Chapter 5

The committee's view

The need to amend section 51AC of the TPA

5.1 Assessing the need for and scope of amendments to section 51AC of the Trade Practices Act is a complex task. Chapters 3 and 4 emphasise that there is fundamental disagreement about the need for a definition or indeed any reform of the unconscionable conduct provisions. Broadly speaking, this reflects the divide between the interests of big business on the one hand and small business on the other.

5.2 The key question for the committee is whether the 'present legal position reflects the appropriate balance between the different groups of interests as a matter of good public policy'.[1] More particularly, does the law effectively prosecute unethical conduct by larger businesses and thereby underpin an efficient market for contractual relationships to the benefit of consumers?

5.3 The committee recognises the arguments in Chapter 4 that the unconscionable conduct provisions have already changed the behaviour of many businesses. This may well be the case, although measuring the scale and proving the causality of any improvement is extremely difficult, and not within the committee's remit.

5.4 However, the committee believes the fact there have only been two successful findings under section 51AC over the past decade primarily reflects the courts' narrow interpretation of this section, rather than any great adjustment in business behaviour. There are simply too many allegations where the actions of retail landlords and franchisors appear unethical, and yet there is no legal redress because it is not unconscionable under the legal definition of unconscionable.

5.5 The committee has received several submissions to this inquiry from franchisees alleging serious misconduct which should be pursued under section 51AC. It is also aware that the Joint Committee on Corporations and Financial Services has received dozens of submissions along similar lines as part of its inquiry into the Franchising Code of Conduct.[2] The committee commends this and any other work that sheds light on the scale of the problem.[3] The evidence is significant and is an important rejoinder to the views and arguments presented in Chapter 4.

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1 Professor Horrigan, *Proof Committee Hansard*, 3 November 2008, p. 13.

2 See Joint Committee on Corporations and Financial Services, *Inquiry into the Franchising Code of Conduct*, December 2008. http://www.aph.gov.au/Senate/committee/corporations_ctte/franchising/submissions/sublist.htm

3 See also, Productivity Commission, *The Market for retail tenancy leases in Australia*, August 2008.

5.6 It is the committee's view that the present legal position is skewed to favour big business interests, sometimes at the direct expense of smaller businesses and consumers. As a matter of good public policy, legislative redress is needed. Importantly, taking action to reform the unconscionable conduct provisions of the TPA must not limit the capacity of larger businesses to drive a hard bargain, or protect smaller businesses with unrealistic expectations or those that are simply inefficient. Rather, any reform of these provisions must be based on a concern that the contractual power of the larger party is not abused and an acknowledgement that the courts' current interpretation of section 51AC sets the bar too high for small businesses.

5.7 The question is how can the bar be lowered? As Chapter 3 noted, submitters to this inquiry have made various suggestions. They are:

- to insert a definition of 'unconscionable conduct' into the Act with reference to conduct that is 'harsh' or 'unfair';
- to insert a list of examples of the types of conduct that would ordinarily be considered to be 'unconscionable' under section 51AC;
- to insert legislative principles for interpreting the statutory provisions on unconscionable conduct;[4]
- expressly prohibiting bullying, intimidation, coercion, physical force and undue harassment in section 60 of the TPA;
- to insert a statutory definition of 'good faith';
- to replace section 51AC as an 'unconscionable conduct' provision with a provision based on legal precedents of 'unfair' conduct, such as section 12 of the *Independent Contractors Act 2006 (Cth)*;[5]
- that if a change is made to the Act, enhanced policy and funding commitment for the appropriate governmental regulators to bring suitable test cases as soon as possible for judicial guidance on the whole statutory regime as reformed;[6]
- to enact a new legislative framework within the TPA to deal with unfair contract terms supported by a national general prohibition on unfair conduct;[7] and
- to implement national unfair contract terms laws (as recently endorsed by COAG) and a national general prohibition on unfair trading similar to the European *Unfair Commercial Practices Directive*.[8]

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4 Professor Bryan Horrigan, *Submission 15*, p. 8.

5 Pharmacy Guild of Australia, *Submission 16*.

6 Professor Bryan Horrigan, *Submission 15*, p. 8.

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

8 Consumer Law Action Centre, *Submission 23*, p. 1.

5.8 This chapter assesses which of these suggestions has merit in terms of encouraging the courts to adopt a broader interpretation of section 51AC of the Trade Practices Act. It also suggests the avenues through which these measures might be developed and which should be given highest priority.

A definition of 'unconscionable conduct'

5.9 This inquiry's terms of reference direct the committee to consider the need for, and scope and content of a definition of 'unconscionable conduct'. Chapter 3 listed the definitions of unconscionable conduct proposed by submitters. There are two key questions before the committee. First, do these proposals offer a solution to the courts' current narrow interpretation of section 51AC? Second, and more broadly, is a carefully worded definition of 'unconscionable conduct' in the TPA necessarily the best option and the highest priority in terms of enforcing the legislative intent of section 51AC?

5.10 In principle, the committee is in favour of inserting a definition of 'unconscionable conduct' into the TPA. A definition could make clear to the courts that the word 'unconscionable' in the context of section 51AC is broader than the equitable concept in section 51AA. The committee has two significant reservations, however.

5.11 The first is that the terms used in the definition would themselves need to be carefully considered for their judicial meaning. It would need to be clear to stakeholders how the courts' interpretation of these terms might encroach on current business practices, and how a definition would affect larger businesses' responsibilities under other statutes. The committee's second (and related) concern is that a definition is not necessarily the priority. Agreeing on terms, defining them and discussing their legal ramifications among stakeholders is potentially a prolonged and difficult process. In the committee's opinion, there is lower-hanging fruit that could be more readily inserted in the Act and which, arguably, would be more effective (see recommendations 1 and 2).

5.12 Take Associate Professor Zumbo's definition. To the committee's knowledge, it is the most comprehensive proposal in the public domain. It is also the most ambitious. What he proposes is 'a new ethical norm of conduct', no less. His definition lists no fewer than nine terms to guide the courts: unfair, unreasonable, harsh, oppressive, (or contrary to the concepts of) fair dealing, fair-trading, fair play, good faith and good conscience. He also notes that the definition is non-exhaustive—the courts can consider other guideposts.

5.13 The committee is concerned that Associate Professor Zumbo's definition, while comprehensive, is legally too complex and uncertain. The various terms he includes do not have precisely the same legal definition, even if they are broadly synonymous to the layperson. His definition is a useful contribution and should be the basis for further discussion. But as it stands, it does not meet the overarching objective of any definition of unconscionable conduct—clarity, for both the courts and the parties.

A ripple effect

5.14 A broad-based definition of 'unconscionable conduct' inserted into section 51AC is a much more ambitious and wholesale reform than amendments that are targeted and confined to the working of section 51AC (see recommendations 1 and 2). Professor Horrigan told the committee that a broad-based definition would have a flow on effect to all sectors and all jurisdictions:

> Even if there are situations of abuse in particular industry sectors that need further addressing and there are - the question is whether they are best addressed through a sweeping definitional change of indiscriminate application across all commercial and consumer activity, with multiple potential policy and regulatory implications, knock-on effects, and new uncertainties.[9]

5.15 He added:

> The point about a definition is that it depends very much on what kind, and is it just going to be a definition that comes in over the top, conditions everything else? …is that the point at which you want to introduce transitional working through, or do you do it [in a way that is]…a bit more targeted in terms of where there is existing uncertainty about the terms of what the provisions mean.[10]

5.16 Professor Horrigan suggested that the committee should consider:

> …whether or not the step of introducing a statutory definition of unconscionable conduct should be taken now and alone, or alternatively whether the legitimate policy concern behind such a suggestion needs more coordinated attention through other means. On this point, proponents of a new statutory definition of unconscionable conduct highlight the possibility of developing model codes or laws that might apply nationwide, either generally or in relation to particular industry sectors (banking, financial services, retail leasing, property management, franchising etc). [11]

5.17 The committee believes that while there is merit to the idea of a definition of 'unconscionable conduct' to be inserted into the TPA, this is not the forum in which it should be proposed. The committee's remit for this inquiry is to examine the need for a definition *for the purposes of Part IVA of the Trade Practices Act*.[12] A definition in section 51AC may well assist the courts to broaden their interpretation of the provisions, but its effect would go far beyond that. To recommend a definition, therefore, would be to propose coordinated institutional dialogue and an action plan to

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9 Professor Bryan Horrigan, *Submission 15*, p. 18.

10 Professor Bryan Horrigan, *Proof Committee Hansard*, 3 November 2008, p. 23.

11 Professor Bryan Horrigan, *Submission 15*, p. 9.

12 Inquiry into the need and scope for a definition of unconscionable conduct in the Trade Practices Act, *Terms of reference*, http://www.aph.gov.au/Senate/committee/economics_ctte/tpa_unconscionable_08/info.pdf

ensure that the different statutory regimes are in sync with the amended TPA[13] and that the various stakeholders understand what their obligations are under section 51AC and other statutes.

5.18 For the same reasons, the committee hesitates to recommend an amendment to section 51AC which replaces reference to 'unconscionable' with the word 'unfair'. Again, the committee recognises the appeal of this proposal. It would lower the threshold for section 51AC cases and may be a simpler and more efficient amendment to the section than a definition of 'unconscionable conduct'. But again, the problem arises of the effect that the lower threshold of 'unfair' will have on the wider architecture of statute across the various sectors and jurisdictions. It would require enacting a supporting national general prohibition on unfair conduct, as Dr Cousins and Mr Bhojani suggest (see paragraph 3.35). And it may, as this committee concluded in 2004, also create more uncertainty and confusion among the courts and the parties and have adverse consequences.[14]

Procedural disadvantage and the setting of unconscionable conduct

5.19 Those who support a definition of 'unconscionable conduct' argue principally that the courts have not used section 51AC beyond the test of 'special disadvantage' established in section 51AA. A definition, they argue, would direct the courts' attention to the much broader remit of section 51AC that was intended when the section was introduced in 1998.[15] It is notable, however, that none of the three proposed definitions explicitly state that unconscionable conduct may relate to either the formation of a contract ('procedural unconscionability') or the operation and progress of a contract ('substantive unconscionability').

5.20 The committee believes that a useful amendment to section 51AC of the TPA would be to make clear that the section applies to the actual operation of a contract, not just its formation. It seems only logical that if the point of a definition is to clarify for the courts that unconscionable conduct in section 51AC is broader than the special disadvantage doctrine, then this should be explicit in an amendment to the Act.

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13 Professor Bryan Horrigan, *Submission 15*, p. 10.

14 Senate Economics Committee, *The effectiveness of the Trade Practices Act 1974*, 1 March 2004, p. xv. The minority report agreed with the majority:

> Government Senators welcome the fact that the Majority Report makes no recommendation for the introduction of vague new statutory language into s.51AC ('harsh', 'unfair' etc.). It is our belief that the consequence of doing so would make the meaning of the section so open to a variety of different interpretations that it would be inimical to the development of a coherent and relatively clear body of law. Furthermore, the transactional uncertainty which the introduction of such language would produce would have undesirable consequences for commerce, the social cost of which is difficult to assess. Paradoxically, it is likely to be the very persons whom the section is designed to protect (ie, persons in a position of relative weakness in a transaction) who would suffer most from such transactional uncertainty. (p. 85)

15 The Hon. Peter Reith, Second Reading Speech, House of Representatives Hansard, 3 December 1998, p. 11884.

Recommendation 1

5.21 **The committee notes that the parliamentary Joint Committee on Corporations and Financial Services has just inquired into the Franchising Code of Conduct. Pending the response to this inquiry, the committee generally supports an amendment to section 51AC of the Trade Practices Act which states that the prohibited conduct in the supply and acquisition of goods or services relates to the terms or progress of a contract.**

Examples of unconscionable conduct: setting the threshold

5.22 A key challenge for the courts in interpreting section 51AC is to set the threshold: at what point does hard bargaining become unethical behaviour? Chapter 2 noted that to date, the successful section 51AC cases have been those in which the conduct involved was extreme and therefore, indubitably unconscionable. There are many more instances where the ACCC has not pursued the allegation because the conduct was not as extreme and the courts have adopted a narrow interpretation of unconscionable conduct. As Bryan Horrigan told the committee: 'The unconscionable conduct general law steps in at the extremes. It does not step in at the middle'.[16]

5.23 In his evidence to the committee, Professor Horrigan flagged the limitations of inserting a definition of 'unconscionable conduct' into the TPA without any other amendment to section 51AC:

> …even if you just insert a new definition, it still has to go into the existing regime with all of its flaws. By that I mean you will still need courts to connect the dots between a definition, albeit an expanded definition; the existing list of indicators, if you leave them as they are; and the fact specific situations in which each of these things have to be applied. The existing statutory indicators, unless there is a radical change made to them, just do not deal with issues about how many of those indicators you need before you say we have unconscionable conduct. What is the priority between them and how much weight you give them in particular circumstances? [17]

5.24 The committee shares these concerns. A definition, however clear, may still stumble on some of the uncertainties in the way the courts consider and weight those factors listed in section 51AC(3) and 51AC(4) of the Trade Practices Act.[18]

5.25 Inserting a statutory list of examples of the types of conduct ordinarily considered unconscionable into section 51AC may provide practical statutory guidance for the courts. They are all pitched in terms of what the supplier did or did not do, which clearly directs the courts to the behaviour that the section is trying to

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16 Professor Bryan Horrigan, *Proof Committee Hansard*, 3 November 2008, p. 22.

17 Professor Bryan Horrigan, *Proof Committee Hansard*, 3 November 2008, p. 18.

18 This is notwithstanding the focus on some judges on interpreting section 51AC(3) such that conduct that is 'fair' or 'clearly unfair' is taken into account. See Justice Paul Finn, 'Unconscionable conduct?', UNISA Trade Practices Workshop, 2006, pp. 14–15.

remedy. They would also provide guidance for small businesses in deciding whether to take action against the larger party and how to frame their arguments for the court.

5.26 The committee notes that there is a growing trend in legislation to insert notes and examples to assist both the courts and the parties understand the effect of the provisions. A list of examples of unconscionable conduct in the TPA is a more direct and transparent way of focusing the court's and the parties' attention on what is 'unconscionable conduct' than the current list of factors in sections 51AC(3) and 51AC(4). These factors can be considered by the courts or they can be ignored completely in preference to other factors. There is no requirement for the court to rule that the action in question is unconscionable even if it correlates to one of the listed factors.

5.27 The list of examples could work differently. It may be interpreted by the courts as a **non-exhaustive** list, but the examples on the list would be regarded as 'unconscionable' for the purposes of 51AC 'in the absence of evidence to the contrary'. If the action in question correlates to one or more of the listed examples, therefore, the court would be obliged to find the action 'unconscionable' or give reasons why it should be considered otherwise. This would be a significant departure from how subsections 51AC(3) and 51AC(4) currently operate and, in the committee's opinion, a significant improvement. The courts could still prosecute in cases where the conduct did not fit a listed example. This is an important rejoinder to the argument that examples would contort business behaviour to avoid these categories. However the committee notes the concern that such a list may be interpreted by the courts as an 'exhaustive list' and this may have unforeseen consequences.

Establishing an industry dialogue on standard setting

5.28 The committee believes that the development of a statutory list of examples would be an excellent way to begin a process of stakeholder standard setting. These examples are a more concrete and practical way of engaging the various stakeholders than the open-ended and open-textured terms in a definition of unconscionable conduct. As such, the committee believes that reform of section 51AC of the TPA should start by focussing stakeholders' attention on the specific examples of conduct that might fall under statutory definition of 'unconscionable conduct'. Once this dialogue is in train, and progress made on agreeing to some examples, drafting a definition should become simpler.

5.29 As an example of how this process might begin, the committee highlights the submission of the National Association of Retail Grocers of Australia. NARGA listed 12 examples of what it saw as "practices that exploit the 'bargaining power' between the particular supplier (the smaller business) and the major chains".[19] It argued that in all 12 cases, the practice relies on the power difference and adversely affect the

19 NARGA, *Submission 9*, p. 3.

supplier and the wider competitive environment.[20] As part of a process of standard setting, NARGA's examples could be referred to the major supermarket chains for comment. They would be asked whether the examples accord with their understanding of 'unconscionable conduct'. And if not, why not, and what does constitute 'unconscionable conduct'?

Principles of 'unconscionable conduct'

5.30 As flagged in Chapter 3, another matter before the committee is whether to insert a list of principles into section 51AC which would clarify for all parties the basic elements of 'unconscionable conduct'. In terms of specificity and precision, a list of principles would fall somewhere between a list of examples and a broad overarching definition of 'unconscionable conduct'.

5.31 Recall that NARGA's proposed principles relate to: 'a significant difference' in bargaining power between the parties; contractual terms that unduly advantage the larger party; a factor that has forced the minor party to accept disadvantageous terms; and evidence that suggests a contractual agreement would have been made on different terms had there not been a significant disparity in bargaining power.

5.32 The committee notes that many of these principles are very similar to the factors listed in section 51AC(3). This is an important difference, however. The factors currently listed in the Act are those that the courts may (or may not) consider as part of a section 51AC case. They provide a very broad indication for the parties as to the matrix of factors that the courts *may* take into account, but there is no certainty of this. A statement of principles, on the other hand, would be a list of factors that the courts *must* consider. If, for example, there is evidence that the terms of a contract unduly advantage the larger party as a result of the difference in bargaining power, the court must find that unconscionable conduct has taken place or give reasons why this ruling should not be made.

5.33 Properly drafted, through the consultative process recommended below, a list of these principles would provide another useful option to clarify section 51AC for the courts and the parties involved. As with the specific examples, a list of principles would also act as a deterrent to larger businesses in a way that section 51AC(3) does not. It is in this context that the committee sees a definition of 'unconscionable conduct' as a third-best option, lacking in clarity and, therefore, less of a deterrent.

Recommendation 2

5.34 The committee recommends that the Federal Government engage industry participants from the retail tenancy and franchising sectors (among others) and the ACCC in an inquiry process. The inquiry should specifically consider the option of producing a list of clear examples, that all parties agree constitute 'unconscionable conduct', into the *Trade Practices Act*. Furthermore,

20 These conditions are the basis for NARGA's definition of 'unconscionable conduct'.

the committee recommends that as a part of this national dialogue, a statement of principles should also be considered.

5.35 A key recommendation of the 1997 report by the House of Representatives Standing Committee on Industry, Science and Technology stated: 'there is an urgent need to establish a body of precedents under the new provisions as quickly as practicable'.[21]

5.36 In the decade since, despite clear consensus that section 51AC adds to the armoury of small business on 'conscionable conduct', there have not been flow-through test cases.[22] The committee emphasises that the ACCC must broaden its perspective in testing the new provisions. In terms of clarifying the legislation, an unsuccessful case that tests issues around the threshold is more useful than a successful prosecution of an extreme case.

5.37 Under questioning, the ACCC acknowledged that of the section 51AC cases it had taken to court, only two had been successful. Still, it noted that case law on the interpretation of section 51AB and 51AC is 'building' and 'providing further guidance to market participants'. It referred to Commissioner Graeme Samuel's comments in July 2007 that the ACCC has renewed its determination to pursue matters to the full extent in these sections.[23]

5.38 The committee welcomes this new resolve. Targeted investigation and funding of section 51AC test cases is crucial.

5.39 The committee also commends the recent government decision to appoint Mr Michael Schaper as a deputy chair of the ACCC given his extensive academic expertise in the area of small business. The *Trade Practices Legislation Amendment Bill 2008* established a requirement that one of the deputy chairs has knowledge or experience of small business. The committee earlier commented that this requirement:

> …is a useful signal to the ACCC, the small business sector and the general community that the parliament acknowledges the role of small businesses in keeping markets competitive and that trade practices legislation has an important role in preventing large businesses unfairly reducing competition in markets at their expense.[24]

Recommendation 3

5.40 The committee recommends that the ACCC pursue targeted investigation and funding of test cases.

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

22 Professor Bryan Horrigan, *Proof Committee Hansard*, 3 November 2008, p. 22.

23 Mr Scott Gregson, *Proof Committee Hansard*, 3 November 2008, p. 9.

24 Senate Standing Committee on Economics, Trade Practices Legislation Amendment Bill 2008 [Provisions], August 2008, p. 18.

'Good faith'

5.41 A number of witnesses suggested that a statutory definition of 'good faith' should be inserted into the TPA. The committee is not convinced of the merit of this idea. As with defining the concept of 'unconscionable conduct', a statutory definition of 'good faith' will only be of use to the courts if its terms are clear. As Mr Scott Gregson, General Manager of the ACCC's Coordination, Enforcement and Compliance Division, told the committee:

> While trying to provide greater clarity, care needs to be taken in relation to some suggestions such as…good faith, that they do not introduce more uncertainty...[25]

5.42 As argued earlier, the committee believes there is considerable merit to the idea of developing and inserting a clear set of statutory examples of 'unconscionable conduct'. 'The supplier should not do X, Y and Z'. But with a concept like 'good faith', which is an overarching principle guiding how parties *should* behave to each other, a corresponding set of examples is not an option. It is true that there has been some judicial interpretation of the term 'bad faith' or lack of 'good faith', but there is not widespread judicial acceptance that there is an obligation of good faith in contractual matters.[26] As Professor Horrigan told the committee:

> The problem is that you have the courts in Australia that, in general law, still have not accepted that there is a general obligation of good faith in commercial and contract matters, except in New South Wales. That is the only jurisdiction where that applies. In the absence of courts in the general law accepting that, it is very hard for courts that are looking at those statutory indicators to leap over the edge and go, 'Everything that we associate with the doctrine of good faith, which does not exist in our general law yet, should be imported into that provision.'[27]

5.43 Professor Horrigan also argued that as with a definition of 'unconscionable conduct', a definition of 'good faith' would be 'sweeping and indiscriminate', raising the bar across all jurisdictions and across all business contexts.[28] Given this, the committee believes that a definition of 'good faith' in the TPA would only add uncertainty. There needs to be a more developed body of law on which a statutory definition could draw before a definition is viable.

Bullying, intimidation, physical force coercion and undue harassment

5.44 Chapter 3 mentioned Associate Professor Zumbo's suggestion that the TPA should specifically prohibit bullying, intimidation, physical force, coercion and undue

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25 Mr Scott Gregson, *Proof Committee Hansard*, 3 November 2008, p. 9.

26 See the ruling of Justice Gordon in *Jobern Pty Ltd v BreakFree Resorts (Victoria) Pty Ltd*, [2007] FCA 1066 (23 July 2007).

27 Professor Bryan Horrigan, *Proof Committee Hansard*, 3 November 2008, p. 22.

28 Professor Bryan Horrigan, *Proof Committee Hansard*, 3 November 2008, p. 17.

harassment in business to business relationships. Prima facie, this seems a perfectly reasonable suggestion. These are surely undesirable in the business setting. And harassment and coercion are currently prohibited in consumer transactions under section 60 of the Act. So why not extend this to business to business transactions?

5.45 Again, the committee believes that there may be a better way to establish the line between a business enforcing a contract and a business engaging in bullying, intimidation, physical force, coercion and undue harassment. The judicial interpretation of these terms may seem clear cut, but this should not be assumed. Take the term 'undue' in the context of 'undue harassment' in section 60. Justice Hill in Australian Competition & Consumer v The Maritime Union of Australia [2001] noted that:

> "undue", when used in relation to harassment, ensures that conduct which amounts to harassment will only amount to a contravention of the section where what is done goes beyond the normal limits which, in the circumstances, society would regard as acceptable or reasonable and not excessive or disproportionate.

5.46 But what are these 'normal limits' that society would regard as acceptable? It would seem that rather than inserting a prohibition into the TPA, a more constructive path would be to encourage some standard setting by industry bodies. Professor Horrigan explains:

> We have not tried a lot of cooperative measures where we force the various parties to at least agree upon what are the things we can agree on that clearly are unscrupulous acts that no proper business would want to see tolerated in its industry. We do it in other areas like corporate governance where we put stakeholders together. There may be a need to put the stakeholders together and get them involved in some standard setting.[29]

Actions, intentions and outcomes

5.47 In its 1997 report, the House of Representatives Standing Committee on Industry, Science and Technology proposed a new section 51AA which stated that, in determining whether conduct is unfair, the court may have regard to the 'harshness of the result'. In its submission to this inquiry, the Motor Trades Association of Australia proposed a definition of 'unconscionable conduct' which similarly refers to conduct that is harsh 'whether the result of such conduct is intentional or not'.[30]

5.48 These proposals raise important questions. Is unconscionable conduct concerned with the unconscionable action in and of itself, or both the action and the outcome? To go a step further, should businesses that deal with a significantly smaller and potentially very vulnerable party have a duty to ensure not only that they act

29 Professor Bryan Horrigan, *Proof Committee Hansard*, 3 November 2008, p. 18.

30 Motor Trades Association of Australia, *Submission 3*, p. 5.

fairly, but that their actions do not adversely affect the smaller party? Is it possible for a larger party to act fairly but have a harsh result on the smaller party?

5.49 Take the example of a 'rogue franchisor' and suppose there were four of these enterprises, all faced with insolvency and all dumping stock on a franchisee. The first franchisor dumps its stock and (could not and) does not know whether the franchisee is capable of selling this stock. As it happens, the franchisee sells it and remains viable. The second franchisor dumps its stock also not able to know whether the franchisee can absorb it. But in this case, the franchisee goes under. The third franchisor knows that the franchisee will not be able to sell the stock and as expected, it goes under. The fourth franchisor also thinks the franchisee will not be able to sell the stock but it does.

5.50 In these cases, the action is the same but the intention and the outcomes differ. Is the second franchisor more culpable of 'unconscionable conduct' than the first because the result was harsher, even though neither could reasonably know the outcome? Is the third franchisor more culpable of 'unconscionable conduct' than any of the others because s/he both knew the likely outcome and that outcome (the franchisee's insolvency) eventuated?

5.51 The committee considers that these issues of intention and result are important considerations in any definition of 'unconscionable conduct'. They were not dealt with in any detail as part of this inquiry, but they warrant close consideration as part of the ongoing dialogue on these matters that the committee proposes (see recommendation 2).

Remedies

5.52 The committee has not examined the issue of remedies in any detail, but it is an important consideration in encouraging smaller businesses to seek redress under section 51AC. Currently, section 82 of the TPA permits a person to recover loss or damage arising from a contravention of Parts IV, IVA, IVB, V or 51AC. The committee heard that as part of efforts to broaden the judicial interpretation of section 51AC, there should also be other avenues made available to seek remedy for breach of the section 51AC provisions.

5.53 NARGA told the committee that delisting is currently a deterrent for small business suppliers in the retail grocery sector to pursue section 51AC cases. Delisting refers to a major grocery chain discontinuing a contract with a small supplier. Mr Gerard van Rijswijk of NARGA told the committee that:

> We believe…that one of the remedies the court could apply to a situation where unconscionable conduct has been found was a requirement that the larger party continues to deal with the smaller party. In other words, taking away that threat of delisting…Those sorts of remedies do not exist in the current legislation. Without that sort of remedy, there is a risk that cases

> still will not be brought, no matter how bad things are, simply because these guys do not want to go out of business.[31]

Conclusion

5.54 The committee is in no doubt that section 51AC of the *Trade Practices Act* has fallen short of its legislative intent. The law as it current operates only addresses unconscionable conduct in the process of contracting (51AA), but not—save for few exceptional cases—in the substantive bargain struck (51AC). The regulator and the courts have not pursued the crucial test cases which would extend the judicial interpretation of section 51AC beyond the equitable concept established in section 51AA. A very poor record of prosecutions reflects a lack of clarity and guidance in section 51AC as to what constitutes 'unconscionable conduct'. In consequence, many smaller businesses with well-grounded allegations of unethical and unconscionable conduct against large businesses have been denied proper access to the judicial process.

5.55 The committee does not recommend inserting a statutory definition of 'unconscionable conduct' or 'good faith', or replacing the word 'unconscionable' with 'unfair'. It agrees that in principle, all these proposals have merit insofar as they would give the courts the tools to lower the current threshold for section 51AC cases. However, the committee cautions that these amendments are sweeping in their application, affecting all commercial and consumer activity and would create obligations and uncertainties for legislatures, regulatory bodies and the courts. It may well be that a coordinated national approach is needed to create a new norm of ethical conduct in business to business transactions in Australia.

5.56 The committee notes that COAG at its meeting in October agreed to a new consumer policy framework comprising a single national consumer law based on the *Trade Practices Act 1974*, drawing on the recommendations of the Productivity Commission and best practice in State and Territory consumer laws, including a provision regulating unfair contract terms. It would be expected that when the Commonwealth consults with the community on the details of the new national consumer law, that it would give further consideration to reform proposals surrounding Part IVA of the *Trade Practices Act* as well as mooted proposals to legislate along the lines of the EU's Unfair Commercial Practices Directive. The committee also notes that the Ministerial Council on Consumer Affairs has proposed that under a national consumer law the redress powers for regulators should be enhanced, including the civil pecuniary penalties.

5.57 The committee's preferred option is to target those areas of section 51AC that could clarify the meaning of 'unconscionable conduct' in the context of section 51AC, without affecting or forcing major change to the wider legislative framework. Moreover, in the committee's opinion, these precise and targeted amendments will

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31 Mr van Rijswijk, *Proof Committee Hansard*, 3 November 2008, pp. 26–27.

provide greater clarity for the courts and for all parties involved than an all-encompassing definition of 'unconscionable conduct'. The committee recommends:

- inserting a prefatory clause into section 51AC stating that the prohibited conduct in the supply and acquisition of goods or services relates to the terms or progress of a contract, pending the response to the Joint Committee on Corporations and Financial Services inquiry into the Franchising Code of Conduct;
- that the ACCC engage industry participants from the retail tenancy and franchising sectors (among others) in an inquiry process which should specifically consider the option of producing a list of clear examples, that all parties agree constitute 'unconscionable conduct', into the *Trade Practices Act*. As part of this national dialogue, a statement of principles should also be considered; and
- that prior to and following these amendments, the ACCC pursue targeted investigation and funding of test cases.

Senator Annette Hurley

Chair