Chapter 3

The need to broaden the 'unconscionable conduct' provisions

3.1 The principal argument in favour of a definition of unconscionable conduct in the TPA is that the current section 51AC is not working effectively because the courts are not interpreting the section as broadly as was the legislative intent. Several submitters held this view.

3.2 In his evidence to the committee, Associate Professor Zumbo argued that the government's intention in introducing section 51AC was 'to formulate a new norm of ethical conduct'. In essence, this section was designed to prevent the party with the bargaining power from trying to shift the terms of a contract (once entered into) to its favour, thereby denying the smaller party the benefits of that contract.[1] However, Associate Professor Zumbo argues that the courts have shied away from addressing unfair contract terms ('substantiative unconscionability'), restricting their purview to conduct in the lead-up to making a contract ('procedural unconscionability').[2] He told the committee that:

> The concept of unconscionable conduct is defined very narrowly. You have to establish a very extreme form of conduct. You have to establish a range of extreme conduct. You need to point to a number of those factors having been present and the conduct being quite severe or extreme. It is only then that the courts will say that the conduct offends conscience. So, in a sense, they are erring on the side of letting conduct go by, even though in ordinary layperson language that conduct may be unethical.[3]

3.3 Other submitters endorsed these sentiments. Competitive Foods Australia argued that there is a 'serious deficiency' in the interpretation of section 51AA and, by extension, section 51AC. It claimed that this deficiency is a consequence of the High Court's ruling in *ACCC v Berbatis Holdings*. In this case, the Court ruled against a tenant on the grounds that the landlords' behaviour was simply 'hard bargaining' as

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1 As with section 51AA, 51AC requires a great disparity of bargaining power. Associate Professor Frank Zumbo, *Proof Committee Hansard*, 3 November 2008, p. 3.

2 Associate Professor Frank Zumbo, *Proof Committee Hansard*, 3 November 2008, p. 3.

3 Associate Professor Frank Zumbo, *Proof Committee Hansard*, 3 November 2008, p. 4.

distinct from 'unconscionable conduct'.[4] Competitive Foods argued that the landlord's behaviour was opportunistic and that the High Court should clarify whether a similar finding could be made under section 51AC.[5]

3.4 The Pharmacy Guild described the protection offered by section 51AC of the TPA as 'illusory', and the list of matters in sections 51AC(3) and (4) as 'minor gloss' to the traditional equitable doctrine established in 51AA.[6]

3.5 The Motor Trades Association of Australia (MTAA) noted that in most cases, the requisites of section 51AA do not apply—most parties are of sound mind and are more than capable of acting in their own best interest. The Association argued that a combination of this restrictive common law interpretation in section 51AA and the lack of a clear statutory definition of unconscionable conduct make it 'extremely difficult' for a party to gain redress under section 51AC.[7]

3.6 Mr Ray Borradale referred to a stalemate in franchising cases on section 51AC:

> Franchisees have had great difficulty in pursuing actions clearly deemed to be unfair, harsh and unreasonable where the most common response from lawyers approached by franchisees is along the lines of;

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4 *ACCC v CG Berbatis Holdings Pty Ltd* [2000] FCA. The Berbatis case concerned the requirement of lessors of a shopping centre for their tenants to abandon proceedings against landlords in exchange for the landlords' consent to renew their leases. The tenants in this case wanted to sell their business to have the time and money to care for an ill family member. They were in a weaker bargaining position than the landlords. However, their lease still had 12 months to run, and a sale with this lease period was unattractive relative to a new term. They could not sell their business without the landlords' agreement and the landlords refused to renew the lease without settlement of the dispute by the tenants to drop their claim.

The case was litigated on the basis on section 51AA with the trial judge, Justice French, ruling that 'a landlord cannot use its legal rights unfairly to exploit the disadvantage of a vulnerable tenant so that the tenant is compelled to abandon bona fide claims it may have against the landlord arising out of its existing lease'. Justice French described the special disadvantage suffered by the tenants as 'situational' rather than 'constitutional' or 'personal'. On appeal, the Full Federal Court and the High Court disagreed with this finding that the tenants were under a special disadvantage (as per section 51AA). Justice Gleeson considered that the tenants simply suffered from 'a lack of ability to get their own way'. However, Justice Kirby dissented believing that the tenants were in a position of serious 'situational' disadvantage. See Brian Horrigan, 'The expansion of fairness-based business regulation', *Australian Business Law Review*, vol 32, 2004, pp. 184–185.

5 Associate Professor Zumbo told the committee that the problem with the Berbatis case was that it was run under section 51AA of the TPA. He argued that the timing of the case prevented a ruling under section 51AC, which meant the court was constrained in what it could rule under section 51AA. *Proof Committee Hansard*, 3 November 2008, p. 3.

6 Pharmacy Guild of Australia, *Submission 16*, p. 5.

7 Motor Trades Association of Australia, *Submission 3*, p. 3.

> *It is unconscionable conduct but few cases are pursued or won on that basis as definition of such conduct is vague and therefore time consuming and expensive to argue. It will cost a lot of money and the likelihood of a win is low. You are better off to accept the behaviour and move on. The only people who win in these cases are the lawyers*.[8]

3.7 Some submitters also queried the ability of the regulator—the ACCC—to take on 'unconscionable conduct' cases. For example, the POAAL noted that it had referred several events to the ACCC for the investigation, with the Commission stating in each case that the behaviour was unlikely to have been met to a level required for a prosecution to succeed.[9]

The lack of successful prosecutions

3.8 In the ten years since section 51AC was enacted, there have been only two successful ACCC-initiated prosecutions of 'unconscionable conduct'.[10] Despite the ACCC's talk of 'pushing more cases to test the law',[11] several submitters to this inquiry were in no doubt that this record was inadequate and reflected the fact that section 51AC was not working as it should. The Consumer Action Law Centre wrote in their submission that:

> The small number of cases indicates that statutory unconscionable conduct is not effective in remedying general unfair trading practices that harm consumers.[12]

3.9 Mr Michael Delaney of the MTAA told the committee:

> Amongst our most numerous members and across all of the trades in which we engage, not one of them has been successful in bringing such an action in the 10 years that the section has been in the act. We have pointed that out to the commission repeatedly and with great chagrin that it should be the case. The fact that there have been so few successful cases secured by the ACCC really tells us all that the good intentions that came out of the Reid committee inquiry report, which led to section 51AC, have not, in fact, been translated into what was proposed by it and what was sought by small business.[13]

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8 Mr Borradale, *Submission 1*, p. 1.

9 Post Office Agents Association Limited, *Submission 6*, p. 3.

10 *Australian Competition and Consumer Commission v Simply-No-Knead, Australian Competition and Consumer Commission v Dataline.net.au Ltd:* http://www.accc.gov.au/content/index.phtml/itemId/800483

11 Australian Competition and Consumer Commission, 'Competition and fair trading: a fair go for small business', *National Small Business Summit*, 3 July 2007.

12 Consumer Action Law Centre, *Submission 23*, p. 9.

13 Mr Delaney, *Proof Committee Hansard*, 3 November 2008, p. 30.

3.10 The Council of Small Business of Australia commented in their submission on the lack of successful prosecutions by the Administrative Decisions Tribunal in New South Wales.

> Since 2002, that Tribunal has heard 29 cases alleging unconscionable conduct. In the 29 cases, unconscionable conduct was found in 5 cases, and of these 2 were overturned on appeal unrelated to the unconscionable conduct claim, 1 matter was transferred to the Supreme Court, unconscionable conduct was withdrawn in 5 cases and unconscionable conduct was held not to be made in 13 cases. In the remaining 6 cases, it was found unnecessary to consider the question of unconscionable conduct. Analysis of the unconscionable conduct claims heard by the Administrative Decisions Tribunal indicate the unconscionable conduct test is onerous and the threshold very high. This is clearly because of the narrow interpretation in accordance with the traditional equitable doctrine.[14]

3.11 Several submitters thereby supported the need for a definition of unconscionable conduct in section 51AC. The MTAA,[15] the Post Office Agents Association Limited (POAAL),[16] the National Association of Retail Grocers of Australia (NARGA)[17], Competitive Foods Australia[18] and the Council of Small Business of Australia[19] all submitted to the committee that a definition would clarify the type of behaviour that could attract prosecution under the Act and serve as a deterrent to this behaviour.

Options to strengthen 'unconscionable conduct' provisions in the TPA

3.12 This section considers some of the options and underpinning arguments for strengthening the unconscionable provisions in the TPA. There are main possibilities for amending section 51AC:

- a statutory definition of 'unconscionable conduct';
- a statutory definition of 'good faith';
- examples of 'unconscionable conduct';
- a statement of principles on 'unconscionable conduct'; and
- replacing the word 'unconscionable' with the word 'unfair';

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14 Council of Small Business of Australia, *Submission 31*, pp. 4–5.

15 *Submission 3*

16 *Submission 6*

17 *Submission 9*

18 *Submission 24*

19 *Submission 31*

A definition of 'unconscionable conduct'

3.13 Several submitters to this inquiry suggested a possible definition of 'unconscionable conduct' which could be inserted into section 51AC of the TPA. Many of these proposed specific reference to 'harsh' or 'unfair' contract terms. Associate Professor Zumbo offered the following definition:

> "unconscionable conduct" includes any action in relation to a contract or to the terms of a contract that is unfair, unreasonable, harsh or oppressive, or is contrary to the concepts of fair dealing, fair-trading, fair play, good faith and good conscience.[20]

3.14 Associate Professor Zumbo recognised that determining what is 'fair' will depend on the circumstances of the case. The purpose of the definition is 'to make it absolutely clear to the court that it did have a broad mandate to review the conduct'.[21] He also emphasised that his is a non-exhaustive definition which overcomes 'the restrictive view that the courts are currently taking towards the notion of "unconscionable conduct" under ss 51AB and 51AC'.

3.15 By defining unconscionable conduct through a variety of other known concepts, Associate Professor Zumbo argued that it is clear that the proposed provision is concerned with dealing with unethical conduct generally.[22] He insists that his purpose is:

> …not about picking winners or protecting the inefficient, but rather…to ensure that unscrupulous large businesses and owners of shopping centres behave in an ethical manner towards consumers and small businesses.[23]

3.16 NARGA offered the following definition of 'unconscionable conduct':

> Unconscionable conduct occurs where a significant difference exists between the negotiating or bargaining powers of parties in an agreement and the stronger party exploits that difference to the substantial disadvantage or detriment of the weaker party.[24]

3.17 The MTAA suggested that the following be inserted into section 51AC:

> 2. “Unconscionable conduct” is conduct in the course of business, whether the result of such conduct is intentional or not, that in all the circumstances

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20 The Hon. Anthony Fels, Retail Shops and Fair Trading Legislation Bill, *Second Reading*, Legislative Assembly, Parliament of Western Australia, 9 May 2006, p. 2291.

21 Associate Professor Frank Zumbo, *Proof Committee Hansard*, 3 November 2008, p. 4.

22 Associate Professor Frank Zumbo, *Submission 11*, p. 12.

23 Associate Professor Frank Zumbo, *Submission 11*, p. 5.

24 NARGA, *Submission 9*, p. 6.

> is **harsh** or oppressive, unjust or **unfair** and has elements of exploitation or lack of good faith by one or more of the parties.
>
> 3. The circumstances of such conduct may involve or is likely to involve:
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> • the exploitation of a party in a vulnerable situation;
>
> • the exploitation of a party in a captive situation;
>
> • a lack of good faith by a party; and/or
>
> • a substantial imbalance in bargaining power.
>
> Where the Court finds any of the above circumstances to exist then the following conduct shall be unconscionable conduct, unless there is evidence presented to the Court to show that the conduct was not unconscionable…[25]

3.18 In their verbal evidence to the committee, the MTAA noted that the words 'harsh' and 'unfair' are used interchangeably in a number of State statutes and are well established through common law.[26]

State debates on a definition of 'unconscionable conduct'

3.19 Some State legislatures, which have drawn-down the unconscionable conduct provisions of the TPA (or similar provisions) into their respective statutes, have already debated the need for a definition of unconscionable conduct. In May 2008, a report by the South Australian Economic and Finance Committee observed:

> The fact the *TPA* does not provide a definition of the term "unconscionable conduct" appears to represent a challenge for the ACCC…While the ACCC is responsible for developing and testing the law in this area, the understanding of the provision remains very limited ten years after its introduction. However, as some witnesses pointed out, the reason for that lack of success may be the original construction of the provision and a lack of guidelines pointing to the intended meaning of the term "unconscionability". Many of those who contributed to the inquiry also stressed that the uncertainty surrounding the meaning of unconscionability makes litigators and lawyers very reluctant to rely on section 51AC as a chosen course of action.[27]

3.20 In 2005, the Western Australian Legislative Assembly debated whether or not it was necessary to provide a definition of unconscionable conduct in the Retail Shops and Fair Trading Legislation Amendment Bill. The Labor government argued against inserting a definition, noting that 'cases would invariably arise that would not be covered by the specific things that we included in the definition'. The Liberal

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25 MTAA, *Submission 3*, p. 5. Emphasis added.

26 Mr Delaney, *Proof Committee Hansard*, 3 November 2008, p. 30.

27 Economic and Finance Committee, Parliament of South Australia, *Franchises*, 6 May 2008, p. 44.

Opposition disagreed, citing Associate Professor Zumbo's definition (above) as an option.[28]

3.21 Others have also expressed concern that the threshold test for a finding on unconscionable conduct is currently too high. In a July 2007 submission to a Productivity Commission inquiry, the Law Institute of Victoria (LIV) argued that the various states' retail tenancies legislation suffer from a lack of definition.[29] The Law Institute argued that:

> …it would be of assistance if a stronger statement of the application of these provisions is contained in the legislation especially with respect to the conduct of both landlords and tenants in the retail leasing context. It may also be desirable to extend the application of the legislation to "unconscionable" conduct whenever it occurred, even if this is prior to the commencement of the relevant retail leases legislation.[30]

3.22 In its submission to the same inquiry, the National Retail Association recommended a review of unconscionable conduct legislation to lower the "barrier" to access and effectiveness, and to provide effective low-cost access and remedies through State Tribunals. It argued that:

> Existing Unconscionable Conduct legislation has been proved to be largely ineffective – a principal result of the legislation also being more complete "defensive" disclaimers by landlords, particularly with regard to (mutually) commercially necessary expectations of business continuity.[31]

3.23 In April 2008, a New South Wales Government Discussion Paper on issues affecting the retail leasing industry in the State was released. It noted the threshold for a finding of unconscionable conduct by the Administrative Decisions Tribunal (under section 62B of the *Retail Leases Act*) is very high. A finding is possible only if the conduct is 'highly unethical' and not simply because conduct is 'unfair' or 'unjust' (see paragraph 3.10). The Discussion Paper argued that the narrow interpretation on procedural unconscionability has meant that the provisions have not operated as

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28 Parliament of Western Australia, *Legislative Assembly Hansard*, 24 November 2005, pp. 7716–7730.

29 The states' retail tenancies legislation reflects the unconscionable conduct provisions of the Trade Practices Act 1974.

30 Law Institute of Victoria, *Submission*, Retail Tenancy Lease Market in Australia Inquiry, Productivity Commission, 26 July 2007, https://www.liv.asn.au/members/sections/submissions/20070726_61/20070726_Productivity%20Commission.pdf

31 National Retail Association, *Submission*, Retail Tenancy Lease Market in Australia Inquiry, Productivity Commission, 26 July 2007, http://www.pc.gov.au/__data/assets/pdf_file/0010/66349/sub047.pdf

intended. Accordingly, it argued that 'there is clearly scope for legislative reform in this area'.[32]

3.24 The NSW Government Discussion Paper listed some options for reform. One is to extend and clarify the criteria to which the Administrative Decisions Tribunal may refer in determining whether conduct is unconscionable. Another is to introduce a test to deal with 'unfair conduct'.[33]

'Good faith'

3.25 In his submission to this inquiry, Associate Professor Zumbo argued that one way of encouraging the courts to have a broader approach to unconscionable conduct is to enact a statutory duty of 'good faith'. He cited a recent Federal Court ruling which identified past cases where judges referred to specific conduct which has been identified as 'bad faith' or a lack of 'good faith'. Based on these judicial interpretations, Associate Professor Zumbo argued that there is a ready body of law on which to base a statutory duty of 'good faith' which could promote ethical business conduct.[34]

3.26 Contract law experts point to the growing use of the term 'good faith' in Australian courts and its proxy for 'conscionability'. Dr Nicholas Seddon and Associate Professor Manfred Ellinghaus, for example, have noted that 'a breach of good faith must often also constitute unconscionable dealing or unconscionable conduct'.[35] Professor Horrigan noted in a 2004 paper that the term 'good faith' is mentioned in at least 150 federal Acts. This referencing reflects the fact that 'good faith' is a 'context-dependent notion'.[36] In his submission to this inquiry, he noted that some of the ideas associated with 'good faith' are distinct from those relating to unconscionable conduct. Accordingly:

> to the extent that any definition of unconscionable conduct is inserted into legislation, the place of good faith in the statutory regime needs to be addressed one way or another, either as a notion that is expressly or implicitly incorporated in the definition, or alternatively as an existing statutory indicator of unconscionable conduct whose meaning and application would be affected in some way by such an overarching definition.[37]

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32 New South Wales Department of State and Regional Development, *Issues affecting the retail leasing industry in NSW*, Discussion Paper, April 2008, p. 20.

33 New South Wales Department of State and Regional Development, *Issues affecting the retail leasing industry in NSW*, Discussion Paper, April 2008, p. 20.

34 Associate Professor Frank Zumbo, *Submission 11*, p. 20.

35 N. Seddon and M. Ellinghaus, Cheshire & Fifoot's Law of Contract (8th Australian Ed., LexisNexis Butterworths, Australia, 2002), pp. 1135–1137.

36 Brian Horrigan, 'The expansion of fairness-based business regulation, *Australian Business Law Review*, vol 32, 2004, p. 161.

37 Professor Bryan Horrigan, *Submission 15*, pp. 8–9.

Examples of 'unconscionable conduct'

3.27 Notwithstanding the need to address 'unconscionable conduct' matters on a case by case basis, the courts might still be assisted by a list of examples noting what—in all circumstances—can be considered 'unconscionable'. Associate Professor Zumbo recommends recasting the factors listed in sections 51AC(3) and 51AC(4) into examples of unconscionable conduct. He argues that these examples would provide 'considerable and practical statutory guidance' on the meaning of 'unconscionable conduct', and would steer the courts away from the narrow equitable notion of unconscionability. The examples could be added to or fine-tuned over time. Associate Professor Zumbo's submission suggested the following preamble and eleven examples of 'unconscionable conduct':

> "Without in any way limiting the conduct that the Court may find to have contravened subsection (1) or (2) in connection with the supply or possible supply of goods or services to a person or a corporation (the business consumer), the following will, in the absence of evidence to the contrary, be regarded as unconscionable for the purposes of subsection (1) and (2):
>
> – the supplier used its superior bargaining position in a manner that was materially detrimental to the business consumer; or
>
> – the supplier required the business consumer to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the supplier; or
>
> – the suppler was aware and took advantage of the business consumer's lack of understanding of any documents relating to the supply or possible supply of the goods or services; or
>
> – the supplier exerted undue influence or pressure on, or engaged in unfair tactics against, the business consumer or a person acting on behalf of the business consumer; or
>
> – the supplier's conduct towards the business consumer was significantly inconsistent with the supplier's conduct in similar transactions between the supplier and other like business consumers; or
>
> – the supplier failed to comply with any relevant requirements or standards of conduct set out in any applicable industry code; or
>
> – the supplier unreasonably failed to disclose to the business consumer:
>
> - any intended conduct of the supplier that might affect the interests of the business consumer; or
>
> - any risks to the business consumer arising from the supplier's intended conduct (being risks that the supplier should have foreseen would not be apparent to the business consumer); or
>
> – the supplier was unwilling to negotiate the terms and conditions of any contract for supply of the goods or services with the business consumer; or
>
> – the supplier exercised a contractual right to vary unilaterally a term or condition of a contract between the supplier and the business consumer for

> the supply of the goods or services in a manner that was materially detrimental to the business consumer; or
>
> – the supplier acted in bad faith towards the business consumer."[38]

A statement of principles on 'unconscionable conduct'

3.28 NARGA argued that in addition to a definition of 'unconscionable conduct' there should be 'a statement of principle, which everybody understood'.[39] Mr van Rijswijk told the committee:

> If the statement of principle talked about the agreement or contract in its widest terms, and talked about a differential in power between the entities that go into that agreement and the abuse of that power, that statement of principle would send a signal to the larger organisations that this is not on.[40]

3.29 NARGA proposed the following principles:

- A significant difference in the negotiating or bargaining power of the parties, This difference could be based on (but not limited to):
  - Relative size or financial strength
  - Knowledge or understanding of the agreement or its consequences
  - Access to better or more timely advice
  - Differing levels of experience
- The presence of terms (or in cases where terms are not set out, practices or outcomes) in an agreement that unduly advantage the larger party and could be shown to be the result of the difference in bargaining power;
- The presence of a factor or factors that have either directly or by implication forced the minor party to accept terms that are disadvantageous;
- An understanding that either the terms of the agreement or the factors forcing its acceptance are seen to be unfair to the minor party;
- Evidence that suggests that the agreement would have been made on different terms had there not been a significant disparity in bargaining power or had there not been any factor present that forced the minor party to accept the terms in the agreement.[41]

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38 Associate Professor Frank Zumbo, *Submission 11*, p. 13.

39 Mr Ken Henrick, *Proof Committee Hansard*, 3 November 2008, p. 26.

40 Mr Gerard van Rijswijk, *Proof Committee Hansard*, 3 November 2008, p. 26.

41 NARGA, *Submission 9*, p. 5.

'Unconscionable' or 'unfair'

3.30 The 1997 report of the House of Representatives Committee on Industry, Science and Technology recommended a new section 51AA of the TPA, which would replace the reference to 'unconscionable' with the word 'unfair':

> (1) A corporation shall not, in trade or commerce, engage in conduct that is, in all the circumstances, unfair.[42]

3.31 In the Second Reading debate on the Fair Trading Bill, Senator the Hon. Peter Cook responded to the government's rejection of this amendment:

> Rather than put in place changes to the TPA which reflect unfair conduct in a business environment as the Reid committee recommend, the government chose in this bill to use the more difficult test of unconscionable conduct … The unconscionable conduct test is harsher and costs a lot more money to challenge … As a consequence, the use of the word 'unconscionable' is an advantage to big business in standing over small business and insisting on conditions which are unfair. You can meet the test 'unfair', but you might not meet the test 'unconscionable' and, as a consequence, the advantage not only in the negotiation of contracts but also in the prosecution of the law lies with the big end of town.[43]

3.32 Ms Jenny Buchan, a lecturer in business law at the Australian School of Business, also supported greater emphasis on the term 'unfair'. She argued that while the concept of 'unconscionable conduct' was not working, the failure is not because the concept is not specifically defined. Rather, she argued that the problem is with the term 'unconscionable conduct' itself, which has 'a very narrow meaning in common law'.[44] A provision as general as section 52 (on 'misleading and deceptive' conduct) would have been adequate for section 51AC had the Howard government chosen the term 'unfair' instead of 'unconscionable'. She suggested that this was an opportunity missed but did not propose amending section 51AC to replace 'unconscionable conduct' with 'unfair'. Instead, she urged the High Court to test section 51AC.[45]

3.33 Others supported the thrust of the 1997 amendment. The Pharmacy Guild proposed leaving 'unconscionable conduct' as an equitable doctrine under section 51AA and replacing the current section 51AC with the 'harsh and unfair' contract provisions of section 12 of the *Independent Contractors Act 2006*:

> (1) An application may be made to the Court to review a services contract on either or both of the following grounds:
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> (a) the contract is unfair;

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42 House of Representatives Committee on Industry, Science and Technology, *Finding a Balance: Towards fair trading in Australia*, 1997, p. xxvi.

43 Senator the Hon. Peter Cook, *Senate Hansard*, 1 April 1998, p. 1704.

44 Ms Jenny Buchan, *Confidential submission*.

45 Ms Jenny Buchan, *Proof Committee Hansard*, 3 November 2008, p. 39.

(b) the contract is harsh.

(2) An application under subsection (1) may be made only by a party to the services contract.

(3) In reviewing a services contract, the Court must only have regard to:

(a) the terms of the contract when it was made; and

(b) to the extent that this Part allows the Court to consider other matters—other matters as existing at the time when the contract was made.

(4) For the purposes of this Part, services contract includes a contract to vary a services contract.

3.34 Dr David Cousins from Monash University's Centre for Regulatory Studies and Mr Sitesh Bhojani, a barrister at the New South Wales Bar Association, also emphasised the importance of an 'unfair conduct' provision in the TPA. It is important, they argued, that the Act prohibit unfair conduct, 'not just conduct which is so unfair as to be described as unconscionable'. Accordingly:

> Our submission is that we should look to return to the Reid report and consider the adoption of an unfairness law that would replace the current unconscionable conduct and Birdsville provisions. We consider this would ensure better protections for consumers and small business, whilst removing unnecessary uncertainties and complexities for business. It would be consistent with current policy aims of removing unnecessary regulatory burdens on business. The Act could be streamlined around this new ethical standard of fairness which the courts could interpret over time as they have done in relation to misleading and deceptive conduct covered by S 52 of the Act.[46]

3.35 Dr Cousins and Mr Bhojani argued that this general prohibition on unfair conduct would need to be supported by some general guidance on what may be considered unfair. They explained:

> Unfair contract terms legislation was adopted by Victoria in 2003. These laws…enable the regulator to take a pro-active approach to considering the fairness of standard form contract terms. Only the regulator can initiate action…A national general prohibition on unfair conduct would be a useful complement to a national, Victorian style, unfair contract terms law. The general law would be subject to both public and private enforcement and cases would be taken on a reactive basis, reflecting their particular circumstances. The unfair contract terms law would be confined to actions by the regulator designed to affect proactively the fairness of contract terms generally affecting many consumers.[47]

3.36 The Consumer Action Law Centre also supported implementing unfair contract terms laws. However, it argued that the best avenue to do this was not by

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46 Dr Cousins and Mr Bhojani, *Submission 30*, p. 4.

47 Dr Cousins and Mr Bhojani, *Submission 30*, p. 4.

amending section 51AB of the Trade Practices Act but through a national general prohibition on unfair trading. The Centre argued that:

> the small number of cases indicates that statutory unconscionable conduct is not effective in remedying general unfair trading practices that harm consumers. However, while amendments to the definition in the TPA may make statutory unconscionable conduct easier to prove, they are unlikely to result in great increases in the number of cases being brought or in significant change to the benefit of consumers (or small businesses) generally, because unconscionable conduct cases by their nature remain focussed on the circumstances of individual transactions, which makes them a poor basis for tackling more general unfair trading practices.[48]

3.37 Significantly, the Centre also claimed that an amendment to the TPA to incorporate unfair contract term laws would:

> …distort the concept of unconscionable conduct beyond its understood scope, and by doing so perhaps create only more confusion or overly narrow interpretation.[49]

3.38 Rather, the Centre supports:

> …the adoption of a national general prohibition on unfair trading or unfair commercial practices, similar to the European Unfair Commercial Practices Directive that forms the basis for new UK laws in this regard. Again, such provisions would allow for more pro-active action by the regulator and are specifically designed to address broader market conduct, including conduct that targets vulnerable or disadvantaged groups of consumers…We suggest that the Committee might consider recommending that the operation of the statutory unconscionable conduct provisions be reviewed properly at the same time as the new unfair contract terms provisions are first reviewed.[50]

Conclusion

3.39 The committee has received various proposals to amend section 51AC of the Trade Practices Act. These range from a statutory definition of 'unconscionable conduct' and 'good faith', to a statutory list of examples and principles of unconscionable conduct, to overhauling section 51AC by replacing 'unconscionable' with 'unfair' and enacting national unfair contract terms legislation.

3.40 The objective of all these options is the same—to clarify for the courts, the regulator and all parties that section 51AC applies to the terms of the contract or the substantive bargain struck, not the process of negotiating the contract. But the scope, the practicality and the implications of these options differ quite significantly. They are the subject of the committee's view in Chapter 5.

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48 Consumer Action Law Centre, *Submission 23*, p. 9.

49 Consumer Action Law Centre, *Submission 23*, p. 10.

50 Consumer Action Law Centre, *Submission 23*, pp. 9–10.