access to justice and makes a recommendation for mandatory mediation of disputes arising under the above proposed provisions.

6.80 The ACCC in its submission also recommended a number of supplementary amendments to assist in its enforcement role. The Committee considers that these proposed amendments would contribute to its proposed enforcement strategy.

6.81 Recommendation 6.3

The Committee recommends that the *Trade Practices Act 1974* be amended:

(a) to allow in Section 82 the recovery of damages under Part IVA giving parties similar rights and access to remedies as are currently available under Section 52; and

(b) to make available civil penalties in Division 1 and 1A of Part V and for the proposed unfair conduct provision, as well as for section 51AB if that is retained.