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*

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Senate Standing Committee on Economics

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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.[1] 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'.[2] 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.[3] 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.[4]

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.[5] 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.

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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 (19976) 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.[6] 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.[7]

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.aph.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.

Chapter 2

'Unconscionable conduct' and the Trade Practices Act

'Unconscionable conduct' as currently codified in the TPA

2.1 Currently, there are three separate subsections of Part IVA of the *Trade Practices Act 1974* that deal with 'unconscionable conduct'; 51AA, 51AB and 51AC. Section 51AA deals with 'procedural unconscionability' which relates to the formation of a contract; sections 51AB and 51AC deal with 'substantive unconscionability' which relates to the actual operation of a contract.

2.2 Introduced in 1992, subsection 51AA states that 'a corporation must not, in trade or commerce, engage in conduct that is unconscionable within the meaning of the unwritten law, from time to time, of the States and Territories'. 'Unwritten law' refers to the law developed by the courts of common law and equity. The reference to unconscionability in section 51AA stems from the traditional equitable doctrine of unconscionability relating to unconscionable bargains and special disadvantage.[1]

2.3 The equitable doctrine of unconscionability was expounded by Justice Mason in *Commercial Bank of Australia Ltd v Amadio* (1983) who referred to 'special disadvantage' as:

> …the class of case in which a party makes unconscientious use of his superior position or bargaining power to the detriment of a party who suffers from special disability or is placed in some special situation of disadvantage, e.g., a catching bargain with an expectant heir or an unfair contract made by taking advantage of a person who is seriously affected by intoxicating drink.[2]

2.4 Significantly, the High Court made clear that a mere disparity in bargaining power between the two parties would not, in itself, be considered a 'special disability'. One of the parties must be affected in their ability to make a judgment as to his or her own best interests. The *Amadio* judgment also established that it is only the setting in which a contract is made that is relevant to a finding of unconscionability: if the *operation* of the contract is harsh, it cannot be impeached on the grounds of unconscionability.[3]

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1 See paragraph 1.3

2 (1983) 151 CLR 447 at 461.

3 Liam Brown, 'The impact of section 51AC of the Trade Practices Act 1974 (Cth) on commercial certainty', *Melbourne University Law Review*, vol 28, 2004, p. 595.

2.5 Subsection 51AB was the original provision in the TPA on 'unconscionable' conduct. It was first inserted in section 52 of the Act in 1986[4] but was shifted to section 51AB as part of the 1992 amendments.[5] Subsection 51AB(1) states that 'a corporation shall not, in trade or commerce, in connection with the supply or possible supply of goods or services to a person, engage in conduct that is, in all the circumstances, unconscionable'. Subsection 51AB(2) states the matters to which a court may have regard in determining whether a corporation has contravened subsection 1. These include:

- the relative strengths of the bargaining positions of the corporation and the consumer;
- whether the consumer was required to comply with the conditions that were not reasonably necessary for the protection of the legitimate interests of the corporation;
- whether the consumer was able to understand any documents relating to supply of the goods or services;
- whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the consumer or a person acting on behalf of the corporation in relation to the supply of goods or services; and
- the amount for which the consumer could have acquired identical or equivalent goods or services from a person other than the corporation.

2.6 Section 51AC was introduced in 1998 to protect small business from unconscionable conduct.[6] Similar to s51AB(2), subsections s51AC(3) and 51AC(4) list a number of factors that the courts may consider in determining whether the conduct of the 'supplier' (51AC(3)) or the 'acquirer' (51AC(4)) is unconscionable (*without in any way limiting the matters to which the Court may have regard*). These include the five factors listed in section 51AB(2) (above) in addition to the following factors:

- the consistency of the conduct with similar transactions;
- the requirements of any applicable industry code;
- the non-disclosure of conduct which might affect the person's interest;
- the extent of negotiation of a contract;
- whether the supplier / acquirer has a contractual right to vary unilaterally a term or condition of a contract; and

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4 *Trade Practices Revision Act 1986,* No. 17

5 *Trade Practices Legislation Amendment Act 1992,* No. 222

6 The amendment was based on a recommendation by the House of Representatives Standing Committee on Industry, Science and Technology in its May 1997 report into fair trading*: Finding a Balance: Towards Fair Trading in Australia* (also known as the 'Reid Report').

- the extent to which the parties acted in good faith.

2.7 Some argue that these factors make section 51AC work well. Mr Liam Brown, a Victorian lawyer formerly with Mallesons Stephen Jaques, has argued that the eleven factors listed in the section contain both procedural and substantive elements which allow the courts to look at both bargaining practices and outcomes. He thereby claimed that section 51AC is a 'workable approach' to prevention of unconscionable conduct; broader than section 51AA and better defined than section 51AB.[7]

2.8 Others argue that the factors in 51AC(3) and 51AC(4) are of limited practical use. They can be considered or dismissed at the court's discretion and they do not define 'unconscionable conduct'. The court determines whether or not the conduct in question is unconscionable based on the circumstances of the case, whether these are listed in section 51AC(3) or not.[8]

Case law and section 51AC

2.9 As mentioned above, 'unconscionable conduct' is not defined in section 51AC. The courts are heavily reliant on case law to guide their decisions on this section. Three cases are of particular note.

Australian Competition and Consumer Commission v Simply No-Knead (2000)

2.10 The case involved a dispute between Simply No-Knead (SNK) and a number of its franchisees. The franchisees complained that SNK had withheld orders of supplies in order to press them into complying with its demands. In addition, SNK had refused to negotiate, refused to provide disclosure documents as required by the Franchising Code, and had distributed promotional material which excluded the franchisees' names.

2.11 This case was one of only two successful ACCC-initiated section 51AC prosecutions. It was a clear case of substantive unconscionability, where the post-contractual conduct of the defendant was 'simply so bad' that it met the threshold requirement. As Justice Sundberg concluded:

> I have concluded that the accumulation of incidents…discloses an overwhelming case of unreasonable, unfair, bullying and thuggish behaviour in relation to each franchisee that amounts to unconscionable conduct by SNK for the purposes of s 51AC(1)…SNK's conduct achieved its aim. Between August and November all the franchisees either

7 Liam Brown, 'The impact of section 51AC of the Trade Practices Act 1974 (Cth) on commercial certainty', *Melbourne University Law Review*, vol 28, 2004, p. 600.

8 Associate Professor Zumbo, *Submission 11*, p. 15.

> terminated their agreements or did not renew them. There is no doubt that SNK's conduct was a cause of their respective decisions in this regard.[9]

Garry Rogers Motors (Australia) Pty Ltd v Subaru (Australia) Pty Ltd (1999)[10]

2.12 In 1997, Subaru introduced its 'six star' programme of service enhancement. Garry Rogers Motors, an authorised Subaru dealer since 1991, advised that it was unwilling to comply with all parts of the programme. Subaru subsequently gave notice of termination of the agreement. Despite Garry Rogers' repeated attempts to show that it had changed its mind and was prepared to comply with the programme, Subaru refused to revoke the notice. Garry Rogers alleged that the termination of the dealership constituted unconscionable conduct.

2.13 The court refused to give relief 'simply for harsh contractual terms when the circumstances of the case indicate that the defendant has not behaved in a particularly reprehensible way either during contractual formation or performance'. The judge ruled that the behaviour of Subaru lacked the necessary threshold requirement of section 51AC; namely, that the conduct complained of was, *in all the circumstances*, unconscionable. There had been no procedural unconscionability and Subaru had merely acted to protect its commercial interest.[11]

Hurley v McDonald's Australia (2000)[12]

2.14 The restaurant chain, McDonald's, ran a promotional game which required participants to collect tokens in a particular sequence to qualify for particular prizes. Ms Hurley claimed a prize based on a mixture of tokens from the previous and current years.

2.15 McDonald's relied on a condition of entry clause to reject Ms Hurley's claim. Ms Hurley argued that McDonald's had acted unconscionably in breach of s51AB. The court noted that the common feature of ss51AB and 51AC was that they required a demonstration of 'serious misconduct or something clearly unfair or unreasonable' beyond the terms of the contract. In this case, McDonald's rejection of the claim was not considered to be particularly harsh or unreasonable in the circumstances.

2.16 The ruling has elicited different reactions. Mr Liam Brown noted that this ruling prevented plaintiffs from using section 51AC 'simply to complain about a

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9 Simply No-Knead and Cameron Bates [2000] FCA 1365, [51]; ACCC News Release dated 25 September 2000, <www.accc.gov.au.>

10 (1999) 21 ATPR

11 Liam Brown, 'The impact of section 51AC of the Trade Practices Act 1974 (Cth) on commercial certainty', *Melbourne University Law Review*, vol 28, 2004, p. 614.

12 (2000) 22 ATPR

contract that is harsh in its operation'.[13] Associate Professor Zumbo has described this ruling as the 'final nail in the coffin' for section 51AC.[14]

2.17 Case law therefore establishes 'serious misconduct' as the threshold for a finding of unconscionable conduct. It is not adequate for a small business plaintiff to cite conduct contrary to one (or various) of the factors listed in 51AC.[15] There must be evidence of procedural misbehaviour in contract formation or an absence of 'good faith'.[16] There is an important issue, however, as to whether the courts and the regulator have been overly cautious in developing section 51AC case law.

The legal view of 'unconscionability'

2.18 Several commentators have noted that the 'unconscionable conduct' provisions in Australian law are very case-specific. Justice Paul Finn has noted that while there are unconscionable conduct provisions in the TPA, the *Corporations Act 2001* and the *Australian Securities and Investments Commission Act 2001* (section 12CA–12CC):

> The one thing we can say with confidence is that it does not have a uniform meaning in the various sections it inhabits.[17]

2.19 In similar vein, Professor Bryan Horrigan has observed:

> Unconscionability may be considered a "descriptive theme" for the grouping together of various strands of doctrine, but the theme itself cannot be used as some kind of overarching test.[18]

2.20 In a 2007 article, James Davidson explained this issue in the following way:

> The use of the umbrella term 'unconscionable' is convenient but then to try and fit circumstances into the doctrine on the basis that they seem 'unconscionable' or 'unfair' within the popular meaning of those words would be to misunderstand the applicability of the doctrine. Put simply, the logic is that a set of circumstances between two parties which give rise to relief under the doctrine of unconscionability may also be the circumstances which are unfair and unconscionable in the popular sense of the word, but

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13 Liam Brown, 'The impact of section 51AC of the Trade Practices Act 1974 (Cth) on commercial certainty', *Melbourne University Law Review*, vol 28, 2004, p. 616.

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

15 This is what Liam Brown has referred to as the 'scattergun' approach. He notes that it is not surprising that these cases have rarely succeeded. 'The impact of section 51AC of the Trade Practices Act 1974 (Cth) on commercial certainty', *Melbourne University Law Review*, vol 28, 2004, p. 613.

16 Liam Brown, 'The impact of section 51AC of the Trade Practices Act 1974 (Cth) on commercial certainty', *Melbourne University Law Review*, vol 28, 2004, p. 621.

17 Justice Paul Finn, 'Unconscionable conduct?', *UNISA Trade Practices Workshop – 2006*

18 Professor Bryan Horrigan, 'The expansion of fairness-based business regulation', *Australian Business Law Review*, vol 32, 2004, p. 169.

> popularly held precepts of unfairness or unconscionability will not on their own invoke the doctrine.[19]

2.21 Indeed, in their submission to this inquiry, the ACCC emphasised that what is 'unconscionable' will depend on the facts of the case and the particular circumstances in which the conduct occurs. In other words, 'the same conduct may be characterised differently depending on the circumstances in which it occurs'.[20]

The structure of the report

2.22 The crux of this inquiry is whether or not section 51AC of the TPA is working according to its legislative intent. There are two broad views.

2.23 The first is that the development of case law on section 51AC has been disappointing and that the section is therefore not working. In other words, there are many more unfair contract terms ('substantive unconscionability') operating in Australia than what the prosecution record would indicate. Accordingly, the courts need greater guidance in interpreting the Act which could be achieved through a definition or examples of 'unconscionable conduct'. Chapter 3 of this report examines these views.

2.24 The opposing view is that section 51AC has worked, and is working well. The lack of successful prosecutions is evidence that business is complying with the law. Any amendment to section 51AC of the TPA would create uncertainty, confusion and less flexibility for the courts to adjudicate on 'unconscionable conduct' cases. Chapter 4 of this report examines this argument.

2.25 Chapter 5 presents the committee's view on the need to amend section 51AC of the TPA and the scope and content of these amendments.

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19 James Davidson, 'Unfair contract terms and the consumer: A case for proactive regulation?', *Competition and Consumer Law Journal*, vol. 15, No. 1, August 2007, pp. 74–92.

20 Australian Competition and Consumer Commission, *Submission 27*, p. 2.

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:
>
> • 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:
>
> (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.

Chapter 4

Arguments against amending section 51AC

4.1 This chapter presents the arguments put to the committee opposing any amendment (including definitions or examples of terms) to 51AC of the Trade Practices Act. There are three lines of argument. The first is that the section works well currently, it has changed industry behaviour and the courts' interpretation has been clear. The second is that any amendment to the section would create uncertainty and confusion. The third position is that while the courts have been too cautious on section 51AC, they—and the current provision—need more time to develop this area of the law.

If it ain't broke…

4.2 The committee received submissions from various organisations arguing that there is no justification for amending section 51AC because it already provides adequate guidance for the courts. These groups included the Business Council of Australia, the Law Council of Australia, Colonial First State Property Management, the Shopping Centre Council of Australia, the Franchise Council of Australia and the law firm Freehills.

4.3 The Shopping Centre Council of Australia argued in its submission that there have been 15 litigated actions by the ACCC under section 51AC, 13 of which have been either successful in the courts or settled by consent. These rulings have provided 'significant guidance' on section 51AC and 'is not evidence that the ACCC is having difficulty in bringing successful prosecutions'.[1] The Council argued that the reason for the relatively small number of section 51AC actions is the small number of complaints, not that the section is an ineffective remedy to unconscionable conduct. It noted that between 1 July 2002 and 30 June 2007, the ACCC received 'only' 179 complaints relating to retail tenancy of which 108 were immediately assessed as not amounting to a breach of the Act.[2] This was despite the ACCC's 'comprehensive publicity and education campaigns' to make small business aware of the provisions of section 51AC.

4.4 The Franchise Council of Australia also argued that the current section 51AC is working well, citing the recent *Hoy Mobile v Allphones Retail Pty Ltd* and *ACCC v*

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1 Shopping Centre Council of Australia, *Submission 17*, p. 3.

2 Shopping Centre Council of Australia, *Submission 17*, pp. 4–5.

Simply No Knead cases. It claimed that the ACCC is 'an effective regulator' and has achieved 'considerable success' in unconscionable conduct cases relating to franchising.[3] The Law Council of Australia, similarly, cited the Hoy Mobile phone case as evidence that the Act is working as intended and argued that the ACCC has been vigorously investigating and prosecuting cases of unconscionable conduct.[4]

Changed industry behaviour

4.5 A related argument in favour of the existing section 51AC is that it has changed industry behaviour. The committee received a submission from Colonial First State Property Management which argued that the current provisions in the TPA dealing with unconscionable conduct have achieved their purpose 'by successfully changing business behaviour'.[5]

4.6 Similarly, the Shopping Centre Council argued in its submission that section 51AC has achieved its purpose. In its experience, 'there is no doubt that section 51AC has contributed to a change in behaviour in key industries including retail leasing'.[6] The Council's submission cited a supporting view from the Productivity Commission in its recent report into the market for retail tenancy leases:

> While some suggested that the current concept of unconscionable conduct sets too high a hurdle, given the substantial incentive for centre landlords to settle an accusation of unconscionable conduct before it proceeds to court, the Commission's assessment is that the current provisions are influencing conduct and reducing costs associated with unnecessary disputation.[7]

4.7 The Shopping Centre Council claimed that the small number of prosecutions under section 51AC were the product of four factors:

- the small number of complaints actually made to the ACCC, which reflects 'that the incidence of such behaviour has always been vastly exaggerated';
- the wide availability of alternative forms of relief under the Trade Practices Act and other statutes;
- a better educated and better informed small business constituency; and

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3 Franchise Council of Australia, *Submission 19*, p. 2.

4 Law Council of Australia, *Submission 28*, p. 1.

5 Colonial First State Property Management, *Submission 2*, p. 1.

6 Franchise Council of Australia, *Submission 19*, p. 8.

7 Productivity Commission, *The Market for retail tenancy leases in Australia*, August 2008, p. xxiv.

- a more heavily regulated market.[8]

4.8 The committee points out that it is easier to claim that the law has changed business behaviour than to prove it. It does seem likely, however, that some businesses may have altered their practices to fit within the courts' rulings on section 51AC. As Dr Cousins and Mr Bhojani flag in their submission:

> It is difficult to assess the impact of the introduction of S 51 AC, or of the unconscionable conduct provisions more generally, in the absence of comprehensive surveys of behaviour before and after adoption of the legislation. It could be expected that the legislation would have had some impact on business behaviour. The Australian Competition and Consumer Commission (ACCC) has taken a number of cases to court over the past decade which has reinforced awareness of the law and tested its interpretation by the judges.[9]

Legal concerns with amending section 51AC

4.9 There are also legal concerns that statutory definitions of 'unconscionable conduct' and 'good faith' and a list of statutory examples of 'unconscionable conduct' are unnecessary, would use vague terms and create unnecessary confusion and uncertainty.

A definition of 'unconscionable conduct'

4.10 The Law Council of Australia put two arguments in opposition to a definition of 'unconscionable conduct' in the Trade Practices Act. Firstly, codification would not pick up developments in the definition of unconscionable conduct at common law. An inflexible definition could undermine one of the objectives of section 51AA which is to broaden the scope of remedies available at common law.[10] And secondly, 'unconscionability' is not an express statutory obligation capable of precise definition but 'a norm of conduct of general application'.

4.11 Accordingly, the Law Council argued that any attempt to define the concept, even through examples, will lead to loss of flexibility in interpretation and loss of guidance on the norm provided by the legal precedent. It noted that section 52 of the TPA dealing with 'misleading and deceptive' conduct works well despite there being no definition of these terms.[11]

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8 Shopping Centre Council of Australia, *Submission 18*, p. 1.

9 Dr Cousins and Mr Bhojani, *Submission 30*, p. 1.

10 Law Council of Australia, *Submission 28*, p. 2.

11 Law Council of Australia, *Submission 28*, p. 4.

4.12 The Shopping Centre Council reasoned in its submission to this inquiry that because section 51AC was introduced to provide an avenue for small businesses to pursue remedies against large businesses guilty of 'unconscionable' conduct, it should not be amended to address conduct which might subjectively be assessed as 'harsh' or 'unfair.' It also argued that the strength of section 51AC is its lack of prescription. The section takes into account 'all of the circumstances' and as a result, it tends to be 'a law of last resort'. The Council added: 'Well advised litigants typically choose more prescriptive, albeit more limited, causes of action where available'.[12]

4.13 The Shopping Centre Council also accused Associate Professor Zumbo of rehashing old arguments made to the 2004 Senate Economics Committee inquiry into the TPA. It cited the committee's report and the basis for its rejection of the terms 'harsh' and 'unfairness' to describe 'unconscionable conduct'.[13]

Examples of 'unconscionable conduct'

4.14 The Law Council of Australia argued that a statutory list of examples of unconscionable conduct (as proposed by Associate Professor Zumbo, paragraph 3.27) would unnecessarily lower the threshold from 'unconscionability' to something more like 'unfairness'.[14] It claimed that the list of non-exhaustive factors in sections 51AB and 51AC 'strike an appropriate balance' between providing the courts with guidance on the one hand and flexibility on the other.[15]

4.15 The Law Council also warned that a list of examples of 'unconscionable conduct' would be inflexible. It argued that these examples would be confined to a specific set of facts and would not cover all the situations in which conduct might be unconscionable. Further, recasting the current list of factors in 51AC(3) and 51AC(4) as examples would unfairly capture cases where unequal bargaining power and a unilateral variation of contract are both a common and necessary part of commercial transactions.[16]

4.16 The Shopping Centre Council of Australia argued that a list of examples of 'unconscionable conduct' would 'immediately put section 51AC in a straightjacket'. It shared the Law Council's concerns that a list of examples risked restricting the courts'

12 Shopping Centre Council of Australia, *Submission 18*, p. 7.

13 Shopping Centre Council of Australia, *Submission 18*, p. 9.

14 Law Council of Australia, *Submission 28*, p. 6.

15 Law Council of Australia, *Submission 28*, p. 2.

16 Law Council of Australia, *Submission 28*, p. 6.

(current) consideration of all the circumstances of the dispute, and that Associate Professor Zumbo's list would elevate those factors to 'ethical norms'.[17]

4.17 The Council also took exception to the example of the supplier's conduct towards the business consumer being significantly inconsistent with the supplier's conduct in similar transactions. It noted that these differences can occur as a consequence of changed economic conditions, rather than unconscionable conduct. It highlighted the ACCC's statement that 'one business may simply have been able to negotiate a better deal than another similar business'.[18]

4.18 Along similar lines, the Franchise Council of Australia argued in its submission that any attempt to amend the 'unconscionable conduct' provisions in section 51AC 'is likely to lead to…increased uncertainty and unnecessary additional cost'.[19] It identified 'significant legal certainty' from the section 51AC cases to date and argued that the motive to broaden the application of the section was misguided. Accordingly, it rejected both a statutory definition of 'unconscionable conduct' and examples to try and define the concept. It claimed that the Franchising Code of Conduct, together with the current provisions of sections 51AC and 52, are a strong legislative framework. It warned that any move to define 'unconscionable conduct' could 'easily upset' the pre-contractual disclosure process.[20]

'Good faith'

4.19 As with a definition of 'unconscionable conduct', some submitters expressed concern that a statutory definition of 'good faith' would also have adverse consequences. The Franchise Council of Australia warned in its submission that:

> …any move to write a good faith clause into the Franchising Code of conduct would have immediate negative effects on the stability of the franchising sector, casting doubt on the status of thousands of existing franchise agreements. Similarly, the FCA regards any attempt to redefine the unconscionable conduct provisions of s.51AC as likely to create doubt and uncertainty in an area of law in which there is precedent and no lack of clarity in the eyes of the courts and the primary policing body, the ACCC.[21]

4.20 The Shopping Centre Council emphasised that the term 'good faith' was not clear and has not been properly defined by the courts. It urged the committee to be

17 Shopping Centre Council of Australia, *Submission 17*, pp. 11–12.

18 Shopping Centre Council of Australia, *Submission 17*, p. 12.

19 Franchise Council of Australia, *Submission 19*, p. 1.

20 Franchise Council of Australia, *Submission 19*, p. 2.

21 Franchise Council of Australia, *Submission 19*, p. 1.

vary of Associate Professor Zumbo's confidence in the courts' understanding of the concept and cited the comments of various legal commentators which underlined their uncertainty of the common law interpretation. The Council noted that their legal advisers have concluded that the phrase 'good faith' takes on different meanings depending on its context:

> In the view of our legal advisers the exact content of any implied obligation of good faith depends on the type of contract, the factual matrix, the parties involved and so on. An obligation of good faith cannot stand on its own. There must first be an agreement with an objectively ascertainable common purpose(s) with respect to which the parties must be able to be 'faithful'. It makes no sense to simply say that parties must perform in good faith. Rather "[w]e must know what terms they will be performing. If we are then requiring those terms to be performed in good faith, really all we are doing is explaining the standard to which they must perform."[22]

The ACCC's view

4.21 The ACCC also cited legal concerns with definitions of 'unconscionable conduct' and 'good faith' and other efforts to codify section 51AC. In evidence to the committee, Mr Scott Gregson of the ACCC's Enforcement and Compliance Division explained:

> There are two risks in the ACCC's view as to codifying conduct from the more general prohibition, as is currently the case, to the more specific prohibitions. Firstly, appreciating the difficulty in identifying upfront all scenarios that might be considered, there is potential to exclude forms of conduct that a general prohibition would allow the court to consider—that is, carving out things that should really be caught by the legislation. Secondly, and almost the other side of that coin, is that in being specific without allowing the court to consider all the circumstances, there is potential for the prohibitions to catch conduct that, in all the circumstances, were not intended to be caught—that is, grabbing too much in by being quite specific…While trying to provide greater clarity, care needs to be taken in relation to some suggestions such as thresholds, fair play and good faith, that they do not introduce more uncertainty, particularly in a scenario where those are concepts that can currently be taken into account in the factors considered under both sections 51AB and 51AC.[23]

22 Shopping Centre Council of Australia, *Submission 18*, p. 15.

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

4.22 The ACCC made clear, however, that the question of where the threshold of 'unconscionable' should be set is ultimately a matter for policymakers and government.[24]

Judicial caution

4.23 Freehills' submission is a significant departure from this argument that no definition is needed because the courts have done their job. Professor Bob Baxt, Partner at Freehills, argued that rather than inserting a definition of 'unconscionable conduct', the courts need to concentrate on developing the interpretation of the current provisions. He claims that there is no reason why section 51AC should not be given 'a much more comprehensive and appropriate interpretation' than in the past. Indeed:

> …were it not for the fact that some of our judges are just too timid in interpreting these provisions in an appropriate fashion, there would be many more successful decisions under s 51AC of the TPA than is currently the position.[25]

4.24 Professor Baxt uses the example of the decision of the Full Federal Court in *ASIC v National Exchange Ltd (2005).* Although the case considered the expression of 'unconscionable conduct' in the context of the Corporations Law, it has parallels with the TPA. While the Court found in favour of the company, it argued there was no doubt that its conduct in question was unconscionable.[26] Professor Baxt expresses concern that:

> the introduction of a new definition will slow down, rather than accelerate, the possible interpretation of s 51AC along the lines suggested by the Full Federal Court in the National Exchange case… Australia has a tendency of being over-prescriptive in its legislative initiatives. We tend to change our legislation too often. This tends to delay the proper and considered interpretation of the legislation that we have in place. The fact that some cases are lost when judges form a particular view is not necessarily a good reason for simply changing the legislation. Sometimes it does take a little bit of time, and a bit of imagination and bravery on the part of judges, to ensure that legislation is interpreted in an effective fashion.[27]

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

25 Freehills, *Submission 21,* p. 1.

26 The judgment was made on the basis of a technical problem in relation to whether the relevant conduct was in 'trade or commerce'.

27 Freehills, *Submission 21,* p. 2.

Conclusion

4.25 The committee received several submissions which argued that the current section 51AC is working well and that no amendments are needed. They emphasised the risks inherent in codifying the section. Definitions, principles and examples could have the effect of limiting the courts' scope to interpret 'unconscionable conduct', or they could capture conduct which should be allowed. The best option, they argue, is to continue developing case law and leave it to the courts to decide 'in all the circumstances' of each particular case.

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

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

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[1] See paragraph 6.73, p 181 of the Fair Trading Report which may be accessed at http://www.aph.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 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."[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.

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[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**

APPENDIX 1

Submissions Received

Submission Number	Submitter
1	Mr Ray Borradale
2	Colonial First State Property Management
3	Motor Trades Association of Australia (MTAA)
4	Mr Rodney Hackett
5	Mr Robert Ferraro
6	Post Office Agents Association Limited (POAAL)
7	Australia New Zealand Secular Association Inc
8	Mr John & Lisa Fonua
9	National Association of Retail Grocers of Australia Pty Ltd (NARGA)
10	Jims Fencing (Australia & New Zealand)
11	Associate Professor Frank Zumbo
12	Dr Evan Jones
13	Mr David Wright
14	Dr Dale Clapperton
15	Professor Bryan Horrigan
16	The Pharmacy Guild of Australia
17	Mr Liam Brown
18	Shopping Centre Council of Australia
19	Franchise Council of Australia
20	Ms Deanne de Leeuw
21	Freehills
22	Australian Competition & Consumer Commission
23	Consumer Action Law Centre
24	Competitive Foods Australia Pty Ltd
25	Mr David Wilkinson
26	CONFIDENTIAL
27	Mr David Ford
28	Law Council of Australia
29	Business Council of Australia
30	Mr David Cousins & Mr Sitesh Bhojani
31	Council of Small Business of Australia
32	Ms Narelle Walter
33	Mr Graeme Brown
34	Motor Trades Association of Australia
35	Mr John & Dianne Purtell

Additional Information

- Received on 18 November 2008 from Motor Trade Association of Australia (MTAA). Answers to Questions taken on Notice on 3 December 2008.

APPENDIX 2

Public Hearings and Witnesses

CANBERRA, ACT, 11 NOVEMBER 2008

- BUCHAN, Ms Jennifer Mary,
  Private capacity
- DELANEY, Mr Michael, Executive Director,
  Motor Trades Association of Australia and Australian Automobile Dealers Association
- GREGSON, Mr Scott, General Manager,
  Coordination, Enforcement and Compliance Division, Australian Competition and Consumer Commission
- HENRICK, Mr Kenneth Michael, Chief Executive Officer,
  National Association of Retail Grocers of Australia
- HORRIGAN, Professor Bryan, Associate Dean,
  Research, Macquarie Law School, Macquarie University
- LOWE, Ms Catriona, Co-Chief Executive Director,
  Consumer Action Law Centre
- RICH, Ms Nicole, Director, Policy and Campaigns,
  Consumer Action Law Centre
- RIDGWAY, Mr Nigel, General Manager,
  Compliance Strategies, Enforcement and Compliance Division, Australian Competition and Consumer Commission
- SCANLAN, Ms Sue, Deputy Executive Director,
  Motor Trades Association of Australia
- SPIER, Mr Hank, Adviser,
  Motor Trades Association of Australia
- van RIJSWIJK, Mr Gerard Anthony, Senior Policy Advisor,
  National Association of Retail Grocers of Australia
- ZUMBO, Associate Professor Frank, Business Law and Taxation,
  Australian School of Business, University of New South Wales