The Senate

Standing Committee on Economics

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

Printed by the Senate Printing Unit, Parliament House, Canberra.

ISBN 978-1-74229-031-7

Senate Standing Committee on Economics

Members

Senator Annette Hurley, Chair South Australia, ALP Senator Alan Eggleston, Deputy Chair Western Australia, LP Senator David Bushby Tasmania, LP Senator Doug Cameron New South Wales, ALP Senator Mark Furner Queensland, ALP Senator Barnaby Joyce Queensland, LNP Senator Louise Pratt Western Australia, ALP Senator Nick Xenophon South Australia, IND

Secretariat

Mr John Hawkins, Secretary Dr Richard Grant, Principal Research Officer Mr Glenn Ryall, Senior Research Officer Ms Lauren McDougall, Executive Assistant

PO Box 6100 Parliament House Canberra ACT 2600 Ph: 02 6277 3540

Fax: 02 6277 5719

E-mail: economics.sen@aph.gov.au

Internet: http://www.aph.gov.au/senate/committee/economics_ctte/index.htm

TABLE OF CONTENTS

Membership of Committee	iii
Chapter 1	1
Introduction	
Background	1
Conduct of the inquiry	2
Chapter 2	3
'Unconscionable conduct' and the Trade Practices Act	
'Unconscionable conduct' as currently codified in the TPA	3
Case law and section 51AC	5
The legal view of 'unconscionability'	7
The structure of the report	8
Chapter 3	9
The need to broaden the 'unconscionable conduct' provisions	
Options to strengthen 'unconscionable conduct' provisions in the TPA	12
Conclusion	21
Chapter 4	
Arguments against amending section 51AC	
If it ain't broke	23
Legal concerns with amending section 51AC	25
Judicial caution	29
Conclusion	30

Chapter 5	31
The committee's view	
The need to amend section 51AC of the TPA	31
A definition of 'unconscionable conduct'	33
Procedural disadvantage and the setting of unconscionable conduct	35
Examples of unconscionable conduct: setting the threshold	36
Establishing an industry dialogue on standard setting	37
Principles of 'unconscionable conduct'	38
'Good faith'	40
Bullying, intimidation, physical force coercion and undue harassment	40
Actions, intentions and outcomes	41
Remedies	42
Conclusion	43
Additional comments by Coalition Senators and Senator Nick Xenophon	45
Need for statutory definition of unconscionable conduct	45
Need for statutory list of examples that constitute unconscionable conduct	47
Need for a prohibition against Bullying, intimidation, physical force coercic undue harassment	on & 48
Need for statutory definition of statutory duty of good faith	49
Need for legislative framework to deal with unfair contract terms in business relationships involving small businesses	ss to 49
APPENDIX 1	51
Submissions Received	
Additional Information	52
APPENDIX 2	53
Public Hearings and Witnesses	