

# Chapter 1

## Introduction

### Background

1.1 One of the main challenges for business regulators in Australia is to develop a framework in which banks, commercial landlords and various other businesses deal with customers, consumers and other businesses fairly. There are now both statutory and non-statutory checks designed to provide small business with remedies against unconscionable conduct in their dealings with big business.<sup>1</sup> Still, there is concern that the statutory checks are not operating as well as they should.

1.2 The *Trade Practices Act 1974* (TPA) disallows conduct that is, 'in all the circumstances, unconscionable'.<sup>2</sup> However, the term 'unconscionable' is not defined in the Act. The legal interpretation of the term is based on a body of case law enunciated by the High Court and principles from the law of equity.<sup>3</sup> The legal concept of unconscionability comes from equity's idea of conduct which is contrary to what a properly informed conscience would say is right.<sup>4</sup>

1.3 The TPA refers to conduct that is 'unconscionable' in two different contexts. The first is section 51AA which is based on the concept of 'special disadvantage' in the common law of equity. The doctrine of special disadvantage protects individuals who, in seeking to make judgements in their best interests, are disabled by age, infirmity, mental illness or other characteristics.<sup>5</sup> A contract that is formulated under this duress is known as a breach of 'procedural unconscionability'. The second context arises under sections 51AB (relating to consumer transactions) and 51AC (business transactions). These sections were intended to extend the equitable doctrine of unconscionable conduct to include contract terms and the progress of the contract. This is known as 'substantive unconscionability'. It is the courts' interpretation of this broader concept of 'unconscionable' conduct that is the main focus of this inquiry.

---

1 This includes the TPA, the ASIC Act, the Corporations Act 2001 and various industry codes of conduct. See Brian Horrigan, 'The expansion of fairness-based business regulation', *Australian Business Law Review*, vol 32, 2004, p. 161.

2 *Trade Practices Act 1974*, section 51AB(1), 51AC(1b)

3 See *Blomley v Ryan* (1956) 99 CLR 362 and *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447; 46 ALR 402; *Gregg v Tasmanian Trustees Ltd* (1997) 73 FCR 191; 143 ALR 328; (1997) ATPR 41 – 567; *Graham Evans Pty Ltd v Stencraft Pty Ltd*

4 Brian Horrigan, 'The expansion of fairness-based business regulation', *Australian Business Law Review*, vol 32, 2004, p. 164.

5 See the judgment of Justice Fullagher in *Blomley v Ryan*.

1.4 This inquiry was established in response to legislation which amended section 51AC of the TPA to remove the \$10 million monetary threshold on unconscionable conduct.<sup>6</sup> South Australian Senator Nick Xenophon moved a second reading amendment 'for an inquiry on the need to develop a clear statutory definition of unconscionable conduct and the scope and content of such a definition'. In so doing, he cited the comments of a leading trade practices law practitioner, Associate Professor Frank Zumbo:

...unless you change the substantive meaning or the substantive flaws in 51AC as they currently exist—that is, a lack of definition of unconscionable conduct in the section itself—removing the cap will not be of any practical assistance.<sup>7</sup>

### **Conduct of the inquiry**

1.1 The committee advertised the inquiry nationally and posted details about the inquiry on its website. In addition, it wrote to selected organisations and relevant statutory authorities advising them of the inquiry and inviting them to make submissions.

1.2 The committee received 31 submissions to the inquiry, 21 of which were made public. The public submissions are listed at Appendix 1, and are available at the Committee's website;

[http://www.apf.gov.au/Senate/committee/economics\\_ctte/tpa\\_unconscionable\\_08/index.htm](http://www.apf.gov.au/Senate/committee/economics_ctte/tpa_unconscionable_08/index.htm).

1.3 A public hearing was held in Sydney on 3 November 2008. The witnesses who appeared are listed in Appendix 2. The committee thanks all those who participated in the inquiry.

---

6 Previously, the provisions of this section were limited to transactions of \$10 million or less.

7 Senator Nick Xenophon, *Senate Hansard*, 16 September 2008, p. 4791.