

Additional comments by Coalition Senators and Senator Nick Xenophon

Need for statutory definition of unconscionable conduct

Coalition Senators acknowledge that it is desirable to approach the question of statutory provisions regarding unconscionable conduct by having regard to three principles:

1. Prima facie, the free enterprise system should be allowed to work without undue interference by governments or courts. Laws of this kind are by their nature exceptional.
2. Whenever Parliaments do intervene to confer a jurisdiction to rewrite commercial arrangements, they interfere with one of the key values of commerce, i.e. security of transactions—in other words, the security of knowing that "a deal is a deal". There could be costs associated with unsettling the security of transactions, since sellers may factor into their price a risk premium, making the good or service more expensive and disadvantaging the most marginal consumer. This, paradoxically, may have the effect of putting the good or service beyond the reach of the very sort of person the provisions are aimed to protect.
3. There is already a well-developed body of common law and equitable principles dealing with duress, unconscionable conduct etc., which predate the statutory provisions. The engrafting of further statutory provisions on the existing legal regime should only be contemplated if there is a demonstrated inadequacy in current law.

However, as noted by the majority report at paragraph 5.6 "the present legal position is currently skewed to favour big business interests, sometimes at the direct expense of smaller businesses and consumers" and that as "a matter of good public policy, legislative redress is needed". Despite this, the majority falls short of recommending the insertion of a statutory definition of unconscionable conduct in s 51AC of the *Trade Practices Act*.

The insertion of such a statutory definition is in our opinion desirable to ensure that small businesses and consumers do have appropriate redress against unethical conduct in the future. Consistent with the three principles set out above, it is the responsibility of the legislature, having enacted s 51AC, to ensure that the courts' consideration of the meaning of unconscionable conduct is not restricted so as to limit the application of the pre-existing common law and equitable principles, nor to read down any interpretation of s 51AC so that it would not address all forms of unethical conduct.

The insertion of a suitable definition would ensure that judicial consideration of section 51AC was able to include both common law and equitable principles and the guidance provided by the definition.

In this regard, we agree with the majority that the definition provided by Associate Professor Zumbo "is the most comprehensive proposal in the public domain". The Majority correctly notes at paragraph 5.12 that Associate Professor Zumbo's definition relies on "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. The Majority also correctly notes that Associate Professor Zumbo's definition "is non-exhaustive—the courts can consider other guideposts."

The terms used by Associate Professor Zumbo can be understood by both the lawyer and layperson and this in our opinion is a clear strength of Associate Professor Zumbo's proposed definition. Accordingly, we disagree with the majority views that Associate Professor Zumbo's definition is "legally too complex and uncertain." Associate Professor Zumbo has previously addressed such concerns:

"The proposed definition is intended to be non-exhaustive and its plain English drafting is clearly aimed at promoting a better understanding of the intended broad operation of provisions like s 51AC and its State and Territory equivalents. Importantly, the expression draws on concepts that have been recommended or are already in use in other legislation dealing with unethical conduct within a commercial context. For example, ..., the word "unfair" was originally proposed as the central concept in what was to become s 51AC.¹ The word "unfair" has also been used to describe the types of contracts that the Industrial Relations Commission of New South Wales has had power to vary or set aside under s 106 of the *Industrial Relations Act 1996* (NSW). Similarly, such words as "harsh" and "oppressive" are, ..., already used in s 22 of the *Leases (Commercial and Retail) Act 2001* (ACT). By relying on concepts already in use or which are capable of being readily understood by those covered by s 51AC or its State and Territory equivalents, the proposed definition would not only assist in promoting consistency in the way that the statutory concept of "unconscionable conduct" is interpreted by Courts and Tribunals across Australia, but it would also be in keeping with the intended broad scope of the statutory concept. Such consistency is particularly valuable in an environment where there has been a proliferation of statutory provisions against unconscionable conduct."²

We would therefore recommend that a definition of unconscionable conduct based on the approach taken by Associate Professor Zumbo, be inserted into section 51 AC of

¹ See paragraph 6.73, p 181 of the Fair Trading Report which may be accessed at <http://www.apf.gov.au/house/committee/isr/Fairtrad/report/CHAP6.PDF>

² See Frank Zumbo, "Commercial Unconscionability and Retail Tenancies: A State and Territory perspective," (2006) *Trade Practices Law Journal*, Vol. 14, p 165 at p. 172.

the *Trade Practices Act* and that it be made clear to the extent that it is not inconsistent with such a definition, the pre-existing common law and equitable principles should apply.

Such a definition would make it clear to the Courts that the term "unconscionable conduct" under s 51AC is to be interpreted in a manner that prohibits unethical conduct in general. A similar definition should also be inserted into s 51AB of the *Trade Practices Act* to ensure that consumers also benefit from a clear prohibition against unethical conduct.

Need for statutory list of examples that constitute unconscionable conduct

While we agree with the Majority's view that a list of examples of what constitutes unconscionable conduct should be included in the *Trade Practices Act*, we believe that a ready list of examples is already found in s 51AC of the *Trade Practices Act*. We are concerned that there has already been considerable delay in providing both a clear statutory definition of unconscionable conduct and a clear statutory list of examples of what constitutes unconscionable conduct. This delay has been to the detriment of small businesses and consumers.

Since there is general agreement that the types of conduct listed in s 51AC(3) are relevant to a determination of what is unconscionable we take the view that those types of conduct found in s 51AC(3) are immediately available to provide examples of what is unconscionable conduct. In this regard, Associate Professor Zumbo has provided the Committee with a draft of a statutory list of examples of what constitutes unconscionable conduct based on s 51AC(3):

"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 supplier 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."³

We would recommend that Associate Professor Zumbo's draft be used as the basis for the enactment of a list of examples of conduct that constitute unconscionable conduct, recognising that such a list should not be considered exhaustive.

Need for a prohibition against Bullying, intimidation, physical force coercion and undue harassment

We agree with the Majority's comment at paragraph 5.44 that Associate Professor Zumbo's suggestion that the TPA should specifically prohibit bullying, intimidation, physical force, coercion and undue harassment in business to business relationships, seems a perfectly reasonable suggestion. In this regard, we would recommend that the *Trade Practices Act* be amended to prohibit bullying, intimidation, physical force coercion and undue harassment. This conduct is just not acceptable in our society and we should not allow it to occur. The conduct is already prohibited in consumer transactions under section 60 of the *Trade Practices Act* and should be extended to a business setting.

³ Associate Professor Frank Zumbo, *Submission 11*, p. 13.

Need for statutory definition of statutory duty of good faith

We note the tabling of the report on Franchising by the Joint Committee on Corporations and Financial Services and, in particular, note the recommendation to introduce a duty of good faith in the Franchising Code of Conduct.

We believe that acting in good faith is essential to the proper and efficient functioning of business relationships. Big businesses acting in bad faith towards small businesses undermine the ability of the small businesses to enjoy the benefits of the contracts they have with big businesses. In this regard, we recommend that a statutory duty of good faith be inserted in the *Trade Practices Act* and that it apply to all business to business relationships.

Need for legislative framework to deal with unfair contract terms in business to business relationships involving small businesses

We are concerned that small businesses are being denied access to a remedy in relation to unfair contract terms in their contracts with big businesses. As noted by Associate Professor Zumbo, judicial scrutiny of unfair contracts terms is currently lacking:

Ensuring greater judicial scrutiny of unfair terms in consumer transactions and business to business relationships involving small businesses would go a long way to promoting ethical business conduct. Such judicial scrutiny of unfair contract terms is currently lacking and unfortunately can act as a green light to unethical business intent on including contract terms that go beyond what is reasonably necessary to protecting their legitimate interests. In such circumstances, a new national legislative framework within the *Trade Practices Act* is needed to deal with unfair terms within business to business relationships involving small businesses.⁴

In this regard, we believe that the current Victorian legislative framework for dealing with unfair contract terms in consumer transactions should be extended to cover business to business relationships involving small businesses.

Senator Alan Eggleston
Deputy Chair

Senator David Bushby

⁴ Associate Professor Zumbo *Submission 11*, p. 22

Senator Barnaby Joyce

Senator Nick Xenophon